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

Case No. 1299/1/3/18

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

16 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

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**HEARING – DAY 17**

## APPEARANCES

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

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

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

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Tuesday, 16th July 2019

(10.00 am)

THE CHAIRMAN: Good morning.

MR BEARD: Good morning it's all right, I'm not going to start again.

Just a couple of references that I wanted to pick up. First of all, the tribunal asked that we provide some references in the Intel decision to the points we were making about the nature of the non-contestable share and the way in which the AEC analysis was carried out there and the way it was carried out by reference to only contestable share, which was a limited part of the demand.

There are lots and lots of references in the Intel decision but perhaps the most important, which we provided to Mr Turner and Mr Holmes overnight, or the neatest encapsulation, are paragraphs 1002 to 1008, which talk about how the AEC analysis is carried out, and Intel's status as an unavoidable trading partner creating the non-contestable share. And then 1009 to 1012, outlining factors giving rise to that non-contestable share, and how it's all dealt with. Then there are exercises of the AEC analysis in relation to each of the relevant OEMs but we haven't provided those references.

1           Just for your notes, that decision is authorities  
2 bundle 10, tab 119, and those paragraphs I referred to  
3 start at page 302.

4           The next reference I wanted to provide was  
5 I referred to older authorities yesterday talking about  
6 the relevant approach that's been adopted to additional  
7 evidence.

8           What I particularly had in mind was the Napp,  
9 Aberdeen Journals line of authorities, but those are  
10 neatly encapsulated in the Argos case, which we referred  
11 to at paragraph 5.64 of our reply. It's in the  
12 authorities bundle 1 at tab 13, and I think the relevant  
13 paragraph is 66. So although that's dealing with  
14 witness statements being admitted at the appeal stage,  
15 it deals with the general principles that are to be  
16 applied.

17           Then the final reference is actually an additional  
18 authority which may or may not be relevant to refer to  
19 in reply. We're going to insert it at tab 10 in the  
20 Royal Mail written closing submissions bundle, which is  
21 known as RM12. It's the Enron case first time round in  
22 the Court of Appeal. And Mr Turner just wanted me to  
23 make clear what it is we're referring to in that. We're  
24 referring in particular to paragraph 64, where  
25 Lord Justice Carnwath emphasises the importance for

1 a regulatory drafting a decision to leave no doubt as to  
2 the nature of the infringement that's been found, if  
3 any.

4 THE CHAIRMAN: Thank you, Mr Beard.

5 MR BEARD: Thank you very much.

6 THE CHAIRMAN: Anything else?

7 MR BEARD: Not for the moment, thank you.

8 THE CHAIRMAN: Mr Holmes.

9 MR HOLMES: Good morning, sir.

10 THE CHAIRMAN: How long do you intend to take?

11 MR HOLMES: Today.

12 THE CHAIRMAN: The whole of today?

13 MR HOLMES: That's my plan. We'll see how we go.

14 THE CHAIRMAN: How does Mr Turner feel about that?

15 MR TURNER: That's fine. We have tomorrow as well. So

16 I will take the morning and then the reply can occupy  
17 the afternoon.

18 THE CHAIRMAN: All right. Okay. Press on.

19 Closing submissions by MR HOLMES

20 MR HOLMES: Thank you.

21 So, to give the tribunal an idea of how I propose to  
22 proceed, if it pleases you, I will first take stock of  
23 the evidence and the argument that the tribunal has  
24 heard in the appeal by reference to section 7 of the  
25 decision which contains Ofcom's analysis on the question

1 of abuse. And this will enable me to address Mr Beards  
2 arguments under grounds 1 to 3 of the appeal.

3 You won't be surprised to hear that my submission is  
4 that each of the elements of Ofcom's reasoning remain  
5 intact at this stage of the appeal, the evidence has not  
6 detracted from those elements. On the contrary, it has  
7 confirmed and strengthened them. I will then turn to  
8 address grounds 4 to 6, of the appeal, which don't  
9 relate directly to the section 7 analysis.

10 Now before we go to section 7, and just to provide  
11 a road map for the tribunal, may I hand up a one-page  
12 overview of the structure of argument in section 7.

13 (Handed)

14 It just maps out the chain of reasoning that can be  
15 found there.

16 As the tribunal will see, there are five substantive  
17 parts to section 7 after the overview, and I will  
18 consider each of those in turn. In considering  
19 subsection (c), I'll address ground 2 of the appeal, and  
20 in considering subsection (d), I shall address  
21 Royal Mail's submissions on the intention underlying the  
22 price differential. And when I come to subsections (e)  
23 and (f), I will respond to grounds 1 and 3.

24 Let me first begin with section (b), which concerns  
25 the relevant market context. So if the tribunal could

1 take up the decision. In relation to this, I can be  
2 relatively brief, as Ofcom's analysis is largely  
3 uncontroversial. But it's worth considering it for two  
4 reasons. First, there are a few points to be made by  
5 reference to the evidence the tribunal has heard. And  
6 secondly, this analysis informs Ofcom's subsequent  
7 reasoning in the decision and is therefore worth  
8 revisiting.

9 If we can start on page 182 of the external  
10 numbering, the red numbering. One finds there an  
11 analysis of the conditions of competition in the bulk  
12 mail delivery market and the associated retail market  
13 for bulk mail, and three essential points are then  
14 developed. The first concerns Royal Mail's position in  
15 delivery, and that is set out under the heading at the  
16 top of page 183 in paragraphs 7.15 to 7.17. Royal Mail  
17 is overwhelmingly dominant on the delivery market. And  
18 at 7.18, one sees the important point that Royal Mail  
19 has a unique national network which confers significant  
20 structural advantages upon it. And in particular, there  
21 are significant economies of scale and of scope.

22 Now, in my submission, the evidence before the  
23 tribunal does not call any of this analysis into  
24 question. Royal Mail has not put forward any evidenced  
25 material to challenge the existence of significant

1 economies of scale and scope in relation to bulk mail  
2 delivery. Those aspects of the market were identified  
3 by Ofcom in both the statement of objections and the  
4 decision.

5 During the appeal, Royal Mail's expert, Mr Dryden,  
6 agrees in his written evidence that mail delivery is  
7 subject to large economies of scale. For your note, he  
8 says this at paragraph 6.17 of his fifth report, and he  
9 confirmed the position under cross-examination by  
10 Mr Turner. So we say the tribunal can take this feature  
11 as read. There is one paragraph in Royal Mail's written  
12 closing submissions in which it appears to query, for  
13 the first time, whether there are economies of scale in  
14 relation to bulk mail delivery. For the tribunal's  
15 note, that is in paragraph 221(b) of Royal Mail's  
16 written closings. And reference is made there to  
17 a passage in a document describing Royal Mail's LRAIC  
18 modelling for bulk mail.

19 Whatever that modelling may or may not show, it  
20 cannot seriously be contended, having regard to the  
21 evidence before the tribunal, that bulk mail is not  
22 subject to significant economies of scale.

23 Insofar as the LRAIC model suggests that is the  
24 case, it is attributable to the fact that Royal Mail's  
25 significant economies of scope are disregarded in the

1 LRAIC analysis because the common costs associated with  
2 its universal service network, which are recovered  
3 across other product lines, are stripped out of the  
4 incremental cost assessment, and that removes the  
5 obvious and intuitive economies of scale which everyone  
6 has previously accepted are large, as Mr Dryden himself  
7 confirmed.

8 In our submission, this only goes to show the  
9 difficulties in relying upon the LRAIC measure as  
10 a meaningful real world indication of any operators'  
11 costs other than Royal Mail, with all of the features  
12 that it has of a national network operating at scale  
13 across the full range of products supplied, under the  
14 universal service.

15 Now, returning to Ofcom's consideration --

16 THE CHAIRMAN: Can I say, this point was put in a very  
17 specific context.

18 MR HOLMES: It was, sir, but --

19 THE CHAIRMAN: It wasn't a general contradiction of what's  
20 in the decision. It was in answer to a criticism of the  
21 construction of the AEC test.

22 MR HOLMES: That's quite true, sir, but my concern was  
23 simply to avoid any misapprehension --

24 THE CHAIRMAN: You're worried if the sheep escapes from the  
25 pen, are you?

1 MR HOLMES: Yes, that this might give rise to in relation to  
2 the economies of scale and cope, which are of course  
3 points that are important and material when considering  
4 the appropriateness of the AEC analysis which has been  
5 supplied.

6 So, returning to Ofcom's consideration of the market  
7 context, the second point that is made, at  
8 paragraph 7.24, is that Royal Mail was an unavoidable  
9 trading partner for any access operator. And the  
10 ensuing discussion then explains why this is the case,  
11 even for access operators entering the delivery market  
12 in competition with Royal Mail. You see at point A that  
13 customers need national delivery of bulk mail, most of  
14 them provide posting to their own customers all across  
15 the United Kingdom. And then at point B, entry by an  
16 end-to-end competitor would be done gradually. At point  
17 C, there is the point that direct delivery entrants  
18 would still be likely to use Royal Mail services, even  
19 in areas where they have their own network, given that  
20 not all customers will be willing to convert from  
21 Royal Mail. And at point D, the observation that entry  
22 is unlikely ever to be national.

23 Over the page, the tribunal will recall figure 7.2,  
24 showing that even by 2018 Whistl still expected to  
25 purchase over half of its delivery needs from

1 Royal Mail, rather than supplying them itself. And that  
2 is 5 years into its roll-out.

3 This market feature is, of course, what provided  
4 Royal Mail with the lever that it needed to be able to  
5 deter competitive entry into its core wholesale  
6 monopoly. As the supplier of an indispensable wholesale  
7 input, it was able to target any direct delivery  
8 entrants with higher prices as a penalty for competing  
9 with it. And we don't understand this analysis of the  
10 relevant market context to be challenged, and it has  
11 been confirmed by the evidence of Whistl's factual  
12 witnesses, who emphasise that entry would necessarily be  
13 gradual, and that conversion of customers was  
14 a challenging process to achieve, even in areas of  
15 roll-out, particularly in the case of large customers.

16 The third and final important point to emerge from  
17 7B can be seen from the heading above 7.27: the retail  
18 market is highly competitive with tight profit margins.  
19 And this point is significant to Ofcom's subsequent  
20 consideration of whether the price differential was of  
21 a scale large enough to be able to achieve the desired  
22 deterrent effect in relation to direct delivery entry.

23 Again, the tribunal has heard the evidence of Whistl  
24 and seen the UK Mail emails to Whistl's customers which  
25 used the possibility of a price differential even before

1 it was introduced, as a means of winning them away.  
2 This is a highly competitive market, in which fractions  
3 of pennies make the difference with, you know, a number  
4 of aggressive competitors fighting for share.

5 So that, in a nutshell, is Ofcom's consideration of  
6 the market context, and we say that it can be taken by  
7 the tribunal as correct. We can turn then to  
8 section 7C, which contains the second substantive  
9 element of the reasoning in section 7. And this is  
10 where Ofcom considers the price differential in some  
11 detail.

12 If we could look back at the road map document, you  
13 will see there are three main elements to the analysis,  
14 and I will consider these in turn. The first is that  
15 MPP1 was not available to direct delivery entrants at  
16 scale. And this involves a consideration of surcharges  
17 and eligibility on the one hand, and the viability of  
18 arbitrage on the other hand.

19 The second element of this analysis concludes that  
20 transactions on MPP1 and APP2 were equivalent for  
21 present purposes, and the third element is Ofcom's  
22 conclusion that there is no tenable justification for  
23 discriminating, in particular that there is no tenable  
24 cost justification.

25 So starting with the first of these, and Ofcom's

1 analysis of how the price differential worked, as  
2 a means of raising the direct delivery entrance costs.  
3 The discussion starts at 7.47 of the decision. And the  
4 tribunal sees Ofcom's finding in the heading above that  
5 paragraph:

6 "The lower prices on MPP1 would not have been  
7 available in practice to access customers that competed  
8 with Royal Mail in delivery on a material scale."

9 In other words, a direct delivery entrant at scale  
10 would be forced to pay the higher prices for APP2 which  
11 the price differential introduced, penalising it for  
12 competing with Royal Mail. And this discriminatory  
13 mechanism is then explained, in particular in  
14 paragraphs 7.51 to 7.53.

15 At 7.51, there is the observation that MPP1  
16 customers would be required to meet a national spread  
17 benchmark, and this required those operators to deliver  
18 a specified proportion of their mail in each SSC up and  
19 down the country. And the tribunal will recall that it  
20 was precisely because of this geographical restriction,  
21 which blocks access operators from direct delivery  
22 competition, that APP2 was introduced in the first  
23 place. Because Whistl saw this as restrictive of its  
24 direct delivery ambitions.

25 Paragraph 7.52 notes that an operator is permitted

1 to fail to meet the required target in up to six of  
2 the 83 SSCs in the UK.

3 So if an operator were to confine its end-to-end  
4 operations to that very limited number of areas, it  
5 could still meet the national spread benchmark and could  
6 use MPP1 without adverse consequences. And a small  
7 scale entry could therefore be maintained.

8 But as paragraph 7.53 explains, any further  
9 expansion of the entrant's operations, extending to six  
10 or more SSCs at conversion rates exceeding 30% of the  
11 targets applicable to those SSCs, would result in the  
12 operator failing the national spread benchmark, and  
13 various adverse consequences would then follow, which  
14 are set out in A, B and C.

15 First, the operator would become liable for  
16 surcharges. The way the surcharges work is that the  
17 operator would effectively have to pay Royal Mail for  
18 the missing volumes which it was delivering itself. So  
19 the operator would have been pay twice. It would pay  
20 for its own direct delivery operations, and it would pay  
21 Royal Mail for the volumes it was not routing through  
22 Royal Mail. And as explained in paragraph 7.53A, the  
23 surcharges would become increasingly painful as  
24 a roll-out continued.

25 And on Royal Mail's own calculations at the

1 administrative stage, by the time the direct delivery  
2 entrant reached 13 SSCs, the pain of the surcharges  
3 would exceed the penalty imposed by the price  
4 differential. And at that point, if the direct delivery  
5 operator could bear the additional costs imposed, it  
6 would opt to face the penalty of the price differential  
7 rather than the pain of the surcharges.

8 Now the tribunal will, of course, appreciate that  
9 the adverse consequences between six and 13 SSCs are  
10 themselves attributable to the introduction of the price  
11 differential. They are part of the mechanism for  
12 penalising a direct delivery entrant for competing.  
13 Without the price differential, the direct delivery  
14 entrant would make sure that it was on APP2 for the  
15 roll-out between six and 13 SSCs, the price plan that  
16 was produced to be hospitable, in part, to Whistl's  
17 direct delivery roll-out plans.

18 The entrant would only roll out on MPP1 to avoid the  
19 greater hardship of having to pay the price differential  
20 which Royal Mail was introducing as a penalty on direct  
21 delivery entry. But the pain resulting from the  
22 surcharges is nonetheless a consequence of the price  
23 differential.

24 So that's the first adverse consequence.

25 The decision also refers to two other potential

1 adverse consequences. The first, which is set out at  
2 7.53B, is that at a certain point, an end-to-end  
3 operator would be automatically removed from the price  
4 plan, once its surcharges reached 15% of the total  
5 postage paid. You'll recall that Mr Beard referred to  
6 this in his closing submissions yesterday. And he said,  
7 based on Mr Harman's analysis, that Whistl could roll  
8 out to 31 SSCs before it reached the 15% surcharge  
9 threshold, and he criticised Ofcom for not engaging with  
10 that analysis.

11 But in my submission, the reason why should be  
12 transparently obvious to the tribunal. Given that on  
13 Royal Mail's own analysis, the pain of the surcharges  
14 would exceed the penalty of the APP2 price differential  
15 after 13 SSCs, Mr Harman's analysis provides no comfort  
16 at all. There is no way from that point that any  
17 economically rational operator would remain on MPP1 if  
18 it chose to continue with its roll-out.

19 Long before 31 SSCs, the operator would have been  
20 forced out of MPP1 and would instead be bearing the  
21 price differential penalty, unless of course, as  
22 Royal Mail hoped and expected, the effect of the price  
23 differential was in fact to lead the entrant to abandon  
24 its roll-out altogether.

25 The third potential adverse consequence, identified

1 at paragraph 7.53C, is that Royal Mail might find  
2 a direct delivery entrant was ineligible to use MPP1 as  
3 soon as it rolled out above six SSCs, on the basis that  
4 it was unable to demonstrate to Royal Mail's reasonable  
5 satisfaction that it had a reasonable likelihood of  
6 meeting the national spread benchmark.

7 Now in this connection it's relevant to note that of  
8 course Whistl was not on MPP1 at the time, it was on  
9 APP2, and would need to switch to avoid the price  
10 differential, and that would depend upon Royal Mail's  
11 consideration of eligibility. And if Royal Mail found  
12 it ineligible, the operator would immediately be exposed  
13 to the full pain of the higher APP2 price, as soon as it  
14 went above six SSCs.

15 As explained at paragraph 7.54 of the decision,  
16 Royal Mail's internal documents at the time proceed on  
17 the basis that Whistl could only remain on MPP1 while  
18 rolling out up to six SSCs. But whether or not an  
19 entrant would be ineligible if its roll-out exceeded six  
20 SSCs, what is absolutely clear is that the price  
21 differential imposed a targeted and discriminatory  
22 penalty upon entry by raising the access costs of  
23 a direct delivery entrant who rolled out in more than  
24 six of the UK's 83 SSCs.

25 THE CHAIRMAN: Sorry to interrupt but Mr Beard was saying

1           that actually Whistl would have been eligible to move to  
2           MPP1.

3           MR HOLMES: I've heard that submission, and --

4           THE CHAIRMAN: Yes, we heard it too, and it's a matter of  
5           fact, and -- yes, I think the point is that Whistl made  
6           a mistake. They obviously misunderstood the  
7           eligibility, they thought it was forward looking and it  
8           was in fact not forward looking.

9           MR HOLMES: Yes, so my response to that is twofold --

10          THE CHAIRMAN: Well, I think just to finish the point --

11          MR HOLMES: I'm sorry.

12          THE CHAIRMAN: -- I think the implication is that that part  
13          of Ofcom's decision is on a false understanding.

14          MR HOLMES: If one looks --

15          THE CHAIRMAN: You need to answer that, I think.

16          MR HOLMES: I'm grateful, sir, and I shall do so.

17                 The first point to note is that Ofcom proceeds by  
18                 reference to the party's contemporaneous expectations of  
19                 the position on each side, both Royal Mail's and  
20                 Whistl's. And both sides of the equation were  
21                 proceeding on the basis that six SSCs would result in  
22                 the non-availability.

23          THE CHAIRMAN: I understand that but I think Mr Beard's  
24          point is that that's a misapprehension.

25          MR HOLMES: It's more a legal than a factual point.

1 THE CHAIRMAN: It's the result of an analysis when the point  
2 is put to decision or appeal, and it's an objective  
3 submission.

4 MR HOLMES: Well, so the tribunal can form its own legal  
5 conclusions in relation to those contractual --

6 THE CHAIRMAN: We're not experts on Royal Mail's eligibility  
7 criteria but that's effectively where the issue is.

8 MR HOLMES: Indeed. And it's a question of contractual  
9 construction, on which I understand that Mr Turner --  
10 Mr Turner and I have liaised to avoid duplication, and  
11 I understand he'll be addressing you on the question of  
12 contractual construction. But on the question --

13 MR TURNER: I will now.

14 MR HOLMES: The parties --

15 THE CHAIRMAN: Sorry, I missed that.

16 MR TURNER: I will now. [Laughter]

17 THE CHAIRMAN: Clearly the liaison was --

18 MR TURNER: No, no, no, the liaison was complete. I was  
19 being tongue in cheek.

20 THE CHAIRMAN: You carried that too far, Mr Turner.

21 MR HOLMES: Mr Turner will step up to the mark, I'm sure,  
22 but the factual point which informed how the parties  
23 actually behaved at the time, which must be a relevant  
24 point for the purposes of competition law --

25 THE CHAIRMAN: I'm not saying it's not a relevant

1           consideration, I'm just saying there is also this  
2           objective point.

3       MR HOLMES:   Yes, I understand.

4       THE CHAIRMAN:   And you're saying that Mr Turner will deal  
5           with it.

6       MR HOLMES:   He will.   The second point, though, is  
7           regardless of where the tribunal comes out on  
8           eligibility, in my submission it makes no real  
9           difference to the substantive analysis, because my point  
10          is that from the sixth SSC, there is targeted  
11          discriminatory penalty imposed as a result of the  
12          surcharges, and it is common ground that from the  
13          13th SSC, that pain, resulting from the surcharges, only  
14          as a result of the price differential, will be of  
15          a sufficient magnitude to force an operator to move to  
16          APP2 if it wishes to continue its roll-out and then to  
17          suffer the impact of the price differential.

18       THE CHAIRMAN:   I think it would be fair to say the decision  
19          tends to put the three points that you have alluded to  
20          on more or less equal footing, and it's a combination  
21          which would limit the roll-out.   But you're emphasising  
22          the surcharge.

23       MR HOLMES:   Well, sir, I'm not sure I'd agree with that.   If  
24          you look at paragraph 7.53 of the decision you see the  
25          first point is the surcharges point.

1 THE CHAIRMAN: I was looking at 7.56.

2 MR HOLMES: Let me just develop my point by --

3 THE CHAIRMAN: Don't let me interrupt your flow.

4 MR HOLMES: No, well, it's just that 7.53 shows what Ofcom  
5 was in fact saying.

6 At A you see a discussion of the surcharges. At B,  
7 you have the reference to the 15% point. And at C you  
8 have third, and in any event, the point concerning the  
9 risk of a finding of ineligibility. So in my  
10 submission, the surcharges point was put upfront and  
11 centre stage.

12 THE CHAIRMAN: Okay.

13 MR HOLMES: It was a sufficient basis for the findings in  
14 the decision.

15 At 7.56 -- I'll just remind myself of 7.56.

16 THE CHAIRMAN: Where you sum it up.

17 MR HOLMES: So there would be a tipping point at which one  
18 or more of the adverse consequences of using APP1 would  
19 require it to remain on the transfer to APP2 and pay the  
20 higher price under the price differential. And I say  
21 that Ofcom relies on all three, but that the first  
22 identified in 7.53, the surcharges, is a sufficient  
23 basis in itself for the conclusion that the price  
24 differential served as a targeted and discriminatory  
25 entry upon penalty.

1           Yes, and -- grateful -- my junior, Ms Morrison,  
2           observes that footnote 8.64 notes the point that I think  
3           I was just making:

4           "We do not consider that our assessment is  
5           materially affected by whether the precise point at  
6           which the access operator would find it commercially  
7           unattractive --"

8           THE CHAIRMAN: 864?

9           MR FRAZER: Footnote --

10          MR HOLMES: Apologies.

11          THE CHAIRMAN: Scrabbling around.

12          MR HOLMES: I was unclear, sir.

13          THE CHAIRMAN: Thank you.

14          MR HOLMES: "We do not consider that our assessment is  
15               materially affected by whether the precise point at  
16               which the access operator would find it commercially  
17               unattractive to use MPP1 would occur once the operator  
18               failed a national spread benchmark in six out of 83 SSCs  
19               or in 13 out of 83 SSCs. In either case, an end-to-end  
20               operator would need to choose between confining its  
21               end-to-end roll-out to a small proportion of SSCs or  
22               paying the higher prices applicable under APP2/ZPP3."

23               That we say is the mechanism of the price  
24               differential. And in my submission, the tribunal can  
25               view that as sustained in this appeal. Regardless of

1 the arguments about eligibility, the surcharging point  
2 isn't disputed. In fact, the analysis is Royal Mail's  
3 own.

4 The documentary evidence the tribunal has seen, and  
5 the oral evidence it has heard, confirms the correctness  
6 of the surcharging analysis. And the tribunal is  
7 invited to hold that the price of differential would  
8 indeed act as a penalty upon access operators who  
9 pursued entry into Royal Mail's core delivery monopoly  
10 on any material scale.

11 There is one area of dispute in relation to this  
12 analysis which I should address, and that concerns the  
13 availability of arbitrage as a strategy. Royal Mail has  
14 claimed, in the appeal, that there was a viable strategy  
15 available to an entrant which would permit it to remain  
16 on MPP1 and to roll out to 31 SSCs using arbitrage.

17 Now, Ofcom's analysis at this point is in paragraphs  
18 7.82 to 7.86 of the decision, and in annex 2 of the  
19 decision. But beginning at 7.82, Ofcom explains what  
20 Royal Mail was talk about when it referred to arbitrage.  
21 You see in the fourth line it states:

22 "The arbitrage strategy envisaged by Royal Mail  
23 would have involved an operator selectively streaming  
24 its items between the MPP1 and ZPP3 plans, sending  
25 cheaper zonal items via ZPP3 and more expensive zonal

1 items via MPP1 at the national price."

2 Pausing there, there is some risk of  
3 misunderstanding in the way in which arbitrage has been  
4 presented to the tribunal at times during the course of  
5 the trial. The strategy described here is not simply  
6 the combined use of one of the national plans with the  
7 pay-as-you-go ZPP3 plan as Royal Mail has at stages of  
8 the trial suggested.

9 The arbitrage strategy to which Royal Mail was  
10 referring in support of its case on this point, and  
11 which it developed in its statement of objections and  
12 the accompanying model, was a more specific and  
13 technical one. It involved exploiting a particular  
14 loophole in MPP1 which resulted from design flaws in  
15 that price plan and its tolerances.

16 The basic problem is that MPP1 is based on observing  
17 a geographic profile, which is less fine-grained and  
18 reliable as a measure of cost than the zonal profile  
19 required under APP2 and ZPP3, because the geographic  
20 units are larger; they're not confined to individual  
21 postal sectors but to SSCs. And because SSCs often  
22 contain postcode sectors falling into different  
23 categories of zone, they therefore impose different  
24 costs on Royal Mail. For postage within a single SSC,  
25 there will be some expensive post, rural, some less

1 expensive post, suburban, and in some cases urban,  
2 contained within the same SSC.

3 This means that MPP1 is a less accurate way of  
4 ensuring cost reflect activity than APP2 or ZPP3. And  
5 that was one of the reasons why Royal Mail wanted APP2  
6 to replace MPP1 when it was brought in. And the type of  
7 arbitrage Royal Mail relies upon would involve  
8 exploiting this design flaw. The operator would use the  
9 MPP1 plan, but would meet the national geographic  
10 profile requirements by means of more expensive rural  
11 and suburban mail wherever possible, and it would then  
12 send the urban mail over to ZPP3, where it could pay the  
13 lower zone price.

14 The first point to note is that this type of  
15 arbitrage, unlike the practice of simply combining  
16 different types of price plan, is by no means inevitable  
17 and nor is it something that Royal Mail was obliged  
18 simply to live with. On the contrary, it was something  
19 that can be addressed by Royal Mail tightening up the  
20 rules.

21 The second point to note is that, as set out at  
22 paragraph 7.83 of the decision, Ofcom notes that the  
23 potential for arbitrage existed before the price  
24 differential, and Royal Mail has consistently  
25 characterised such arbitrage as unfair and

1 inappropriate, and had communicated that view both  
2 publicly to the market and at large and specifically to  
3 Whistl.

4 At point A of paragraph 7.83, Ofcom explains that in  
5 2013 Royal Mail used its contractual powers explicitly  
6 to attempt to close down such arbitrage opportunities.

7 Now, one of the methods that Royal Mail employed in  
8 order to address the defect was by including the urban  
9 density benchmark in MPP1. And this was intended to  
10 control an MPP1 operator zonal profile within each SSC.  
11 It required an operator to make sure that the same  
12 percentage of its total urban mail across the UK went to  
13 any given SSC, as Royal Mail itself sent to that SSC.  
14 So for example, if Royal Mail sent 3% of its total urban  
15 mail to a given SSC, an operator on MPP1 would similarly  
16 be required to send 3% of its total urban mail to  
17 that SSC.

18 But this was not an effective solution to the  
19 arbitrage problem, because it doesn't control the  
20 relevant proportion of urban mail to other kinds of mail  
21 sent within an individual SSC. So in other words, an  
22 operator could evenly reduce the volumes of urban mail  
23 all across the UK and still comply with the urban  
24 density benchmark, and it could then send the mail it  
25 had taken out of MPP1 using ZPP3 at a cheaper rate,

1 leaving the higher cost items for delivery at the  
2 average price using MPP1. So there was still an  
3 opportunity for arbitrage, and it was this that  
4 Royal Mail says Whistl could have exploited.

5 Now Ofcom wasn't persuaded by this. Its conclusion  
6 is set out in 7.84.

7 In the light of Royal Mail's efforts to eradicate  
8 arbitrage, and its public opposition to arbitrage, Ofcom  
9 considered that while the arbitrage strategy described  
10 by Royal Mail might theoretically have been possible, no  
11 rational end-to-end entrant would seriously have  
12 considered relying upon such arbitrage as a viable  
13 long-term plan to avoid the adverse consequences of  
14 a price differential. And at paragraph 7.85, Ofcom  
15 notes that Royal Mail's modelling at the time when  
16 introducing the price differential did not envisage  
17 Whistl engaging in the supposed arbitrage strategy which  
18 is now prayed in aid. And nor did Whistl attempt to  
19 engage in such a strategy as a way round the price  
20 differential.

21 On the contrary, Royal Mail's expectation and  
22 intention, as we'll see, was that Whistl could not  
23 proceed with the roll-out on MPP1, and that if it rolled  
24 out at all, it would have to do so on APP2 and face the  
25 associated cost penalty introduced by the price

1 differential.

2 Now, just to make this point good, let me show you  
3 again by reference to Royal Mail's understanding of the  
4 position at the time, looking at some documents in C4A,  
5 if I may. If we could turn to tab 25, the tribunal has  
6 seen this on several occasions. It's the presentation  
7 from 30th September 2013 entitled "Proposed Actions on  
8 Access to Protect the USO". And if we could turn within  
9 it to page 4, the tribunal will recall there the  
10 discussion of action 2, as it was then termed, the  
11 introduction of the differential between PP1 and the two  
12 zonal plans.

13 Under "Objective justification", on the right-hand  
14 side of the slide, the third bullet states:

15 "Royal Mail might argue a 0.3p price differential is  
16 immaterial as far as direct competition is concerned."

17 Then it says this:

18 "A small scale DD operation, five or less SSCs,  
19 could be supported on PP1 and any wider roll-out would  
20 be sure to trigger Ofcom's intervention in any case."

21 So Royal Mail's expectation at the time was that  
22 a small scale operation, five or less SSCs, was what  
23 could be supported on PP1. There is no indication here  
24 or in any of the other documents that a direct delivery  
25 entrant could go above six SSCs, still less roll out to

1 31 while remaining on MPP1.

2 Turning on to page 25, there is a specific  
3 discussion of Whistl, or TNT as it then was. You see at  
4 the bottom of the page, just above the page number,  
5 that:

6 "The likelihood of complaint is classed as high as  
7 they would need to switch to PP1 to continue to compete  
8 with UK Mail but that would then dent their direct  
9 delivery plans."

10 That was because of the view expressed earlier that  
11 only a small scale direct delivery operation of up to  
12 five or less SSCs could be supported on MPP1.

13 Consistent with this document, Royal Mail's  
14 modelling of Whistl's likely response to the price  
15 differential was that Whistl would stop rolling out  
16 before five SSCs, switch to MPP1 and stay there --  
17 I should say stop rolling out at five SSCs, switch to  
18 MPP1 and stay there.

19 Now Royal Mail does not dispute that there was no  
20 modelling done at the time based on Whistl engaging  
21 arbitrage. You, sir, I recall, in opening put the point  
22 to Mr Beard and there has been no subsequent suggestion  
23 that there was any such modelling.

24 A final point on arbitrage. If we could return to  
25 the decision -- it might be worth keeping this document

1 to hand, if there's space on the desk, because we're  
2 going to need it for another purpose in a moment -- and  
3 look briefly at 7.86. This explains that Royal Mail has  
4 indeed tightened up its rules since 2014, and  
5 specifically, the arbitrage problem has been addressed  
6 through further amendments to the urban density  
7 benchmark in 2017. The benchmark is now set according  
8 to the percentage of urban mail relative to the volume  
9 of all mail at each SSC, and this enables Royal Mail to  
10 ensure a more balanced zonal profile within each SSC.

11 For your note, this is explained in annex 2 to the  
12 decision at paragraphs A2.14 to A2.18, and Royal Mail  
13 has not disputed the correctness of this.

14 THE CHAIRMAN: It does not help us with 2013 to 2014 though.

15 MR HOLMES: No, sir, but what it does show -- in my  
16 submission, it makes good two of the submissions that  
17 I've just made. The first is that any operator that  
18 rolled out based on a strategy of grandiose arbitrage  
19 was building a business on foundations of sand because  
20 Royal Mail had the means to correct arbitrage.

21 THE CHAIRMAN: Mm-hm.

22 MR HOLMES: It also demonstrates the second point, which is  
23 whereas Royal Mail has sought to suggest that arbitrage,  
24 like the poor, will always be with us, that's just not  
25 the case. It results from particular design flaws,

1           loopholes, which can be flexed and dealt with by  
2           contractual amendment. Mr Beard says that would require  
3           a contract change notice. Well, my response to that is  
4           to say: indeed, but no operator could advance  
5           a substantial investment when it knew that such a change  
6           could be introduced subsequently and it equally knew the  
7           hostility that Royal Mail had very publicly stated to  
8           arbitrage. And to be clear, that hostility results from  
9           the fact that this is not just a benign combination of  
10          plans. It is a mechanism which jeopardises cost  
11          recovery under MPP1, because MPP1 is intended to achieve  
12          an average price by ensuring that the profile matches  
13          Royal Mail's profile.

14                 But there is some risk, insofar as only expensive  
15          items are being routed via MPP1 while cheaper items are  
16          being sent via ZPP3 that this will disrupt the averaging  
17          mechanism as a means of ensuring cost recovery. So you  
18          can quite see why Royal Mail might be concerned to shut  
19          down arbitrage.

20                 Now, Mr Beard referred to Royal Mail's arbitrage  
21          analysis at overflow bundle tab 17, and we say this is  
22          of no assistance to him.

23                 In response to this analysis, Mr Wells was clear  
24          that Whistl did not engage in arbitrage to any extent at  
25          the time the price differential was introduced. And the

1           tribunal will recall that that time it was on APP2, and  
2           the arbitrage strategy which Royal Mail was modelling  
3           involves a combination of MPP1 and ZPP3, and it  
4           expressly deals with this mismatch where the urban  
5           density benchmark doesn't adequately control for urban  
6           volumes in individual SSCs.

7       THE CHAIRMAN: Sorry, at that time did Whistl use ZPP3 at  
8           all?

9       MR HOLMES: It did. My understanding, sir, is that it did.

10      THE CHAIRMAN: That's my understanding too.

11      MR HOLMES: But of course you can use ZPP3 without that  
12           showing an arbitrage strategy in the sense that we  
13           discussed it.

14      THE CHAIRMAN: That's just the use of multiple price plans.

15      MR HOLMES: Yes, for example it may reflect the fact that  
16           you have a particular customer with an urban profile of  
17           mailings, and for that customer it makes obvious sense  
18           to go via ZPP3 because the post they're directing is  
19           cheap post.

20      PROFESSOR ULPH: I also just ask, we heard evidence from  
21           both Mr Polglass and Mr Wells that there were costs  
22           associated with arbitrage, both in terms of having to  
23           print letters in a particular way, but also in terms of  
24           having the software that could actually manage the  
25           routing of mail at any significant scale.

1 MR HOLMES: Yes.

2 PROFESSOR ULPH: How does that figure in your argument?

3 MR HOLMES: Well, sir, I agree that that evidence is  
4 relevant, and in my submission it tends to confirm  
5 Ofcom's conclusion that arbitrage could not be relied  
6 upon as a strategy for significant entry, because what  
7 it shows is that the desktop, after-the-event analysis  
8 that Royal Mail undertook, which showed this possibility  
9 of 31 SSC entry, doesn't factor in real world business  
10 costs for both customer and operator which may have  
11 arisen, and may indeed have been insuperable on the  
12 evidence that was given at the relevant time, given  
13 the -- I understood the evidence to be that the software  
14 simply didn't exist at that time for the kind of  
15 detailed balancing of the materials.

16 So insofar as that evidence is correct, it is  
17 a further reason to sustain the conclusions that Ofcom  
18 arrived at.

19 THE CHAIRMAN: I think Mr Beard said that Whistl engaged in  
20 arbitrage now.

21 MR HOLMES: Yes.

22 THE CHAIRMAN: You don't dispute that?

23 MR HOLMES: He did, he did. So -- your question really  
24 contains my answer. The "now" is the point that we'd  
25 underline: we're now a number of years on.

1 THE CHAIRMAN: Following from my colleague's comment then,  
2 they must have spent the money on the software and  
3 incurred the costs.

4 MR HOLMES: It suggests they have found a way of doing  
5 arbitrage. I should say, though, sir, that --

6 MR TURNER: [Sotto voce]

7 THE CHAIRMAN: Perhaps these questions are better for  
8 Mr Turner then he has stepped up to the mark.

9 MR HOLMES: Yes. I mean, for reasons that are complex  
10 should say that Ofcom does not accept that chart says,  
11 that even now Whistl engages in arbitrage. The fact  
12 that there is a mismatch between the profile of their  
13 urban delivery and their general delivery may simply  
14 reflect the profile of some individual customers and  
15 therefore may be an example of the benign practice  
16 that's described.

17 THE CHAIRMAN: But it's not a major point.

18 MR HOLMES: For all the reasons given in paragraphs 7.82 and  
19 7.86 of the decision and in annex 2, we invite the  
20 tribunal to uphold Ofcom's conclusion that arbitrage  
21 could not realistically have been used by an entrant to  
22 avoid targeted discriminatory surcharge.

23 PROFESSOR ULPH: Can we just summarise your point as being:  
24 although arbitrage involves the simultaneous use of more  
25 than one price plan, the simultaneous use of more than

1           one price plan is not necessarily arbitrage.

2       MR HOLMES:   Yes.

3       PROFESSOR ULPH:   That's your point?

4       MR HOLMES:   I'm grateful, sir, it is.   That's a crisp  
5           encapsulation.

6           So that concludes my discussion at one part of 7C.  
7           That's to say, Ofcom's analysis of the mechanism whereby  
8           the price differential could be expected to inflict  
9           targeted damage on direct delivery entrants.

10          So returning to the road map document for a moment,  
11          the tribunal will see that the remaining elements of  
12          section 7C contain Ofcom's consideration of whether the  
13          price differential can be said to amount to price  
14          discrimination.   And it's in this connection that I can  
15          address the remainder of ground 2.

16          There are two elements to Ofcom's consideration,  
17          each of which Royal Mail contests.   The first is that  
18          transactions on MPP1 and APP2 were equivalent.   And the  
19          second is that the resulting price discrimination cannot  
20          be justified.

21          So if we consider equivalence first.   Ofcom's  
22          analysis of this begins at paragraph 7.65 under the  
23          heading "Equivalent transactions".

24          If the tribunal turns on to paragraph 7.74, on  
25          page 203 of the external numbering, you see Ofcom's

1 conclusion, based on the evidence, that the substance of  
2 the transactions carried out by Royal Mail in respect of  
3 access was and is equivalent between customers on each  
4 type of price plan.

5 And as Ofcom then proceeds to observe, the  
6 underlying services provided were the same on each plan,  
7 and the profile requirements under each plan had the  
8 same objective of ensuring that the averaged price list  
9 reflected Royal Mail's costs.

10 Now, in the appeal, Royal Mail has sought to contend  
11 that the price plans do not involve equivalent  
12 transactions, and it says in particular that APP2 is  
13 a greater value to customers than MPP1, because of the  
14 greater flexibility which it allows them.

15 In other words, Royal Mail claims that it saw the  
16 plans as separate products which were of different value  
17 to customers and it introduced the price differential to  
18 tap these differing pockets of demand.

19 The problem with this claim is that it is  
20 inconsistent with the evidence of what Royal Mail  
21 actually did and what it in fact intended. Royal Mail  
22 did not start with an investigation of the value which  
23 particular customers attached to APP2. It did not seek  
24 to work out what they would be prepared to pay for  
25 increased flexibility in the hope of selling more of

1 APP2 at a higher price that reflected its allegedly  
2 greater value.

3 In fact, Royal Mail's focus from the outset was how  
4 it could incentivise customers not to launch a competing  
5 direct delivery service, or to purchase from such  
6 a service. The tribunal will recall the slide deck on  
7 23 July 2013, which described the commercial rationale  
8 for the price differential as being to "create financial  
9 incentive for providing a national mail distribution".  
10 For your note, that is in bundle C4A, tab 14, page 9.

11 Royal Mail's hope and expectation was not that it  
12 would be able to sell its APP2 product at a higher price  
13 point, the usual motivation for product differentiation,  
14 instead, Royal Mail expected the higher APP2 price to  
15 drive by far its largest APP2 customer, Whistl, who  
16 represented almost the entirety of the demand for APP2,  
17 on to the comparatively cheaper MPP1 plan. As we saw  
18 a moment ago in the slide deck, from 30th December 2013,  
19 Royal Mail thought that Whistl would need to switch to  
20 PP1 to continue to compete with UK Mail.

21 So Royal Mail thought the price differential would  
22 be too high a price to pay, and no company that is  
23 genuinely engaged in product differentiation raises its  
24 prices in order to drive the bulk of its demand away.  
25 So this was not, in my submission, product

1 differentiation, it was targeted price discrimination to  
2 penalise and thereby deter competition.

3 Royal Mail says in its closing submissions: what  
4 about the rump of other APP2 customers? Perhaps this  
5 explains the product differentiation. You see this is  
6 point, for example, at paragraph 1.10C of its written  
7 closing submissions. If we could turn that up. It's  
8 the written closing submissions of Royal Mail, RM12.

9 You see from page 33, paragraph 1.10, that  
10 Royal Mail is addressing the argument that the price  
11 differential was not a benign price differentiation  
12 strategy on the basis that Royal Mail did not intend the  
13 higher APP2 prices to be paid by Whistl but rather  
14 sought to confine Whistl to MPP1.

15 They make various points about that. It's the third  
16 one I want to address for now.

17 "Whistl was not the only customer on APP2 or ZPP3  
18 that would have been required to pay the differential  
19 had the CCNs been implemented. In the circumstances,  
20 the reference to the alleged intention vis à vis Whistl  
21 is simply insufficient to allow Ofcom to conclude that  
22 Royal Mail did not intend the APP2 and ZPP prices to be  
23 paid at all."

24 Now on this issue, the 30th September slide deck is  
25 again instructed. Do you still have that to hand, sir?

1           It's at C4A, tab 25.

2           THE CHAIRMAN: Mm-hm.

3           MR HOLMES: If we could look again at slide 4, and at the  
4           "Objective justification" box in the right-hand side of  
5           the page. It is the final bullet I would ask the  
6           tribunal to consider:

7                     "A regional operator could always switch to  
8                     a national consolidator to access the lowest prices."

9                     So Royal Mail was therefore considering how its  
10                    other customers could avoid the price, the higher price  
11                    on APP2, and could enjoy the lower price on MPP1,  
12                    notwithstanding their regional focus.

13                    So these customers were not expected to be willing  
14                    or able to pay extra for greater flexibility. It was  
15                    not in order to tap that pocket of demand that the price  
16                    differential was being introduced.

17                    And turning on to page 13, you see that there is  
18                    a detailed annex considering Royal Mail's large  
19                    customers one by one. And this contains some  
20                    confidential material, so I shall be cautious, but for  
21                    each customer you will see, in the non-confidential  
22                    text, Royal Mail considers: would they switch plans?

23                    First of all, there's a discussion of the MPP1  
24                    customers, and you see they would not switch, for the  
25                    reason which is given there. It's fairly obvious.

1 I can't see how it can be confidential. I don't know if  
2 Mr Beard has any objection to my reading it without  
3 mentioning the customer's name?

4 MR BEARD: Sorry, we're just double checking. I think it's  
5 unlikely to be. Without customer names that absolutely  
6 fine. Thank you Mr Holmes.

7 MR HOLMES: I'm grateful.

8 So you will see that for MPP1 the conclusion is that  
9 they don't need to switch because they're compliant with  
10 the cheaper plan.

11 Then on page 23, the discussion of APP2 customers  
12 begins. You see the customer there mentioned, an  
13 indication of its revenue and the current contract, PP2.

14 You see:

15 "Would they switch plans?"

16 There's then an indication of that consideration.

17 And I'd like to just refer to the final clause:

18 "... could switch volumes to a PP1 operator."

19 It's the same point which is made above.

20 Then at page 25 -- the same point is made on page 24  
21 for the operator there, and then at page 25, one comes  
22 to Whistl. You see there:

23 "Would they switch plans currently on PP2?"

24 "Probably yes in the short-term as they wouldn't  
25 incur any surcharges on PP1 now."

1           We've seen already the expectation that Whistl would  
2           switch to MPP1 although this would dent its direct  
3           delivery ambitions.

4           So, in the light of this evidence, we say that the  
5           suggestion that Royal Mail was engaged in an exercise in  
6           product differentiation is not sustainable on the facts.  
7           If this were really an exercise of product  
8           differentiation, one is bound to ask who the customers  
9           are who Royal Mail is said to have expected to pay more  
10          for APP2 reflecting their demand for a more flexible  
11          product. And no company that was genuinely engaged in  
12          product differentiation would set a price for a product  
13          which it expected none of its customers to pay.

14       PROFESSOR ULPH: Could we state your point in a slightly  
15          different way, of saying that even if there's  
16          a potential difference between the products, the market  
17          wouldn't bear the price differential? You have to prove  
18          that the market will actually sustain a higher price and  
19          that's essentially the point you're making, is it?

20       MR HOLMES: Sir, that sounds entirely plausible as a way of  
21          stating the point to be.

22       PROFESSOR ULPH: Okay.

23       MR HOLMES: I shall check with those behind me that there is  
24          no objection. It may be I should perhaps come back to  
25          you after I've discussed in the short adjournment with

1           those who are more knowledgeable than I am.

2           PROFESSOR ULPH:   Okay.

3           MR HOLMES:   I don't want to misspeak.

4           THE CHAIRMAN:   Careful before you agree to anything,  
5                            Mr Holmes.

6           MR HOLMES:   That's very sound, very sage advice, sir, if  
7                            I may say so.

8                            To conclude, we invite the tribunal to hold that  
9                            Ofcom was right to treat what was being done here as  
10                           price discrimination in relation to basically equivalent  
11                           access products, and to reject Royal Mail's alternative  
12                           account of its conduct as an example of product  
13                           differentiation.

14          THE CHAIRMAN:   Mr Holmes, you've already made the point  
15                            elsewhere, I think, about the volumes involved with  
16                            these customers, who are liable to switch or not.

17                            That's right.   The volumes compared to Whistl's volumes.

18          MR HOLMES:   I have, sir, and I'm grateful for that reminder.

19                            I shan't -- the point is simply that --

20          THE CHAIRMAN:   The figures are confidential --

21          MR HOLMES:   -- Whistl is by far the largest customer, as  
22                            these slides show.

23          THE CHAIRMAN:   The figures are confidential.

24          MR HOLMES:   They are.   I don't think there is any dispute  
25                            that Whistl was by far the largest customer.   I think it

1           was accepted by Ms Whalley in cross-examination, if  
2           I recall correctly.

3       MR BEARD:   That's accepted by Royal Mail, absolutely.

4       MR HOLMES:  I'm grateful to Mr Beard.

5           So the final element of section 7B of the decision  
6           relates to whether Royal Mail's targeted price  
7           discrimination can be justified.  And Ofcom's findings  
8           in the decision -- the finding in the decision is that  
9           Royal Mail's justifications do not work.  I should say  
10          we can put away tab 25 for now; I won't be coming to  
11          that document for a while.

12          So the justification that's pursued on the appeal  
13          relates to cost.  The value justification is now put as  
14          a product differentiation point.  So we can look  
15          immediately at Ofcom's analysis of that question, and we  
16          can pick up at paragraph 7.106 of the decision.  There  
17          you see a summary of Ofcom's findings which are then  
18          developed subsequently.

19          So Ofcom says, in the opening words of the  
20          paragraph, that it:

21                 "... does not consider that the price differential  
22                 introduced by the Royal Mail can be justified by any  
23                 reference to potential cost savings associated with the  
24                 local volume forecasts as described above that  
25                 Royal Mail required its MPP1 customers but not its APP2,

1 ZPP3 customers to provide."

2 Several points are then made. First, the declines  
3 in volumes that Royal Mail was seeking to identify and  
4 plan for would in practice have resulted from end-to-end  
5 competition. Secondly, MPP1 customers would not have  
6 launched end-to-end services, and we've seen the view  
7 that Royal Mail took about that.

8 Thirdly -- and this is, in my submission, the  
9 decisive point -- there is no reason to suppose that  
10 APP2/ZPP3 customers could not also have provided  
11 valuable forecasts in relation to anticipated volume  
12 reductions, in particular SSCs resulting from their  
13 intended roll-out of end-to-end delivery services, and  
14 yet Royal Mail did not attempt to obtain such forecast  
15 information from them or offer any financial incentive  
16 for such information equivalent to the lower prices  
17 conferred on MPP1 customers by the price differential.

18 The formulation there, sir, we say meets the point  
19 which has been made at times by Royal Mail, that it  
20 would not have been appropriate to oblige APP2 customers  
21 generally to provide forecast information, some of them  
22 might have been unable or unwilling to do so. It would  
23 not have been necessary to do so in order to make  
24 a workable cost justification. It would have been  
25 sufficient to offer the option and, attaching to the

1 option, to offer the prospect of the same financial  
2 reward which was being offered on MPP1.

3 The fourth point is to note that Royal Mail modelled  
4 the cost savings it expected to achieve based on  
5 Whistl's direct delivery roll-out plans. And the  
6 overall conclusion, at point E, is that Royal Mail's  
7 cost justification involves penalising operators for not  
8 providing information, even though Royal Mail did not  
9 seek or contractually require them to provide that  
10 information.

11 In the appeal, Royal Mail contends that the cost  
12 justification is well founded. Now, it argues in  
13 particular not all APP2 customers could have provided  
14 the forecast information, and as I've just said, we say  
15 there is nothing to this point. To justify price  
16 discrimination, Royal Mail must show that there is some  
17 good and plausible reason for operating a cheaper price  
18 to an operator on MPP1 than APP2, but it accepts that by  
19 far its largest customer on APP2 could have provided  
20 valuable forecast information to Royal Mail that would  
21 have enabled cost savings.

22 If Royal Mail was trying to make cost savings, one  
23 has to ask why it did not offer Whistl the opportunity  
24 to supply forecasts in exchange for a discount, and  
25 Ofcom makes that point at 7.106C of the decision.

1           We say that it's fatal to the cost justification.  
2           The answer can't be that this simply didn't occur to  
3           Royal Mail at the time, because we know from the  
4           contemporaneous documents that the point was indeed  
5           raised with Royal Mail by its advisers, it was explored  
6           during the process of designing the price differential.  
7           Ofcom asked about it, Whistl asked about it. And  
8           neither of Royal Mail's factual witnesses could answer  
9           the point. Indeed, the tribunal will recall the regret  
10          that Dr Jenkins expressed that she hadn't given stronger  
11          advice in relation to the cost justification.

12          In my submission, the reason why Royal Mail did not  
13          offer Whistl more favourable pricing can be inferred  
14          from the documents relating to its intention. To have  
15          done so would have gone directly counter to the  
16          commercial rationale for a price differential. The  
17          purpose of which was to defend Royal Mail's volumes by  
18          deterring competitive entry. Indeed, as Mr Frazer  
19          observed yesterday, this is the whole premise of  
20          Royal Mail's ground 4 and he drew attention to  
21          paragraph 233C of Royal Mail's closing submissions,  
22          where:

23                 "Royal Mail anticipated that without the price  
24                 changes, continued cherry-picking would suppress EBIT  
25                 below 5%, and in announcing the price differential

1 Royal Mail hoped to avoid the inevitable downward  
2 pressure on its EBIT that would result from increased  
3 end-to-end competition."

4 So this is not about managing the decline in volumes  
5 by taking costs out of the system; it's about avoiding  
6 volume loss to Royal Mail.

7 Clearly, if Whistl had been offered the lower price  
8 while pursuing entry in exchange for forecast  
9 information that would enable cost savings, Royal Mail  
10 would not have been able to defend its volumes.

11 This just goes to show that the cost justification  
12 does not work. The justification does not reflect what  
13 Royal Mail was really seeking to achieve, and in  
14 consequence, the measure was not appropriately designed  
15 to achieve the cost justification.

16 THE CHAIRMAN: What do you say to Mr Beard's point that the  
17 analysis of the cost justification carried out by  
18 Royal Mail dictated the size of the differential when  
19 the final decision came to be taken?

20 MR HOLMES: As I understand it, he said it didn't dictate  
21 it. He said they did some modelling, which would have  
22 allowed them, they say, to impose a much higher price  
23 differential, and they decided not to go for the full  
24 impact of the price differential. It's true that they  
25 did --

1 THE CHAIRMAN: Because of the sensitivity of this analysis,  
2 is what he said.

3 MR HOLMES: It's true that they did modelling, but they did  
4 the modelling in order to try to justify a measure that  
5 they were pursuing for other commercial reasons, I say,  
6 and I say that's made good by the evidence that's before  
7 the tribunal about the true intention of the measure,  
8 and this explains why they didn't offer the price  
9 reduction, the lower price, to Whistl itself, although  
10 it could obviously have provided extremely valuable  
11 information if it had indeed gone ahead with its  
12 roll-out.

13 MR FRAZER: What about the point in Royal Mail's closings  
14 that Whistl didn't want to provide this information?

15 MR HOLMES: Well, sir, I think Mr Turner will probably  
16 address this point. The evidence of Whistl's witnesses,  
17 as I understand it, was that they might have had some  
18 reluctance to provide the information, but if push came  
19 to shove, and the financial incentive made it worth  
20 their while, they would have done so.

21 MR FRAZER: Thank you. Sorry, I should have put that to  
22 Mr Turner.

23 MR HOLMES: No, not at all. I'm grateful, it's useful to  
24 know the tribunal's thinking.

25 THE CHAIRMAN: Mr Turner is going to have a lot to answer.

1 MR HOLMES: He is. I'm ducking some of these bullets.

2 So the tribunal is invited to uphold Ofcom's  
3 rejection of the cost justification for the reasons  
4 given in section 7C of the decision. So that deals  
5 with --

6 THE CHAIRMAN: I'm sorry to keep interrupting you.

7 MR HOLMES: Not at all.

8 THE CHAIRMAN: But just to be clear, we had a discussion  
9 with Mr Beard yesterday about the relevance or otherwise  
10 of the detailed work done by Dr Jenkins and others on  
11 calibrating and explaining possible cost justifications.  
12 I think he put to us that that was perfectly consistent  
13 with there being an actual cost justification. Whether  
14 you began with the differential and then tried to  
15 justify it or whether you began with the cost saving and  
16 then looked at what the price differentiation -- I think  
17 he put it to us that those two parallel processes didn't  
18 lead to a colourable conclusion.

19 MR HOLMES: Yes.

20 THE CHAIRMAN: You don't agree with that, I take it?

21 MR HOLMES: Well, sir, I don't agree with that but I don't  
22 need to make good my arguments on ground 2 to say that  
23 the tribunal need conclude that you can never devise  
24 a cost justification as a supporting argument for  
25 a measure which has other underlying commercial

1 objectives. The short point on the cost justification,  
2 and the reason why it fails, is because it is not a good  
3 justification for charging a differential price between  
4 MPP1 and APP2.

5 That's because Royal Mail accepts that the customer,  
6 their largest customer by far on APP2, could have  
7 provided the forecast information which they say would  
8 have enabled them to manage costs coming out of the  
9 network more effectively.

10 It was also the operator that was most likely by  
11 far, if it went ahead with its roll-out, to produce the  
12 kind of precipitant drops in volume in localised areas  
13 which were said to provide the basis for the cost  
14 savings. The argument was that if you knew in advance  
15 that a particular area was going to see a sudden and  
16 dramatic drop in volumes, localised drop in volumes, you  
17 could start planning, managing the decline of the  
18 operations in that area in a way that would enable you  
19 to take out costs in a managed way, and that would  
20 produce cost savings.

21 THE CHAIRMAN: That's Dr Jenkins's work, and you're saying  
22 that's really irrelevant because it wasn't made  
23 available to people who could provide it.

24 MR HOLMES: Well, indeed. And more than that, not only the  
25 people who could provide it, but the people whose plans

1 to roll out were used as the basis for modelling the  
2 savings that could be achieved.

3 There is something particularly perverse about  
4 calculating and trying to justify a price differential  
5 which you really think will deter entry on the basis of  
6 the costs that you will then allegedly be able to save  
7 if entry were to occur when you're not seeking  
8 information from that operator about their entry. It  
9 really just does not work as a justification.

10 This is what Dr Jenkins was telling Royal Mail at  
11 the time. It's what Oxera was saying. Look, Whistl  
12 could provide valuable information. And that just  
13 doesn't stack up as a cost justification. But they went  
14 ahead. And we say the fact that they went ahead  
15 although the cost justification didn't work is yet  
16 another indication that the real purpose was not about  
17 cost justification, not about saving costs through  
18 managing volume decline. It was about avoiding the  
19 decline from happening in the first place by deterring  
20 Whistl's entry.

21 That brings me to the next topic, which is  
22 intention, which is what is covered in section 7D of the  
23 decision. And I do have a few points to make by  
24 reference to that.

25 We're at 11.20, now, it's a substantial -- would it

1           be worth breaking now?

2       THE CHAIRMAN: It would be worth breaking now, yes.

3       MR HOLMES: I'm grateful.

4       THE CHAIRMAN: Thank you.

5       (11.19 am)

6                                       (A short break)

7       (11.30 am)

8       MR HOLMES: Sir, I'm obliged to Ms Morrison for providing me  
9           with a reference that I should give you for your note,  
10           if I may. It is to the modelling that was used as the  
11           basis for the cost justification, and which was based on  
12           direct delivery entry using different predictions for  
13           Whistl's roll-out. And that is set out in an annex to  
14           the disclosure committee report of 6th January 2014, and  
15           can be found at C4B, tab 79, internal pages 9 to 21. So  
16           unless the tribunal has any further questions on  
17           ground 2, I propose to turn now to section 7D.

18       THE CHAIRMAN: We've been referred to that before.

19       MR HOLMES: I have referred to that before.

20       THE CHAIRMAN: Yes.

21       MR HOLMES: In opening submissions. It was just for  
22           completeness, so that the tribunal --

23       THE CHAIRMAN: Yes -- no, we've looked at the disclosure  
24           committee. Absolutely.

25       MR HOLMES: Section 7D, if you a look for a moment at the

1 road map document, contains Ofcom's finding of  
2 a deliberate strategy on Royal Mail's part to limit  
3 competition. It commences at 7.123.

4 Ofcom's conclusion, set out in the heading, was that  
5 Royal Mail's conduct reflected a deliberate strategy to  
6 limit competition from its first and only significant  
7 competitor.

8 And you see from paragraph 7.124 that the finding is  
9 based on the detailed narrative set out in great detail  
10 in section 4 of the decision. Some elements of which  
11 are then highlighted in the ensuing paragraphs of (d).

12 The tribunal has now seen the underlying documents  
13 for itself and has heard the witnesses and it can make  
14 its own assessment of those materials. My submission is  
15 that the evidence bears out Ofcom's conclusion and that  
16 no satisfactory alternative explanation has been  
17 provided for Royal Mail's conduct.

18 In its closing submissions, Royal Mail has made two  
19 points in relation to the factual material. We should  
20 see how it puts those points. They're in paragraphs 29  
21 to 32 of its written closing submissions, if you could  
22 just turn those up.

23 So the first point which is made appears at 29 and  
24 30. The claim there is that Ofcom's cross-examination  
25 of Ms Whalley focused on the traffic lights slide, and

1 at paragraph 30 it is said that the limited roll-out  
2 shown in the green column did not represent Royal Mail's  
3 expectation of what would actually happen. And  
4 Royal Mail considered there was another possibility,  
5 namely that Whistl would suffer the pain inflicted by  
6 the price differential and ramp up its roll-out so as to  
7 escape from its punitive effects.

8 Royal Mail's second point appears at paragraph 32  
9 over the page. It contends that Royal Mail proceeded on  
10 the basis that Whistl would secure investment, and so be  
11 well able to forgo 10% rates of return in the  
12 short-term. It was on that basis that it proceeded.

13 I'd like to deal with those two points in turn.

14 On the first point, claiming that Royal Mail did not  
15 have the hope -- which claims that Royal Mail did not  
16 have the hope and expectation that its actions would  
17 curtail Whistl's roll-out, I'd like to make four  
18 observations if I may. The first is that the hope and  
19 expectation is clear not only from the traffic lights  
20 slide but from a wealth of other contemporaneous  
21 documents. And I put many of those to Ms Whalley and  
22 discussed them with her at some length.

23 I showed her, for example, the PSB document from  
24 July 2012, which described the price differential as  
25 serving to "create financial incentive for providing

1 a national mail distribution".

2 In relation to that document she recognised that  
3 there were benefits to Royal Mail from having a national  
4 distribution of mail.

5 When I put to her that this was not a concern about  
6 managing the removal of costs, in other words, the cost  
7 justification, she said:

8 "Yes, it would be misleading of me to say that there  
9 weren't benefits in having national distribution of  
10 mail."

11 For your note, the reference is transcript Day 5,  
12 17th June, page 136, line 14, to page 137, line 3.

13 I asked her whether she agreed that creating  
14 a price/financial incentive for committing to a national  
15 distribution of mail to all postcodes would raise  
16 competitors' costs. And her reply is, in my submission,  
17 revealing. She said:

18 "At the time, the company recognised that any step  
19 that it took to try to protect the universal service  
20 could potentially have an impact on the costs of another  
21 player in the market, because in a declining market  
22 there simply -- if you are taking a step to try to  
23 protect the activities of one business, in this case the  
24 universal service, which was a legal obligation, the  
25 company recognised that there could be an impact on

1 other players in the market."

2 The reference is transcript Day 6, 18th June,  
3 page 10, lines 9 to 17.

4 I put it to her then that the impact on a direct  
5 delivery entrant was not a collateral effect of the  
6 price differential when it was described as a measure to  
7 incentivise operators to commit to a national  
8 distribution of mail. In her reply, she reiterated that  
9 there were significant benefits to Royal Mail from  
10 having a national fall to earth profile. That is on  
11 page 11, starting at line 12.

12 Now, in my submission, these documents, and  
13 Ms Whalley's responses, show that the price differential  
14 was, in Ms Whalley's words, about protecting the  
15 activities of Royal Mail's business. And that the  
16 protection was achieved by encouraging a direct delivery  
17 entrant to use Royal Mail's network on a nationwide  
18 basis, thereby deterring direct delivery entry in  
19 certain particular areas.

20 Mr Beard referred to this point by saying that  
21 volumes were a zero sum gain. We say that's  
22 a reflection of the same point.

23 I also showed Ms Whalley Oxera's proposal, dated  
24 22nd August 2012, identifying various options which were  
25 all described as being considered in order "to respond

1 to the threat of direct delivery competition".

2 She accepted that this was a fair description of  
3 what Royal Mail was considering at the time.

4 I then showed her Oxera's initial thoughts and one  
5 of the options being canvassed alongside the price  
6 differential, suggesting targeted discounts in SSCs  
7 where Whistl was entering. The tribunal will recall the  
8 option E document.

9 Royal Mail's council said yesterday that it was not  
10 appropriate for me to put this and other associated  
11 documents to Ms Whalley because she was not the author  
12 and was not copied. But the documents were relevant, in  
13 my submission, to her evidence as to Royal Mail's  
14 intentions, and it was appropriate to ask for her  
15 unvarnished reactions.

16 Moreover, the final version of the relevant note on  
17 option E was in fact exhibited to Ms Whalley's witness  
18 statement and was therefore recognised as of relevance  
19 to her evidence.

20 THE CHAIRMAN: I think Mr Beard's point was that it's not  
21 illegal to identify a competitive threat if you are  
22 a competitor.

23 MR HOLMES: No, indeed.

24 THE CHAIRMAN: The question is how you do it.

25 MR HOLMES: Yes.

1 THE CHAIRMAN: So the mere identification of a threat from  
2 a direct entry operator isn't culpable.

3 MR HOLMES: No, the point that I sought to put to Ms Whalley  
4 by reference to the option E document was that  
5 Royal Mail had an underlying intention to deter direct  
6 delivery competition, because that intention is manifest  
7 on the face of the option E note, as it was originally  
8 provided by Oxera. The tribunal will recall that one of  
9 the commercial objectives pursued by the measure was  
10 said to be "maximising the probability of Whistl not  
11 rolling out or even scaling back its current direct  
12 delivery operations".

13 So I asked her whether the intention behind this  
14 proposal was to deter Whistl's roll-out. She declined  
15 to answer that question. The reference is to the  
16 transcript on Day 6, page 31, line 21, to page 32,  
17 line 20. Instead, she simply repeated that there were  
18 a number of options under consideration and that this  
19 wasn't a Royal Mail document.

20 But in my submission, when considering Royal Mail's  
21 intentions the tribunal can and should look at these  
22 other documents that Ms Whalley was not able,  
23 satisfactorily, to explain.

24 They are relevant in the appeal because they address  
25 the evidence of Royal Mail's principal witness of fact,

1 which appears on its face to suggest that the price  
2 differential was about the cost justification, and not  
3 about protecting volumes by deterring Whistl's entry.

4 The second submission I wish to make in this  
5 connection relates to the evidence that Ms Whalley gave  
6 on the key question of whether the price differential  
7 was intended to discourage roll-out. In my submission,  
8 her response was unsatisfactory and that in consequence  
9 the tribunal should attach no significant weight to her  
10 evidence on this issue.

11 So, before discussing the documents with her, the  
12 tribunal may recall I asked Ms Whalley as a general  
13 matter whether she could confirm whether the price  
14 differential was really introduced with the aim of  
15 managing the cost consequences of the roll-out, or  
16 whether it was instead to discourage such roll-out from  
17 occurring. And in my submission her responses were  
18 carefully worded in order to avoid answering that  
19 question directly. They were deliberately evasive and  
20 they were not satisfactory.

21 It may assist to look directly at this exchange, if  
22 we may. Does the tribunal have the transcripts to hand?  
23 The transcript I wish to consider is on Day 5,  
24 17th June.

25 I'd like to pick it up at page 126, starting at line

1 three. You see the question in lines 3 to 7.

2 "So your evidence is, before we consider the  
3 contemporaneous documents, that the aim was to manage  
4 the cost consequences of the roll-out and not in fact to  
5 discourage such roll-out altogether? Is that a fair  
6 summary?"

7 There was then a long pause, which is recorded on  
8 the transcript. And so I was led to ask her:

9 "Do you understand the question I'm putting to you,  
10 Ms Whalley, because it's very important?"

11 She then asked me to repeat the question. I asked  
12 her again:

13 "Is your evidence that the price differential was  
14 introduced with the aim of managing the cost  
15 consequences of a direct delivery roll-out and not to  
16 discourage such roll-out from occurring?"

17 There was then another long pause, and she said as  
18 follows:

19 "Yes, the price differential was part of the  
20 commercial response that the company considered that we  
21 would take within our legal and regulatory obligations  
22 in order to try to mitigate the risks to the business,  
23 which were very considerable, of the direct delivery  
24 entry."

25 Now, that of course did not answer the question

1 I was putting. It did not clarify how the very  
2 considerable risks to the business resulting from direct  
3 delivery entry were being addressed by the price  
4 differential.

5 So I asked her again whether she was saying that  
6 Royal Mail was not seeking to discourage roll-out from  
7 direct delivery.

8 Her reply, at page 127, line 2, was:

9 "We knew we could not stop a direct delivery  
10 entrant."

11 Again, that was not a clear or direct answer to the  
12 question which I posed. It left it unclear whether  
13 Royal Mail was trying to limit the entrant to rolling  
14 out at a small scale. So I asked again:

15 "Were you trying to limit it to a small scale  
16 roll-out?"

17 She said, in response:

18 "What we were trying to do was to develop  
19 a commercial response which would help us to sustain the  
20 universal service. That's what we were trying."

21 And she detailed off there. And I said to her that  
22 that was an evasive answer, and that she hadn't answered  
23 the question I put. I asked her again:

24 "There are two ways in which you could theoretically  
25 be approaching this. One is to manage the cost

1 consequences of a roll-out that you expected to happen  
2 and the other is to stop the roll-out from happening on  
3 any scale by deterring it. I want to know which of  
4 those two genuinely informed Royal Mail's  
5 decision-making at the time."

6 There was then another lengthy pause. I interjected  
7 to say that the question didn't require a pause. It was  
8 a simple and straightforward question, that she was  
9 unable to answer.

10 She began saying:

11 "I think it's not ..."

12 Then she trailed off, and the tribunal will see the  
13 ellipsis. It wasn't overspeaking. She dried up.

14 By then I had put the question multiple times  
15 without a response, and so I asked:

16 "Is it a question you don't feel able to answer  
17 until we see the documents?"

18 Her response was:

19 "Let's go through the documents."

20 In my submission, Ms Whalley's failure to meet this  
21 simple and important question with a simple and  
22 straightforward answer means that the tribunal really  
23 cannot draw conclusions as to the purpose behind the  
24 price differential from the evidence which she gave,  
25 whether on the traffic lights slide or otherwise.

1           If anything, I would submit that the inference to be  
2 drawn from her refusal to answer the question directly  
3 is that Ofcom's assessment of Royal Mail's intention  
4 should stand as correct.

5           The third point is that Royal Mail's green column in  
6 the traffic lights slide did not reflect Royal Mail's  
7 expectation as to what would happen is not consistent  
8 either with the slide deck in question or with  
9 Ms Whalley's evidence. If we could now open the slide  
10 deck, please. It is in C4A, tab 35.

11           I'd like to pick it up at page 9, if I may,  
12 evaluation of proposed solution, April 2014.

13           You see that the second bullet refers to:

14           "Introducing a small price incentive less than 1.5%.  
15 The customers committing to a national profile of mail  
16 is likely to be attractive to almost all customers and  
17 will not exclude direct delivery competition. The  
18 market share (in delivery) that we might expect to lose  
19 within the permitted tolerances of MPP1 is 1.4%,  
20 representing £30-40 million of revenue."

21           So the first point, the slide deck itself describes  
22 the green column, which appears on the next slide as the  
23 outcome which Royal Mail might expect. It's clear, in  
24 my submission, that this was their expectation. The  
25 document speaks for itself.

1           If you turn on to the traffic lights slide itself  
2           which is on page 10, you see that the market share loss  
3           shown there is indeed 1.4% and 40 million. And as  
4           Professor Ulph observed yesterday in questioning, the  
5           row in which that figure is shown is described as the  
6           likely outcome for direct delivery operator.

7           Keeping the slide open, can we now see what  
8           Ms Whalley had to say about it. The relevant transcript  
9           is on Day 6, and the discussion was on page 51. Sorry,  
10          I have a wrong reference. If you could give me one  
11          moment, sir. It may be Day 5. Yes. It is the Tuesday  
12          18th June transcript, which is Day 6, and it is indeed  
13          page 51.

14          I hope that the tribunal will see in the bottom two  
15          lines at page 51, beginning at line 24:

16                 "The green column is in substance the option closest  
17                 to the one ultimately implemented by Royal Mail. That's  
18                 correct, isn't it?"

19                 And Ms Whalley says, "Yes".

20                 I then ask:

21                 "And green signifies that it was, in Royal Mail's  
22                 view, the best approach? Is that correct?"

23                 She replies:

24                 "Yes, we considered it was the best approach to try  
25                 to protect the universal service, yes."

1           Now, pausing there, if Royal Mail's hope and  
2           expectation had not been that the loss of market share  
3           would be as described in the green column of slide 10,  
4           why would they have regarded this as the best option for  
5           protecting the universal service?

6   PROFESSOR ULPH:  Going back to your zero sum point, isn't  
7           the answer because that gives you the lowest loss of  
8           revenue?

9   MR HOLMES:  Yes, indeed, sir.

10   PROFESSOR ULPH:  The two are perfectly negatively  
11           correlated.

12   MR HOLMES:  Exactly right.  The loss to Royal Mail is the  
13           gain to Whistl.  And so the lower the percentage shown  
14           there, the smaller Whistl's roll-out will be achieved.  
15           You're absolutely right.  They're exact inversely  
16           correlated.

17   PROFESSOR ULPH:  My point was more that if you're thinking  
18           about intention, you could say the intention was the  
19           bottom line, the revenue, and the line above that was  
20           the consequence of that intention.

21   MR HOLMES:  Yes.

22   PROFESSOR ULPH:  Rather than saying it was the line above  
23           that was the intention, and the line below is the  
24           consequence.

25   MR HOLMES:  Well I see that point, sir.

1 PROFESSOR ULPH: Okay.

2 MR HOLMES: In my submission, the two are inherently bound  
3 up, they're two sides of the same coin. They wanted, of  
4 course, to preserve revenue for universal service, but  
5 the way that they intended to do that was by deterring  
6 entry and thereby maintaining market share. And that's  
7 the competition concern that's identified.

8 Ms Whalley then referred to the three blue charts  
9 that are on page 11 of the slide deck. We were able to  
10 agree that the top chart showed the 'do nothing'  
11 roll-out underlying the red column zero of slide 10.  
12 I think we also greet that the bottom two charts showed  
13 two possible roll-out schedules that could arise under  
14 the scenario described in the top box of scenario 2 on  
15 page 10.

16 Now, of course, the middle roll-out chart is the one  
17 consistent with the end state shown in the  
18 green column 2, where Whistl only gets to 1.4% market  
19 share, and also with the second bullet on page 9.

20 The third chart shows a different roll-out pattern  
21 in which Whistl is assumed to press on, notwithstanding  
22 the price differential and the costs that it imposed.  
23 So I asked Ms Whalley on page 54 of the transcript,  
24 starting at line 8:

25 "Which of these charts do you think Royal Mail hoped

1 and expected to happen, the middle or the bottom chart?"

2 Her response was to say:

3 "We actually didn't know."

4 Now, that did not answer my question. I wasn't  
5 asking whether they knew what would happen, but what  
6 they hoped and expected to happen. So I asked her  
7 again:

8 "You may not have known what would happen. Which  
9 did you hope and expect would happen?"

10 Again, Ms Whalley didn't answer the question.

11 "Royal Mail thought it was possible and feasible  
12 that actually scenario 3 might happen."

13 I told her that this was an evasive response and  
14 I put the question again, after showing her the bullet  
15 on slide 9, stating that the 1.4% market share loss to  
16 Whistl is what Royal Mail might expect to happen. Her  
17 answer is at page 55, beginning on line 4, and it is  
18 this answer that Royal Mail specifically relies upon in  
19 their written closing. She said as follows:

20 "When we were discussing this at the time, I don't  
21 think it's right to characterise it as our expectation.  
22 You're right to say that the modelled number is that,  
23 but we were not aware at that time of the nature of  
24 Whistl's business plan, its investment, how it would --  
25 at the time this was done, how it would consider and we

1 thought there was an option as set out in the bottom of  
2 slide 11, that actually TNT would take the opportunity  
3 to accelerate the roll-out. We recognised there would  
4 be a cost to Whistl of doing that, but we did consider  
5 that that was a possibility."

6 Now, read as a whole, Ms Whalley appears here to be  
7 accepting that the model number the 1.4%, was indeed an  
8 expectation. Her only qualification to that is that  
9 there was a possibility of an alternative outcome,  
10 namely accelerated roll-out. So, in my submission, that  
11 passage should not be read as Royal Mail seeks to do, as  
12 saying that there was no expectation on Royal Mail's  
13 part that the result of the price differential would be  
14 to limit Whistl to a 1.4% market share, and a small  
15 roll-out covering six SSCs.

16 So I then put to her the following point:

17 "If you thought it was the outcome that was more  
18 likely or reasonably likely to occur, it would have been  
19 plainly irrational to adopt scenario 2, wouldn't it?  
20 Because the result of scenario 2 on the bottom of these  
21 charts is to accelerate Whistl's roll-out to lead it to  
22 erode your market share faster, because it's going hell  
23 for leather to escape the access charge penalty that you  
24 are introducing by means of the price differential."

25 So, in other words, if the Royal Mail that really

1 thought the effect of scenario 2 would be to lead Whistl  
2 to accelerate its roll-out by comparison with the  
3 'do nothing' scenario shown in the first chart, it would  
4 never have adopted scenario 2.

5 Ms Whalley's response was to say:

6 "I don't think that's a fair reflection of the  
7 discussions that Royal Mail had at the time in putting  
8 together these options. As I said, we considered that  
9 there were options that Whistl might have and we  
10 actually did not know what Whistl would do, and we  
11 thought that there were options whereby Whistl could  
12 continue its roll-out, recognising there would be a cost  
13 to that."

14 Now, in my submission, that didn't engage with the  
15 irrationality point. It repeated a scripted answer  
16 which she had already given.

17 And Mr Beard had no answer to the irrationality  
18 point yesterday either.

19 Turning to page 65 of the transcript, at the very  
20 bottom of the page, I asked Ms Whalley:

21 "Why would you include that scenario in slide 10 --  
22 that's to say, that 1.4% and 40 million scenario -- if  
23 you didn't regard it as the one you expected and wanted  
24 to result?"

25 There was then a pause. She replied:

1           "As I said, that was -- when we were considering  
2           these options -- and I come back to what I have said  
3           before, which is that Royal Mail was very mindful that  
4           whatever it did to try to use the commercial freedoms  
5           that Ofcom had asked it to do should not prevent another  
6           entrant in the market from competing. Royal Mail  
7           considered that there were options for Whistl, as shown  
8           on slide 11, to progress with its roll-out."

9           So at its highest, in my submission, Ms Whalley's  
10          evidence is only that there was a possibility that  
11          Whistl might behave other than as modelled in  
12          scenario 2, but she would not answer the question of why  
13          it was included, that scenario, as the privileged green  
14          scenario on slide 10, and she did not address the  
15          irrationality of pursuing scenario 2 if the result were  
16          really a faster erosion of market share than under the  
17          'do nothing' scenario.

18          In my submission, it is clear that Royal Mail's hope  
19          and expectation was indeed that Whistl's roll-out would  
20          be limited to 1.4% of the market, in other words that it  
21          would stop at six SSCs and stay on MPP1. And the  
22          tribunal can form that conclusion from looking at the  
23          document itself.

24          Mr Beard made two further points about these slides  
25          which I shall briefly pick up. The first was to suggest

1 that scenario 2 could be read as referring to both the  
2 second and third charts, and that this was consistent  
3 with the reference to "by 2014" in the green column's.  
4 This is incorrect. This is shown by the reference of  
5 switching to PP1 and staying there, which you see in the  
6 penultimate row of column 2. We know that this would  
7 involve stopping at a low number of SSCs on Royal Mail's  
8 view. We saw it in the 30th September slide pack. And  
9 it's also clear from the third bullet on page 9:

10 "A larger scale direct delivery operator would need  
11 to move to a zonal price plan to minimise surcharges.  
12 This would involve a trade-off between short-term losses  
13 to achieve longer term profits, as zonal pricing tilt  
14 has an impact on how a DD operation might develop, see  
15 next slide."

16 That is, of course, what is shown in chart 3 on  
17 slide 11. And it was not what is described in the  
18 green scenario 2 on slide 10, because that expressly  
19 refers to a situation there the operator would switch to  
20 PP1 and stay there.

21 The other point Mr Beard made was that the third  
22 chart, on page 11, just assumed reduced profitability  
23 not zero profits. Now, that is, with respect,  
24 incorrect. There is a specific modelling based on  
25 particular assumptions using Royal Mail's entrance cost

1 model which underlay these charts, and that was of  
2 course the modelling that Royal Mail in fact did,  
3 instead of an AEC assessment, when deciding how to  
4 proceed, and the working notes, or some of them, are at  
5 tab 38. If you turn forward to that, you see that  
6 scenario 2 on page 7 assumes that they won't do any DD  
7 unless they can make a 10% profit.

8 That the scenario set out in the green traffic  
9 lights slide. And the alternative modelling is shown at  
10 page 5. And you see the assumption "assumes that they  
11 do not need to make a profit." So the assumption was no  
12 profit. And the tribunal will recall the genesis of  
13 this modelling. We can see it from the 3rd October  
14 note, at tab 27 of this bundle, at page 10. If you look  
15 at the two paragraphs between the bullets and the  
16 heading towards the foot of the page, this is the  
17 October 3 Oxera note. You see that their view is:

18 "There are no easy ways to address the points we  
19 make above. If Ofcom accept the point of principle that  
20 a value-based differential can be an objective  
21 justification, then they will be more open to consider  
22 the positive aspects of the model. Alternatively, Ofcom  
23 is minded to conclude the proposal has the potential to  
24 seriously affect the competitive dynamics of the direct  
25 delivery market, that it will be an uphill struggle.

1 Work and evidence demonstrating that the price  
2 differential will not have an exclusionary effect is  
3 therefore of paramount importance, although we  
4 appreciate this is somewhat counter-intuitive from  
5 a commercial perspective as, ideally, you would want to  
6 show the opposite."

7 So, to conclude on the traffic lights slide, my  
8 submission is that it is plain from this document that  
9 it reflects what Royal Mail thought was likely to happen  
10 and what they in fact wanted to happen. The other  
11 modelling went against what Royal Mail would ideally  
12 want to show, to use the language of the Oxera paper,  
13 namely the successful deterrence of Whistl's roll-out.

14 So that deals with Royal Mail's first contention, on  
15 intent, that there was no expectation of Whistl  
16 curtailing its roll-out, as shown by the traffic lights  
17 slide.

18 The second contention --

19 PROFESSOR ULPH: If I can just ask a question?

20 MR HOLMES: Yes, of course.

21 PROFESSOR ULPH: In an interchange with Mr Beard yesterday,  
22 I put the point to him that there might have been  
23 a change of view between October and December. But in  
24 October, they weren't thinking of Whistl getting  
25 external funding.

1 MR HOLMES: Yes.

2 PROFESSOR ULPH: And therefore, they might be limited to  
3 chart 2. But by December they knew that Whistl was  
4 going to get external funding and therefore chart 3  
5 might be appropriate, thinking about --

6 MR HOLMES: Yes.

7 THE CHAIRMAN: I wonder how you respond to that.

8 MR HOLMES: The first point is -- I mean, I will come to  
9 this, because it is effectively the second proposition,  
10 but by way of immediate response, the timing, in my  
11 submission, doesn't work, because that October slide  
12 deck was presented on November 13 to the chief executive  
13 committee. I will find you the reference for that.  
14 Footnote 263 of the decision. And it's also referred to  
15 in paragraphs 193 and 196 of Ms Whalley's witness  
16 statement.

17 The announcement of the price differential was then  
18 made on 6th December 2013, and no intervening  
19 development is identified in Ms Whalley's witness  
20 statement. So if there really were some material change  
21 between this slide presentation on 13th November and the  
22 announcement of a decision in principle on 6th December,  
23 why is that not set out clearly and forcefully in the  
24 witness evidence that was supplied? I mean, one can  
25 see, actually very clearly, the point when one looks at

1 Ms Whalley's witness evidence. If you could take up  
2 bundle C2, turn to tab 1, which is Ms Whalley's  
3 statement. So you see at paragraph 194 that she says:

4 "Our strategy to revise the price plans was also  
5 stress tested and assessed against the other strategic  
6 and commercial options available to Royal Mail, in order  
7 to ensure that it was the best and most appropriate  
8 course of action to take. For example, a draft  
9 discussion document on options for protecting the USO,  
10 dated 30th October, and presented at the  
11 13th November 2013 CEC meeting, explains the various  
12 strategic options available to Royal Mail at the time,  
13 which included ..."

14 There's then a reference to slide 7, setting out the  
15 various options. And they include, at C:

16 "Launch package of initiatives without reducing  
17 average prices."

18 And that includes the price differentiation, the  
19 price differential for a national profile.

20 At 195 you see:

21 "It was clear to us that the best course of action  
22 would be option 3, ie, to launch a package of pricing  
23 proposal initiatives, without reducing average prices.  
24 This option would prevent revenue dilution and ensure  
25 that Royal Mail could earn a commercial rate of return

1           necessary to ensure the financial sustainability of the  
2           universal service."

3           Then:

4           "Shortly afterwards, on 15th November 2013,  
5           I presented on our regulatory strategy to the board ..."

6           Then if you turn to annex 4, it gives a time line of  
7           the relevant stages. You have the CEC meeting on  
8           13th November 2013, at which the slide deck we've been  
9           discussing was presented, including the traffic lights  
10          slide. You've got the board meeting of 15th November.  
11          Then 6th December 2013 you have the email to access  
12          customers announcing the decision in principle to  
13          introduce a price differential.

14          There's nothing in Ms Whalley's statement to suggest  
15          some intervening step where the scales fell from their  
16          eyes and they suddenly became aware of external  
17          investment.

18        THE CHAIRMAN: I think Mr Beard suggested you didn't  
19          cross-examine Ms Whalley on these later.

20        MR HOLMES: Ms Whalley on these later --

21        THE CHAIRMAN: These later meetings.

22        MR HOLMES: The later meetings? I mean, there are two  
23          points in response to that. We say first that the  
24          genesis of the price differential is very clearly set  
25          out in the documents, and as the time line I've just

1 discussed shows, by the 6th December, when the decision  
2 in principle was announced, the materials were the ones  
3 on which I cross-examined Ms Whalley.

4 The second point I would make is that the tribunal  
5 will have apprehended the practical difficulties that  
6 were involved in cross-examining Ms Whalley, and the  
7 time that had already elapsed as a result of the  
8 considerable pauses which interspersed her answers, and  
9 there were practical timing constraints within the  
10 window allowed, and in my submission, I put the key  
11 points to her.

12 There was another point made in relation to the  
13 evidence --

14 THE CHAIRMAN: --(overspeaking) -- recall you asking for  
15 more time.

16 MR HOLMES: She was unavailable after the Tuesday.

17 In my submission, I put the key --

18 MR BEARD: I'm sorry, that's not true. She said she would  
19 come back. That's not true.

20 THE CHAIRMAN: Thank you, Mr Beard.

21 MR HOLMES: As I say, I believe that I put the relevant  
22 points in cross-examination. I don't believe that any  
23 of the subsequent documents cast doubt on the  
24 justification, and I will come to the two -- the  
25 justification that was apparent, the purpose that was

1           apparent in the documents which I did put, and I will  
2           come to the two particular documents which are relied on  
3           Royal Mail to suggest that suggest that there was some  
4           supervening development, and I will address those if  
5           I may.

6           THE CHAIRMAN: Can you also address Mr Beard's other point,  
7           which is that Ofcom has found documents from its case  
8           file which were not referred to in the decision and not  
9           disclosed early enough to allow Royal Mail to comment  
10          on.

11          MR HOLMES: Well, sir, all of the documents in the case file  
12          were disclosed as part of access to file. There were no  
13          documents that were not disclosed to Royal Mail.  
14          I think the criticism that was put was that we didn't  
15          specifically rely on those documents in the decision.

16                 That's correct. We relied on other documents which  
17          we say demonstrated Royal Mail's intention. But we were  
18          then faced at the appeal stage with evidence which  
19          appeared on its face to present a version of events  
20          which we regarded as inconsistent with those other  
21          documents. This was the version of events presented in  
22          Ms Whalley's statement, which appearing to suggest that  
23          the motivation of the price differential really was to  
24          manage a decline in volumes by allowing cost savings to  
25          be made in advance.

1           If you look at her witness evidence, that appeared  
2           to be what she suggested. It wasn't totally clear but  
3           those were the points she emphasised in a carefully  
4           worded statement. That was contrary to the finding in  
5           Ofcom's decision that Royal Mail's conduct reflected  
6           a deliberate strategy to deter entry by Whistl.

7           And in testing that proposition, Ofcom was fully  
8           entitled to put any documents which shed light on  
9           Royal Mail's intentions at the time, and the note on  
10          option E was one moreover that Ms Whalley herself, in  
11          a later version of the document, had exhibited to her  
12          witness statement. So we say that there is no  
13          justification in any suggestion that it was  
14          inappropriate to put those documents.

15          The purpose of cross-examination is to obtain the  
16          unvarnished reaction of witnesses of fact to  
17          contemporaneous documents. Royal Mail was aware of  
18          these documents. They were documents internal to  
19          Royal Mail itself. We didn't need to rely upon them in  
20          the decision, and I rely upon the documents contained in  
21          the decision, but we were fully entitled to see what the  
22          reactions of Ms Whalley were to the documents set out,  
23          which expressed in very vivid terms a commercial  
24          objective of deterring entry and expansion by Whistl,  
25          and indeed, in encouraging Whistl to abandon the entry

1           which it had already made.

2           So I make no apologies for putting those documents  
3           it was the right course.

4   THE CHAIRMAN: I wasn't asking you to make an apology.

5           There are two points that arise in relation to this.  
6           One is our position, as a tribunal, on a merits appeal  
7           in possibly making use of the documents that are not  
8           referred to in the decision. Mr Beard alluded to that.

9           The other is whether Royal Mail have had a fair  
10          chance to respond to those documents in the course of  
11          the appeal, and presumably -- and I anticipate what your  
12          answers will be but you do need to cover those.

13   MR HOLMES: Yes, I understand, sir.

14          So, in my submission, Ofcom was entitled to put  
15          documents to test the case upon appeal.

16   THE CHAIRMAN: That's just what you've been talking about.

17   MR HOLMES: Yes, otherwise there would be no purpose in  
18          factual evidence at the appeal stage.

19   THE CHAIRMAN: I'm glad somebody said that. Thank you.

20   MR HOLMES: So the submission is that -- and as regards the  
21          suggestion that Royal Mail did not have an opportunity  
22          to respond, Royal Mail put forward a very senior  
23          internal witness, who was centrally involved in the  
24          process of designing the price differential. Her  
25          witness evidence describes her central role in

1 controlling the legal regulatory process around the  
2 design of the price differential. And she was well  
3 placed to speak to Royal Mail's intentions underlying  
4 that and other options that were considered at the time.

5 Royal Mail was fully aware of these documents  
6 because it itself had disclosed them, and they were on  
7 the case file. So, in my submission, there's no truth  
8 in the suggestion that they were placed at any  
9 disadvantage as a result of addressing those documents.  
10 But if the tribunal has any concerns, I would say that  
11 the documents which are addressed in the decision, and  
12 which were cross-examined upon, and which, in my  
13 submission, did inform the decision in principle to  
14 adopt the price differential, and were not contradicted  
15 by any subsequent documents, were in the decision and  
16 they were adequately and satisfactorily put to  
17 Ms Whalley.

18 That's my submission on that.

19 So we've strayed now into the second of Royal Mail's  
20 intentions in its written closing submissions, which, as  
21 Professor Ulph alluded to, is the suggestion that  
22 Royal Mail came subsequently to believe that Whistl had  
23 external investment that would permit it to roll out  
24 with no profits.

25 In addition to the timing point I've already

1 developed, there are four further fundamental  
2 difficulties with this claim. The first is that it  
3 would be irrational to proceed with their plan if they  
4 really thought that Whistl would adopt the accelerated  
5 roll-out modelling in the both chart on slide 11 of the  
6 traffic lights slide deck. The 'do nothing' scenario  
7 would in that case be the better course for them.

8 And you've seen the evidence of Ms Whalley, the  
9 written evidence of Ms Whalley, which said that the  
10 option that they selected was designed to avoid revenue  
11 dilution. Well, chart 3 would have resulted in revenue  
12 dilution a go-go.

13 The second is that there is no good documentary  
14 evidence to support this claim. Royal Mail relies on  
15 two documents, and we should look at those. The first  
16 is a board paper from 6th December 2013, at C4B, tab 63.  
17 You will see these are minutes of the meeting of the  
18 board of directors of Royal Mail, held on  
19 11th December 2013.

20 As we understand it, and Mr Beard will correct me if  
21 I'm wrong, the comment which is relied upon is a single  
22 sentence on page 3, at point G(iii), where it's stated  
23 that:

24 "The board discussed TNT and Stephen Agar reported  
25 on their service in comparison to Royal Mail. He

1 further advised that he believed that TNT had now  
2 received financial backing for expanding end-to-end  
3 operations beyond the current zone."

4 Now, what we say about this is that, as you probed  
5 with Mr Beard in questioning yesterday, there is nothing  
6 in this document to link the investment which is  
7 described with any belief on Royal Mail's part that the  
8 investor was proceeding on the basis that Whistl could  
9 forgo any profit for several years. There's nothing to  
10 suggest the investment was intended to permit a roll-out  
11 under conditions of zero profitability.

12 The other document that's relied upon is the  
13 modelling accompanying the 6th January disclosure  
14 committee paper. That is at C4B, tab 79.

15 We think, although again Mr Beard will correct me if  
16 I'm incorrect about this, that the intended reference is  
17 to pages 18 and 19 of that document, where modelling is  
18 shown on three scenarios.

19 You see one is the TNT communicated plan. The  
20 second is roll-out with a £50 million investment. You  
21 see a reference there to the fact that "TNT has recently  
22 announced a joint venture with LDC", and that it had  
23 been looking for an investment partner to invest  
24 50 to 80 million euros, and that the assumption is,  
25 at 44, that the modelling suggests that:

1           "With a £50 million investment, TNT could expand its  
2 network more quickly."

3           Then scenario 3:

4           "RM modelling of TNT roll-out with £100 million  
5 investment ..."

6           And that would allow for "local market share in  
7 excess of 40%."

8           Now, again, there is nothing to suggest that any of  
9 the modelling assumptions proceeded on the basis that  
10 investment would allow Whistl to forgo profit. Instead,  
11 various sensitivities are considered and there's no  
12 indication that Royal Mail thought that the correct  
13 sensitivity was one in which an investor would come  
14 along and would underwrite loss-making or unprofitable  
15 activity for several years.

16           The fourth point is that Royal Mail's claim that it  
17 believed Whistl's investment meant that it could roll  
18 out without profit is made, to our knowledge, for the  
19 first time in the closing submissions at the conclusion  
20 of the trial. Mr Beard again will correct me if I'm  
21 wrong but we're not aware of where this was advanced in  
22 response to the SO or at the oral hearing or in  
23 Royal Mail's notice of appeal.

24           It's not in any of the witness statements which have  
25 been advanced.

1           If this were an important and decisive  
2           consideration, we ask why it wasn't flagged in the  
3           witness statement of Ms Whalley. So, in our submission,  
4           to have this emerge at the eleven and three-quarterth  
5           hour of the trial is not satisfactory and should be  
6           treated with extreme caution.

7           THE CHAIRMAN: Well, you did extract something from  
8           Ms Whalley to that effect, I thought. The roll-out  
9           would involve foregoing profit.

10          MR HOLMES: Yes, but --

11          THE CHAIRMAN: Depending on what you mean by foregoing  
12          profit.

13          MR HOLMES: No, indeed, but as I understand it, the change  
14          of circumstance which is suggested to have been decisive  
15          and is said to have led Royal Mail to believe at the  
16          time of -- at some point in December, and in January,  
17          that it was okay to go ahead because Whistl could roll  
18          out at a formidable pace in accordance with the third  
19          chart, was that the investment would allow him to plug  
20          the gap, and that was the basis on which it was being  
21          advanced.

22                 We don't see any evidence for that. On the  
23                 contrary, Royal Mail has, on a number of occasions,  
24                 emphasised the point that it didn't know about Whistl's  
25                 investment. It didn't have the relevant information.

1 In fact that was a point that Ms Whalley made --

2 THE CHAIRMAN: She did. On several occasions.

3 MR HOLMES: -- on several occasions.

4 So the final point is that the claim appears to us  
5 to be inconsistent with what Royal Mail documents were  
6 indicating at the time when the price differential was  
7 finally introduced by means of the issuing of the CCNs.

8 And the tribunal will recall the email that  
9 Jon Millidge, the company secretary, sent to the board  
10 at the time of the decision to roll out. Perhaps we  
11 should turn it up briefly. It's in C4B at tab 84.

12 The relevant passage is on page 2, in the  
13 third-from-last paragraph on the page:

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

21 We say that this is difficult to reconcile with  
22 a claim that Royal Mail thought that Whistl's investment  
23 was in the bag, and that it would permit Whistl to roll  
24 out on the accelerated schedule shown in the third chart  
25 following the introduction of the price differential.

1           Now Mr Beard suggested that this was one of the  
2 documents that I should have put either to Ms Whalley or  
3 to Dr Jenkins. In my submission, it's very difficult to  
4 see why this document should have been put to either of  
5 those witnesses. Ms Whalley wasn't copied on it, and  
6 it's unclear what evidence she could give about it.  
7 Dr Jenkins, an external economic consultant, would have  
8 even less to say about an internal Royal Mail  
9 board level communication.

10           And in any event, the meaning is clear. We say that  
11 this document shows that Royal Mail anticipated that the  
12 price differential could affect both Whistl's customer  
13 relationships and its external investment. And as we'll  
14 come to see when we consider section 7F of the decision,  
15 those predictions were remarkably prescient.

16           So on section 7D, I would invite the tribunal to  
17 find that Ofcom's conclusions as to Royal Mail's  
18 intention was well founded. Royal Mail's conduct  
19 reflected a deliberate strategy to limit competition  
20 from its first and only significant competitor, by  
21 applying a discriminatory surcharge under APP2.

22           Now, that is, subject to your questions, all I have  
23 to say about intention.

24 THE CHAIRMAN: Hang on.

25 MR HOLMES: Returning to the road map, the tribunal sees

1 that Ofcom's analysis turns in section E to the likely  
2 and actual effects of the price differential. That's in  
3 fact contained in 7E, and 7F. And the road map digests  
4 the five core expects of Ofcom's reasoning in 7E, price  
5 differential was a penalty raising entrants' costs.

6 The price differential was large enough to make  
7 entry significantly more difficult and therefore less  
8 likely to occur. Incentivising competitors not to  
9 compete could be expected to cause harm to consumers.  
10 The AEC was not appropriate in this case and in any  
11 event Royal Mail's ex post AEC was flawed. And the  
12 adverse effects were likely, despite suspension. And  
13 then actual effects considered in 7F.

14 I propose to take matters in the following order.  
15 First, I will consider the parts of the analysis  
16 relevant to ground 1, to get that out of the way. These  
17 are found in particular in the fifth proposition of 7E,  
18 and in 7F. For ground 3, I shall then deal with the  
19 preceding subsections of 7E taking them in order.

20 The first two are relevant to Mr Harman's  
21 materiality critique, and the remaining two are relevant  
22 to the AEC argument, and whether Ofcom was required to  
23 do more than it did to assess the likely impact of the  
24 price differential on consumer welfare.

25 So, starting with Ofcom's analysis relevant to

1 ground 1, if we could take up the decision. I need,  
2 before we consider the relevant parts of section 7, to  
3 address three more general objections that Mr Beard  
4 makes, which need to be dealt with at the outset, and  
5 they require a broader architectural analysis of the  
6 decision.

7 I think, if I understood his points correctly, he  
8 made three particular criticisms. First, he suggested  
9 that the relevant conduct complaint of by Ofcom was  
10 unclear. Ofcom does not specify clearly enough what  
11 acts on Royal Mail's part it was investigating and  
12 penalising.

13 Secondly, there is a criticism of Ofcom for  
14 assessing what effect would follow from introducing the  
15 price differential once it came to be charged and paid.

16 Thirdly, there is a contention that Ofcom did not  
17 undertake any assessment of the effect that introducing  
18 the price differential would be likely to have during  
19 the notice period and then following suspension.

20 Now, in our submission, none of those objections is  
21 well founded. As regards the relevant conduct, we say  
22 that this is very clearly articulated from the outset of  
23 the decision, as is the nature of Ofcom's assessment of  
24 likely effects. And one finds it in bright lights, we  
25 say, in the executive summary, if you could turn to

1 that. It starts at page 3 of the external numbering.

2 The tribunal will see in section 1.3 that the  
3 decision sets out Ofcom's finding that Royal Mail abused  
4 its dominant position in the market for bulk mail  
5 delivery services in the United Kingdom by issuing  
6 contract change notices on 10th January 2014 which  
7 introduced prices.

8 And we've concluded that this infringement lasted  
9 until at least 21st February 2014, being the date on  
10 which Ofcom opened an investigation, meaning that the  
11 CCNs were suspended.

12 Turning on to paragraph 1.17, you see there  
13 a recognition that:

14 "On 10th January 2014, Royal Mail exercised  
15 a contractual power under the ALC to change unilaterally  
16 the terms and conditions of access. As part of  
17 a package of measures, Royal Mail issued the CCNs which  
18 introduced for the first time a difference in pricing  
19 between the price plans, specifically Royal Mail prices  
20 on APP2 and ZPP3 were to be increased by approximately  
21 1.2% or 0.25 pence per item relative to the prices  
22 available on MPP1. Due to the applicable contractual  
23 rules and restrictions, MPP1 would in practice be  
24 unavailable to an entrant that rolled out delivery  
25 services of its own in competition with Royal Mail. In

1 the remainder of this decision we refer to the  
2 difference in price introduced by the CCNs between APP2  
3 and ZPP3 and MPP1 as the price differential."

4 Then, turning to paragraph 1.21, you see that Ofcom  
5 observes that after it opened its investigation,  
6 Royal Mail suspended the implementation of the price  
7 differential, as well as some of the other changes in  
8 the CCNs.

9 At paragraph 1.23 you see the task that Ofcom  
10 considers it was necessary for it to undertake:

11 "Ofcom has considered whether the introduction of  
12 the price differential in January 2014 amounted to an  
13 abuse of Royal Mail's dominant position in the bulk mail  
14 delivery market."

15 And they've undertaken an in the round assessment of  
16 all the circumstances to determine whether, at the time  
17 the price differential was introduced [at the time it  
18 was introduced with the CCNs] Royal Mail's conduct was  
19 reasonably likely to give rise to a competitive  
20 disadvantage or a restriction of competition."

21 There's then a reference for dissection 7. The  
22 likely effects are then summarised in paragraph 1.24.  
23 And you see that as part of the assessment, Ofcom  
24 considered what effect the price differential would have  
25 if the prices were charged and paid. This is set out at

1           subparagraphs (e) and (f):

2           "Based on our analysis of profitability prices and  
3           costs, the price differential would have had a material  
4           impact on the profitability of an end-to-end entrant  
5           both in absolute terms and also relative to its profits.  
6           The material effect to the price differential was  
7           particularly evident in the case of Whistl, which was  
8           the target of Royal Mail's pricing strategy, and for  
9           whom the price differential was calibrated to deter  
10          further expansion of its end-to-end activities."

11          Then at (f):

12          "In the context of the prevailing features and  
13          conditions of the bulk mail delivery market and the  
14          associated retail market for bulk mail at the time, such  
15          a material impact on profitability was likely to make  
16          entry or expansion of bulk mail delivery significantly  
17          more difficult. The introduction of the price  
18          differential increased the already high barriers to  
19          entry and expansion in the bulk mail delivery market,  
20          thereby reducing the incentives on an access operator to  
21          risk entry."

22          Now, in its closing submissions Royal Mail has  
23          suggested that this is not the right approach. But in  
24          my submission, analysing the effects that the price  
25          differential would have, if the prices were charged or

1           paid, is essential on any view. You can only consider  
2           what effects the price differential would be likely to  
3           have immediately following the issuing of the CCNs  
4           during the notice period that would then follow, and  
5           then in the period following its suspension, if you have  
6           first assessed what the prices would do to the  
7           competition if and when they came into effect.

8           We had took this to be common ground. Royal Mail  
9           had previously accepted it, and one sees that from  
10          Royal Mail's skeleton argument. I don't know if you  
11          have the skeleton arguments to hand, sir.

12         THE CHAIRMAN: I think they're in the cupboard, Mr Holmes.

13         MR HOLMES: Ah, then perhaps if we could take it from my  
14          written closing submissions, which I hope -- I think  
15          they're in OFC.

16          So I've set out a quotation from Royal Mail's  
17          skeleton argument in paragraph 64 on page 90. And the  
18          relevant passage is in paragraph 22 of the quotation,  
19          which is on page 20. And you'll see that Royal Mail  
20          says there:

21                 "If Ofcom had wanted to make such a finding [that's  
22                 to say a finding that the issuing of the CCNs amounted  
23                 to an infringement although the prices didn't come into  
24                 effect] it would that have had to show not only that the  
25                 price differential contained in the CCNs would have been

1 unlawful if implemented, but also ..."

2 And then various other matters.

3 Now I'll come to address the other matters. The  
4 point is simply that they accepted you can't really  
5 sensibly address what effects the CCNs and the price  
6 differential introduced by it would have during the  
7 notice period and following suspension if you don't know  
8 how they will affect the market as and when the prices  
9 are charged.

10 And the tribunal will recall Mr Harman's analysis --

11 MR BEARD: Sorry, if it helps Mr Holmes, we're not  
12 disagreeing that you have to do the first stage but you  
13 also need to do the second, is what we say. I think  
14 I answered that in relation to a question from  
15 Mr Frazer. So we're not demurring from the proposition  
16 that's been quoted from our skeleton.

17 MR HOLMES: I'm grateful for that, Mr --

18 THE CHAIRMAN: A commendable moment of agreement.

19 MR HOLMES: I think there's been agreement and cooperation  
20 all round today, sir, so I'm grateful for Mr Beard's  
21 clarification.

22 And the tribunal will recall, of course, that  
23 Mr Harman's analysis proceeded on exactly this basis.  
24 What he does is he does his IRR analysis, which he says  
25 you need to do first of all on the assumption that the

1 prices are charged or paid. And then he says you have  
2 to do this sort of probabilistic adjustment to it to  
3 reflect -- now let me get this right -- you've got to  
4 discount the internal rate of return to reflect the  
5 impact on -- by reference to the change in Whistl's  
6 expectations of the price differential ever coming into  
7 effect by reason of the issuance of the CCNs. I think  
8 that's the case.

9 Now --

10 THE CHAIRMAN: One little point. You're quite clear, when  
11 the decision says "introduce", that means the  
12 publication of the CCNs?

13 MR HOLMES: Yes.

14 THE CHAIRMAN: Yes.

15 MR HOLMES: Yes, sir, yes.

16 So it's common ground Ofcom had to do this  
17 assessment. It's not some fundamental category error,  
18 some misplaced endeavour on Ofcom's part to assess what  
19 would happen if the prices were charged or paid.

20 It's also incorrect to suggest that the decision  
21 stopped with a consideration of likely effects if the  
22 price differential were charged or paid. And did not  
23 consider likely effects during the notice period, and  
24 following suspension.

25 We can see that if we return to the decision, again

1 to the executive summary, first of all, and look at the  
2 paragraphs H and I. As these explain, Ofcom's view was  
3 that:

4 "The introduction of the price differential was  
5 reasonably likely to distort competition from the point  
6 at which CCNs were issued by Royal Mail."

7 That's the point set out in the final sentence of H.  
8 Then at I you see that:

9 "Our analysis of the restrictive effect of the price  
10 differential is supported by evidence of the immediate  
11 developments observed in the market following the  
12 introduction of the price differential. We have  
13 concluded that the evidence shows that the introduction  
14 of the price differential materially contributed to  
15 LDC's decision not to complete its investment in Whistl  
16 in January 2014 and Whistl's decision to reduce and then  
17 suspend its roll-out plans. This evidence also supports  
18 our conclusions on the continuing effect of the  
19 introduction of the price differential despite its  
20 suspension."

21 So findings as to likely effects from the moment the  
22 CCNs were issued, including after their suspension,  
23 borne out by the actual effects observed in the market.

24 Three points. First, it's not correct, in my  
25 submission, that the conduct is unclear. Secondly,

1           there was no error in assessing the prices as if charged  
2           or paid. And thirdly, there was no failure to consider  
3           the likely effect of introducing the price differential  
4           notwithstanding its suspension.

5           THE CHAIRMAN: This is still all going to the clarity of the  
6           decision, or --

7           MR HOLMES: It's going to the clarity of the decision and  
8           it's also going to ground -- it's laying the groundwork  
9           to address ground 1.

10          THE CHAIRMAN: Okay.

11          MR HOLMES: The final point is clearer still when one comes  
12          to consider the analysis in section 7. Mr Beard took  
13          you to some paragraphs of section 7E that are relevant  
14          to that but I don't believe that in this context he took  
15          you to any of section 7F, where the actual effects of  
16          introducing the price differential were addressed.

17                 We turn first of all within section E to  
18          paragraph 7.203. You see the conclusion in the  
19          preceding heading:

20                         "The suspension of the price differential does not  
21          prevent a finding of abuse on the particular facts of  
22          this case."

23                 At paragraph 7.203:

24                         "It's noted that the implementation of the price  
25          differential was suspended six weeks after it was

1 introduced to the CCNs."

2 So you have my submission that it's quite clear that  
3 what the introduction of the CCNs means is the  
4 publication of the -- sorry, the introduction of the  
5 price differential means is the publication of the CCNs.  
6 I think that Mr Frazer adverted to that point during  
7 questioning yesterday.

8 And the assessment then begins at paragraph 7.209.  
9 Ofcom describes 7.209A, its task.

10 "The requirement in a case under Article 102(c) and  
11 section 182(c) of the Act that the conduct must involve  
12 the application of the similar conditions to other  
13 trading partners does not mean that pricing practices  
14 are captured only when the relevant prices are actually  
15 charged and paid for those trading partners. Equally,  
16 under Article 102 and the chapter prohibition generally,  
17 Ofcom is required to assess the reasonably likely impact  
18 of the price differential on a forward-looking basis,  
19 ie, it is required to assess whether the conduct was  
20 abusive at the time the relevant acts were committed.  
21 We take into account the evidence as to what in fact  
22 occurred in order to inform an assessment of what the  
23 reasonably likely effects of the conduct were at the  
24 time it was engaged in."

25 In my submission, 7.209A is a correct direction in

1 law. What Article 102 and 102(c) require is  
2 a consideration of the likely effects of conduct from  
3 the moment that the conduct occurs. It's a focus on the  
4 substance and not the form.

5 Now, on any view, the practice contained in the CCNs  
6 would have involved price discrimination, and it's  
7 common ground, as Mr Beard has helpfully confirmed, that  
8 Ofcom needed, as part of its assessment of the  
9 reasonably likely effects, to consider how that price  
10 discrimination would impact upon the market.

11 So we say that just applying basic and foundational  
12 principles under Article 102 generally, and under  
13 102(c), Ofcom was right to look ahead from the moment  
14 that the CCNs brought in, introduced the price  
15 differential, and to consider what likely effects might  
16 flow from that.

17 At 7.212 you see Royal Mail's submission at the  
18 administrative stage. And it's rejected by Ofcom:

19 "Having carefully considered Royal Mail's arguments  
20 we do not agree that the price differential as  
21 introduced was incapable of having any anti-competitive  
22 effect on the market because it was expected to be and  
23 was in fact suspended as a result of the initiation of  
24 Ofcom's investigation. Applying the relevant aspects of  
25 the legal framework summarised above, our conclusions on

1 the facts of this case rely in particular on a number of  
2 points."

3 Which are then set out.

4 And the first, 7.213, is the observation that  
5 Royal Mail anticipated that the price differential could  
6 have effects notwithstanding its suspension following  
7 Ofcom opening an investigation. And we've seen the  
8 email from Mr Jon Millidge in which he stated his  
9 expectation and the collective expectation of Royal Mail  
10 that access pricing charge changes will be suspended  
11 pending the outcome of an Ofcom investigation, and that  
12 although the view is that Whistl's claims as to the harm  
13 they will suffer are exaggerated, nonetheless, two  
14 possibilities are recognised: the first is that it may  
15 be difficult to attract new customers, and secondly,  
16 that Whistl's financing may be conditional on there  
17 being no regulatory or competition law dispute ongoing.

18 So anticipation of effects notwithstanding  
19 suspension by Royal Mail itself.

20 There's then, at 7.215, an identification of various  
21 aspects of the evidential record which inform an  
22 assessment of Royal Mail's conduct in introducing the  
23 CCNs. You see at 7.215A a reference to the internal  
24 Royal Mail discussions indicating a desire to send  
25 a very assertive signal to the market through the

1 introduction of the price differential and other price  
2 changes despite the legal risks.

3 Now Mr Beard says about that that the very assertive  
4 signal that was being contemplated was a higher price  
5 differential than the one that was in fact introduced.  
6 But I submit that this document is still instructive as  
7 to the way in which Royal Mail was thinking about the  
8 CCNs and their potential to serve as a signal to the  
9 market. And the market signalling, in my submission, is  
10 a feature of Royal Mail's conduct which is borne out by  
11 the evidence that the tribunal has heard and has seen  
12 during the course of this appeal.

13 One can see this from a passage in the traffic  
14 lights slide deck, which is at C4A, tab 35.

15 THE CHAIRMAN: You're going to come on to the point,  
16 presumably, which Mr Beard made, which is price  
17 signalling is not within 102(c).

18 MR HOLMES: I shall address that point, yes.

19 It's on slide 9. You'll see that the first bullet  
20 states:

21 "Our proposal is to provide a series of actions,  
22 each of which has a rational and commercial business  
23 justification. Taken together, the combined package of  
24 actions will address most of the immediate problems with  
25 access contracts and send a clear signal to the market

1 that we will compete effectively to protect the USO."

2 Looking forward to slide 10, you have my point that  
3 the price differential here under consideration was 0.2,  
4 slightly below the level that was in fact adopted. This  
5 the traffic lights slide, your green scenario.

6 Now, what I derive from this document is that market  
7 signalling was very much in Royal Mail's mind as it  
8 devised these proposals. This is consistent with the  
9 very assertive signal and shows a general intention to  
10 send a signal to the market. That passage, by the way,  
11 was set out at paragraph 4.45 of the decision for your  
12 note.

13 The tribunal may recall also that the letters  
14 strategy document described the October 2012  
15 consultation as providing a signal to the market as to  
16 the pricing options which Royal Mail was investigating.  
17 The reference for your note is C4A, tab 13, page 33.  
18 And in cross-examination, Ms Whalley accepted that  
19 another mitigating action which Royal Mail had taken to  
20 manage the risk of direct delivery was to put the market  
21 on notice of the possibility of some form of  
22 commitment-based pricing in the future.

23 The reference is transcript of 17th June, Day 5,  
24 page 105, lines 1 to 5.

25 The tribunal will also recall that Whistl's response

1 to the October 2012 consultation to Royal Mail, this  
2 clear signal to the market, the signal to the market, as  
3 a mitigating action, which Ms Whalley accepted had taken  
4 place, was to explain the impact that the consultation  
5 was having on its business. An impact which Whistl  
6 regarded as deliberate. That was what Whistl said to  
7 Royal Mail at the time.

8 So we say that the evidence showing that Royal Mail  
9 was conscious of sending a signal to the market through  
10 the CCNs is strong, and Ofcom's reference to market  
11 signalling in the decision was right in this context.

12 MR FRAZER: Mr Holmes, just coming back to slide 9 on our  
13 favourite slide deck, are you troubled at all by the  
14 fact it says "sent a clear signal to the market that we  
15 will compete effectively"?

16 MR HOLMES: No, sir. I think by "compete effectively" they  
17 mean formulate a commercial response that will have  
18 a desired impact upon Whistl. I think that's the only  
19 fair reading of that reference in the light of all of  
20 the surrounding material.

21 THE CHAIRMAN: And we can draw what conclusion we like from  
22 that, is what you're suggesting?

23 MR HOLMES: You can, sir.

24 Now, returning to the decision, 7.215B and C note  
25 that Royal Mail was aware that Whistl was looking for

1 a direct delivery investor. And in addition, that  
2 investor confidence was important in assessing whether  
3 roll-out would occur.

4 Now, Mr Beard I think referred to the Millidge email  
5 set out at 7.213, but he didn't address the slide  
6 presentation excerpt which appears at paragraph 4.18 of  
7 the decision and in figure 4.1. You see that's referred  
8 to at C of 7.215, and if we could just look at that.

9 You may recall that we have seen this document  
10 before. It's part of the letters strategy presentation  
11 from May or June 2013. And the slide shows scenarios  
12 and potential influence on direct delivery risk to  
13 business plan. And you'll recall that there's a reduced  
14 risk to the plan "if TNT remains focused on upstream  
15 only as is and there's an increased risk to the plan if  
16 direct delivery risk increases".

17 You'll see at the middle of the page there is, as  
18 one of the factors that would reduce the risk to the  
19 plan:

20 "Ofcom guidance on direct delivery undermines  
21 potential investor-partner confidence."

22 So, in my submission, this shows an awareness of the  
23 importance of investor-partner confidence to Whistl's  
24 success in rolling out. And I put this point to  
25 Ms Whalley in cross-examination. I said to her, having

1 shown her this document:

2 "Royal Mail was aware that the scope for TNT to  
3 enter depended upon events not undermining potential  
4 investor-partner confidence. That's right, isn't it,  
5 Ms Whalley?"

6 There was then a pause recorded on the transcript,  
7 and she gave this answer:

8 "All I can say on that is at the time we knew that  
9 Whistl was looking for an investor, but we had no  
10 further information on who the investor was or what the  
11 nature of the investment would be."

12 Not a direct answer to my question. That was Day 5,  
13 page 54, lines 16 to 23.

14 Dr Jenkins was rather more forthcoming in her  
15 evidence in this connection. It emerged during her  
16 cross-examination that Oxera gave economic advice in the  
17 immediate run-up to the adoption of the price  
18 differential on the need of Whistl to secure investment  
19 and the likely impact of Royal Mail's conduct in that  
20 regard. So this was under questioning from Mr Turner,  
21 I believe. The relevant reference is Day 7, page 128.  
22 The question was:

23 "So let's just pause and see what you have said to  
24 us all. You have just said that you did discuss  
25 specifically with the client, Royal Mail, the investment

1 position of Whistl and the impact that its behaviour  
2 might have on the confidence of an investor. Have  
3 I understood you correctly?"

4 The answer was:

5 "We discussed the question of whether an investor in  
6 Whistl would -- how an investor in Whistl would be  
7 thinking about its investment in Whistl and -- so that  
8 is what we were talking to Royal Mail about and we  
9 were -- actually not at this point. Not in the  
10 October 3rd document. That would have been later in the  
11 process."

12 The question was then put:

13 "We see nothing about that in any of the papers, and  
14 there are quite a lot. Was that because it was  
15 considered to be privileged?"

16 The answer came back:

17 "No, it would have just been in discussion in  
18 meetings, in the run-up to the proposals to the board,  
19 which -- the papers for that were being written by the  
20 internal Royal Mail team."

21 So the advice isn't documented. It appears that  
22 after Oxera's rather frank early contributions to the  
23 discussion, Royal Mail preferred to receive advice from  
24 them orally. Mr Beard suggested that I should have  
25 cross-examined Dr Jenkins on her advice in December and

1           January. The difficulty is that there was no written  
2           advice on which I could examine her. We wrote to ask  
3           what written advice was relied on, after receiving  
4           Dr Jenkins's statement, and the answer which came back  
5           was:

6                     "The 3rd October note."

7           And it turned out that Dr Jenkins had not in fact  
8           contributed to the preparation of even that note. But  
9           for present purposes, the evidence of Dr Jenkins shows  
10          that Royal Mail was alive to the impact of its conduct  
11          on Whistl's investor and had in fact sought advice in  
12          relation to that question. And this was a matter that  
13          was very much in Royal Mail's contemplation.

14          Sir, I'm conscious of the time. Would that be  
15          a convenient moment?

16   THE CHAIRMAN: Thank you very much.

17   (1.01 pm)

18                     (The Short Adjournment)

19   (2.00 pm)

20   THE CHAIRMAN: Mr Holmes, as I said to Mr Beard yesterday,  
21          you are going to cover the question of the penalty,  
22          aren't you?

23   MR HOLMES: I am, sire.

24   THE CHAIRMAN: It's not on your road map but I realise that  
25          is because it's not in section 7.

1 MR HOLMES: Exactly, sir, you rightly apprehended. I was  
2 planning on covering 4 and 5 extremely briefly, and only  
3 really to allow the tribunal the opportunity to raise  
4 any questions that it has, and then 6, once I've  
5 finished ground 3.

6 THE CHAIRMAN: Okay.

7 MR HOLMES: We were discussing, sir, Ofcom's analysis of the  
8 likely effects of the introduction of the price  
9 differential notwithstanding its suspension. Before  
10 I pick up with that discussion, can I briefly deal with  
11 two matters that were canvassed with me in questioning.

12 The first was that I said that I would respond to  
13 Professor Ulph in relation to his reformulation to the  
14 point regarding product differentiation. We do agree  
15 with your formulation and we're grateful for it.

16 The second point concerned your question to me, sir,  
17 about whether it was appropriate for me to have  
18 cross-examined Ms Whalley on the new documents, as they  
19 were referred to, the documents from the case file,  
20 which are not referred to in the decision. There are  
21 three submissions I'd like to make on reflection about  
22 that.

23 The first is to observe that it's obviously not  
24 necessary to cross-examine Ms Whalley on her own  
25 evidence in order for her to include a complete account,

1 for example regarding any changes to the evidence.  
2 That's a matter for Ms Whalley and for Royal Mail's  
3 counsel to do. That's the first point.

4 The second point is to just refer the tribunal, in  
5 case it's helpful, to a case which discusses the value  
6 of documentary evidence briefly. It's a judgment of  
7 Mr Justice Leggatt, as he then was, sitting in the  
8 Commercial Court of the Queen's Bench Division, from  
9 2013, and the case is Gestmin v Credit Suisse.

10 The facts needn't detain us. The paragraph I wanted  
11 to show to you, in case it's of assistance, is at  
12 paragraph 22 of the judgment. And you'll see there that  
13 Mr Justice Leggatt makes certain comments on the place  
14 of documentary evidence and the role of oral testimony.  
15 And he states his view that:

16 "The best approach for a judge to adopt in the trial  
17 of a commercial case is, in my view, to place little, if  
18 any, reliance at all on witnesses' recollections of what  
19 was said in meetings and conversations and to base  
20 factual findings on inferences drawn from the  
21 documentary evidence and known or probable facts. This  
22 does not mean that oral testimony serves no useful  
23 purpose, but its utility is often disproportionate to  
24 its length."

25 An observation the tribunal in may sympathise with.

1 THE CHAIRMAN: Disproportionately short, you mean?

2 [Laughter]

3 MR HOLMES: That wasn't what I had in mind, sir, but is  
4 really a matter for you.

5 THE CHAIRMAN: We'll think about it.

6 MR HOLMES: "Its value lies largely, as I see it, in the  
7 opportunity which cross-examination affords to subject  
8 the documentary record to critical scrutiny and to gauge  
9 the personality, motivations and working practices of  
10 a witness rather than in testimony of what the witness  
11 recalls of particular conversations and events. Above  
12 all, it is important to avoid the fallacy of supposing  
13 that because the witness has confidence in his or her  
14 recollection and is honest, evidence based on that  
15 recollection provides any reliable guide to the truth."

16 So the observation that I draw from this is simply  
17 that the tribunal can repose confidence in the  
18 documentary evidence insofar as it feels that clear  
19 conclusions can be drawn from that. It need not feel  
20 the need for guidance from the oral testimony of  
21 witnesses where, in its view, the documents are clear as  
22 to the indications of what happened.

23 So that's only --

24 THE CHAIRMAN: Somewhat different considerations apply in  
25 relation to expert witnesses.

1 MR HOLMES: They do indeed, sir. We fully endorse that.

2 The third point is -- I think I've covered this  
3 ground already, but the new emails were put to  
4 Ms Whalley in response to Royal Mail's appeal, and what  
5 she says in her witness statement. There was no need,  
6 we say, to put them in the statement of objections or to  
7 canvas them in the decision.

8 And we do rely on the documents which were contained  
9 in the decision as providing a basis for Ofcom's  
10 findings as to the intention underlying Royal Mail's  
11 conduct.

12 After that small detour, we can return, if we may,  
13 to the section of the decision which we were considering  
14 immediately before the short adjournment, and we were  
15 at 7.215 of the decision on page 247, and we had  
16 discussed points A, B and C. The final point, D, which  
17 Ofcom identifies as relevant to the background when  
18 considering the effect of the CCNs following their  
19 suspension, is that:

20 "Any new entrant would need to convert and/or build  
21 its customer base in order to support and sustain the  
22 roll-out."

23 In my submission, that was endorsed by the factual  
24 evidence that the tribunal heard from Whistl's  
25 witnesses. And adverse effects on the ability to

1 attract new customers of the kind which Mr Millidge  
2 anticipated in his email are therefore highly pertinent  
3 when considering the likely effects of Royal Mail's  
4 conduct in introducing the price differential, whether  
5 or not the charges came to be charged or paid.

6 At 7.216, Ofcom finds that:

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

11 Here, the important point is that, as set out in (f)  
12 below, Whistl and LDC did in fact react. And that  
13 supports Ofcom's conclusions as to the likely effects of  
14 Royal Mail's conduct.

15 At 7.217, Ofcom addresses the suggestion that the  
16 CCNs were mere announcements that were incapable of  
17 having any effect on competition pending actual  
18 implementation. And Ofcom's first point, at 7.27A, is  
19 that:

20 "It is not correct to characterise the CCNs as mere  
21 announcements. They were a formal exercise of  
22 Royal Mail's unilateral power to change the access terms  
23 of the contract."

24 That is not comparable with the announcement in  
25 December 2013. It was a step that would take effect

1 automatically unless there was some subsequent  
2 intervening action, either by a third party or by  
3 Royal Mail itself, deciding to withdraw the CCNs. So  
4 Royal Mail had done all that it needed to amend its  
5 contract, and this could not simply be ignored by other  
6 market actors. It was a very public act that would  
7 produce effects without further action being required,  
8 and this, we say, is analogous with the conduct in  
9 AstraZeneca. And we developed this submission in our  
10 written closings at paragraphs 76 to 79. I won't repeat  
11 the points we make there, but we say this meets the  
12 point that this conduct is simply a signal of an  
13 informal kind. It is a concrete step in the market of  
14 a kind that would need to be taken into account.

15 Paragraph 2.17B makes the point that customers were  
16 indeed supposed to use the notice period to prepare for  
17 the changes. That was the purpose of the notice period.  
18 And as a result, they could not simply ignore the CCNs.

19 At point C, Ofcom makes the point that the  
20 possibility of suspension does not mean that a rational  
21 operator could simply ignore the implications of the  
22 changes in their business planning, and this point is  
23 then developed in subsequent paragraphs. In particular,  
24 at paragraph 7.224, Ofcom considers in turn the position  
25 during the notice period immediately following the

1 issuing of the CCNs, and then again following  
2 suspension.

3 So 7.224A covers the notice period, and it observes  
4 the reasons why the CCNs and the price differential  
5 which they introduced couldn't simply be ignored. This  
6 was an indispensable input. And you see the point in  
7 the middle of the paragraph that:

8 "The implications in particular could not be ignored  
9 in circumstances where an operator was considering  
10 making significant investments in the market."

11 In the final sentence: operators would have to  
12 consider the risks, if any, to their business, under  
13 various scenarios -- as a consequence.

14 At 7.224B, Ofcom turns to consider the situation  
15 following suspension. And you see there Ofcom's  
16 analysis for these same reasons: even after the price  
17 differential's implementation was suspended, it was  
18 reasonably likely that the acts committed by Royal Mail  
19 would have continuing effects on the market.  
20 Forward-looking business planning has to take account of  
21 the potential costs and risks to the business and  
22 therefore any potential consequences for the business  
23 that would flow from the implementation in whole or in  
24 part of suspended price changes.

25 Pending the withdrawal of the price differential or

1 the determination that it was unlawful, it is  
2 unrealistic to suggest that a rational operator or  
3 investor would ignore the implications of the price  
4 differential for its business. And two supporting  
5 factors are identified at point C. First, Royal Mail  
6 took further steps to reduce any uncertainty as to  
7 whether the price differential might come into effect.  
8 Specifically, it signalled to the market that it still  
9 meant to go ahead as soon as possible, despite the  
10 suspension. There was no withdrawal.

11 Secondly, there is the evidence as to what actually  
12 happened, which is in section F. And we say that this  
13 is very important because it endorses the conclusion  
14 that there would be likely effects notwithstanding  
15 suspension, because although the suspension occurred, we  
16 see what happened.

17 If you turn to section F and paragraph 7.230, two  
18 consequences are identified at 7.230. First:

19 "The disruption of LDC's decision to complete its  
20 agreed investment in Whistl in January 2014."

21 And secondly:

22 "Whistl's decisions to reduce and then suspend parts  
23 of its planned further roll-out of its end-to-end  
24 delivery operations."

25 There is then a discussion of the LDC investment.

1 And at paragraph 7.232 you see that the evidence showed,  
2 at point A, that when the introduction of the price  
3 differential was signalled in December 2013, it its  
4 anticipate impact led to the conclusion of the  
5 MAE condition. And the actual introduction of the price  
6 differential, along with the other matters in the CCNs,  
7 was a material factor in LDC's decision to invoke the  
8 MAE condition.

9 Then, turning on to paragraph 7.236, you see similar  
10 points made in relation to Whistl's own roll-out  
11 planning. You see that, at A:

12 "After Royal Mail's announcement on  
13 6th December 2013 of its intention in principle to  
14 introduce a price differential, Whistl recognised the  
15 risk posed by a price differential. And, as set out at  
16 paragraph 4.146 above, even before the price  
17 differential was introduced, Whistl developed plans to  
18 postpone further property investments in its end-to-end  
19 operations and delayed three of the seven proposed  
20 expansion areas for 2014."

21 Pausing there, in our submission, the December to  
22 January period is a very helpful natural experiment. It  
23 shows how the price differential considered in isolation  
24 affected Whistl's and LDC's willingness to proceed with  
25 their venture. It showed that the expectation of the

1 price differential in itself and considered alone, was  
2 enough to lead them to take steps to put off their  
3 plans.

4 While they did not know the level at which the price  
5 differential would be introduced, Whistl's presentation  
6 to Ofcom in December 2013 shows that they correctly  
7 guessed what Royal Mail would do. Their central case in  
8 the modelling was indeed a 1.2% increase. So they were  
9 considering the effect of exactly the price differential  
10 which was then introduced by means of the CCNs. And the  
11 reference for your note is C4B, tab 55, page 10, which  
12 refers to 1.2%.

13 So when Royal Mail says that Ofcom hasn't  
14 disentangled the likely effects of the price  
15 differential from those of the other actions that  
16 Royal Mail had prepared for Whistl and that were  
17 introduced in tandem, that is not quite right. The  
18 evidence supports Ofcom's conclusion that it was  
19 a causal factor in the delay of the investment and the  
20 roll-out. It and it alone led Whistl and LDC to pause.

21 Royal Mail also makes the submission that the  
22 issuing of the CCNs did not adversely affect Whistl or  
23 LDC because they had already factored in the risk of  
24 a price differential in December as a result of this  
25 earlier signalling.

1           My submission on that is that Royal Mail cannot  
2           salami slice its conduct in this way. The correct  
3           analysis is that the December announcement removed some  
4           uncertainty, and the CCNs then put matters beyond doubt,  
5           and -- that Royal Mail would indeed introduce the price  
6           differential, and that removed uncertainty from the  
7           market, crystallising risk for Whistl and LDC. And the  
8           rational course for Whistl and LDC, as shown by their  
9           revealed behaviour, was to put matters on hold while  
10          this harmful measure was investigated.

11          The wait was, of course, not costless for  
12          competition or for consumers. It was competition  
13          delayed, monopoly extended, and an opportunity of  
14          reduced prices for consumers and improved products  
15          foregone during the period for which Whistl and LDC  
16          delayed their plans in the course of 2014.

17          So, to conclude on ground 1, we say that Ofcom did  
18          analyse the likely effects of the introduction of the  
19          price differential on a forward-looking basis, taking  
20          account of the possibility of suspension. It concluded  
21          that Royal Mail's conduct was likely to have adverse  
22          effects and did in fact have adverse effects. That was  
23          the correct approach in law.

24          Ground 1 is a formalistic objection based on  
25          a straw man decision and not the decision that Ofcom in

1 fact reached. I would invite the tribunal to reject it  
2 and to uphold the findings in the parts of section 7  
3 which I have just considered, which precisely examined,  
4 on a basis that we say was adequate, what was likely to  
5 happen and what in fact happened, notwithstanding the  
6 suspension of the CCNs and the fact that the  
7 introduction of the price differential was therefore  
8 stopped and put on hold while Ofcom investigated.

9 THE CHAIRMAN: Just on paragraph 72.6 (sic), if I can take  
10 you back to that, Mr Beard made the point that price  
11 changes --

12 MR HOLMES: I'm so sorry, what was the reference?

13 THE CHAIRMAN: 7.216, which is decisions finding that the  
14 introduction of the price changes was reasonably likely  
15 to be factored into Whistl's business plans. I think  
16 Mr Beard made the point that it wasn't actually put into  
17 the business plan. Is that something you deal with?

18 MR HOLMES: Yes, sir. "Business plans", here, is not used  
19 in the sense of --

20 THE CHAIRMAN: So it's not the business plan --

21 MR HOLMES: -- the modelling that was done prior to either  
22 the announcement or the introduction of the CCNs --

23 THE CHAIRMAN: So your view is that they took it into  
24 account and reacted to it?

25 MR HOLMES: Yes, it was the business planning. It was the

1 actions which are then described. And that is put  
2 beyond doubt by the reference "forward to subsection F",  
3 which is referring, in my submission, to actions in the  
4 market. It was how they were proceeding in response to  
5 the introduction of the price differential, the fact  
6 that they changed their roll-out schedule, stopped  
7 rolling out in particular places, save where they were  
8 already committed, and that LDC invoked the MAE  
9 condition, didn't make the investment.

10 THE CHAIRMAN: Right.

11 And while we're on formalistic arguments, as we  
12 discussed yesterday, what would be the position if the  
13 price changes had been applied for one day, or one hour,  
14 or one moment? Does that mean that they are then, on  
15 Mr Beard's argument, applied, and Article 102(c) applies  
16 in full, because the withdrawal takes place the day  
17 before they're not, and is that a satisfactory position?

18 MR HOLMES: In my submission it's not a satisfactory  
19 position. What Article 102 and Article 102(c) both  
20 require is just a consideration of the impact of  
21 particular conduct, the likely impact of particular  
22 conduct in the market. Here we have a contractual  
23 arrangement where price changes were introduced with  
24 a notice period by the CCNs and Ofcom looked at what the  
25 likely effects of that was, and it reached conclusions.

1 And that is the correct approach.

2 So the attempt to read into Article 102(c)  
3 a requirement that for a pricing discrimination practice  
4 to give rise to likely adverse effects, prices must  
5 always be charged or paid, is unnecessary, and it does  
6 lead to exactly these oddities.

7 THE CHAIRMAN: Even for a very short time?

8 MR HOLMES: Even for a very short time.

9 THE CHAIRMAN: Yes, thank you.

10 MR HOLMES: Can I now turn back to consider the earlier  
11 parts of section 7, relevant to ground 3, unless there  
12 are further questions on ground 1?

13 There are two matters to discuss. The first is the  
14 materiality assessment and the second is AEC. And I'd  
15 like to take the points in the order of section 7, and  
16 the first point that arises is in relation to Ofcom's  
17 consideration of materiality.

18 In my submission, that consideration must be viewed  
19 in the context of the analysis that we have already seen  
20 in the decision. First, as to the mechanism of the  
21 price differential which showed it as a discriminatory  
22 surcharge on competition, which exposed direct delivery  
23 entrants to higher costs as the price of entry.

24 Secondly, it needs to be considered in the light of the  
25 analysis as to Royal Mail's intention, which showed that

1 it was hoped and expected to deter entry.

2 And thirdly, it needs to be considered in the light  
3 of Ofcom's analysis as to the actual effects on Whistl  
4 and LDC which showed that they had responded to the  
5 price differential's introduction by suspending their  
6 roll-out and investment plans.

7 So, at the risk of being melodramatic, we have  
8 a murder weapon, the mechanism, we have confessional  
9 documents in the form of the documents on intention, and  
10 we have the corpse of competition during the period that  
11 competition is delayed.

12 THE CHAIRMAN: But you don't have a signed confession!

13 [Laughter]

14 MR HOLMES: A signed confession, that would perhaps be too  
15 much to hope for. But we do have documents which we say  
16 shed light on the intent.

17 Against that backdrop, we say that Ofcom did not  
18 require any very elaborate assessment to conclude that  
19 the price differential was material. If we could turn  
20 to see what Ofcom says and pick this up at 7.141. You  
21 see the title above 7.141, as in other sections, records  
22 the conclusion:

23 "The price differential amounted in effect to  
24 a penalty on access customers seeking to compete in bulk  
25 mail/end-to-end delivery, making entry significantly

1 more difficult and therefore less likely to occur."

2 So that's the conclusion.

3 The first sentence of paragraph 7.141 then explains  
4 what the materiality analysis was aiming to check. It  
5 was about assessing whether the penalty was enough to  
6 achieve its intended effect. Do you see that? Whether  
7 it was reasonably -- it explained that it is reasonably  
8 likely that the price differential would achieve its  
9 intended effect by making entry significantly more  
10 difficult and therefore less likely.

11 In other words, the question was: had Royal Mail  
12 correctly calibrated the price differential so that it  
13 was likely to have the desired effect of deterring  
14 entry?

15 At 7.141A, Ofcom's conclusion is set out:

16 "The price differential would result in  
17 a significant increase in an end-to-end entrant's access  
18 costs from the point at which MPP1 became unavailable in  
19 practice to the entrant."

20 7.141B then explains how Ofcom assesses the point.  
21 It considers various metrics by reference to Whistl in  
22 order to put the 1.2% increase in a commercial context.

23 Turning on to 7.142, you see the reference back to  
24 section (c) which we've already considered, the  
25 mechanism whereby the price differential would penalise

1 an entrant. And there is a graphic illustration of the  
2 impact of the price differential at figure 7.7.

3 Now, this has received criticism in the appeal  
4 process. There are two criticisms in particular.  
5 First, it's said that this is not to scale. Now, of  
6 course, it's only intended to be illustrative. And the  
7 scale showing the price differential as only a very  
8 small sliver of the overall access cost must also be  
9 understood in context.

10 Because while the 1.2% differential is small  
11 relative to the total costs of purchasing delivery  
12 services from Royal Mail, it is large by reference to  
13 retail margins.

14 The other criticism that is made is that the graph  
15 shows a vertical jump once a certain number of SSCs is  
16 reached. And that is, of course, correct, based on the  
17 party's contemporaneous views as to eligibility. But  
18 even if one included a growing volume of surcharges  
19 between six and 13 SSCs, this would also be an adverse  
20 effect of the price differential, and it would still  
21 steeply increase costs over a critical early period of  
22 the entrant's roll-out.

23 So we say that that figure has been unfairly  
24 criticised. It's not intended as a significant element  
25 of Ofcom's analysis, but it does explain the mechanism

1           in a graphic form that was considered earlier and  
2           described fully earlier in section 7.

3           PROFESSOR ULPH: Can I just clarify a point?

4           MR HOLMES: Yes, of course.

5           PROFESSOR ULPH: So that red section there where you have  
6           "extra payments", going back to the point you made  
7           earlier on the fact of the differential, the surcharges  
8           you have to incur is a consequence of the differential?

9           MR HOLMES: Yes.

10          PROFESSOR ULPH: Is that what you're including there as part  
11          of the extra payments or is that just  
12          a -- (overspeaking) --

13          MR HOLMES: It should be included as the extra payments,  
14          I agree. What it would require is a slight adjustment  
15          to this graph. I think it would require a triangle to  
16          be added, effectively, before the red part, as Mr Harman  
17          does. But his graph is a little -- I wouldn't say that  
18          it intends to mislead but the very thin sliver he shows  
19          does need to be set in the context of the retail margins  
20          and the impact of the price differential accordingly on  
21          retail competition.

22          PROFESSOR ULPH: Okay, thank you.

23          MR HOLMES: Turning on to paragraph 7.147, one comes to the  
24          metrics that Ofcom considered, and you see first, at  
25          table 7.1:

1            "A quantification of Whistl's additional access  
2 costs based on its volume forecasts for 2014 to 2018."

3            You see that in 2014, for example, in the financial  
4 year, starting in April, the figure is 8.7 million.

5            And at paragraph 7.153, Ofcom then introduces the  
6 three metrics it considers. The first is a comparison  
7 between Whistl's profits as an access operator and the  
8 costs associated with the price differential. And you  
9 see that this point is then developed at  
10 paragraphs 7.154 and 7.155, and what these show is that  
11 the impact would indeed be immediate and substantial.  
12 If Whistl proceeded with its roll-out, it would lose  
13 upfront the entire profit stream of its established  
14 existing access business.

15           The second metric is a comparison between Whistl's  
16 forecast profits as operator with a growing delivery  
17 business and the cost of the price differential,  
18 modelled over the 2014 to 2018 roll-out period covered  
19 by its business plan. And here, again, the impact is  
20 substantial. At paragraph 7.156, Ofcom notes that over  
21 half of Whistl's forecast profit over the four-year  
22 roll-out period would be taxed away by the penalty.

23           And the third metric at paragraph 7.153 is  
24 a comparison with the size of LDC's investment. And at  
25 paragraph 7.160, Ofcom notes that the amount of the

1 penalty for 2014 to 2018 is equivalent to the entire  
2 investment which Whistl was fighting to secure. So it  
3 would have to borrow the same amount again.

4 Now, in my submission, understood in the context of  
5 what Ofcom was actually trying to do here, the small  
6 step it was taking, these are all helpful contextual  
7 indicators which show that the price differential would  
8 cost the only real world entrant, Whistl, dearly.

9 Mr Beard criticises this analysis as untethered.  
10 But it is, in fact, a small and well-reasoned step in  
11 a chain of reasoning which also includes Ofcom's  
12 findings as to the penalising mechanism, the intent to  
13 deter entry, and the actual effects on entry. And seen  
14 in that context, in my submission, these are sufficient.  
15 All they aim to do is to show that Royal Mail was not  
16 mistaken in its expectations as to the impact of the --  
17 this level of price differential, notwithstanding its  
18 apparently small level on the entry incentives of  
19 a direct delivery entrant.

20 Now, Mr Harman says that Ofcom should have done  
21 a more elaborate exercise. It should effectively have  
22 modelled as though it were an investor working out an  
23 adjusted internal rate of return to see whether the  
24 price differential would make the difference between  
25 a positive and a negative return. And it should then

1           adjust that by means of a probabilistic assessment aimed  
2           at ascertaining the incremental impact of the issuance  
3           of the CCNs on Whistl's assessment of the risk of the  
4           price differential being upheld. I hope that does his  
5           analysis justice.

6           Now we disagree that this was necessary.

7           We note firstly that Mr Harman's own IRR assessment  
8           isn't that full assessment appraisal. He fairly accepts  
9           that he has not, for example, factored in the impact of  
10          the other changes introduced by the CCNs, including in  
11          particular the zonal tilt, although on Royal Mail's case  
12          this has had a much more material impact on Whistl's  
13          investment incentives and roll-out incentives.

14          We also note that he accepts, in the joint expert  
15          memorandum, that an investor may need a positive rate of  
16          return in order to run risks which may not be fully  
17          reflected in a business plan.

18          And most fundamentally, Mr Harman's proposed  
19          exercise is unnecessary, we say, because of the actual  
20          evidence as to the market actors' conduct. So  
21          Mr Harman's proposal brought to my mind the old adage,  
22          which I see from an Internet search is variously  
23          attributed: "It's all very well in practice, but how  
24          does it work in theory?" The elaborate exercise that is  
25          suggested is not needed where we have conduct in the

1 real world which we can observe, specifically in  
2 circumstances where the impact to the price differential  
3 is isolated by the natural experiment to which I have  
4 referred above, the December 2013 period during which  
5 there was an expectation that only the price  
6 differential would be brought forward, no knowledge of  
7 the zonal tilt at that time. Whistl correctly estimated  
8 as its central case what the price differential might  
9 be, and this was enough to lead Whistl and LDC to put on  
10 the brakes and to bring their plans to a juddering halt.

11 So, subject to the tribunal's questions, those are  
12 my submissions on materiality.

13 THE CHAIRMAN: There's a discussion later on in the decision  
14 about what would have happened to Whistl without the  
15 price differential. Are you going to cover that, or do  
16 you think that's already covered?

17 MR HOLMES: Sir, it's not on my current path. Would you  
18 mind if I were to refresh my memory, or are there  
19 particular paragraphs that you'd like me to address you  
20 on?

21 THE CHAIRMAN: No, I just want to know whether you want us  
22 to consider it.

23 MR HOLMES: The decision -- we would obviously urge the  
24 decision to consider the decision as a whole, which we  
25 stand by. Nothing --

1 THE CHAIRMAN: We have quite a lot to consider so we have to  
2 focus on particular -- (overspeaking) --

3 MR HOLMES: I appreciate that, sir, but just as an aside,  
4 you will have seen the very full appeal which has been  
5 brought, the very full closing submissions which have  
6 been provided. This process has been hard fought  
7 throughout. That explains the length of the decision.  
8 And it also, if I might put in a short plea of  
9 mitigation, explains in part the period that was covered  
10 by Ofcom's investigation. These were matters that were  
11 contested extensively at all stages.

12 THE CHAIRMAN: The passages I was thinking of are from 7.240  
13 onwards.

14 MR HOLMES: 7.240. I'm grateful.

15 Ah, yes. So this is addressing Royal Mail's  
16 arguments that Whistl would have failed in any event.  
17 So I think there are two submissions to make about this.  
18 Firstly, we do support the submissions made here. We do  
19 say that the evidence which the tribunal has heard in  
20 this appeal sustains the view that other considerations  
21 do not explain the difficulties -- and in a way -- that  
22 Whistl and LDC encountered.

23 And in a way the natural experiment is a helpful  
24 indicator in that regard, because it's very hard to  
25 localise any of the alleged concerns in that crucial

1 December to January period -- a number of them post-date  
2 that period and so can't be considerations. I'm  
3 thinking in particular of the dumped mailbags, which  
4 I think relate to a period in April 2014, from  
5 recollection. So some of the points that were being put  
6 I think can't explain the stoppage that occurred when  
7 introduction of the price differential was first  
8 signalled. But we do say that Whistl could have  
9 entered.

10 Another point I should perhaps make is Royal Mail  
11 has, on a number of occasions now, referred to evidence  
12 and material relating to the ultimate decision of LDC to  
13 withdraw its investment, and Whistl to leave the direct  
14 delivery market. To be clear, Ofcom's decision does not  
15 make findings as to either of those matters resulting or  
16 being contributed to, causally, by the price  
17 differential.

18 The focus of the decision is on the period in 2014,  
19 and the impact of the introduction of the price  
20 differential on Whistl's roll-out and on LDC's  
21 investment during that period. And we say that is  
22 enough to show a restriction of competition for the  
23 reasons that I've already alluded to, that competition  
24 delayed is competition denied, to coin a phrase. The  
25 competition did not bring benefits to consumers during

1           that period.

2           THE CHAIRMAN: You did not get that one from the Internet, I  
3           hope!

4           MR HOLMES: Sir, not all of my research is on the Internet.  
5           [Laughter].

6           I'm grateful, as ever, to Ms Morrison and her  
7           encyclopedic knowledge of the decision. It is indeed  
8           a formidable thing to observe. In 7.241B, she makes the  
9           point that Ofcom observes that Royal Mail itself saw  
10          direct delivery competition as viable. And the traffic  
11          lights slide predicted that the combination of the zonal  
12          tilt and the price differential was necessary to achieve  
13          the preferred outcome of deterring Whistl's entry. So  
14          the main market actor here, the incumbent monopolist,  
15          with its developed understanding of the market and its  
16          detailed entrant costs modelling, did not at the time  
17          see Whistl as a busted flush. On the contrary, it was  
18          taking steps to address the threat of direct delivery  
19          competition. And all of the effort which is observed in  
20          the contemporaneous documents does not suggest the  
21          actions of an undertaking that viewed the prospect of  
22          competition as fanciful.

23          THE CHAIRMAN: Thank you.

24          MR HOLMES: So that really covers the main components of  
25          Ofcom's positive case in the decision, the reasoning

1 that was relied upon centrally in support of Ofcom's  
2 conclusion. It got the mechanism, the intent, the  
3 likely effects and the actual effects on an entrant as  
4 Ofcom considered they fell to be assessed.

5 The remaining discussion is, in a sense, responsive  
6 to an argument that Royal Mail and its lawyers have  
7 enthusiastically pursued, which is to say that Ofcom was  
8 required in relation to this conduct to undertake an  
9 AEC test, or to accept the results of the AEC test that  
10 Royal Mail's expert consultants undertook, in order to  
11 see whether the penalty which it was imposing by means  
12 of the price differential was one that an as-efficient  
13 competitor in Royal Mail's position could itself have  
14 withstood.

15 THE CHAIRMAN: Well, I think they say that's what the law  
16 is.

17 MR HOLMES: They say that's what the law is. And I'd like  
18 to address that now, if I may.

19 So Ofcom's consideration of the point begins at  
20 7.182. You see Ofcom's conclusions summarised in the  
21 preceding heading:

22 "The application of an AEC or price cost test based  
23 on Royal Mail's costs is not necessary or appropriate in  
24 this case."

25 Ofcom then sets out three arguments in support of

1           that conclusion. I'd like to consider each of these in  
2           turn. First is indeed the point to which you adverted,  
3           sir, the law.

4           "In Ofcom's view, the case law does not show any  
5           requirement to undertake an AEC test in all cases."

6           This point is developed in paragraph 7.192 to 7.195,  
7           by reference to the discussion in section 5 of the  
8           decision. The second argument, which is developed in  
9           paragraphs 7.196 to 7.198, is that the AEC test is not  
10          appropriate in the present case, having regard to the  
11          nature of Royal Mail's conduct.

12          The third argument Ofcom develops is at  
13          paragraph 7.199. And the essential argument made in  
14          that paragraph is that the AEC test was not relevant or  
15          informative in this case due to the other evidence  
16          available as to two matters: the first is the likely  
17          impact of the conduct in the context of the specific  
18          conditions of the bulk mail delivery market; and the  
19          second is the potential for an entrant to exert  
20          beneficial competitive pressure on Royal Mail. These  
21          main points are then developed by Ofcom in  
22          paragraph 7.200 in explaining why the AEC test performed  
23          by Royal Mail was not informative in this context.

24          I shall submit to you that those arguments are each  
25          correct, that Ofcom was right not to carry out its own

1 AEC test, and that it adequately considered the AEC  
2 analyses performed by Royal Mail after the event.

3 Beginning with the law, the summary in  
4 paragraphs 7.192 to 7.194 needs to be considered in view  
5 of the more detailed articulation of the relevant  
6 framework which is found in section 5. And I'd like to  
7 begin by taking you there. It's specifically referred  
8 to in 7.192.

9 If we could pick up at paragraph 5.19 on page 123.  
10 Here, Ofcom sets out some of the key legal principles.  
11 These are also reproduced, for your note, at  
12 paragraphs 110 and following of Ofcom's written closing  
13 submissions. And they underpin Ofcom's subsequent  
14 analysis of the case law, which deals specifically with  
15 the relevance or not of AEC tests.

16 The first point to observe is at 5.19, where Ofcom  
17 notes that the competition law is directed at protecting  
18 the process of competition. The dominant undertakings,  
19 like any company, are entitled to compete on the merits,  
20 and an obvious example would be vigorous price  
21 competition. And this may result in the exit from the  
22 market of competitors that are less efficient or which  
23 otherwise supply products and services that are less  
24 attractive to consumers for whatever reason.

25 So that's the point at 5.19.

1           At 5.21, you see the second key point, which  
2 outlines the special responsibility of dominant  
3 undertakings not to allow its conduct to impair genuine  
4 undistorted competition. This is why, as set out in  
5 Post-Danmark I and quoted in paragraph 5.22, conduct  
6 cannot be countenanced if its actual purpose is to  
7 strengthen its dominant position and abuse it. And it's  
8 these key principles which we say are reflected in the  
9 Intel judgment.

10           At paragraph 5.25, Ofcom quotes four of the key  
11 paragraphs from Intel, including two of the key  
12 paragraphs upon which Royal Mail relies in support of  
13 its case, that Intel confirms the AEC test as the  
14 benchmark for an abuse in pricing practice cases.

15           Focusing in particular on the paragraphs which  
16 underpin Royal Mail's case, we should look carefully at  
17 133 and 136. 133 observes that:

18           "It is no way the purpose of Article 102 to prevent  
19 an undertaking from acquiring, on its own merits, the  
20 dominant position on a market, nor does that provision  
21 seek to ensure that competitors less efficient than the  
22 undertaking with the dominant position should remain on  
23 the market."

24           Royal Mail suggests that the wording of  
25 paragraph 133 shows that the key concept to have regard

1 to in all pricing cases is the "as-efficient  
2 competitor", but in my submission that is not a correct  
3 reading of this paragraph. What this paragraph says is  
4 that competition law does not seek to ensure that less  
5 efficient markets stay on the market, or a dominant  
6 undertaking is competing on the merits. That is not the  
7 same as saying that competition law is only concerned  
8 with the impact of pricing practices on as-efficient  
9 competitors. In particular, where a dominant  
10 undertaking departs from competition on the merits.

11 Paragraph 134 reinforces the point that competition  
12 on the merits may lead to exit from the market, but  
13 paragraph 135 equally emphasises the special  
14 responsibility of dominant undertakings to avoid  
15 impairing genuine undistorted competition. And against  
16 this background, the Grand Chamber reiterates the point  
17 from Post-Danmark I, that:

18 "In the light of a dominant undertaking's special  
19 responsibility, Article 102 prohibits a dominant  
20 undertaking from, among other things, adopting pricing  
21 practices that have an exclusionary effect on  
22 competitors considered to be as efficient as it is  
23 itself, and strengthening its dominant position by using  
24 methods other than those that are part of competition on  
25 the merits."

1           And it's this language of Article 102 prohibiting  
2           thing, among other things, pricing practices having an  
3           exclusionary effect on AECs which was subject to  
4           specific consideration in Post-Danmark II. I'll come to  
5           that point shortly.

6           But continuing through this section, if we go on to  
7           page 135, Ofcom sets out in detail the case law which  
8           requires an authority to consider all of the relevant  
9           circumstances in considering whether conduct is abusive  
10          or not, and this is, we say, the third key principle  
11          which is relevant to Ofcom's assessment.

12          Paragraph 5.61 outlines the test as it's set out in  
13          Post-Danmark I:

14          "The requirement is to consider all the  
15          circumstances and to examine whether those practices  
16          tend to remove or restrict the buyer's freedom as  
17          regards choices of sources of supply, to bar competitors  
18          from access to the market, to apply dissimilar  
19          conditions to equivalent transactions with other trading  
20          parties, thereby placing them at a competitive  
21          disadvantage, or to strengthen the dominant position by  
22          distorting competition."

23          Paragraph 5.62 then considers the particular  
24          circumstances that were at issue in Post-Danmark I  
25          and II respectively. In Post-Danmark I, Post-Danmark

1 was by no means in a position of overwhelming dominance  
2 on the market at issue. On the contrary, it had only  
3 about 50% of the market. And this was a factor to which  
4 the court specifically drew attention. By contrast, in  
5 Post-Danmark II, the position was very different. In  
6 the market at issue in that case it was still a partial  
7 statutory monopolist with an overwhelming market share.

8 At paragraph 5.64, Ofcom notes, by reference to  
9 Post-Danmark II, some of the types of consideration that  
10 were considered relevant to the assessment in that case,  
11 including, for example, the possession of a network with  
12 unique geographical coverage or other structural  
13 advantages.

14 Intel is then picked up again in paragraph 5.67,  
15 insofar as it sheds light on the classic 'all the  
16 relevant circumstances' test. And Ofcom there outlines  
17 that in paragraphs 138 and 139 of Intel, the Grand  
18 Chamber made clear that where the dominant undertaking  
19 puts forward evidence that the conduct in question was  
20 not capable of restricting competition, the Commission  
21 must analyse, amongst other things, the possible  
22 existence of a strategy aiming to exclude competitors  
23 that are at least as efficient.

24 So Ofcom here recognises the fact that in assessing  
25 all the relevant circumstances, it needs to consider any

1 AEC analysis put forward by the dominant undertaking as  
2 part of all of the evidence that is before it.

3 The three key principles which are outlined in these  
4 passages of section 5 then inform Ofcom's assessment of  
5 whether an AEC test is required as a matter of law. And  
6 that specific consideration is at paragraph 5.83 and  
7 following.

8 At page 141, you can see Ofcom's conclusion in the  
9 light of the case law from the heading:

10 "An AEC or price cost test is not necessary,  
11 relevant and appropriate to all in all cases."

12 As observed in paragraph 5.85, the key authority in  
13 this regard is Post-Danmark II.

14 And over the page, at 5.87, there is the quotation  
15 from paragraph 57 of Post-Danmark II:

16 "... as the Advocate General stated in points 61 and  
17 63 of her Opinion, it is not possible to infer from  
18 Article 102 or the case law of the Court that there is  
19 a legal obligation requiring a finding to the effect  
20 that a rebate scheme operated by a dominant undertaking  
21 is abusive to be based always on the  
22 as-efficient-competitor test."

23 And in that paragraph you'll see that the court  
24 expressly approved the views set out in paragraph 61 and  
25 63 of Advocate General Kokott's opinion, and we'll need

1 to look at those.

2 "The Court then goes on to hold that it's not  
3 possible to infer an obligation to conduct an AEC test  
4 in rebate schemes. And it finds that the case law does  
5 not support the finding that an AEC test is required in  
6 pricing cases."

7 On this basis, as recorded at paragraph 5.90 of the  
8 decision, the Court found in 61, paragraph 61 of its  
9 judgment, that the as-efficient competitor test must be  
10 regarded as "one tool among others" for the purposes of  
11 assessing whether there is an abuse of a dominant  
12 position in the context of a rebate scheme.

13 Now I said I would take you to 61 and 63 of Advocate  
14 General Kokott's opinion, and that's because they shed  
15 light on these words "among other things", which  
16 Mr Beard attaches significance to -- as they appear in  
17 Intel.

18 If we could now turn to paragraphs 61 and 63 of  
19 Advocate General Kokott's opinion, it's at  
20 authorities bundle 9, tab 102, internal page 9.

21 If you start with paragraph 60, you see that the  
22 Advocate General explains that the Commission's guidance  
23 on Article 102 is not binding on national competition  
24 authorities. She explains that authorities are bound by  
25 the requirements arising from article 82, which it was

1 for the court to determine. And this point is endorsed  
2 in paragraph 52 of the Court's judgment in  
3 Post-Danmark II.

4 In paragraph 61, she states that in her view,  
5 Article 82, as it then was:

6 "... does not support the inference of a legal  
7 requirement to carry out an AEC test in the case of  
8 a rebate."

9 That's to say a pricing scheme.

10 At paragraph 62, Advocate General Kokott  
11 acknowledges that the court has on occasion called for  
12 an AEC test to be carried out in connection with other  
13 pricing practices, insofar as it has held that  
14 Article 102 prohibits, "amongst other things, adopting  
15 pricing practices that have an exclusionary effect" on  
16 as-efficient competitors.

17 Pausing there, if you turn to internal page 17, you  
18 can see that the reference that is there made is to  
19 paragraph 25 of Post-Danmark I. You see that in  
20 footnote 38. You see there the reference to  
21 Post-Danmark I.

22 So turning back to the opinion, at paragraph 63,  
23 Advocate General Kokott continues to explain that this  
24 case law does not support the inference of an absolute  
25 requirement to conduct AEC tests. The first reason for

1 that is that the case law calling for an AEC test is  
2 specifically concerned with particular types of pricing  
3 practices such as low pricing practices, and the second  
4 reason is the language used by the court of "among other  
5 things", or, in the French, "notamment". This makes  
6 clear that competition law is not only ever concerned  
7 with the impact of conduct on as-efficient competitors.

8 And this is the reasoning which was expressly  
9 endorsed by the Court of Justice in paragraph 57 of its  
10 judgment in Post-Danmark II. And the "among other  
11 things" language then reappears in the Intel judgment at  
12 paragraph 136.

13 So we say that read in the light of Post-Danmark II  
14 and the comments of Advocate General Kokott, which were  
15 approved, Mr Beard is reading too much into those words  
16 "among other things". There was no intention to suggest  
17 that pricing practices must all be assessed by  
18 a universal benchmark of the as-efficient competitor  
19 test.

20 If we can turn up paragraph 197 of Royal Mail's  
21 closing submissions, you see there the core submission  
22 about "among other things" at 136 of Intel. It's at  
23 page 64. And this was developed by Mr Beard yesterday.

24 So what Royal Mail says is that paragraph 136 of  
25 Intel makes clear that pricing practices must be

1           assessed against an AEC standard, and the AEC test is  
2           the benchmark. They say that "among other things"  
3           should be interpreted as referring only to non-pricing  
4           practices. But we say this interpretation is directly  
5           contrary to the judgment of the court in  
6           Post-Danmark II, and there's nothing in the reasoning of  
7           Intel which suggests that the court intended to reverse  
8           this interpretation. All the court did was to repeat  
9           the wording of paragraph 25 of Post-Danmark I without  
10          amendment or comment. And it did so in the context  
11          where the authority, the Commission, had in fact carried  
12          out an AEC test, and no one was arguing before the court  
13          that it erred by doing so.

14                 So what the Grand Chamber did do in Intel is clarify  
15          what an authority or court must do when faced with AEC  
16          arguments from the undertaking. It must analyse or  
17          consider the material put forward. And this point is  
18          developed in detail at paragraphs 120 to 123 of our  
19          closing submissions so I won't repeat those points in  
20          detail here.

21                 Turning back to the decision, these points are then  
22          developed in paragraphs 591 to 596. As observed in  
23          paragraph 595, the Grand Chamber was not asked the  
24          question in Intel that was posed in Post-Danmark II. It  
25          was not asked whether there are circumstances in which

1 an AEC test is not relevant or appropriate for the  
2 purposes of the authority's ultimate decision on whether  
3 conduct is abusive.

4 So, based on this analysis, there are five main  
5 points I would make in response to Royal Mail's  
6 submissions on the law. First, it's been suggested by  
7 Royal Mail that Ofcom essentially shied away from the  
8 Grand Chamber's judgment in Intel, this was an  
9 inconvenient development following the administrative  
10 process, and that Ofcom was in denial about what Intel  
11 had to say. Now, we say that is a baseless criticism  
12 when the decision is considered as a whole. I've shown  
13 you a number of passages in which Ofcom engaged in  
14 a detailed consideration of the contents of the Intel  
15 judgment, and of the crucial passages that Mr Beard  
16 relies upon.

17 Second, the suggestion that Intel silently signalled  
18 that, going forward, an AEC test is the benchmark in all  
19 pricing cases is not well founded. In paragraph 136,  
20 the Grand Chamber repeated language that had been  
21 subject to very recent and specific consideration in  
22 Post-Danmark II, and in that case the Court of Justice  
23 made clear that competition law is not only concerned  
24 with the impact of pricing practices on as-efficient  
25 competitors. And by repeating that language, the court

1 in Intel cannot be taken to have silently signalled that  
2 the previous judgment was wrong.

3 It might be worth looking at paragraph 136 again.  
4 You can find it in the decision at page 125. We say  
5 that the correct reading of this paragraph is that  
6 a dominant undertaking is prohibited from adopting,  
7 among other things, pricing practices that have an  
8 exclusionary effect on competitors considered to be as  
9 efficient as itself, but that other pricing practices  
10 may also fall foul of Article 102, particularly where,  
11 as in this case, they depart from competition on the  
12 merits. A discriminatory penalty on competitive entry  
13 is a very clear and paradigmatic example of competition  
14 that is not competition on the merits, particularly in  
15 a case where contemporaneous internal documents show  
16 that such a course was selected with the deliberate  
17 intention of blocking competitive entry by a direct  
18 delivery competitor as an alternative to meeting the  
19 direct delivery entrant with competition on price  
20 through across the board discounts because the dominant  
21 undertaking wished to avoid revenue dilution and ensure  
22 that it captured the value of letters.

23 The second point to note is that paragraph 136 makes  
24 clear that a dominant firm is also prohibited from  
25 strengthening its dominant position by using methods

1 other than those that are part of competition on the  
2 merits. And we say that extends to a case such as the  
3 present.

4 The third point to note is that Mr Beard's  
5 alternative interpretation risks introducing an  
6 arbitrary distinction between pricing practices and  
7 non-pricing practices. In my submission, it's clear  
8 beyond doubt that non-pricing practices may infringe  
9 Article 102, whether or not the undertaking that they  
10 had the effect of excluding is as efficient as the  
11 dominant undertaking. And you have my example from  
12 opening of a situation in which a dominant undertaking  
13 makes a payment to a competitor to leave the market.

14 Now, that exclusionary conduct could be subject to  
15 an as-efficient competitor standard. You could readily  
16 assess whether an as-efficient competitor would be  
17 excluded by the payment by assessing whether it would  
18 still be profitable for the competitor, for an  
19 as-efficient competitor to enter in the alternative to  
20 accepting the payment. But you wouldn't say that such  
21 a payment does not infringe Article 102 because an  
22 as-efficient competitor would not be excluded.

23 We say that this shows that non-pricing practices  
24 may clearly infringe Article 102 regardless of whether  
25 or not the effect would be to exclude an as-efficient

1 competitor, and where you that have targeted pricing  
2 conduct which is similarly directed at the obvious  
3 exclusion of a competitor, with no benign motivation,  
4 and with the clear intention of deterring entry through  
5 a penalty, equally that may be viewed as departing from  
6 competition on the merits and may be found to infringe  
7 Article 102 whether or not an undertaking with the  
8 resources and advantages of the dominant undertaking  
9 could in principle withstand the discriminatory  
10 surcharge which the dominant undertaking is introducing  
11 into the market.

12 THE CHAIRMAN: I wonder if that's a moment to pause,  
13 Mr Holmes.

14 MR HOLMES: I'm grateful, sir.

15 THE CHAIRMAN: It was a long sentence.

16 MR HOLMES: Indeed.

17 (3.13 pm)

18 (A short break)

19 (3.23 pm)

20 MR FRAZER: Mr Holmes, now you've been released from your  
21 long sentence, I wonder if I can just ask you something  
22 for clarification.

23 I think it's your submission that, as it were, the  
24 use of the same words in paragraph 136 that had been  
25 previously used in Post-Danmark II was some kind of

1           Masonic handshake which demonstrated that both cases  
2           could be read together, and that Post-Danmark II  
3           survived, as it were, not through stealth but through  
4           this kind of use of the same language. Is that what you  
5           submitted?

6           MR HOLMES: I'm not sure I put it quite that way.

7           MR FRAZER: No, I'm sure you didn't.

8           MR HOLMES: The submission of Mr Beard is that  
9           Post-Danmark II was silently overruled, as you, sir, put  
10          it in opening, although there's nothing on the face of  
11          Intel which states that in terms.

12          My submission is, rather, that the language in the  
13          relevant paragraph can and should be read in the light  
14          of earlier judicial commentary which has not been  
15          expressly overruled on the meaning of "among other  
16          things". You, have the Advocate General clearly  
17          expressly a view about what "among other things" means  
18          in Post-Danmark II, which the court endorsed in  
19          Post-Danmark II. So it's not so much that we can say  
20          that Intel was silently signalling that Post-Danmark II  
21          is still good law; it's simply that there is nothing to  
22          indicate that Post-Danmark II has been impliedly  
23          overruled. And that judgment does shed light on the  
24          meaning of the words set out in paragraph 136 of Intel,  
25          and I pray that interpretation in aide.

1 MR FRAZER: Understood. Is there anything else you can pray  
2 in aid, as it were, any other judicial statement that  
3 perhaps -- I know we've been handed up a judgment, for  
4 example.

5 THE CHAIRMAN: Opinion.

6 MR FRAZER: An opinion, rather, sorry.

7 MR HOLMES: I was going to come to that.

8 There are certainly extrajudicial sources that I can  
9 cite, and I've set out a number of those in the written  
10 closings, as you can see. I don't think that there is  
11 another authoritative source from a judgment of the  
12 Court of Justice.

13 MR FRAZER: The chairman invited you perhaps to look at the  
14 opinion in Ernst & Young.

15 MR HOLMES: Indeed, sir, and I was going to come to that --  
16 if it's the Ernst & Young opinion you were alluding to  
17 then certainly I have a submission to make in that  
18 connection, if I may.

19 THE CHAIRMAN: But your submission is that Intel has not  
20 overruled Post-Danmark II?

21 MR HOLMES: It is, I'm grateful --

22 THE CHAIRMAN: Mr Beard's submission is that it has.

23 MR HOLMES: Yes. And my submission absolutely --

24 THE CHAIRMAN: And neither of you wants a reference?

25 MR BEARD: Well, I put my case on two bases, either that it

1           is sub silentio overruled or that, in any event, you  
2           need to take AEC into account as part of the relevant  
3           circumstances.

4       MR HOLMES:   And there are a number of reasons why we say  
5           a reference is not needed in this case.

6       THE CHAIRMAN:   Sorry, Mr Holmes.

7       MR HOLMES:   But one of them is that we have clear guidance  
8           from the case which actually addressed this question  
9           specifically: Post-Danmark II was a reference for  
10          a preliminary ruling.  The Court of Justice, of course,  
11          deals with the questions which are put to it.  Like any  
12          sensible court or tribunal, it focuses on the task at  
13          hand.  And the task at hand in Post-Danmark II required  
14          it to consider specifically this question of whether an  
15          AEC test was useful, necessary, relevant, in all the  
16          circumstances.  And Post-Danmark II said two things  
17          about that: it said, first of all, not necessary in all  
18          cases.

19                 In fact, it went further.  It said -- in the  
20          particular circumstances that were highlighted in the  
21          reference, it wasn't even relevant to consider an  
22          as-efficient competitor, because in the circumstances it  
23          didn't shed light -- there was no practical possibility  
24          of an as-efficient competitor, a Post-Danmark II 2, to  
25          coin a phrase.

1           So those were the direct answers that we have from  
2           the top court charged with interpreting European law.  
3           And by contrast, in Intel, the Court of Justice was not  
4           concerned with addressing that specific issue. It was  
5           faced with an appeal from the General Court's judgment,  
6           and read in context the key issue that arose in that  
7           case was whether the General Court had made an  
8           impermissible shortcut by relying on the  
9           Hoffmann-La Roche judgment uncritically as giving rise  
10          to a conclusion, perhaps in the form of an irrebuttable  
11          presumption, that exclusivity rebates were invariably  
12          infringe of competition.

13          And what it said was: no, you have to do an 'all the  
14          relevant circumstances' test there, as well at least in  
15          circumstances where the dominant undertaking brings  
16          forth material at the administrative stage, which  
17          challenges the existence of a foreclosure effect.

18          In those circumstances, you have to do a wider  
19          assessment. And the really decisive consideration, in  
20          my submission, in Intel, isn't hard to see. I think any  
21          court would be struck by the oddity of the fact that  
22          the Commission itself had clearly regarded as-efficient  
23          competitor at the administrative stage as a sufficiently  
24          relevant standard to have spent pages analysing whether  
25          the as-efficient competitor test was met, and had drawn

1 its own conclusions in the Intel decision, but the  
2 General Court had allowed the Commission to disown that  
3 analysis and to say: you really don't need to worry  
4 about that. And the Court of Justice said, you know,  
5 that's just not good enough. In circumstances where the  
6 Commissioners looked at it, there's a ground of appeal  
7 before the General Court challenging it, the General  
8 Court has to jolly well look at that.

9 And I say that is the key conclusion that can be  
10 drawn from the judgment in Intel.

11 Now, of course, one needs to be cautious of taking  
12 the views of any single judge on a multi-member court  
13 that decides by unanimity. You've seen the note of  
14 caution that I myself sounded in my written closing  
15 submissions when I referred to the extrajudicial  
16 writings of Judge Da Cruz Vilaça, the reporting judge in  
17 that case. But it's at least of some relevance that his  
18 view, as set out in that article, was not that  
19 Post-Danmark II had been overruled, and was not that the  
20 'all the circumstances' had been fixed in some decisive  
21 way. And it would be quite an extraordinary  
22 interpretation, in my view, to derive from Intel that it  
23 had basically swept aside 30 years of jurisprudence and  
24 had introduced as an invariable requirement, in all  
25 pricing cases, the need to conduct or to assess an

1 AEC test and to regard an AEC test as highly relevant,  
2 even in circumstances where the Competition Authority  
3 did not consider, having regard to the nature of conduct  
4 at issue, that it was a meaningful or enlightening  
5 metric.

6 That would be a surprising interpretation. And  
7 Mr Beard's interpretation of Intel has strengthened.  
8 He's gone to the furthest extreme interpretation of  
9 Intel. His comments on the first day of opening, it's  
10 quite instructive to revisit them, they're propositions  
11 that it's actually quite hard to take exception to.  
12 They were quite modest conclusions drawn from Intel that  
13 are very much along the lines that I've just described.  
14 By closing, we were being told that Intel was authority  
15 for the proposition that the AEC test is the benchmark  
16 for pricing practices.

17 And in my submission, that is to put too much weight  
18 on Intel.

19 I think the tribunal can take comfort from the  
20 multiple sources that we cite which show that this is  
21 not the view of very many people. Now it's true that  
22 there are a number of dominant undertakings -- Mr Beard  
23 said there were many dominant undertakings, and a number  
24 of them are, of course, his clients; he's a very popular  
25 barrister. Those dominant undertakings may be very

1 comfortable with the proposition that an AEC test should  
2 apply in all cases, but I say that it's a distortion of  
3 Article 102 and it would be the wrong approach for this  
4 tribunal to endorse where you have very clear evidence,  
5 very clear evidence, about an intent to harm the  
6 competitive process, to penalise competitive entry, and  
7 more than that, you have not only likely effect, you  
8 have Whistl stopping its roll-out.

9 Now, any Competition Authority, looking at that, in  
10 my submission, would need to look askance.

11 And moreover, if one looks at the results of the  
12 AEC test, I do pray in aid the fact that the AEC test,  
13 if it really were the test, would unbind Prometheus --  
14 it would release a dominant undertaking to exact savage  
15 retribution on a competitor.

16 The level of the price differential that could be  
17 introduced in those circumstances doesn't stop at 1.2%.  
18 It doesn't stop at the 0.5p, the very assertive signal  
19 that -- I think it was referred to in -- no, in the  
20 email, in Matthew Lester's email. It would allow  
21 a price differential of 5 pence, based on a set of costs  
22 from an undertaking that produces multiple product  
23 lines, is everywhere, and has 100% market share.

24 THE CHAIRMAN: This is Prometheus untethered, is it?

25 MR HOLMES: It is Prometheus untethered, sir, yes. That's

1 the untethering that I think the tribunal should be  
2 alive to and concerned about.

3 Anyway, I'm sorry, I have rather moved off the  
4 cerebral discussion of the law, but there you have my  
5 impassioned plea to the tribunal, sir.

6 THE CHAIRMAN: Thank you.

7 MR HOLMES: I think there are three more points on the law,  
8 sir, unless there are further questions that the  
9 tribunal has?

10 THE CHAIRMAN: I think you need to move on.

11 MR HOLMES: I should move on from --

12 THE CHAIRMAN: No, I think you should not waste any more  
13 time. Not that you're wasting time.

14 MR HOLMES: You mean stop now on as-efficient competitor?

15 THE CHAIRMAN: No, finish what you're saying on the law.

16 MR HOLMES: I'm grateful.

17 THE CHAIRMAN: -- merely the classical illusions that we've  
18 (inaudible) to one side.

19 MR HOLMES: I'm grateful.

20 Three more points on the law. First, we say that  
21 Ofcom's interpretation of Intel must be right if it is  
22 accepted that the relevant test is one of all the  
23 relevant circumstances. No single mathematical test can  
24 be determinative if what the authority has to do is look  
25 at all the available evidence and the nature of the

1           conduct in reaching a decision as to whether particular  
2           conduct is abusive.

3           The fifth point is that Ofcom's interpretation of  
4           Intel is supported by subsequent case law, extrajudicial  
5           and academic commentary. You have my submissions in  
6           closing at paragraphs 124 to 131.

7           I was grateful for the tribunal's sharp eyes in  
8           drawing attention to Advocate General Wahl's opinion in  
9           case C of 633 (2016) Ernst & Young. If we could just  
10          look at that, please. I hope it's been handed up. This  
11          is a case which is not concerned with the application of  
12          Article 102. It is about the application of the  
13          standstill obligation in the merger regulation. But the  
14          proposition that it contains is just an indication from  
15          Advocate General Wahl, who was of course the Advocate  
16          General in the Intel case, about his understanding of  
17          the impact of Intel on Post-Danmark II, which adds, we  
18          say helpfully, to the other sources identified in  
19          paragraphs 124 to 131 of our written closings.

20          At paragraph 95, he considers that, in accordance  
21          with the ordinary rules of evidence, it is for the  
22          Commission to prove the alleged infringement of the  
23          standstill obligation.

24          Paragraph 96 then deals with the evident that the  
25          Commission may rely on in this regard. And he stresses

1           that the evaluation of evidence is unfettered, so long  
2           as it has been lawfully adduced and it is credible.

3           Advocate General Wahl then stresses that there is no  
4           requirement to use a particular method or test, and the  
5           authority for that is in footnote 35. So turning to  
6           that, which is at page 15. As the Tribunal has  
7           identified, Advocate General Wahl there refers by  
8           analogy to paragraph 57 of Post-Danmark II. And  
9           Post-Danmark II is of course the paragraph which the  
10          tribunal is familiar with in which the court stated that  
11          it was not necessary in all cases for the AEC test to be  
12          performed in pricing cases.

13          There's no suggestion here that any authority, since  
14          Post-Danmark II, has overruled, by silence, the  
15          proposition in Post-Danmark II that an AEC test is not  
16          always required. Indeed, Advocate General Wahl's  
17          reliance on paragraph 57 points to the opposite  
18          conclusion.

19          One final point, if I may. It's clear from  
20          Post-Danmark II that there are situations in which an  
21          AEC test is of no relevance. The court states that in  
22          terms, in paragraph 59, in respect of a situation where  
23          the emergence of an as-efficient competitor is  
24          practically impossible. But the court's judgment stands  
25          for a general principle that the AEC test is one tool

1 among others. Its relevance or appropriateness will  
2 depend on all of the other relevant circumstances, and  
3 this was rightly, we say, Ofcom's starting point.

4 But it had to consider whether the AEC test was  
5 appropriate or informative in considering the actual  
6 case before it, but it was not obliged to do an AEC  
7 test, and it was not obliged to accept the AEC test  
8 undertaken by Royal Mail as determinative or even as  
9 highly relevant, as Mr Beard submits.

10 So that completes my submissions on the law.

11 The second strand of argument relating to the AEC  
12 test sets out Ofcom's reasoning as to whether the AEC  
13 test was required in a case which involved applying  
14 a penalty to a rival supplier. Ofcom's assessment was  
15 that it was not competition on the merits.

16 I think I can probably proceed by giving you the  
17 references, given the timing. Paragraph 7.184A of the  
18 decision sets out Ofcom's assessment of the nature of  
19 the conduct, and it makes two points. The first is that  
20 the Court of Justice has found AEC tests to be relevant  
21 in cases where dominant undertakings have engaged in low  
22 pricing practices.

23 It was suggested by Mr Beard yesterday that no one  
24 will dispute that the reference to the CJEU ruling that  
25 it doesn't apply to low pricing practice situations is

1 not a term of art found in any judgment.

2 Well, we do say that this language appears in the  
3 case law of the Court of Justice. The footnote to  
4 paragraph 7.184A gives, as an example, paragraph 55 of  
5 Post-Danmark II, and we drew the tribunal's and  
6 Royal Mail's attention to the use made of this  
7 terminology in other cases in paragraph 153 of our  
8 written closings.

9 The second point made in paragraph 7.184A is when  
10 you look at the nature of this conduct, it was a case of  
11 a dominant undertaking raising a rival supplier's price.  
12 And this is picked up in the reasoning of 7.196 to  
13 7.198.

14 We say that Ofcom was here assessing the nature of  
15 the conduct in accordance with all of the case law,  
16 including Intel. That is a substantive analysis and  
17 it's not a labelling issue. Pricing practices will  
18 inevitably take various forms, and the case law suggests  
19 that practices that involve low pricing are types of  
20 conduct where an AEC test is part of the evidence base,  
21 at least in some cases, but this was not a case where  
22 the dominant undertaking was competing vigorously on the  
23 merits by offering better prices or products than its  
24 competitors. It was a penalty case applied to a  
25 competitor who dared to compete.

1           The fact that this case involved raising prices is  
2 clear from the evidence. I don't need to take you  
3 through it all; it's set out in our written closings at  
4 paragraphs 158 to 161.

5           So Royal Mail rejected low pricing. It rejected  
6 across-the-board price reductions. It would book(?) no  
7 loss of competition, and the measure sought was instead  
8 a costless one.

9           As a consequence, the nature of the conduct did not  
10 point towards an AEC test in the appropriate tool on the  
11 particular facts at issue in this case.

12           Now I should briefly respond to some of the  
13 criticisms directed at Mr Matthew's evidence yesterday.  
14 At page 132 of yesterday's transcript, for your note it  
15 was suggested that Mr Matthew has a fundamental problem  
16 with margin squeeze cases, because one way you can  
17 impose a margin squeeze is through raising the wholesale  
18 prices.

19           Mr Beard suggested that Mr Matthew's position was  
20 that in these circumstances, a margin squeeze was not  
21 a low pricing practice, and that is not correct. For  
22 your note, the easiest way to see this is by reading  
23 paragraph 146 of Royal Mail's own written closings, the  
24 last sentence of which makes clear and provides the  
25 reference for where Mr Matthew expressed the opposite

1 conclusion.

2 Secondly, at pages 203 to 204 of yesterday's  
3 transcript, Royal Mail appeared to suggest that  
4 Mr Matthew considered this case to fall within the fuzzy  
5 or grey area. And that is also incorrect.

6 We do say it's important to make sure that  
7 Mr Matthew's overall evidence is fairly reflected, and  
8 with respect to this case, Mr Matthew explained on  
9 Day 11, page 151, lines 8 to 21, in response to  
10 a question from you, sir, asking Mr Matthew about the  
11 need to act cautiously as a dominant undertaking,  
12 Mr Matthew responded:

13 "I think that's right. And again, it wouldn't be  
14 for all forms of behaviour, certainly, but when you're  
15 using this type of behaviour, when you're making  
16 something a penalty contingent on what your primary  
17 entrant does, yes, I think it's right that they should  
18 be on notice. Don't do those things if you think it's  
19 likely to have a significant impact in reducing the  
20 chances of them coming into this market unless you have  
21 a good reason for doing it. And that seems to me to be  
22 a desirable incentive."

23 Then Mr Matthew commented in response to the  
24 question about the risks of false positives or negatives  
25 at transcript for Day 11, page 152, lines 7 to 18, as

1 follows:

2 "But to me, yes, I think this case would be a case  
3 where, if you were to use price cost tests in a very  
4 mechanical way, you know, you would have failed to pick  
5 up a fairly clear looking case of anti-competitive  
6 foreclosure. And the only reason you would do that is  
7 if you felt that the chilling effect was sufficiently  
8 great that you should allow a few of these bad ones  
9 through, such that the majority do better. But as I've  
10 said, I would have thought it would be relatively easy  
11 to make clear that these sort of arrangements lead you  
12 to a different set of balances than would apply if  
13 circumstances were significantly different."

14 MR BEARD: I'm so sorry, before Mr Homes goes on, just to  
15 confirm, in relation to the position of Mr Matthew and  
16 Mr Parker, I think -- I haven't gone back and checked  
17 the transcript in relation to the margin squeeze issue  
18 and whether it's non-LPP or LPP. I may have reversed my  
19 reference to Mr Parker and Mr Matthew. It's set out in  
20 our closing submissions. So the position that Mr Holmes  
21 has just articulated in relation to Mr Matthew that he  
22 treated all margin squeezes as LPP is different from  
23 Mr Parker, who treated them differently depending on  
24 whether there was a wholesale price rise or not.

25 I apologise for that. That was me misspeaking

1           yesterday.

2           THE CHAIRMAN: Could you perhaps correct the transcript?

3           MR BEARD: I could correct the transcript, and it is in our  
4           written closing correctly, so I apologise.

5           MR HOLMES: I'm grateful for that clarification.

6                        So Mr Matthew did fairly acknowledge that  
7           authorities may need to consider cases across the  
8           factual spectrum, which will range from clearly  
9           anti-competitive conduct to conduct that looks like  
10          quintessential competition on the merits, and that  
11          conduct falling in the middle may raise problems in  
12          other cases. And this was the fuzzy or grey area to  
13          which Mr Matthew was referring. But he was not  
14          suggesting that this case was one that admitted of  
15          doubt.

16                       So the final proposition that Ofcom relies upon in  
17          relation to the as-efficient competitor is that the  
18          as-efficient competitor test is really not informative  
19          in the circumstances of this case. Paragraph 7.199 of  
20          the decision essentially points to the other evidence  
21          and analysis in section 7, and says:

22                        "Look in the light of the evidence we have already  
23          considered, the impact of the differential in this  
24          market. We do not consider an AEC test to be relevant  
25          in these circumstances."

1           And I've taken you through that evidence. But in  
2           summary, in paragraph 7.199 itself, Ofcom had regard to  
3           the features of the market that were outlined in  
4           section 7B. This market was vulnerable to exclusionary  
5           conduct, and the evidence considered showed that the  
6           hindering of the emergence of a less efficient entrant  
7           was likely to limit a potential source of competitive  
8           pressure on a monopolist to the detriment of consumers.

9           Ofcom's third conclusion was that an AEC test would  
10          not provide any relevant material in answering the key  
11          question of whether or not this conduct was abusive on  
12          the facts of this case.

13          Then finally, in relation to paragraph 7.200, Ofcom  
14          explained why Royal Mail's analyses didn't take matters  
15          any further forward, and Ofcom's position remained that  
16          it did not need to perform an AEC test. These points  
17          are developed in the annex to our written closing  
18          submissions. We don't accept that they are not points  
19          that were flagged in 7.200. 7.200A highlighted two  
20          particular features of the AEC test that meant it did  
21          not place weight on it. The first feature was that it  
22          used Royal Mail's costs, and the second was that it  
23          assumed 100% conversion rate.

24          Those points are both developed in the light of the  
25          evidence heard by the tribunal on appeal in the annex to

1 Ofcom's written submissions, and we rely on that.

2 It also considers other matters, such as the  
3 increased risk to entrants, the point canvassed at  
4 7.200C, and the VAT exemption the point referred to at  
5 7.200C.

6 So for that reason, we do say that the annex is  
7 appropriately within the scope of these proceedings and  
8 that the tribunal should have regard to it in assessing  
9 the usefulness of the AEC analysis submitted by  
10 Royal Mail in these proceedings.

11 So that concludes, subject to any questions the  
12 tribunal may have --

13 THE CHAIRMAN: Just a minute. So the contents of the annex  
14 is not derived from points in dispute in this appeal; it  
15 arises from what is flagged in 7.200?

16 MR HOLMES: We say that it certainly reflects discussion and  
17 has been developed as a result of discussion in the  
18 appeal.

19 THE CHAIRMAN: Would it be unfair of us to conclude that it  
20 might have been better if the contents of the annex  
21 were -- had actually been in the decision?

22 MR HOLMES: Well, sir, I mean the tribunal will --

23 THE CHAIRMAN: With the benefit of hindsight, which we have?

24 MR HOLMES: The tribunal will form its own views --

25 THE CHAIRMAN: Yes.

1 MR HOLMES: -- about that.

2 THE CHAIRMAN: I'm asking you.

3 MR HOLMES: Of course. Certainly it's analysis that I would  
4 rely upon as relevant, and that the tribunal can and  
5 should take account of in the context of its assessment  
6 of this case.

7 THE CHAIRMAN: And we are entitled to note that it is  
8 slightly fuller treatment than 7.200.

9 MR HOLMES: Indeed, sir. I think that the would be fair.

10 Are there any other questions in relation to grounds  
11 1 to 3, or -- I'm conscious of the time. The tribunal  
12 does need to break at 4.15; is that correct?

13 THE CHAIRMAN: We do need to break at 4.15, so you need to  
14 crack on.

15 MR HOLMES: I'm sure you'll thank me if we finish today.

16 THE CHAIRMAN: Thanks are completely irrelevant, Mr Holmes.

17 MR HOLMES: Yes, well indeed, sir.

18 Ground 4, the tribunal may -- I may not need to  
19 trouble the tribunal. It was only very briefly  
20 developed by Mr Beard. There are five key points that  
21 we'd highlight from our written closings. First, the  
22 burden of proving objective justification is on the  
23 undertaking seeking to rely on it. Secondly, Parliament  
24 has entrusted the responsibility of protecting the  
25 universal service on Ofcom as the independent regulator,

1 not on Royal Mail as the dominant undertaking and  
2 designated universal service provider.

3 Thirdly, Hilti is apt in this case. Mr Beard tried  
4 to distinguish it on the basis that Hilti was purporting  
5 to put itself in the role of general policemen of other  
6 laws that bore its products. But we say that is a good  
7 analogy to the present case. Royal Mail was seeking to  
8 put itself in the position of protecting the universal  
9 service obligation by managing the structure of  
10 competition in the market. And in the present case, the  
11 position is actually worse than it was in Hilti, in that  
12 the real and designated authority, Ofcom, had already  
13 decided that there was no imminent threat. Not once,  
14 but on multiple occasions.

15 Fourthly, the suggestion that Intel requires an AEC  
16 assessment in the context of objective justification is  
17 new, and we say it's misguided in this case. As  
18 recorded at paragraph 8.21 of the decision, Royal Mail  
19 had not adequately demonstrated efficiencies resulting  
20 from its conduct. And in any event, as set out in  
21 paragraph 8.23, the conduct was not indispensable or  
22 necessary to the realisation of the efficiencies, given  
23 the legal framework that was in place to protect the  
24 universal service.

25 Fifthly and finally, the points that Royal Mail

1 makes in respect of the EBIT margin are wrong for the  
2 reasons developed in Ofcom's closing submissions in  
3 paragraphs 221 to 225. Mr Beard yesterday challenged  
4 the idea that the EBIT margin was -- that the EBIT 5% to  
5 10% indicative metric was one amongst others that Ofcom  
6 had put forward. He suggested that that was  
7 the position that developed after March 2017, and that  
8 it was not the position as articulated in the Ofcom  
9 statements in March 2012, which were germane. For your  
10 note, the reference is transcript Day 16, page 197,  
11 lines 6 to 11.

12 We say that is wrong as a matter of fact, and  
13 directly contrary to the evidence, and we refer the  
14 tribunal to the documents and meetings summarised in  
15 paragraphs 223 to 224. It's apparent there that Ofcom  
16 repeatedly, throughout 2012 and 2013 in both formal  
17 written documents and in meetings, made clear to  
18 Royal Mail that the EBIT margin was only indicative and  
19 that it did not guarantee Royal Mail a rate of return,  
20 and Royal Mail is wrong to suggest differently.

21 Ground 5 Royal Mail only adopted in its written  
22 closing submissions, and unless the tribunal has any  
23 specific question, I will do the same. For your note,  
24 the relevant paragraphs are at paragraphs 234 to 258 of  
25 our closing submissions. I'm grateful.

1           So that brings me to penalty. Royal Mail has made  
2 a number of points in respect of the penalty imposed by  
3 Ofcom, and has sought to persuade the tribunal to reduce  
4 the penalty or to even apply no penalty at all. Of  
5 course, we accept that the tribunal has the power to  
6 impose a different penalty to that imposed by Ofcom, but  
7 having now heard the evidence in this case, we submit  
8 that the penalty Ofcom imposed was an appropriate one,  
9 and should not be reduced.

10           There is no substance in Royal Mail's criticisms  
11 regarding how Ofcom calculated the penalty. Now, before  
12 I deal with the specific points raised, I'd like to make  
13 three overarching points. First, Ofcom was careful to  
14 apply the relevant guidance in this case, the CMA's  
15 penalties guidance. And I will take you through this  
16 when addressing the specific points made by Royal Mail.  
17 And that approach is of course important, because it  
18 ensures consistency across cases within the UK  
19 competition arena. And applying the approach set out in  
20 that document, we say there's no basis for the  
21 imposition of a lower overall fine.

22           Secondly, we would emphasise that Ofcom applied  
23 a very significant reduction on grounds of  
24 proportionality. The level of the reduction is  
25 a confidential figure, but it is worth having in mind,

1           when reviewing the calculation of the overall level of  
2           the fine. The easiest place to find it quickly is  
3           probably in Whistl's closing submissions, paragraph 251,  
4           if you have all of the closing submissions close at  
5           hand.

6           You see the second sentence there, the scale of the  
7           reduction for proportionality. Do you have that, sir?

8       THE CHAIRMAN: Yes.

9       MR HOLMES: Now in making this reduction, Ofcom specifically  
10           bore in mind a wide range of factors, including most of  
11           those now relied on by Royal Mail in support of its  
12           arguments on ground 6.

13           Now, in particular, the factors considered included,  
14           firstly, the duration of the infringement and, secondly,  
15           the suspension of the price differential. That's set  
16           out in the decision, paragraph 10, point 120, on  
17           page 318.

18           So we say that this significant reduction alone,  
19           more than adequately reflects all of the points raised  
20           by Royal Mail.

21           Thirdly, if the tribunal agrees with Ofcom's case on  
22           the other grounds, and that is the context in which the  
23           issue of penalty arises, then deterrence is an important  
24           consideration for Ofcom and for the tribunal.

25           Contrary to what Mr Beard suggested yesterday, the

1 simple fact of a finding of infringement is not plainly  
2 sufficient. If the tribunal is considering the level of  
3 penalty, it will have upheld Ofcom's finding that  
4 Royal Mail adopted a deliberate strategy to foreclose  
5 its first and only likely competitor in the bulk mail  
6 delivery market, through a penalising mechanism.

7 In doing so, Royal Mail gained a significant and  
8 lasting advantage in the market, including  
9 a considerable financial benefit. And this is precisely  
10 the kind of conduct that should be deterred, and only  
11 a substantial financial penalty will make it clear to  
12 dominant undertakings that it is not in their interest  
13 to act in this way.

14 It was canvassed in argument with Mr Beard whether  
15 an important factor in relation to proportionality in  
16 this case was that the contractual mechanism included  
17 a provision which provided for automatic interim  
18 measures or some such terminology. Now, in my  
19 submission, that would not be a safe basis to make any  
20 substantial further reduction in the level of the  
21 penalty from the substantial reduction already made in  
22 relation to proportionality.

23 That is for this reason: I have taken you, sir, to  
24 the passages in the decision which analyse the likely  
25 and actual effects which flowed from the introduction of

1 the price differential, notwithstanding its suspension.  
2 So it would not be safe to conclude that that provision  
3 rendered this conduct safe and satisfactory. It clearly  
4 did not. And there clearly was harm; you have my  
5 submission that there was harm to consumers. There was  
6 likely harm and actual harm.

7 Now, if I could now briefly address the six specific  
8 points raised by Royal Mail in respect of the penalty.  
9 The first was intention or negligence, and Royal Mail's  
10 submission was that there was neither of these. Now, we  
11 say Ofcom's findings on this are clear and are amply  
12 supported by the evidence before the tribunal. This is  
13 set out in our closing submissions, paragraphs 8 to 26,  
14 which I won't repeat.

15 Royal Mail relied yesterday on one email. The  
16 wording of this email really speaks for itself. Can I  
17 invite you to turn it up one more time. It's in C4A,  
18 tab 46.

19 PROFESSOR ULPH: Sorry, which tab is it?

20 MR HOLMES: Tab 46 of C4A.

21 Now this email records a conversation that  
22 Stephen Agar had had with Matthew Lester, the company's  
23 CFO. The passage I want to draw your attention to is  
24 the one which begins:

25 "He was fairly relaxed about the legal risks,

1 provided what we were doing was reasonable and arguable.  
2 He was very keen for us to give the market a very  
3 assertive signal."

4 Now the indication here is that the main aim is an  
5 assertive signal to the market, and that as long as that  
6 could be delivered, Royal Mail's senior executive was  
7 relaxed about the legal risks.

8 Mr Beard suggested that the price differential was  
9 set at a lower level than that suggested in the email.  
10 But it was still set at a level that was meant to send  
11 a clear signal, and I showed you the document about  
12 that. And as the evidence before you shows, Royal Mail  
13 succeeded in sending a clear signal, and its conduct had  
14 a material impact on the market.

15 THE CHAIRMAN: So are you saying intention or negligence?

16 MR HOLMES: I'm saying that, at the very least, negligence,  
17 but arguably an intention to harm competition.

18 THE CHAIRMAN: Are we quite clear on the law on this point?

19 MR HOLMES: I believe so, sir. Is there a particular point  
20 that I can --

21 THE CHAIRMAN: I think we just want to draw your attention  
22 to one case which I think is not in the authorities  
23 bundle, which is Lundbeck, the decision of  
24 8th September 2016, which I accept is under appeal, and  
25 I think paragraph 762 discusses the nature of intention

1           or negligence, refers to the Schenker case. Just think  
2           that ought to be on the record.

3       MR HOLMES: I'm grateful. We will, if we may, consult that  
4           and give you our considered view about it at the start  
5           of proceedings tomorrow, if Mr Turner and Mr Beard will  
6           indulge me.

7           Very brief -- I'm very, very close now to the end of  
8           my script, sir. You look concerned. It will only be  
9           a minute.

10       THE CHAIRMAN: Just noting the time of day.

11       MR HOLMES: Yes.

12           Royal Mail's closing submissions also attached  
13           weight to the words "provided what we were doing was  
14           reasonable and arguable". But we all know that  
15           "arguable" is a long way from what Mr Beard termed as  
16           "moderate and conservative". And as the tribunal has  
17           seen, Royal Mail was well aware that its conduct  
18           entailed significant legal and competition law risks,  
19           and the economic advice before Royal Mail told it that  
20           there was no more than "a fighting chance of successful  
21           arguing to Ofcom that a price differential would not  
22           have the effect of restricting genuine end-to-end  
23           competition".

24           The references for those quotations are set out in  
25           paragraph 262 of our closing submissions.

1           And of course, Royal Mail has never disclosed the  
2           legal advice which it took, and that's -- as you, sir,  
3           rightly emphasised, no criticism can be levelled at it  
4           for maintaining privilege. That's its absolute right.

5           But in circumstances where it then seeks to pray in  
6           aid the advice as a mitigating factor --

7           MR BEARD: No, we don't pray in aid legal advice. We have  
8           never done that. We have not waived, we don't rely on  
9           it, and it's neutral. We rely on other external advice.

10          MR HOLMES: I'm grateful. So there is no legal advices  
11          relied upon in support of the proposition that what  
12          Royal Mail did was moderate and conservative.

13          I now deal with the assertion that Ofcom's finding  
14          related to a novel abuse which Royal Mail somehow could  
15          not have anticipated, and there are three sub-points  
16          about this. First, given the evidence on Royal Mail's  
17          intentions and awareness of the risks of its conduct, we  
18          say that it's unsustainable that it would have been  
19          particularly surprised by a finding of infringement.

20          Secondly, you have our submissions that the Atlantic  
21          Container approach must be read in the light of the  
22          approach subsequently taken in AstraZeneca, and that  
23          this therefore does not assist Royal Mail. And this is  
24          set out in our closing submissions at paragraphs 264 to  
25          265.

1           Thirdly, contrary to what Mr Beard submitted  
2 yesterday, Mr Matthew in no way suggested that the  
3 conduct in the present case fell into a grey area. On  
4 the facts, it was clear, in his view, that this was  
5 appropriate conduct that should appropriately be  
6 sanctioned as abusive.

7           So, in summary, there is really no basis for  
8 Royal Mail's suggestion that no penalty should be  
9 imposed because of the novel feature nature of the  
10 conduct.

11           The next issue concerns the starting point for the  
12 penalty calculation. We say that Royal Mail's argument  
13 here is just not borne out by the penalty guidance. We  
14 should perhaps turn that up. It's at  
15 authorities bundle 1 at tab 7.

16           The penalty guidance deals with the percentage  
17 starting point at paragraph 2.4 and following.

18           In 2.4 it makes clear that UK regulators will apply  
19 a starting point of up to 30% to an undertaking's  
20 relevant turnover in order to reflect adequately the  
21 seriousness of the particular infringement.

22           2.5 stipulates three factors to be taken into  
23 account in each case. Looking at these, all three  
24 suggest, in my submission, that the present case is  
25 likely to be towards the high end of seriousness. How

1 likely is the type of infringement at issue by its  
2 nature to harm competition? The extent and/or  
3 likelihood of harm to competition in the specific  
4 relevant circumstances of the individual case? And  
5 finally, whether the starting point is sufficient for  
6 the purpose of general deterrence.

7 Indeed, there are many features in the present case  
8 that you often would not even expect to see made out in  
9 a foreclosure decision, including actual effects on  
10 Whistl.

11 Paragraph 2.6 then sets out the principles to be  
12 applied in setting a specific starting point. You can  
13 see from the second bullet point, and from 2.7, that  
14 a starting point below 10% is unusual, and would not  
15 normally be applied. That means one would normally need  
16 to% a starting point between 10% and 30% depending on  
17 the seriousness of the conduct.

18 One can readily imagine a factual scenario with  
19 a less serious infringement and, given the finding of  
20 a deliberate strategy and the actual impact on Whistl,  
21 a starting point of 20% right in the middle of the  
22 standard spectrum is, in our submission, both fair and  
23 appropriate. We say that a useful comparison can be  
24 drawn with the Balmoral Tanks case. We don't need to  
25 turn it up. But it's at authorities bundle 2, tab 23.

1 That concerned information exchanged at a single meeting  
2 and the CMA nonetheless selected a starting point of 18%  
3 of the relevant turnover, and that was upheld by the  
4 Competition Appeal Tribunal, and that was despite the  
5 fact that there was a lack of specific evidence of  
6 specific harm as set out at paragraph 146 of the  
7 tribunal's judgment.

8 Turning now to the multiplier used to reflect the  
9 duration of the conduct, in selecting the multiplier of  
10 one, Ofcom again adopted the correct and appropriate  
11 position under the guidance, and you can see that from  
12 paragraph 2.16 of the guidance, which states in terms:

13 "Where the total duration of an infringement is less  
14 than one year, the CMA will treat that duration as  
15 a full year for the purpose of calculating the number of  
16 years of the infringement."

17 And only:

18 "In exceptional circumstances, the starting point  
19 may be decreased where the duration of the infringement  
20 is less than one year."

21 It is clear from Balmoral Tanks that it is difficult  
22 to qualify as an exceptional case. I just point the  
23 tribunal to paragraphs 147 to 149 of the judgment.

24 Now as for the geographic market definition, in  
25 reality, any arguable error in the market definition

1 would almost inevitably have led to a full substantive  
2 ground of challenge by Royal Mail on this point. And  
3 the fact that this comes up as only a minor point on  
4 penalty is, we say, illustrative.

5 However, Ofcom maintains that the market definition  
6 in this case was correct, and we set out the reasons at  
7 paragraphs 275 to 279 of our defence. And regardless of  
8 that, points such as this one are addressed more than  
9 adequately, and in any event, by way of the very  
10 substantial proportionality reduction Ofcom applied.  
11 That brings me to the last point on ground 6,  
12 proportionality. As foreshadowed at the outset, the  
13 fine of £50 million already represents a very  
14 significant reduction on the overall amount Ofcom  
15 calculated applying the penalty guidance.

16 It specifically and expressly reflects factors such  
17 as the suspension of the price differential and the  
18 short duration of the infringement, and overall it  
19 amounts to a small percentage of Royal Mail's turnover.  
20 That's 0.5% of the group's annual turnover in the  
21 financial year before the imposition of the penalty, and  
22 also 0.5% of its average turnover in the 3 years prior  
23 to the imposition of the penalty.

24 That compares very favourably with the savings  
25 Royal Mail was able to make by avoiding Whistl's entry

1           into the market as a direct delivery competitor. As you  
2           will recall from the traffic lights slide, Royal Mail  
3           estimated that an as-planned roll-out was likely to  
4           cause it a revenue loss of between 5.9% and 9.4%.

5           Finally, Royal Mail has repeatedly drawn comparisons  
6           with Intel. And as explained in our written closing  
7           submissions, the Commission operates under different  
8           guidelines and is therefore not a relevant comparator.  
9           Moreover, if one were to draw a comparison, it's worth  
10          bearing in mind that the fine imposed in Intel was over  
11          1 billion euros, some 20 times the fine Ofcom imposed on  
12          Royal Mail in the present case.

13          So, sir, those are my submissions on penalty. It  
14          would not be appropriate to adjust the penalty, in my  
15          submission. The correct penalty was adopted and should  
16          be upheld by this tribunal.

17          Subject to any further questions, and the point that  
18          you have raised in relation to Lundbeck, those are my  
19          submissions.

20        THE CHAIRMAN: Thank you very much, Mr Holmes.

21          Tomorrow, Mr Turner. We have been thinking about  
22          the point that Mr Beard made, that in part of your  
23          written closing submissions you take issue with  
24          Mr Harman's evidence. I think Mr Beard suggested that  
25          you were taking issue on the basis of things that were

1 new, that had not previously been canvassed.

2 MR TURNER: Yes.

3 THE CHAIRMAN: Yes. I have to say that I think that is  
4 contrary to the ruling I made on the fairness or  
5 otherwise of Mr Harman not being able to give evidence,  
6 and we not adjourning the proceedings. I would invite  
7 you to bear that in mind in your oral closing  
8 submissions.

9 MR TURNER: What I will do is I will explain what I've done  
10 in the written closing submissions to show why it's  
11 compatible with your ruling.

12 THE CHAIRMAN: Well, that would be a start. I may not  
13 agree. Thank you.

14 Right. Thank you very much.

15 Tomorrow morning, 10 o'clock, then, again?

16 MR TURNER: Yes, 10 o'clock.

17 THE CHAIRMAN: I think so. Take advantage of where we are.  
18 Thank you very much.

19 (4.18 pm)

20 (The hearing adjourned until 10.00 am the following day)

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