IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 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 18

A P P E A R AN C E S

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

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

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

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Wednesday 17th July 2019

(10.00 am)

THE CHAIRMAN: Welcome to what might be the final day.

MR HOLMES: Might be, sir. (Laughter).

THE CHAIRMAN: I'm just saying that to keep everybody interested.

MR HOLMES: Yes, well, I have any one point to add to my submissions yesterday.

THE CHAIRMAN: Carry on.

Closing submissions by MR HOLMES(continued)

MR HOLMES: It's simply the addition to a further authority to those already before the tribunal, one that was referred to by the tribunal yesterday, that is the Lundbeck judgment in the General Court. We've handed up copies, which I hope the tribunal has.

THE CHAIRMAN: We have copies.

MR HOLMES: We rely, sir, on paragraph 762 in support of two propositions. The first is that the test of whether an offence was committed intentionally or negligently as a matter of European competition law is whether the undertaking concerned could not be unaware of the anti-competitive nature of its conduct. And secondly, in applying that test, it does not matter whether or not it was aware that it was infringing the competition rules of the treaty. And we say that that is consistent

with the approach taken in the decision, and we refer you specifically to paragraphs 10.12B and 10.33 of the decision.

That was all I had to add, sir.

THE CHAIRMAN: Thank you, Mr Holmes.

MR BEARD: Just on that, we noted that the tribunal raised it. It is actually referred to, that paragraph, and the essence of the relevant propositions are in fact quoted, paragraph 9.9 in our notice of appeal, and Lundbeck 762 is in fact footnoted at footnote 569.

THE CHAIRMAN: We didn't think it was controversial. We just wanted to make sure we had access to all the relevant documents.

MR BEARD: Yes.

THE CHAIRMAN: We're not trying to make any point.

Mr Turner. You are now on.

Closing submissions by MR TURNER

MR TURNER: May it please the tribunal, I adopt the submissions you heard yesterday from Ofcom. One of the functions of closing submissions is to give the tribunal a suggested route map for your judgment. What I propose to do, then, by way of preliminary, is to deal with three overarching points which I hope will be of help to you. I'll then proceed to make one general point about the substantive framework which we recommend for your

analysis in the judgment. Finally, I'll sweep up a number of the loose ends from the specific submissions made by Royal Mail's council on Monday, and in writing.

THE CHAIRMAN: Do you think we should deal first with this issue on paragraph 176 of your closings and get that out of the way?

MR TURNER: I would prefer to deal with that in sequence if I may, sir. I'd prefer to deal with that when I come -- if you're talking about Mr Harman and one paragraph, it would be much better if I can address that when I come to it. I will deal with it.

THE CHAIRMAN: I think I'd prefer to get it out of the way now so we're clear on what we're hearing. It might possibly seep over into other parts of your submissions, and it would be a shame to --

MR TURNER: It will not seep over into other parts of my submissions. I will deal with it if you insist.

THE CHAIRMAN: What's your objection to dealing with it?

MR TURNER: My objection to dealing with it now is not only that it will take me out of turn but it will derail the process. But, sir, if you want to deal with it, I will --

THE CHAIRMAN: -- (overspeaking) -- process is not so fragile that you will be derailed by dealing with a relatively short point. I hope it is a relatively

short point. I'm not making a big thing of it.

MR TURNER: Well, it would be a great shame to make a big deal of it because we say it is a very simple point. We agree with the tribunal that it is important to make sure that there is no aspect of what we're saying that is untoward but we don't think there is.

THE CHAIRMAN: I think the point against you is that, bearing in mind the careful and difficult discussion we had about the consequences of Mr Harman no longer being available for cross-examination, our ruling was based on the assumption, amongst other things, and -- I say assurances from counsel, but at least statements from counsel, including one from you -- and I'll quote from it. It's the transcript of Day 15. It says:

"My point at the moment is that these are matters of opinion where the ground has been traversed very fully ahead of the hearing with input from Mr Harman on them and on which this tribunal is entitled to disagree."

That is page 81. So the question is, are the points you're making in relation to Mr Harman, and the one that's been focused on in particular, matters where the ground has been traversed very fully in front of the tribunal? I think it's as simple as that. If you can assure me that it is.

MR TURNER: And I can.

THE CHAIRMAN: We're not going to refuse to hear you but obviously this goes to weight, the weight that we might attach to what you say. There's no point in you wasting time on things where we can't be sure that we're going to attach weight to them. So it's your problem, in a way.

MR TURNER: I'm very grateful for the clarification, sir. Is it only the point in 176 that you're concerned about? Nothing else?

THE CHAIRMAN: That is my understanding. It is a point Mr Beard made.

MR BEARD: I highlighted that. I think, as I said, the way in which the criticisms are made of Mr Harman, and the suggestions that material is irrelevant and the way that is reasoned, depending on the way Mr Turner is now going to put his case orally, we say that much of what is done here goes beyond what is appropriate in the light of the tribunal's ruling. But we focus particularly on that because that crystallises the point rather than working through paragraph by paragraph.

THE CHAIRMAN: All right. You're entitled to take that point when you address us in reply.

MR BEARD: Of course.

THE CHAIRMAN: And for us it's a question of what weight we will attach to what is said. We're very conscious of

the need to be vigilant, and the basis on which we agreed to proceed in Mr Harman's absence. And I'm assuming that you, Mr Turner, are also conscious of that.

MR TURNER: Absolutely, sir. And the point that is made there, and I will therefore show it to you, and the other points Mr Beard has now raised with it, are things that were covered already by the experts in their rival submissions, they're in the joint statement, and in any event you have the factual material too on which you can form your judgment.

THE CHAIRMAN: Okay, well, we're not wishing to derail you too much. Are you able to assure us at this stage that you can point to material in the substance of what we've looked at, whether it is the joint expert statement or other expert opinions, that you're basing your points on?

MR TURNER: Yes, I will. I fully intend to do that.

THE CHAIRMAN: Well, on the basis that you must do that, I'm happy to proceed now.

MR TURNER: I'm grateful.

Sir, I'll go back to the beginning, and I said I was going to deal with certain basic points that the tribunal will want to take into account in its judgment. The first of these is a constitutional matter. It was

a question that the chairman raised with Mr Beard concerning the approach the tribunal should take to deciding the issues in the grounds of appeal, based on all the evidence that you've received, and so you said this was something we may well need to come back to.

Sir, you rightly picked up on footnote 96 in Royal Mail's written closings. At this point, may I ask the tribunal, if it would be convenient, if you could have to hand for my submissions all three of the parties' written closing submissions because I will be referring to them.

THE CHAIRMAN: You may take it that we have.

MR TURNER: Sir, you referred to footnote 96.

Footnote 96 is a very clear statement of Royal Mail's position, but there and elsewhere too, Royal Mail says it is wrong for you to decide the underlying issues yourselves, or at least that it should be exceptional if it means doing so by reference to any points which weren't addressed in the decision.

Another very clear place where this happens you will see on page 72 of their written closings, and it's referring to the same area, the AEC test, and a claim that Ofcom didn't deal with these matters at the administrative stage or in its decision, essentially that that is that.

If it's taken at face value, this means that a significant amount of the evidence you've received has been a waste of time. It would include Mr Parker's expert reports, although Royal Mail never sought to exclude them from the case as inadmissible. It would include much of the illuminating debate in the hot tub. And it would even include your assessment of the demeanour in court and the quality of the evidence which was given by Royal Mail's former COO and director of regulation and government affairs, Ms Whalley.

When the chairman challenged Royal Mail's counsel, he retreated. He suggested that if you do have regard to new material which has emerged in the trial, it could be taken into account in your judgment but you should be very slow to uphold Ofcom, and instead he indicated that you might more appropriately comment on the issues to assist the regulator and then send it back to Ofcom for a reconsideration. That's Day 16, pages 124 to 125.

The submission is profoundly misconceived. You know the trial you've presided over is an appeal on the merits. What does that mean? It means that you're not just considering whether Ofcom was entitled to reach the conclusion it did based on the evidence in the decision and on the reasoning in the decision. That is another kind of legal procedure which is called a judicial

review.

Your function is to seek to decide the substantive issues of infringement raised in the grounds of appeal, as far as you can, by reference to all the material which has emerged in a very full judicial process. You're aiming to reach your own final decision about whether Ofcom got it right or wrong. This is a basic point, and in view of Royal Mail's position, and its reference yesterday again to the Argos case, it's necessary for me to make it good. Briefly.

The sharpest demonstration that their approach to the whole case is wrong is shown by the Napp case. I won't labour this but I do want to draw to your attention a short number of paragraphs, and you'll find it in AB1, authorities bundle 1, at tab 10. The essential point is that in that case, not only did this --

PROFESSOR ULPH: Which tab are we at?

MR TURNER: Tab 10.

Now my essential point is that not only, in that case, did the tribunal have regard to new documents which were never before the Competition Authority, it actually ordered disclosure of them itself, in the judicial process. And they related to the central question of whether the company had anti-competitive

intent, and they were instrumental in the tribunal's final judgment upholding the authority.

Similarly to Royal Mail in this case, the company in that case left no stone unturned, and they appealed the judgment to the Court of Appeal. The Court of Appeal judgment records very bitterly that their Lordships were presented with a bundle of 60 authorities and more than 1,000 pages of documents. It was never suggested, though, that the tribunal's approach to receiving and relying on new evidence was in any way wrong.

If I may invite you to turn to page 19 of the judgment in front of you, at the bottom you have paragraph 81, which records that the tribunal in that case wrote to the parties -- this was before the trial -- indicating issues on which the tribunal considered time at the hearing could profitably be concentrated. It asked Napp, the company, to draw to its attention any documents from Napp, at board or senior management level, which discussed or referred to its objective or strategy or policy considerations that the company took into account when it was setting its prices. It was another pricing case.

Go over the page to 82.

What happened was that the company replied enclosing a bundle of 21 new documents. So that was the position.

Then if you go forward to page 30, halfway down there's an italicised heading, "The documents disclosed following the tribunal's request".

You'll see that Napp, the company, argued it was inadmissible, save to the extent it supported its own case, otherwise it would be unfair. It wasn't relied on in the decision, and they questioned the inferences to be drawn from the documents.

The tribunal pointed out its wide powers to secure the just expeditious and economical conduct of the proceedings, and these are powers which you still have under a different name.

At 129, that the tribunal decided to ask for their attention to be drawn to the documents in view of the fact that in the notice of appeal the company was asserting the factors that were or would be taken into account by the company in setting its prices, but as far as they could see without referring to any of the key documents.

And 130, that the tribunal, having requested the documents, that they said they were admissible and they intended to rely on them.

Go to page 32, paragraphs 134 and 135, the tribunal was dealing with an objection to this, based on a judicial review authority, Ermakov. The tribunal said

at 134:

"... given the powers of this Tribunal, it seems to us the analogy with Ermakov does not go as far as Napp submits. In those circumstances it is virtually inevitable that, at the judicial stage certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director."

Then at 135, they reach the decision that there was nothing in that reasoning which precluded them from determining the appeal based on everything they had. And finally, on page 80, two final paragraphs, are at 311 and 312. What happened was that the Competition Authority said: these are important documents, they weren't there before us, but you should take them into account. And at 312, the tribunal said:

"In our judgment, while these documents pre-date the

period of the infringement, they explain the origins and motives of Napp's pricing policy."

And that:

"... they [were] in [their] view evidence of what Napp's intentions were during the period of the infringement."

So that was an orthodox case where it was established right at the outset of this tribunal getting up and running how it's meant to function, and an approach to an appeal which says things which weren't before the regulator mean that you shouldn't uphold it or you should be slow to do so and you should remit the case to it, are fundamentally wrong.

And I should add that this then went to the Court of Appeal, which confirms, unsurprisingly, that in appeals from a specialist expert tribunal, such as this one, it would be extremely slow itself to overturn findings which you make on matters such as foreclosure and absence of competition on the merits.

So if you put away that case, I then want to go forward in time to one of the cases that Royal Mail has relied on in this appeal. It's the JJB Sports case which is at RM12, tab 2. It's the closing submissions bundle that Royal Mail handed up. It's been labelled RM12 but you may have it under a different ...

THE CHAIRMAN: Yes, it's not labelled but we have it.
MR TURNER: I'm sorry, sir?
THE CHAIRMAN: I said it's not labelled but we have it.
MR TURNER: It's in tab 2, and there's a single paragraph which really sums it all up. And that is on page 83. On page 83 you'll see a heading "New Evidence Before the Tribunal". And it succinctly summarises the whole point.

> "The Tribunal has now heard a great deal of evidence, much of which is not referred to in the decision. Such a situation is a common occurrence in appeals to the Tribunal which are appeals 'on the merits' and effectively take the form of a new hearing ... as the Tribunal observed in Napp ... it is virtually inevitable that, at the appeal stage, matters will be gone into in considerably more detail than was the case at the administrative stage. New witness statements may be filed; new documents may come to light; a witness may say something in the witness box that has never been said before. Sometimes a new development will favour the OFT, sometimes it will favour the appellants. In our view, provided each party has a proper opportunity to answer the allegations made, and that the issues remain within the broad framework of the original decision, we should determine this appeal on the basis

of all the material now before us."

That is the law. Yesterday morning, Royal Mail's counsel signalled that it was persisting in its stance and relied on an interim judgment in 2003, a year before this one, which is a case called Argos, Argos v Littlewoods. That was a case about collusion in the selling prices for toys and games. And consistently with that, Mr Beard's position is very puzzling. The issue was totally different from the one that you are concerned about. That was a case where the Competition Authority put in a great deal of new, basic factual witness evidence when filing its defence in advance of the trial. It wasn't responsive to any new point in the grounds of appeal, it was an attempt, effectively, to amend the decision.

If you pick that up, that's in the first appeal bundle again -- authorities bundle, I'm sorry, at tab 30. You'll see the position on page 7 in that case.

THE CHAIRMAN: Tab 13?

MR TURNER: Yes, it should be tab 13, the Argos v Littlewoods judgment. I'm going to page 7, where there's a heading "The Three New Witness Statements", and if you glance at that, you'll see what happened, as I say, is that following the service of the defence, the OFT served three further witness statements

which it now seeks to adduce as evidence.

Paragraph 28:

"In our view, those witness statements contain significant evidence that, at first sight, is material to whether an infringement of the Chapter I prohibition has been committed. The witness statements also contain evidence that is not in the original notes of interview or indeed the decision. In general, the witness statements amplify, at first sight to a considerable extent, the evidence available to the OFT as to whether there was an infringement, how the infringement came about, and the course it took.

"29. The position therefore is, that the OFT seeks to support the decision with new material that is not contained in or referred to in the decision, and was not put at the administrative stage. It is only now, after the notice of appeal has been filed, that Argos and Littlewoods have seen this material for the first time."

Now Mr Beard referred to page 28, paragraph 66. It begins on the bottom of page 27. That is a paragraph which sets out a series of propositions or principles arising from cases where similar behaviour had either happened or had been alleged before. And the point that that issue was different from an ordinary case such as we have before us today, when new material comes out of

the cut and thrust of the trial and questions from the tribunal members, is made crystal clear in the following paragraphs 67, 68 and 69.

If you look at 68:

"Unlike the situation in Napp, the appellants in this case advance no material new evidence beyond that already advanced at the Rule 14 stage. The three witness statements ... do not, therefore, deal with a new case ... in Napp the new evidence did not involve any material addition to the evidence of infringement set out in the decision in question.

"69. In the present case, by contrast, the three witness statements now sought to be adduced by the OFT contain, at first sight, direct, new, evidence of the infringements alleged in the decision."

So it was an entirely different set of circumstances.

You can put that case away now. That is the first preliminary point, the constitutional matter. I hope it's been of assistance to remind you of the key foundational authorities.

The second preliminary point I wish to make is this: this is a case which Royal Mail is likely to say turns on the important points of law. Pure law. If they lose, they will look for points of appeal on law, or

even a reference to the Court of Justice, if that is still possible at the time of giving judgment.

We invite, and we encourage the tribunal, to make clear and definitive findings about the underlying facts based on the highly revealing evidence that you have read and heard at the trial, because this case does not turn on points of law. In particular, I will emphasise three areas. After having heard the Royal Mail witnesses, Ms Whalley and Dr Jenkins, the consultant, you have gained a deeper understanding of a central question in the case, which is whether what Royal Mail did when it introduced the price differential counted as competition on the merits or not. You are in the position to make a series of very specific findings which, together, lead to the irresistible inference that Royal Mail's conduct was a form of foreclosing behaviour, and not competition on the merits.

Those are conclusions, if you make them, that the Court of Appeal would be very slow to interfere with, as it sharply underlined in the Napp case.

So far as the changes to the zonal tilts are concerned, that's an area of the case which was heard on the margins in this trial. The lawfulness of that aspect of the CCNs falls outside the scope of these proceedings. But we would suggest that you've heard

enough to appreciate that there are real concerns about whether that too was anti-competitive, anti-competitive targeting behaviour, and illegal, as Dr Jenkins warned Royal Mail was a risk. Day 7, pages 142 and 13 of the transcript.

Second --

THE CHAIRMAN: Sorry, are you suggesting we can stray outside the grounds of appeal?

MR TURNER: I'm suggesting that you should not do so, stray outside of it, but if you were able to bear in mind the position that you've heard material that gives that flavour, it may be something that you wish to make some indication about in your judgment. It's a matter for you. At the very least, it's not something to treat as lawful behaviour, as part of the factual context.

THE CHAIRMAN: Thank you for the advice.

MR TURNER: That's the Royal Mail witnesses and what you get from them. You've heard the Whistl witnesses, Mr Polglass and Mr Wells. From them, you've gained a good understanding of how the notification of the price differential produced effects on firms in the marketplace generally, the customers, and on Whistl and on LDC specifically. And you are in a good position to reach clear findings of fact about those things too.

Third, and finally, you've heard the economic

experts, Mr Dryden, Mr Matthew, Mr Parker, both in the hot tub and individually, and by doing so, you've been able to explore in depth the question of foreclosure of competition in the particular circumstances of this market, and to understand the suitability of the AEC test designed by Mr Dry.

In our written closings, we suggest that your approach to dealing with the arguments on the AEC test should be multi-layered. If you have our written closings there, may I invite you to open them and go to page 48. This is the section of our submissions dealing with the AEC test.

The first thing we deal with, if you simply have the pages open, is the point of law, which Royal Mail has raised. In a nutshell, they argue that an AEC test is an indispensable part of assessing any pricing abuse after the Intel judgment.

We say that's a misreading of Intel. If you look at paragraph 138 of our submissions, you will see there the thorough legal analysis of the Intel judgment which we conducted is entirely in line with Ofcom's oral submissions yesterday. Every point.

So it was there in writing before Royal Mail's counsel stood up. But none of it was engaged with by Royal Mail when making oral closing submissions on

Monday. Presumably Royal Mail's waiting until the final reply, but that is really not a satisfactory way for an appellant to approach closing oral submissions.

Mr Beard did seem to suggest in general terms that Intel was a case in which parallels stood to be drawn with the circumstances of our case today. And you heard him argue that Intel was a case in which there was a non-contestable part of the market, and where there were very substantial economies of scale and scope, he said, and where the court said that the appropriate way of investigating anti-competitive foreclosure was to apply an AEC test.

That's Monday, pages 147 and 153 to 154.

He was pressed to give references to show what he was relying on in the Intel judgment, or in other material, and he did it overnight. He referred to a certain section of the Commission decision in the Intel case. I'll invite you to look at that now. It's at authorities bundle 10, tab 119.

Now, the references he gave overnight were on page 302 on the bottom right-hand side to pages 1002 to 1012 of the Commission decision.

I'm sorry, paragraphs 1002 to 1012.

If you look at, for example, paragraph 1004 on page 302, you see the point, three or four lines down,

that it was concerned with the situation where an entrant would not have as broad a sales base as Intel, and would be foreclosed from entering. It concerned a situation where the entrant could be as efficient as Intel in the contestable part of the market.

And there is an important difference between that case and the present, and our case is far more akin to the postal market in the Post-Danmark II case. In the present case, it is a fact that Royal Mail has significant economies of scope and that it can allocate the vast majority of its common costs to other services, and does so in Mr Dryden's AEC test.

In the present case, we know that there are economies of density too, and that an entrant starting from zero can't hope to replicate Royal Mail's advantages, which come from the fact that it's got 100% of the volumes in each area. Part of the modellings approach.

Furthermore, the nature of the behaviour in our case is different from what you have here. If you go forward in this to paragraph 1625, further on, you'll find that on page 467, looking at the numbering at the bottom, you'll see, left-hand side, in paragraph 1625, that Intel was relying on an argument there, at 1, that by using a rebate it has only responded to price

competition from its rivals and thus met competition. And as we have discussed here, the behaviour of Royal Mail did not involve price discounts to meet competition.

In any case, the AEC point -- you can put this way now -- is not one that should be decided by you on the basis of the law and differences with Intel alone, although you will no doubt wish to cover that. If this case is decided by you against Royal Mail, this is the principal area where they will try to raise a point of law for appeal, if they can. And it is for that reason we encourage you to make the layered series of factual findings outlined in our written submissions between paragraphs 140 and 160.

If I may, I wish to break those down, if you're looking at our written submissions.

So, beginning on page 50, they concern first, from paragraph 140, the reasons why the market conditions in our case fall within the letter of what was said in Post-Danmark II, because that case outlined circumstances where an AEC test is just not illuminating to help prove whether you have foreclosing conduct, or harmed competition and consumer interests.

At paragraph 141 you'll see that we set out the two circumstances that were specifically mentioned in that

case, Post-Danmark II. The two circumstances were: a situation where the market conditions make emergence of an AEC to a monopolist practically impossible; and the situation where the presence of a less efficient competitor would be likely to exert a constraint on the dominant firm.

That's what was said in that case, as the reason for taking a different course.

At paragraph 142, we refer to the very clear evidence you have received that the competitive constraint criterion spoken to in Post-Danmark II is met in our case. Set out there, the evidence showing that.

At paragraphs 143-4, the other side and over the page, and 147, referring to what Mr Parker said, we refer to the evidence you've received which allows you to conclude that the condition of practical impossibility is met here too, that you cannot realistically imagine an entrant being able to match these cost advantages enjoyed by Royal Mail.

That's the letter of Post-Danmark II.

Second, we go on from that to refer to further considerations which fall within the overall principle articulated in Post-Danmark II. The principles showing why an AEC test isn't a good tool for giving you an answer to the question you're really concerned about: is

there a restriction of the competitive process which harms consumers?

These include, in paragraph 150 of our submissions, the clear evidence that a new entrant like Whistl would need to grow to achieve economies of scale over time and density.

Paragraph 152 includes an observation that Mr Beard picked up in his address on Monday. It's the observation that Mr Dryden's analysis doesn't, to use his words, describe a roll-out path. We term that misleading, a roll-out path, and it is. I should stress, in response to Mr Beard's brief remark about it, that this is in no way any personal criticism of Mr Dryden. Mr Dryden is one of the finest industrial economists in the field, and he has a distinction widely recognised and admired at the Competition Bar of being entirely straightforward and reliable. The point we're making here is about the test, not the person.

And the particular issue is not about which sequence of SSCs a new entrant can be expected to follow in a roll-out path, as Mr Beard wrongly apprehended. That was the transcript, Day 16, Monday, page 184.

Our point, as you can see at paragraphs 150 to 153, was a different one. Our point is this: it is that the Dryden test doesn't take into account the circumstances

of a nascent entrant struggling to grow to scale from a very small base by means of a gradual roll-out. At paragraph 153 we cite Mr Dryden's evidence on this in the cross-examination. If you look at the quote, you will recall that the way he said his test overcomes that scale issue is by envisaging that the entrant compensates for early losses by becoming a more efficient competitor than the dominant firm in the future. The quote. The standard of the as-efficient competitor becomes the standard of the more efficient competitor.

Then the second wider principle we deal with at paragraphs 154 and 155, and that is that it has emerged in the oral evidence that the Dryden test fails to take into account a second, very important feature of the case before you. Regardless of the financial adjustments to his model, the fact is that Whistl's customers who can't coordinate with each other to sponsor the newcomer, they reacted to the signal of the price differential by declining to place further business with Whistl. That's what happened.

Mr Polglass, paragraph 31 of the witness statement.

Leave aside the private expectations or behaviour of Whistl, that is the way that the customers responded. There's a prisoner's dilemma dimension to this. They

each don't want to be the one whose customer service is disrupted if Whistl falls over under the commercial pressure. And this is despite Whistl, as you heard and saw, going round to their customers to reassure them that it would absorb the financial pain of the price differential itself. I showed you some examples of the letters.

So this feature of the anti-competitive behaviour and its market impact wasn't factored into the model, as Mr Dryden confirmed. You see that at paragraph 155, with the quotation:

"The short answer is it hasn't."

It's difficult to see how this sort of thing could be factored in without making some quite questionable assumptions which are hardly compatible with the bright line legal certainty that Royal Mail demands it must have.

Now, on Monday, Professor Ulph suggested that one could deal with the legal certainty issue that Mr Beard was referring to again by modifying the pure AEC test to model things like the VAT advantage and other non-replicable advantages. It's page 185 of the transcript. Well, in fact, that is very close to what Mr Parker actually did in his expert report. He identified what he called a SLIO, a slightly less

efficient operator, which in particular stripped out this advantage and then made a modest allowance for the common cost issue. And on that basis, which was only slightly updated in the supplementary report, the AEC test is failed.

Mr Parker also went down, to quote the chairman, the road to Rio, and this too did not involve using private cost information building going to the entrant. It involved taking account of the economies of density which were enjoyed by Royal Mail, and accounting for those too. And this also would have shown that the test was failed to an even greater extent.

Now, Mr Beard's response to Professor Ulph involved accepting that this sort of adjustment could be made. He said if it had been, it was "a debate that could sensibly have been undertaken", but it was not the approach taken in Ofcom's decision, and Royal Mail didn't do it. Page 186.

That is not a sufficient response. And so, third and finally, after inviting you to make findings on those issues, we come to the coup de grace, in paragraph 160, of our written submissions. Even if, despite everything, you apply the Dryden-Harman test to what they call their base case, which assumes 100% coverage in every area of the roll-out where you have

delivery on the sequence they imagine, the test is still failed. It's failed if you make a reasonable and correct assumption, which is that an entrant intending to roll out a rival network wouldn't be eligible to get on to the MPP1 plan. And why? Because its forecasts, the 2-year forecasts it would have to produce, would immediately show that it couldn't meet the conditions of the plan. It wouldn't have a reasonable likelihood of meeting them.

That is the point made in Mr Parker's supplemental report, to which both Mr Harman and Mr Dryden took the opportunity to respond to in writing themselves. Two further little reports. You'll recall Mr Harman agreed with the mathematics. He was merely instructed to disagree with the factual premise on eligibility.

Now, if you stand back, therefore, the AEC point, the whole issue, is not something that falls to be decided on the law. It should be addressed both in terms of its inapplicability to the circumstances of our particular case, and on the footing that even if it is applied, when you make appropriate assumptions, the test is failed.

To conclude on this matter, that is why there is no question of any reference to the Court of Justice. A court or tribunal could only make a reference if it

considered that a decision on an uncertain point of European law was necessary for it to reach its final decision. And here, the state of the evidence you've got, and the circumstances of the case, mean that no reference is warranted.

Now, I've touched on the eligibility dispute, so I may as well deal with that now too.

We say it's clear that Whistl wasn't eligible to join the MPP1 plan, if it presented a mailing forecasts to support the application to join, now demanded, which actually showed that it wouldn't meet the MPP1 conditions. So Susan Whalley said that Whistl had options. This was put to her in cross-examination.

Whistl did have the option to join MPP1, yes, if it decided not to roll out, and denied or dented, self-dented, its direct delivery ambitions.

There are six points which we say compellingly support this proposition on eligibility. And for the first, please open the Royal Mail closings, if you have those close to hand, page 38. You will see there, at paragraph 124, that they extract and quote the terms of the access letter contract. As you'll see from paragraph 2.1, if you read the italics, that it's explicit and, quite frankly, unambiguous. It refers to a need to show a reasonable likelihood of meeting these

two benchmarks.

Then, if you open -- and please keep this to one side, but if you go to our submissions, page 33, please look at paragraph 93. You'll recall that Ms Whalley herself accepted in cross-examination that the natural meaning of these words was as Whistl has interpreted them.

The natural way for a business to understand, she agreed what was written, was that it is forward looking. Their witness said that. Second point.

The third, you keep open our submissions, is that Royal Mail itself in its contemporaneous interactions with customers, in late 2013, behaved as though this requirement was forward looking.

If you go to paragraph 94 over the page of our submissions, we quote the document. The identity of that particular customer, which was a major well-known household name, you may recall, is redacted. But Royal Mail itself was looking forward and considering whether the plans of the business would show that it could meet the conditions. It wasn't a historic issue.

Point 4. Whistl itself plainly assumed that the requirement was forward looking, and that Whistl couldn't meet it. If you go to paragraph 91 of our submissions, on the previous page, we extract what he

said in his witness statement. And I would draw to your attention there was no cross-examination on that.

Fifth point. Mr Wells was questioned about this, unlike Mr Polglass. And the response that he gave to Royal Mail's counsel is very clear. And we set it out in full in the following paragraph, paragraph 92, in our submissions. He gave a very clear and robust response.

The sixth point requires you to turn back to Royal Mail's written closing submissions to see how they tried to deal with this on page 40, at paragraphs 127 to 130. That is where Royal Mail tried to back up their position that the condition of eligibility was purely historic. And what you will see is that the first point, at paragraph 127, is that a customer already on the MPP1 plan wouldn't be kicked off until surcharges were being applied to 15% of its mailing volumes.

That is a different issue from what we are concerned about, which is the eligibility to join that plan.

The second point is at paragraphs 128 and 129. Those paragraphs are not terribly easy to understand, but what seems to be envisaged is that a notional entrant is starting from scratch on the MPP1 plan without having rolled out at all. And that, again, is just irrelevant to the question before us. They finally turned to the position of Whistl and its eligibility,

after all of that, at paragraph 130, at the foot of page 40. The assertion there is that Royal Mail told Whistl it would be eligible on the basis of its previous posting profile, presumably, that is, even if Whistl intended to continue to roll out.

That has no basis in any evidence. The reference that they give in connection with this point that they told us is the note of a meeting which occurred on 17th December 2013 between Whistl and Royal Mail. At that meeting, all that the Royal Mail person, Mr Agar, said, was that Whistl currently satisfied the conditions of MPP1. Ms Whalley was the only person I could ask questions of about that, and she accepted it, in the cross-examination. That is paragraph 96 of our submissions, setting it out.

Finally you'll see, at paragraph 130(b), at the top of page 41 of Royal Mail's closing --

THE CHAIRMAN: Sorry, just to be clear, you're saying that Ms Whalley accepted that what Mr Agar said was that at the current level of roll-out Whistl satisfied the eligibility criterion?

MR TURNER: That's all -- but it didn't go beyond that, yes. She didn't suggest that it went further than that. She was the only person who could be questioned about it, so all you have is that note of the meeting, which doesn't

deal with the question of eligibility in circumstances where Whistl is considering a roll-out.

THE CHAIRMAN: And she wasn't at the meeting.

MR TURNER: And she wasn't. She says in her witness statement "I was briefed after it"; that's why I asked her questions, but she couldn't say any more about it.

So, finally, one comes to paragraph 130(b), which is at the top of page 41 on the Royal Mail submissions. This is effectively a statement that doesn't matter, because Whistl was in any case resistant to providing forecast information to Royal Mail, which would have been necessary for joining this plan.

They say that based on the evidence that was given orally by Mr Nigel Polglass. That claim is wrong, if it is trying to suggest that Mr Polglass agreed that Whistl wouldn't have provided forecasts as the price of avoiding this price differential. That point, would you have done so, was not put to Mr Polglass, although it was an explicit part of his witness statement.

May I ask you to turn that up in bundle C2, tab 5. There you will see the proposition that he wasn't questioned about on page 181 of the red numbering at the bottom in paragraph 63. If you have that open, what he is saying is:

"I'm not saying that we would have provided the

forecast happily. For obvious reasons, we found the idea of informing a super-dominant and unavoidable trading partner our detailed plans for where we were going to compete in the future deeply unattractive, but it would still have been far preferable from having our E-to-E business plan blown apart by a price differential and it seems likely that measures could have been put in place by Royal Mail to allay some of those concerns but we were never given the option."

And so on.

That issue was not asked about of Mr Polglass.

So to conclude on eligibility, the tribunal is in a position to make a strong finding that the natural and reasonable way to understand the eligibility conditions for MPP1 is that it was forward looking, and that the evidence at trial fully supports this.

So that deals with those preliminaries. I then move to the next topic, which is the substantive legal framework which we recommend for the judgment. And if you would, please, I'd ask you to pick up the annotated list of issues which was attached to Royal Mail's written closing submissions. You'll recall that what they did was that they took the list of issues and inserted an extra column.

What you'll see is that the parties in the list of

issues for the tribunal didn't group the issues only under the six grounds of appeal. They came up with a threshold dispute, which I will call issue zero. Issue zero, the issues at the beginning, is essentially whether Ofcom's analysis in the decision was exclusively done under the rubric of improper price discrimination, and whether, as Royal Mail is contending, it's also the framework for analysis, the only framework analysis that the tribunal should now adopt too.

So you see from page 1, if you have that in front of you, the first row, that Royal Mail is saying that this case is essentially about discriminatory pricing within Article 102(c) of the treaty and that is that. Look in the second column:

"It was inevitably and explicitly concerned with the terms of Article 102(c)."

That's their legal case.

That's the appellant's position. Ofcom's rival position is in the first row, first column, at the bottom:

"Issue zero (as included by Ofcom).

"Did the decision find that Royal Mail infringed Article 102 generally or did it find only that Royal Mail infringed 102(c)?"

At first sight, this might appear to you to be an

arid dispute. The dispute matters, we say, for two reasons. First, it matters because it's a necessary prelude to Royal Mail's ground 1. Their ground 1 is a mechanistic claim that, because you label this an abusive price discrimination case, it requires prices actually to have been charged and paid to get off the ground.

There are many reasons why that very odd ground of appeal, which fills over 30 pages of Royal Mail's closing submissions, can be dismissed without hesitation. But if you find in any case that Ofcom did also analyse this conduct, using the time-honoured two-stage test, asking itself, is this competition on the merits, if not, is it likely to restrict the competitive process, then ground 1 doesn't even get off the starting blocks.

That's because Royal Mail accepts, it's explicitly accepted, that notification to the marketplace by a dominant firm of its pricing intentions is something which is capable of being abusive behaviour in its own right. It says it just can't be price discrimination.

They say that in their opening skeleton at paragraph 6.

That is the first reason why this threshold dispute matters. The second is because of their implications

for their third ground of appeal. According to Royal Mail, once you've labelled this a pricing conduct case, then becomes a necessity, as we were saying earlier, as a matter of law, to apply an AEC test to it. Pricing case, AEC test. It's a mechanistic component of the appeal again.

If you turn to page 8 of this annotated list of issues, you see it set out in vivid black and white terms at issue 3.1.1, at the foot of the page. So it's the second row, second column:

"It is necessary as a matter of law to consider the position of an AEC in assessing whether pricing conduct does or is likely to result in anti-competitive foreclosure."

Then in the box above that, on the same page, Royal Mail -- it's case is that in deciding to ignore its AECT analysis, Ofcom applied a distinction between low pricing practices, where AECT does apply, and non-LPP practices, where AECT is irrelevant, which was uncertain, flawed and contrary to authority.

I would put aside the terminology of low pricing practices, with their new acronym of LPP -- which I normally think of as legal professional privilege.

[Laughter]

It's selected by Royal Mail in an attempt to suggest

that Ofcom is putting forward some novel legal test, and the true position is very simple: if, without doing an AEC test, Ofcom was able to conclude that what you have looked at departed from competition on the merits, and that it was likely to harm competition in the bulk mail delivery market, then Ofcom wasn't applying any uncertain or novel standard at all. What it was doing was applying the time-honoured test, and an AEC test was simply not required to establish whether there was anti-competitive foreclosure. Their insistence on the AEC test is reminiscent of the saying that "to a man with a hammer, everything looks like a nail". And that's how they have approached the mandatory requirement which they say results from this test.

So perhaps this point about whether, if one applies the orthodox approach, you're entitled to reach the conclusion anyway that there is a breach of the competition rules, forms an additional point of law that can be added to my list of points for rejecting the notion that use of an AEC in this case was mandatory.

Our submission is that Ofcom did indeed approach the case in this way, and secondly, that the evidence which you've now received very fully at the trial confirms the correctness of their overall conclusions on infringement when you apply the general framework of analysis as well

as the specific rubric of Article 102(c).

It is for that reason that we would submit it would be appropriate, if your judgment did deal upfront with what the parties have labelled "issue zero" as well as grounds 1 to 6.

On the question whether Ofcom did approach the analysis this way, you heard from Mr Holmes yesterday where he carefully took you through the way that the decision read, and how it worked. I would wish to show you just a few references to supplement what Mr Holmes said. If you'd please open the decision in bundle C1 tab 1, I'll ask you please to start at page 121 of the internal numbering, at paragraphs 5.17 and 5.18. I don't think these were read to you yesterday by Mr Holmes. We looked at the adjacent paragraph.

So 5.17 is where the regulator says:

"The question is whether, in any given case, the conduct in question is contrary to the chapter 2 prohibition or Article 102 as a whole. It is not simply a question of whether the conduct falls within one of the examples provided in those provisions. In this case, example C is particularly relevant given the nature of Royal Mail's conduct. However, the key question is whether, on the facts, the particular conduct of the dominant undertaking constitutes an abuse

contrary to 102 or the chapter 2 prohibition."

So they're specifically saying, "We're not funnelling it in the way that is suggested."

MR FRAZER: It must be said, however, that that's one of the very few paragraphs in the decision that refers to 102 as a whole. Everything else apart from I think one or two others is labelled "102(c)" specifically, is it not?

MR TURNER: That is true. There are many cases where 102(c) is referred to. This, and we've given certain other references in the opening skeleton, however, do show that the analysis was considered both under that rubric and more generally under 102, and it is appropriate therefore to recognise that that was so. I'll give you just a few more references to make this good which you might not have looked at before. If you go to page 129, again discussing the framework, and you go to the bottom of the page, you have paragraph 5.46, where at the end of the discussion Ofcom concluded:

"The focus in any given case is on determining whether the particular pricing or other discriminatory practice in question amounts to competition on the merits, or anti-competitive foreclosure. As noted at 5.26, this is what our investigation has focused on."

So I hope this helps, because it shows that this was not something that was an afterthought or only appearing

in peripheral paragraphs.

Let's go back to the paragraph they referred to, 5.26. You'll find it on page 123, two-thirds of the way down the page.

"Our investigation [they say] has therefore involved consideration whether Royal Mail's conduct in this case was (a) an example of competition on the merits ..."

Which is permitted:

"... or (b), a breach of the special responsibility as a dominant undertaking to avoid impairing genuine undistorted competition."

You'll see that in the immediately preceding paragraph, 5.25, they explain that in approaching it in that orthodox way, they thought they were applying Intel, for the reasons Mr Holmes outlined yesterday.

So I turn to the findings, the findings of fact and expert assessment by you, the tribunal, that we would invite you to make on the basic issue of competition on the merits. For that, please would you open our closings on page 11.

What we have done is to set out, essentially, six key points on which we are inviting the tribunal to make specific findings. The first is referred into paragraph 32, its market context. The continual price increases from Royal Mail to the customers and the

pent-up demand for an alternative service. And the PwC due diligence document which was prepared for the investor pinpointed the same things.

If you turn the page to point 2, is that -- paragraph 34 -- Whistl was offering a type of service, standard service, which had features that were of widespread value to customers, and which Royal Mail didn't provide. And it was also offering better prices, paragraph 34.

And those are things that improve, unambiguously, consumer welfare. Mr Beard made a puzzling comment in his submissions on Monday, page 7 of the transcript. He suggested that Whistl's tracking service couldn't be good, and I quote, if it "couldn't tell whether mail was being dumped in a bin or canal".

Right. Well, that was as puzzling on Monday as it was when the same point was put to Mr Polglass. The tracking service didn't have a form of push notification which would pick up a dumping in a canal, or misbehaviour of a postie when that happened. And that isn't the point. The service had very clear and obvious advantages to the senders of bulk mail, local authorities, hospitals, banks and so forth. Imagine Thames Water sending out its bills or a hospital sending out its appointment letters. You've been shown the

evidence in the PwC report for the prospective investor that customers did value this innovative alternative to Royal Mail.

You don't need to open that up again, but there was an objective appraisal by the professional firm advising the investor.

Third point is an important one. Whistl was itself offering legitimate competition on the merits -- and I emphasise the word "legitimate" as well as "competition on the merits" -- and that is because there was a very heavy emphasis in Susan Whalley's long witness statement suggesting that Whistl's market entry should be thought of as illegitimate cherrypicking, or cream skimming, in a situation where Royal Mail was constrained, it had to charge uniform prices, it had one hand behind its back. This evaporated under cross-examination. Royal Mail's fear was shown to be fear of the competitive process. In direct delivery, because it would result in a loss of delivery volumes and mail delivery is a fixed-cost business.

And we've cited two transcript extracts which come from the Whistl cross-examination in paragraph 19, pages 6 to 7 of our closings.

The fourth point on which we would also invite you to make a finding is this: while it lasted, Whistl's

competitive behaviour did have the real effect in practice of acting as a constraint on the monopolist's power over pricing. Again, that was admitted in an unvarnished matter by Ms Whalley in the cross-examination. If you look at page 5 of our document, our closings, you will see the extract at paragraph 16. Then specifically on page 15 in paragraph 42, which I'd ask you to go to. Look at the last lines in the exchange in paragraph 42:

"So we can see here how competition in bulk mail was operating as a market constraint on your power over pricing?

"Answer: Yes."

This was an improvement in consumer welfare, through legitimate competition, which has gone.

As respects service, Ms Whalley confirmed, in answer to the Chairman, that Royal Mail didn't consider that feature of the rival service as any basis for upping its own game.

The fifth point in my sequence of six is the crunch. It is that Royal Mail's introduction of the price differential was in no sense engagement with a process of competition against Whistl. What it was was behaviour which had the aim of suppressing Whistl's ability to grow by making its access to distribution

more expensive in those parts of the country where it relied on Royal Mail, what Professor Salop called input foreclosure, and by deterring customers in the market from using Whistl. Customer foreclosure.

On page 2 of our written closings, at paragraph 6, we cite Ms Whalley's plain unvarnished admission that the nature of Royal Mail's conduct was that it may well deter the customers who dealt directly with Royal Mail -- we've set out the admission -- including the major banks, the charities, from going on to place any significant quantity of delivery business with Whistl.

Now, on this, there has been a suggestion from Royal Mail that none of us can know whether Royal Mail's prices might have been even higher in the absence of the price differential, so that the price differential might, after all, be regarded as, somehow, pro-competitive behaviour. And on this, we invite you very firmly to make a sixth finding. The evidence establishes that the relatively higher prices notified for the APP2 plan for those customers were not expected to be paid. They were not expected to be a source of income. We know that the MPP1 plan was increased in price in line with the pattern established over previous years. We know that Whistl accounted for the vast

majority of all APP2 volumes, and the proportion is set out on page 30 of Ofcom's closing submissions. We say it's very difficult to see any reason for Royal Mail to continue to claim confidential treatment for it, but there it is.

The documents show that Royal Mail's expectation was that the very small number of APP2 customers, only a few, and above all, Whistl, would be pushed onto the cheaper plan. And that is shown by the various documents that Mr Holmes took you to yesterday, and I shan't repeat that. And that is why it is correct to view Royal Mail's conduct as unmitigated raising rival's costs behaviour. It doesn't have a pro-competitive element.

Now, Royal Mail argued on Monday that in 2014, the time when Whistl made the complaint to Ofcom, Mr Parker had accepted that the price differential was a discount, and he is now resiling from that. That submission ignored the statements of Mr Parker about this point when he was questioned. The reference is Day 13, page 49. Mr Parker was not saying this was pro-competitive behaviour in any sense. What he said was that at the time of writing the 2014 report, from the perspective of Whistl, it was concerned about a discount relative to the prices it faced on APP2,

which is a different matter.

Finally, Royal Mail's written closings assert that the evidence at the trial has not shown the notified prices, the APP2 prices, to be a deterrent, which was not expected to be paid. It's their assertion, paragraphs 154 to 160 of their document.

They say it, it's asserted. They do not grapple with the documentary evidence which shows this very clearly, and which Mr Holmes in particular took you to yesterday, either in their writing or orally.

There is, though, one significant point that Royal Mail has made in its closing submissions. One relevant to competition on the merits. So if you please open their submissions again, they argue that the evidence has shown that they didn't intend to limit the growth of Whistl in the market except through fairly competing with Whistl for business. If you go to page 8 of their document, paragraph 32, you have a point that took us aback. Paragraph 32, the first three lines:

"It's clear [they say] from the materials referred to in the evidence of Ms Whalley that it was on the basis that Whistl would secure investment [et cetera] that RM proceeded."

That is a most surprising submission, given the evidence you have seen and heard. Royal Mail refers in

the same paragraph to the fact that in the board meeting on 11th December 2013, Royal Mail believed that Whistl had got financial backing for expanding the end-to-end operations. So it says, well, things had changed by that date. Put to one side that they had signalled this originally on 6th December, a few days before that.

This was said in the note of the meeting on 11th December that we believed that Whistl had received financial backing. What follows from that? It obviously does not mean that Royal Mail thought the financial backing was in the bag, or that notifying the price differential would not upset it. Ms Whalley explicitly confirmed in the cross-examination that Royal Mail was aware that whether or not Whistl got external investment would affect its roll-out plans. And the quote there is paragraph 14 of our written closings that you may want to look at too. So it's paragraph 14 on top of page 5. She was asked about that slide:

"All of these assumed no major investments available. We were aware that TNT was looking for external investment, and that whether or not it got it would affect the progress of the roll-out plans, yes, we presumed, yes."

So she says that this was actually being taken into

account, and we know from what Dr Jenkins said that it was also discussed as an issue with Oxera in the advice they received about what they could do.

Then, on 17th December 2013, they meet Whistl and Royal Mail. And I'd ask you to pick that up again, please, at C4B, tab 72. If you go to page 3 towards the bottom:

"AR asked if Royal Mail had considered what impact the price differential would have on the planned investment."

So this is after that board meeting that they're relying on. This is several days later.

"Mr Agar [SA] said the RM have not considered what impact the decision will have on that investment. He said they were only aware of the announcement by Herna and they had an inkling of an investor being lined up."

So the inference you can draw from this is that Royal Mail's factual claim in their written closings, and developed by Mr Beard on Monday, that their assumption at this point was that financial backing had been received and that was the basis on which they decided to proceed, cannot be right.

Sir, I'm making good progress. Would this be a convenient point or shall I go on?

THE CHAIRMAN: Yes, I think this will be a good point.

(11.29 am)

(A short break)

(11.40 am)

THE CHAIRMAN: We've C4B still hanging in the air. Are you still there, or can we put it away?

MR TURNER: Well, we can put that to one side, I am going to be coming to that in three minutes. I dealt with some specific findings that we'd invite the tribunal to make in connection with the question of competition on the merits. A series of matters.

Equally, on the second limb of the classic test, whether the conduct was likely to damage the competitive process, we also invite you to make certain specific findings. Those are essentially set out in our written closings at paragraphs 44 to 51. For completeness, I should add, because this wasn't crystal clear in the closings, the point that we also refer to in paragraph 63, which is on page 23. For completeness, those are, one, as both our witnesses, Polglass and Wells explained in their statements without challenge, the notification of the differential undermined the willingness of customers to sign up to the service. And that halted the ability to grow.

The second point, it caused Whistl to take prompt steps to scale back its roll-out, and the documents

you've seen leave no doubt as to the causation.

The third point, it enabled Whistl's rival, UK Mail, in the upstream area, to attack the competitive position of Whistl in retail upstream markets, and that in turn threatened the business we're concerned with, the entire E-to-E business, which depended on it.

The fourth point is that it caused the investor to add the material adverse events clause, and to hold back from the investment while the investigation was ongoing.

I draw to your attention, in case it's missed, the paper of 22nd March 2014, referred to there in paragraph 63, which was an investor paper, and that leaves no doubt that the price differential was the investor's concern. So it's the investor's words which are quoted, that Royal Mail had announced a gerrymandering of the pricing methodology which would render the end of E-to-E competition in the UK by TNT:

"If accepted, it would result in TNT or any other new entrant being on a price plan where the differential means they couldn't be profitable competing with Royal Mail."

Now, with one glancing exception which leads on from this, none of this was spoken to by Royal Mail in the closing oral submissions. It wasn't properly engaged with. There is a glancing exception. The glancing

exception, you'll recall, concerned the reasons why LDC stepped back from the investment in the venture after the notification of the price differential.

And Mr Beard sought to say that LDC had said, "This has nothing to do, our behaviour, with the price differential, it was all about the zonal tilt."

He referred to the letter which was written by LDC to Ofcom. The account he gave was incomplete and it was not correct. In that connection -- I'm sorry, my bundle is wrong, it's C4C, isn't it -- I'd ask you to pick up that letter, which is at tab 153 of C4C. You'll recall Royal Mail went to this as part of their oral closings. The context is the document which I have just reminded you of from March 2014, quoted in our written closings.

If you go to page 2 of the internal numbering of the document, you have the discussion of the price differential on that page, which I took you to at the start of the trial.

You'll recall that the summary, italics, bold at the bottom, marked "Summary", refers to the adverse impact of the price differential. It's what it's talking about. So that's the answer that they gave in connection with request 2.

It's with all of that as the background that you do go forward to page 4, the part Mr Beard referred you to,

and as the chairman rightly remarked on Monday after a break, the very first paragraph under this answer to request 6 was omitted by Royal Mail's counsel but it is relevant.

MR BEARD: I'm sorry. I read it.

MR TURNER: It refers back to the earlier responses including in connection with request 2. And it repeats, in the context of LDC stepping back from the investment, that Royal Mail's pricing proposals referred to earlier would have rendered the end-to-end roll-out commercially unviable.

So, yes, it is certainly the case that the answer to request 6 moves on to refer to the zonal tilt, but it is perfectly apparent that the price differential was an issue covered here too.

THE CHAIRMAN: As I recall, Mr Beard said that he accepted that was the case in relation to the inclusion of the MAE.

MR TURNER: Yes.

THE CHAIRMAN: Yes.

MR TURNER: The --

THE CHAIRMAN: -- (overspeaking) --

MR TURNER: -- first paragraph is referring, however, to the -- what was the influence on LDC's behaviour. Look at what request 6 is about. And this is concerned with

the final decision not to complete the agreement. And they are encapsulating what has already been referred to, which does include the discussion of the price differential.

THE CHAIRMAN: It's fair to say MAE was engaged, not included. It was engaged. That's to say it was applied.

MR TURNER: Yes, that's right.

So then, I turn, finally, to specific points on the individual grounds of appeal and put away bundle C4C.

What I will do is to make really only very brief observations to supplement Ofcom's points, and sir, I shall deal with the Harman stuff directly.

So I walk through them in turn. Ground 1.

Ground 1 can be dealt with very shortly and we have seven propositions. The analysis runs like this: point 1, the relevant conduct, which is sanctioned in Ofcom's decision, was the issue of the CCNs, and that is crystal clear from, for example, paragraph 7.3 in the decision which Mr Frazer put to Royal Mail's counsel. Monday's transcript, page 70.

The behaviour involved notification of an intention to implement new prices in three months' time. No doubt.

Proposition 2. That was market behaviour. It was

not an internal discussion. And moreover, to underline this, in the context of this industry, announcements of this kind by Royal Mail to its customer base were very important as signals to customers, which caused them to adapt their market behaviour.

And this was well known. In addition, then, to the references on this that Mr Holmes gave you, I take you to a couple more. In C4A, at tab 25, please. You'll recall the presentation which is marked or headed "Proposed actions to protect the USO".

It is very instructive to see how Royal Mail itself talks about its own behaviour. If you go to page 8, that's concerned with customer discussion on changing and possibly increasing the number of zones. Look at the description and commercial rationale in the top left box:

"The process of having a discussion with customers would demonstrate we're working collaboratively and listening to views whilst sending clear signals of possible future direction to enable customers to prepare for all eventualities."

In this organisation's relationship with its customers, this sort of behaviour, these announcements and these signals, it knows, affect the way its customers prepare to deal with things in the

marketplace.

Similarly, if you go to the -- and this is C4B, at tab 63, the Royal Mail board minutes, which are the ones which were relied on for the proposition that Royal Mail decided to proceed because it was satisfied that Whistl had obtained investment.

C4B at tab 63, going back to page 3. Again, what you have at the top of the page, G(i), is how Royal Mail itself sees the sort of behaviour that it engages in, when it makes these announcements to the customer base:

"Stephen Agar explained the company would be introducing a price differential reflecting a cost benefit to Royal Mail and increasing the zonal price differentials to better reflect competitive conditions between zones. He advised the board that the company had signalled to the market that it was getting ready to do something in this area, and TNT had immediately contacted Ofcom to complain."

So this is another reference to how they view the sort of announcements that they make. It's one of several. Mr Holmes has given you others. Essentially, this is not merely external market conduct. In this industry, my second point, this counts.

Third proposition, when you apply the overarching test, the general test for abusive behaviour, the

question for you is whether this signalling amounted to a form of competition on the merits or not. And our point is that when you are thinking about that, the notification is inextricable from the conduct which is being signalled. If what they're proposing to do is itself not competition on the merits, then an announcement that this is what you intend to do is equally not competition on the merits.

Fourth point. The next question to ask is whether the conduct was likely also to restrict competition, and that involves considering the impact of the notification on the people who were affected by it. That's Whistl and all the other customers. And looking at the interactions. And again, that is exactly what Ofcom did in the decision under appeal.

The fifth point is this: Royal Mail characterises this, this ground 1 point, as a changed case by Ofcom which really is about generating uncertainty. A novel form of abuse. Well, actually the better way of characterising this was exactly what Professor Ulph flagged up. This is not generating uncertainty. This is just signalling something which is an increased likelihood of certain specific pricing behaviour.

Sixth point. The scope of this conduct which is sanctioned also needs to be properly understood. As the

decision found, and we've given the reference in our opening skeletons, paragraph 58, what happened on 10th January 2014 was the culmination of signalling to the market definitive intentions to introduce the price differential, which first happened in December 2013.

We agree with Mr Holmes that Royal Mail cannot salami slice the infringement by taking the position that everything that happens up until midnight on 9th January 2014 is unconnected with the infringement, which is a single event on 10th January 2014.

Ofcom, in the decision, was right to view it in the round and to see it as the culmination of price signalling.

And the seventh point is this: the conduct was persisted in, tenaciously, after, even after, the CCNs were suspended.

If I may, I would ask you to open the decision, where I will give you a few short references to a few key paragraphs. So that's bundle C1. The first in the decision is on page 106. You'll see paragraph 4.196 and the quote from Royal Mail there, so you see that in February 2014 at the time of the suspension, the Royal Mail position is: we want this put into effect as soon as possible.

Then you go forward to page 108, over the page, and

you'll see a group of paragraphs, 4.204 to 4.207, dealing with the subsequent period. Royal Mail, throughout, is maintaining its determination to implement these.

Finally, page 115, paragraph 4.230. This is something that was referred to, you'll recall, by I think both the Whistl witnesses in their oral evidence, in different ways. That even when they withdrew the measure, they said that they would want to reissue the change notices, to allow customers a fair and reasonable notice period. They were signalling throughout to the market continued determination to maintain this price differential.

That is all I propose to say on ground 1.

Move to ground 2. Improper price discrimination. Now, I've already tackled the question of eligibility to join the MPP1 plan. There's then an issue whether Whistl could not only have joined the MPP1 plan, but stayed on it using an opportunistic process of arbitrage, and thereby continuing a roll-out, economically, up to 31 SSCs. On Monday, Royal Mail submitted that Whistl was engaged in arbitrage in 2013, 2014, and he said the growth accelerated substantially. He said that Whistl's arguments that arbitrage wasn't a feasible option for the company should not be

accepted.

Mr Holmes has largely covered this yesterday, but one outstanding issue was raised -- I think Professor Ulph -- and it concerned the fact that the Whistl witnesses in their oral evidence explained that arbitrage would have involved the substantial business costs including the development of new software which wasn't available at the time.

On this, the matter is largely addressed in our written closings. I ask you, please, to open those and go to page 36, where we have a heading above paragraph 101, "Arbitrage". We deal with that between 101 and 113. If you look particularly on page 38, at paragraphs 106 and 107, you have the key extracts from the evidence of, respectively, Polglass and Wells on these points.

Now, Royal Mail suggested that, contrary to the witnesses' evidence, charts which had been handed up by Royal Mail during the cross-examination of Mr Wells shows that Whistl was using arbitrage in 2013, and that its use of the arbitrage accelerated quickly after 2013. And he did this to suggest that the evidence given was unsatisfactory.

Those charts you should have in the overflow bundle at tab 17. We have spares here, if the tribunal would

wish. This is what was relied on. Let's look at it.

These charts are showing Royal Mail's analysis of the volumes of mail which Whistl was posting through the national contract and through the zonal contract between 2013 and 2019. So if you look at the bottom numbers for the bars, "1314" means 2013/2014. And so on for each year.

There is nothing on these charts that undermines Whistl's evidence on arbitrage whatsoever. On the contrary, it supports it. And there are three points you'll appreciate. The first is that, as Mr Holmes explained yesterday, this bottom chart is showing the number of items posted by Whistl through the zonal contract. It doesn't tell you what proportion of that is the arbitrage. The two are not synonymous.

The second is that this bottom chart, if you look at it, shows that for the year 2013/14, the first year, you've got about 80 million mail items going through a zonal contract.

And that matches the evidence of Mr Wells that Whistl was posting around 80 million items zonally at that time. The tribunal will recall that Mr Wells explained that around half of those volumes related to customers who only had zonal postings like Peterborough City Council, and the other half of them were about

customers who were using arbitrage in the sense of dividing a national spread of their mail between the APP2 and the ZPP3 plans whilst still keeping the tolerance of APP2.

So the tribunal will note that there was a small increase in the use of the zonal contract in the next year, 14/15, and another fairly small increase in 15/16. And you'll see a more significant increase in the zonal usage after 16/17. And again, this matches the evidence of Mr Polglass about the timing of Whistl using arbitrage more extensively, driven by its exit from the delivery market. If you pick up Mr Polglass's statement, it's at C2, tab 5, he deals with what happened, paragraph 58 on page 179.

He says there, second sentence:

"Whistl did start using arbitrage on a relatively small scale to minimise its costs last year. Now we no longer have an E-to-E plan, we don't have the same concerns about the availability of arbitrage in the future, and we've taken the view we should use it to minimise costs in some circumstances."

So that is actually what has happened. The scale of it is apparent from this.

Then if you go to the top chart there's a third point. And it's that you'll see that the scale which is

being used on the y-axis for the top chart is very different from the scale on the bottom chart. So visually, if the author was seeking to get these compared with each other, it's rather misleading.

The top chart shows that Whistl's volume of mail through the national contract in 2013/14 was almost 3 billion items. And against that, the 80 million items being sent through the zonal contract was a tiny fraction, less than 3%, of Whistl's overall volume of mail.

2014/15 what you'll see is the relative proportion of zonal to national mail -- and you'll appreciate the scaling on the side of the two histograms -- is still very low. It's well under 10%. And since that time, and after Whistl's exit from end-to-end, the proportion of zonal posting has increased in line with what Mr Polglass said about when Whistl started to develop the software.

It wasn't feasible for Whistl to engage in arbitrage while rolling out direct delivery on the scale suggested by Mr Harman. And that is even before you come to the question whether it would have been a rational business strategy to rely on arbitrage in circumstances where the context is Royal Mail threatening to, and subsequently has, cut down on the scope for arbitrage in any case.

MR BEARD: Sorry, just to be clear, Mr Harman doesn't proceed on any basis on his analysis using arbitrage. I don't know what Mr Turner was saying --

MR TURNER: Mr Beard will deal with this in his reply.

MR BEARD: I'm sorry, it's a misstatement.

MR TURNER: It's not a misstatement.

Ground 3, I've only got a few additional points. The first is Royal Mail's new argument in its closings, at paragraph 221(b) of page 72. This was another surprising development in the written closing submissions of the appellant. It's about the calibration of the AEC test, and if you look at what's said in the third line, about economies of scale issues the way they put it is this:

"It's by no means clear that these scale issues necessarily affected the reliability or usefulness of the AECT analysis."

That is convoluted and it is cagey. In (a), they refer to Intel as a parallel case to support their point. And I've covered that. The court in Intel certainly said nowhere that there were market features similar to our own case, and the reference to the underlying Commission decision turns out to be a damp squib.

Royal Mail then refers at (b) to an obscure table in

a confidential Royal Mail document which has never previously been looked at in detail. That was a document appended to Mr Dryden's report to support a different point. It's paragraph 9.15 and footnote 70. I won't go to it. The point was that Royal Mail's LRIC includes a cost of capital reflecting risk. And that was the footnote reference. Nothing was said about there being limited economies of scale in bulk mail delivery.

To the contrary, the tribunal has received very clear consistent evidence from everybody that there are significant economies of scale and scope and density in mail delivery. And in particular, you'll recall that Royal Mail's witnesses themselves explained, in the plainest language, that a decrease in mailing volumes would lead to higher costs for Royal Mail. For example, it was put to Ms Whalley, Royal Mail's key concern was that because of the high proportion of fixed costs in their network, the average cost of delivering the mail goes up when the volume goes down. And she said:

"Yes, there was the concern that if volumes reduce the unit costs go up."

Day 6, page 90.

Then, more specifically, Mr Dryden was taken to paragraph 6.17 of his own fifth report. He said,

I quote:

"Mail delivery is subject to large economies of scale. If the overall volumes of Royal Mail were at the same level as an entrant might anticipate, the Royal Mail average cost would be substantially higher."

He confirmed in cross-examination that was the position. Then in the same exchange he said this, Day 12, page 109:

"... I certainly don't disagree with the proposition that you [a new entrant, that is] would have to overcome a degree of scale and density disadvantage."

And this evidence from Mr Dryden in the box really disposes of the point and it is all the tribunal needs.

So what about the confidential document at RM6, tab 1.2, referred to in the written closing submissions? This was left unexplained there, and when Mr Beard opened his oral closings, he did not open it. He did not try to explain it to you. And since nothing has been made of it, nor will I. I'll content myself with the a small number of remarks about it only.

First, as you see from what's said in 221(b), RM isn't arguing that outdoor delivery involves no scale economies. And outdoor delivery includes the provision of the posties, it's a major activity.

Second, that table, if you go to it, references to

other cost elements which Royal Mail is saying are linear to volume. When you look at it, it appears simply to involve hiving off the fixed costs of the mail business, allocating them to other services, and then looking at the variable costs. A new entrant wouldn't be able to allocate those costs to other services.

The third point is, as far as we see it from that table, it doesn't even purport to address all the relevant cost elements. It provides only certain examples.

And therefore, to conclude, we say there is nothing that should disturb the tribunal in its judgment from reaching a very clear finding on the evidence that bulk mail delivery is characterised by substantial economies of scale, of scope and of density.

That then takes me to the Harman evidence on the topic of materiality of the impact of Royal Mail's conduct.

Sir, I'm grateful to you for giving me the indication you did, and I have looked at these overnight with that in mind.

Our written submissions are not intended, in paragraph 176, or anywhere else, to go beyond the matters on which Mr Harman had a full opportunity to debate the position with the other experts, shown in the

joint statement, and on which Royal Mail's full advisory team is perfectly able to comment with no unfairness.

If we open up our submissions, I'm going to take you to certain points in them, including that point, sir, that you referred to, which culminates, really, in 177.

The discussion in relation to the Harman evidence begins, really, at the top of page 60, paragraph 169. In that section we cover essentially three main points, which I'll look at in a moment.

Point 1 is the fact that his IRR analysis of materiality doesn't capture the risks and uncertainty dimension facing the entrant. That is precisely the same point that Ofcom has made in its own written submissions, that the supposedly reliable and objective analysis is flawed.

That's the first submission. I'll look at how I deal with it in a moment.

The second is the point that the probability assessment in the reply report, the fifth, is a manifestly flawed way of looking at how Whistl and its investor could be expected to treat the event, the notification of the price differential, and to respond to the signal it sent.

The third point we make here is that the implications of the probability assessment are also

peculiar from an enforcement perspective, because what it means is, if you think about it for more than an instant, the more manifestly illegal the behaviour is, the more likely it is for Ofcom to stamp on it, the less they say Whistl would have expected it to have been implemented, to have got through. And therefore, they say, the lower the effects on competition.

That was something also, I will show you, directly discussed in the hot tub.

THE CHAIRMAN: Sounds like circularity to me.

MR TURNER: It is.

The fourth point that we are seeking to make, the fourth essential point, is also something that has been well trodden, I hope. It is necessary to appreciate that these surcharges on the MPP1 plan which Whistl would have paid if it was eligible to join it, at that time, they are, too, a consequence of the price differential. It's not just then you move from MPP1 back on to APP2 that the consequence of that structure bites and has effect. Mr Harman's IRR analysis, when you look at the table, just doesn't take that into account.

So those are the essential points we're seeking to make.

If I may begin with the joint statement, which

you'll find in bundle C3, it's at tab 2. And the point the first point we make, and we're coming back, again, to paragraphs 176 and 177, that was covered in the debate between the experts, and I referred in Mr Beard's application to adjourn the trial to page 60 and the second column, where you'll see at the top, it may be highlighted in your version, the end of that first paragraph, at the top of page 60, in the second column:

"Mr Harman hasn't attempted this exercise. His IRR estimates do not capture all the risks and challenges that an entrant faced, in particular the zonal tilt. Thus the analysis does not properly implement his approach."

THE CHAIRMAN: Sorry, I'm not with you. What question are we answering?

MR TURNER: The question whether the IRR analysis is fully taking into account the risks and uncertainties way --

THE CHAIRMAN: What number question, please?

MR TURNER: I'm sorry --

THE CHAIRMAN: In the joint statement?

MR TURNER: In the joint statement. So it's issue 10, which begins on page 57.

THE CHAIRMAN: Yes, I've got my own copy.

MR TURNER: I see, thank you. Page 19 of the internal version.

THE CHAIRMAN: Right.

MR TURNER: You'll see the three columns: Harman, Matthew and Parker.

Harman, a point I made at the end of the application to join, is actually, there, having the last word, even there. So if you look on page 58, halfway down, page 20 internally, Mr Matthew has raised several points in his column:

"In the interests of brevity I don't attempt to address every point herein, however I make certain observations and provide relevant cross references."

Essentially he was dealing, therefore, with everything that was said by the other experts.

And one of those points, if you go to internal page 22, which I referred to before, is precisely the point that his IRR approach is missing a relevant dimension. It's not looking at the risks and uncertainties; it's taking a particular projection, a particular business plan. He then soups it up in certain ways so as to take into account assumed income after the roll-out period. He derives an IRR. And that projection, with all of the growth, all of the expenditure, all of the operating expenditure assumptions remaining constant, is something that he takes as the basis for his objective appraisal.

The point being made here, and which we're making also, is that there is an additional dimension, which is that you may never achieve those projections, but that IRR case may not happen because of the disruptive effect of the behaviour. And that is what is meant. It is the same point that Ofcom has made in its submissions, paragraphs 192 to 195, essentially. And our essential criticism, if you go back to our written closings, is to make that point in 176 which I've now articulated, which, in fact, we say is the point that was being considered. And it's put, then, in conclusion in 177:

"Another approach to understanding the defects is it abstracts from all the commercial risks and uncertainties that underlie the projections in the business plan."

That's all we are saying. This is a point which is simple and straightforward, and there's nothing unfair in either us or Ofcom making it.

We, as well as Ofcom, have referred to an earlier report by Mr Harman. Go over the page to page 63. You'll see the reference to paragraph 6.9 and 6.10 of the third report, which is a case where Mr Harman himself, when considering the implications of an IRR analysis in the earlier report, says, well, that doesn't necessarily give the full picture because there were

other risks and uncertainties that needed to be taken into account.

That's all the point is.

THE CHAIRMAN: Okay.

MR TURNER: Then I'll quickly deal with the others. If you go forward to paragraph 190, we say there are further major errors. In fact I'm only referring here to one of them. And this is the point that I've just adumbrated, that he's not taking into account surcharges as part of the cost in his IRR analysis.

He begins by saying that the impact is the additional payments you make when you are pushed back on to the APP2 plan, which he assumes happens in April 2015.

That's the surcharge point.

Mr Holmes covered it yesterday. It's a clear and obvious freestanding point. If you accept that point which doesn't depend on the debate with Mr Harman to have continued, then you will also conclude that there is an error in his work because he overlooks it.

The third point is about the fifth report and the probability analysis. If you turn over the page to 66, you see the submission, which is really focused at the bottom, paragraph 198.

"More generally, Mr Harman's probability analysis

overlooks the point that Whistl and LDC would rationally respond to the notification in a different way from making an instant probability assessment and then pressing forward."

You'll see the reference that we give there to Mr Parker's report, because that's what Mr Parker said. It was elaborated in his main report. This point is about the role of delay, and the option value of delay. Mr Parker developed that in his report, and then what happened is that Mr Parker responds to it --

THE CHAIRMAN: Mr Harman.

MR TURNER: Mr Harman, I'm sorry, responds to it, in his reply. We refer to that at paragraph 200. And it's also in the joint statement in issue 2. And it was canvassed in the hot tub exercise by Professor Ulph. And you have the factual evidence about what actually did happen in response to the notification of the price differential, which, as Mr Holmes pointed out, was a sort of natural experiment.

So all of that can be taken into account perfectly fairly, and it leads to you being able to find in your judgment that Mr Harman's probability analysis does not assist. There is no unfairness on that.

The final point is really paragraph 202 of our submissions, and this is what, sir, you referred to as

the circularity point. It's a form of logical contradiction. It was a point decisively covered in the joint statement. I won't open it again, but is it page 91 of the red numbering, internal page 53. The experts debated that as well. Perhaps you would turn that up and look at it.

Sir, if you have that, internal page 53 and you look at issue 31, Mr Parker, on the right-hand side:

"I don't think it's sensible to assess the materiality by reference to whether Ofcom would find the conduct to be unlawful. It would lead to a logical contradiction."

He makes the point, and they have discussed it.

For completeness, there's one other area which the Harman report purports to cover, and that is his opinion that Whistl's operational decisions and LDC's investment decisions were actually caused by factors other than the price differential notification. As you'll recall, that was the big section 7 of his main fourth report.

We address this in our submissions at paragraphs 207 and following, under the heading "Actual Effects in Limiting and Ultimately Excluding Competition by Whistl". We've given the classification in the list of issues, issue 3.6.

It's not really a point for Mr Harman at all. He

gives his opinion that Whistl's operational decisions and LDC's investment decision were caused in fact by things other than the price differential. Notification.

But these are matters of fact, which you will make your own decision about on the basis of all the evidence. They were mainly covered in the written evidence given by Mr Polglass, and in the cross-examination of Mr Polglass by Mr Beard. It's dealt with in paragraphs 211 to 224 of our written submissions. We set out the quotes under the headings given by Mr Harman.

We make the point, for example, that where reliance is placed on delays in the roll-out, if you look at paragraph 211, being behind schedule in 2012 and 2013, that all of that preceded the decision to invest and the PwC report of October 2015. So to refer to earlier events as having caused the later decision to withdraw doesn't make any sense.

Royal Mail has given no good response to any of these points, including from paragraph 219 onwards, the operation issues and the local sort issue, because it has no good response. I shan't take time up by developing those.

Sir, unless you have any questions, that's all I propose to say about Mr Harman and ground 3.

THE CHAIRMAN: Fine.

MR TURNER: So then ground 4, and I'm almost finished.

I only have three points to make about their ground 4 on the objective justification and Article 106 of the treaty.

The first is to pick up the legal proposition in Royal Mail's submissions on page 74, in their footnote at 116, which I'd invite you to look at. So their proposition is this:

"Where a dominant undertaking has raised a potential objective justification, it is for the regulator to prove that the conduct in question is not objectively justified."

Microsoft.

That may surprise you, as it surprised me. If you read the case, you will see that that is a false quotation, which misses out the inconvenient words. The quotation says:

"Where a dominant undertaking has raised a potential objective justification and supported it with arguments and evidence, it is for the regulator to show that the arguments and evidence cannot prevail."

And the update to position on how objective justification works is most clearly set out in the court's judgment in Post-Danmark II at paragraphs 48 to

49. That gives the classic modern definition. And essentially, if Ofcom proves there's an exclusionary effect which comes out of behaviour which isn't competition on the merits, the burden shifts. It's then over to the dominant firm to try to show, if it can, that there are efficiency advantages which counteract the negative effects on competition and on consumer interests.

That's the correct schema.

My second point is to pick up on the thread that's put to Mr Beard by Mr Frazer. Royal Mail's submissions in the objective justification part of their written closings appear to the reader unashamedly to declare that their conduct was justified by the desirability of suppressing end-to-end competition. Mr Frazer referred Royal Mail's counsel to one reference which I think was on page 75 at 233, letter C. you'll see the last sentence there:

"In announcing the price differential therefore, Royal Mail hoped to avoid the inevitable downward pressure on its EBIT which would result from increased end-to-end competition."

You find it in other places too. If you turn to page 76, look at the bottom line there, in letter D, the same point.

In short, the complaint made by Royal Mail concerns the expansion of end-to-end competition. And I wish to make one point which is a slightly narrower one than the one Mr Frazer put. This, as the statement of what they were seeking to achieve, which is limiting end-to-end competition, whether or not by a process of legitimate competition on the merits, is unambiguously at odds with the position that was taken earlier in their skeleton, which is that Royal Mail was satisfied the price differential would not impact on the growth of end-to-end competition. You compare, in that regard, the paragraph we looked at earlier, which is paragraph 32 on page 8.

It is clear, they say, from materials referred to in the evidence of Ms Whalley that it was on the basis that Whistl would secure investment that RM proceeded.

You'll recall that that then engages their second chart in that series with an accelerated roll-out programme.

THE CHAIRMAN: Third chart, I think.

MR TURNER: Third chart, I'm sorry.

Those two positions are not compatible.

Secondly, and to return to the point that Mr Frazer put, it is perfectly clear that this part of Royal Mail's submissions is not saying that Royal Mail

was envisaging competition on the merits against end-to-end rivals on price or quality or some other parameter of competition. It wasn't envisaging engaging in that form of competition with end-to-end rivals.

As it said in paragraph 233 of their document, it was concerned to avoid a downward pressure on its pricing, which would result from increased end-to-end competition.

Not to meet that pressure, but to avoid it. In other words, the concern was to remove a constraint which end-to-end represented.

My third and final point is that at paragraph 237, and actually throughout this document and all previous submissions, Royal Mail asserts that it always acted with the intention of complying with its obligations under the competition regime. Yesterday Mr Beard said that Royal Mail doesn't claim it relied on legal advice. It relies only on other external advice. Page 174 of the transcript.

May I ask you to turn up Ms Whalley's evidence for this tribunal at C2, tab 1. Please go to page 67. In one of the many places where Ms Whalley refers to the determination of the company to obey the law, she says, in the first sentence of 220:

"As explained above, our price changes had all been

subjected to rigorous scrutiny including by external legal and economic advisers to ensure they complied with the applicable laws."

And one further example, if you go back to paragraph 189 on page 58, you see there she says:

"During the development stages the three options were heavily discussed and rigorously scrutinised by a combination of business, legal and regulatory personnel as well as by both external, legal and economic advisers. This was to ensure Royal Mail was pursuing the best commercial options while at the same time ensuring the options remained compliant with Commission law."

And so on.

THE CHAIRMAN: Well, it is possible to advance the proposition that you tried to stay within the law by taking legal advice but, for reasons of public policy associated with legal professional privilege, you don't want to disclose it. That's not an unreasonable position to adopt.

MR TURNER: No, absolutely.

My point is this: it is very clear that if they are going to, as she does here, rely on having taken legal advice to ensure they are compliant with the law, then, in such a case, they should put up or shut up. Because

you cannot rely on that. The evidence which you have received makes quite clear that the company knowingly took legal risks when it notified the price differential. If they want to suggest to the contrary, they can produce their legal advice. They've chosen not to. They cannot rely on it, positively, to suggest that their intention was to comply with the law.

THE CHAIRMAN: I think there are two questions. One is whether they -- one is what the legal advice said, which I suppose, as I said before, for public policy reasons may well not be disclosable. The other is whether it is a correct statement that they relied on legal advice. They may have misinterpreted it and their reliance may not have been effective. It's a different point. You're entitled to take it, but it is a different point.

MR TURNER: Yes, absolutely. What I'm doing is responding to the point that was made yesterday. You'll see very clearly from 220 and 189, among other places, what is said is a reliance on the legal advice as a matter of fact. And if they're going to use that as evidence that their intentions were to ensure that they were fully compliant with the law, that is something they cannot say if they, at the same time, choose, as is their entitlement, not to produce that advice.

THE CHAIRMAN: I accept it's a fine line to walk.

MR FRAZER: Mr Turner, sorry, I didn't want to interrupt you before but since there's a pause. Just to be fair, you quoted some extracts, 233(c) et cetera, which showed, you said, that Royal Mail hoped to avoid a downward pressure on price. In fact what they say is a downward pressure on EBIT in both of those cases. And albeit it might amount to the same thing, it's not actually what was said in the closings.

MR TURNER: I understand. Thank you for the clarification.

I'm not going to deal with ground 5. I'll conclude on ground 6 with a very brief summary of the position to round off what I ended saying in the opening submissions.

You have a very serious case where a near monopoly has consciously used anti-competitive means to cause the exit of a rival which represented the only real competition in bulk mail delivery. By doing what it has done, it has caused significant damage to consumer interests. By its own calculations, it has profited to a far higher degree than the level of the fine imposed on it. We submit that the tribunal should have no hesitation in dismissing the appeal and in maintaining or increasing the penalty.

So, subject only to questions from the tribunal and one further remark --

THE CHAIRMAN: What amount do you suggest we increase it to, Mr Turner?

MR TURNER: That is at large and is in your discretion. I make no submissions in that connection.

THE CHAIRMAN: You that have advised us on copious other things; are you not going to advise us on that?

MR TURNER: No, I will leave that, sir, in your discretion.

The final remark is this: that, sir, you are to be congratulated for having made the reference, in the trial, to a classic movie, and as a result we wish to present the tribunal with a present, which we hope will assist the long hours that you will be taking to write your judgment in the case --

THE CHAIRMAN: Well, I was going to come back to you on that; all I said was the route to --

[Laughter]

MR TURNER: Yes, I saw that on the transcript.

THE CHAIRMAN: This is highly improper and will have to be handed in to the public purse.

[Laughter]

MR TURNER: In that case we shall enjoy it, sir.

So, unless there are any questions from the tribunal, those are the intervening submissions.

THE CHAIRMAN: Okay, thank you.

Mr Beard, do you want to begin now?

MR BEARD: I'm in the tribunals hands. I'm happy to start at quarter to 2 or 2 o'clock. I shouldn't think I'm going to be about more than about an hour in total.

THE CHAIRMAN: Why don't you start now?

Submissions in reply by MR BEARD

MR BEARD: Can I just organise one or two files I've got.

THE CHAIRMAN: If you'd rather have a delay --

MR BEARD: No, no, no, it is literally a question of shutting things up so I can reach my notes.

I'll try and work my way through various of the points that have been made, particularly by Mr Holmes. Can I start with issues on intention, if I may.

I think it's important, given where we've got to on what Ofcom says the infringement is, and what Mr Turner very emphatically says the infringement is, that it's to do with notification and the signalling that's involved in the contract change notification. And I make an obvious point about that, that there is nothing we have here, apart from these attempts in the course of submissions to clutch on to things like Mr Millidge's email the day before the CCNs, to suggest that there was an intent by anyway of issuing a notification to do anything that would in any way damage competition.

Now, I'll come back to the various documents that are referred to as suggesting that the price

differential was intended to limit competition, the actual price differential, and things like the traffic lights slides and so on, but when we're asking ourselves what the case is that's now being put against us, it's to do with this notification, it's to do with the signalling, and in relation to that, we don't have any evidence as to the suggestion that that, simply that notification, without its implementation of the price differential, amounted to an intent to limit competition.

It is worth, in that regard, just looking at the relevant sections of the decision, if I may.

If we go to decision at 7D, I make the very obvious point that all of this section D, which starts at page 216, this is all about the price differential and the actual price differential, not the proposal to put it into place or the notice necessary for it to come about. And you just can't conflate those two issues. You can't say that there was an intent by way of putting in place a notification that a pricing differential should come into place, that you have made a finding in that regard even if you make a finding that the price differential itself was intended to limit competition. You actually have to make a further finding, and you just don't see it here.

There's a vast difference between saying you had intent to limit roll-out by the pricing, and intent to limit roll-out simply by issuing the change notice.

As I say, no finding here. As we heard from Mr Holmes as he was working through the documents, and we see in Ofcom's closing submissions, none of that material assists him here. So you can turn through all of that section -- and I'll come back to some of that material in a moment -- and it doesn't assist.

So what Mr Holmes ends up doing, then, is fishing for other material from elsewhere in the decision to try to bolster the omission in this regard on the intent in 7D. So for instance, he turns on to the section on suspension which begins at 241 and goes to, for instance, paragraph 7.215, and he fixes on this document that we say has been thoroughly misunderstood: the very assertive signal email.

Now, that email itself is actually suggesting that you had a situation where Royal Mail was considering, in relation to the price differential itself, that it should take a conservative approach. Then someone comes along and says actually we should be a bit bolder, and that's what that email says:

"We should be bolder here."

Then, of course, what we see in the end is that

Royal Mail reverts to the less bold approach when it comes to actually putting forward the price differential in the notice.

But the key thing about that is there's nothing in there that's saying by issuing a notice, we're intending to limit competition. What is being contemplated there is: should we put in place pricing that is bolder as against the calibration of risks that we've undertaken?

That is a different proposition, and of course it is instructive that we don't see this material being referred to in the assessment of intent section in 7D.

It's similarly the case when we look at the other material here. So if we work through 7.215 and go down to C, and these references to:

"Royal Mail's internal documents show that it was aware that a direct delivery investor has been sought and identified by Whistl, and the investor confidence in direct delivery was an important factor in assessing whether roll-out would occur."

Well, the first of the references really is, apart from not being referred to at all in the intent section, you have to go back to paragraph 4.18 here. So paragraph 4.18, you'll recall, precedes this strange flowchart that moves from left to right over time. And it's set across a period of years, which was a June 2013

document.

Mr Holmes I think refers to the top box which is on the boundary of 2014/2015, 2015/2016, and says:

"Look, here's a reference I've found that is referred to in the decision in the context of the suspension provisions."

And talks about the possibility of direct delivery guidance potentially undermining potential investor-partner confidence, but there it's talking about Ofcom's guidance. It's very difficult to see how that in any way can be evidence of intent in relation to the notice.

The other paragraph that is referred to in that regard is at 4.114. Here -- well, page 84. I'll just take you to it:

"The board was also advised that Whistl was believed to have now received financial backing for expanding end-to-end operations beyond the current zone."

So that is a reference to minutes of the board meeting of 11th December. So this is just a statement of fact -- which I'll come back to in the context of the traffic lights slide -- that, by that time, Royal Mail really was a lot clearer about the idea that there was going to be investment. But the idea that there was an underlying intent that had somehow started earlier --

because, of course, as we noted, the process of considering what you were going to do with price changes for April 2014 you had to start long ago, because you had to issue the notices in January -- the idea that this was part of some scheme where there was an intent to issue a notice, and, by issuing a notice that was going to be suspended, you had the intent to limit competition, it just doesn't support that proposition at all.

So the materials that have been clutched at from other parts of the decision, they don't deal with the omission in 7D. So even if Mr Holmes could make out this supposed intent to limit the competition by way of the pricing, neither Ofcom nor Mr Holmes has made out any intent in relation to the notification itself, which is critical to the way the case is now being put.

But I do want to deal with the allegation that the pricing itself that was being put forward had an intent to limit or exclude competition, and in particular, competition from direct delivery operators, because we say that that story itself is profoundly flawed. The intent wasn't to exclude or limit Whistl in and of itself; it was to protect the volumes that underpin the sustainability of the USO.

Of course, we recognise that in a zero sums gain

situation, us retaining volumes meant that Whistl wouldn't have those volumes.

But that in and of itself tells you nothing about whether there is anything problematic to do with the conduct at all. There are flavours in some of the submissions that have been made that if you take away volumes and therefore revenues from rivals by the structure you put in place in pricing, you're inherently harming them. Well, if you are inherently harming them, that is what happens all the time in relation to markets, and that doesn't tell you whether or not the price changes in question, because I'm here talking about the price changes, were themselves with an unlawful intent.

As I say, Mr Holmes's case very heavily turns, I think, on the traffic lights slides, and I'll just very briefly go to those.

THE CHAIRMAN: Before we go to that, you could have several intentions, couldn't you? You could have a legitimate intention to preserve volumes --

MR BEARD: Yes.

THE CHAIRMAN: -- and you could have an illegitimate intention to deprive a competitor of those volumes, and those two intentions could co-exist because they focus on the same activity.

MR BEARD: Well, that is possible. I can see that that is true. And to some extent, that's why, in competition law terms, as we saw in the case law that we referred to in opening, the focus is on an objective analysis rather than obsessing about intent.

And indeed, what we see in the case law is saying: abuse of dominance is an objective question, you can take into account evidence of intent in considering those matters, depending on what the relevant circumstances are to consider in relation to a particular reviews. But that's precisely why this starting point that Mr Holmes effectively reiterated in the structure of his submissions of, well, look at the indent, you drive at the intent, you think of this as being a penalty, and as soon as you're thinking about it as a penalty, then everything drops neatly into place, it's discriminatory, exclusionary, and so on, that's the wrong way round to look at these things. Because of course you can see intent in many different ways, and that's why competition law is cautious about it.

Indeed, there are very few circumstances, if we think about whenever intent is actually articulated as critically relevant in the case law, that it's ever really important in the abuse assessment. You actually see it particularly in relation to the tramlines for

predatory pricing cases. But beyond that, it's referred to in the case law as something you take into account in relation to the evidence, but it's important that it isn't the driving force, and that's part of the problem with the way that Ofcom has approached this.

So if you have a situation where we say our intent was to protect volumes, conscious of the concerns about the universal service, and Ofcom says: Aha, but protecting those volumes meant you intended that, in a zero sum game, Whistl wouldn't have those vessels.

Well, it's very difficult in those circumstances to say, well, there is no such thing as some sort of correlative impact on Whistl in those circumstances by our legitimate intent, but you shouldn't see it as being our goal to limit Whistl in those circumstances, because that's not how we were thinking about it.

And if the analysis in competition law terms turns on which perspective you take in those circumstances, going back to a theme I've emphasised in the closings, you really do undermine questions about what the relevant test is here, because you end up turning abuse cases into mens rea cases, and we know that's not right.

THE CHAIRMAN: The intention can be specifically relevant in the context of the penalty.

MR BEARD: That we accept. We accept --

THE CHAIRMAN: -- (overspeaking) -- you would --
MR BEARD: We do accept that. And we accept it -- well, although it's intentional negligence in those circumstances, so even there, what you're dealing with is not having to identify sort of fine-grained levels of intent.
THE CHAIRMAN: Let me ask you, do you draw any distinction between intention and strategy?
MR BEARD: Well, yes, one has to draw, but the terms are different and mean different things, but the idea that you would have an unintended strategy is somewhat unlikely, and therefore a strategy will almost invariably bring with it a notion of intent because you don't coincidentally and accidentally end up with a strategy that you're trying to pursue. You can end up with --
THE CHAIRMAN: So a strategy can be a guide to intention, can it?
MR BEARD: If you can identify that someone has fixed on a particular strategy, then it must be right that that strategy, if it is clear and then being pursued, is some sort of evidence of --
THE CHAIRMAN: -- (overspeaking) -- a corporation has a mind or a soul -- (overspeaking) --
MR BEARD: Yes, precisely. It would be bizarre otherwise,

because if you had evidence of a strategy, the idea that it was unintended would not be right, and therefore I can see that it must be relevant to the evidential question.

THE CHAIRMAN: Shall we pause there?

MR BEARD: Yes, I'm going to go to traffic lights. It's enormously tempting before lunch, but I'll perhaps pause.

(1.00 pm)

(The Short Adjournment)

(2.00 pm)

MR BEARD: So I was moving on just to the idea that in fact in relation to the pricing itself, so the price differential, there was intent to limit the rival, Whistl, rather than the key intent being to protect the USO, and legitimately to enter into pricing arrangements that would retain volumes and, as we know, the key case against us on that hinges on these traffic lights slides. If we could take it up at C4A, tab 35. It's now a very well thumbed document.

So if we just pick it up at slide 9, we've seen these before, it's held against Royal Mail that the first bullet talks about sending a clear signal to the market that we'll compete effectively to protect the USO. In my submission, that in no way suggests any

improper intent. The idea that one can read that as implying some sort of improper intent or such an inference can be drawn from it is quite wrong.

We recognise in the next bullet point that by reference to the 30 to 40 million, reference is being made to the position under scenario 2, over the page. What is also notable, though, if you go to the third bullet point:

"A larger scale direct delivery operator would need to move to his own price plans and minimise surcharges. This would involve a trade-off between short-term losses to achieve longer-term profits. Our zonal pricing tilt has an impact on how a DD operation might develop."

So it's talking about the possibilities of there being short-term losses for longer-term gains even at that stage.

Then talking about there being further assessment.

But you do have modelling or an outline on page 10, which is predicated on certain assumptions, and those assumptions are the ones that Mr Holmes particularly has emphasised, that here it was being assumed there was no major investment, and that the entrant continued to make 10% profits in any expansion. And he says, well, on the basis of that outline by reference to scenario 2, where you end up is on the second chart, on the next page.

Holding those assumptions steady, one can see that if you apply scenario 2, that is the sort of modelling that would come out.

But it's also instructive of course that the charts on the following page plainly aren't holding those assumptions steady, because the very fact that you have the third chart, which is suggesting forgoing reasonable rates of return, is not explicitly but by necessary implication flexing the assumptions on the preceding page.

Now, in cross-examination there was all sorts of contention by Mr Holmes that what was going on here was Royal Mail indicating its intent to use scenario 2 in order to hold people to the second chart, and that it couldn't be expected that there would be any likelihood of moving to the third chart, and indeed, Mr Holmes put it as high as saying it would be irrational to proceed with scenario 2 if you thought the third chart was going to be the outcome.

He emphasised that again in closing, and with respect to him, it's just a complete non sequitur. Because what is going on here is that Royal Mail is looking at a situation where the assumptions made in relation to scenario 2 are not borne out. And plainly it would not be irrational to proceed with modifications

as set out under scenario 2, even if those assumptions were incorrect, because what you would be doing by implementing scenario 2 is seeking to reduce the level of lost profitability you faced as someone expanded more rapidly in direct delivery entry. So in those circumstances, it's not a question of rationality.

What is recognised is that if an entrant, and in particular someone like Whistl, forwent profit, and one way that could happen is because there was investment, then it would still be rational to be introducing price differentials because you'd be less badly off than if you did nothing.

So in those circumstances, you have a situation where what you have here is not, as Mr Holmes says, some sort of gotcha, some kind of smoking gun suggesting that here we have the evidence of nefarious intent that you stuck with the green column and you ended up with the second chart and it was just irrational to think you'd do anything else, anything else would eventuate, because actually, what was going on was it was saying was, well, if those assumptions held steady, you'd be on chart 2. But, of course what we know is those assumptions did not hold steady over time.

Mr Holmes at one point during the part of his closing, said that there was nothing to show that

Royal Mail believed that Whistl's investor could forgo any profit for several years. But again, that's just the wrong question here. The question is whether Whistl would be willing to forgo a rate of return over a short period in order to accelerate its roll-out, and one of the ways that that could occur is either by taking losses for a period in the hope of paying them back or by getting investment.

It's not a question of the investor forgoing profit, because the investor would be modelling its returns over the longer period in those circumstances, so again, he's asking the wrong question.

So what we know here is not that we have evidence of some nefarious intent. What we have is a set of models that are being constructed as to what is the best set of arrangements for Royal Mail that it's then testing against whether or not it's justified in pursuing that. But it's not suggesting that the chart 2 is the necessary outcome or the expectation, or it must be that. And of course, as I said in my closing, what was lacking in consideration of cross-examination by Mr Holmes was cross-examination of Ms Whalley and Dr Jenkins in relation to longer periods.

Now Mr Holmes protested that he lacked time. With respect, that was not his best point made during the

course of this hearing. In particular, when Ms Whalley had specifically offered to come back the day after she had her commitment for a job interview. There was no issue in relation to Dr Jenkins being available. It was choice on the part of Mr Holmes. He thought he'd got enough from this document. But he didn't have enough from this document in order to support, even in relation to the pricing, his submissions on intent, and what we see is, as we approach the time when the announcement is made in December and then through to the decisions in January, is that Royal Mail did know that there was going to be investment and therefore the assumptions that underpin the traffic lights no longer obtained.

Now, in closing, Mr Holmes said, "Ah, but we got the timing wrong because by 10th December you didn't know anything". Well, that was a somewhat surprising submission because actually, if we go to RM7, tab 54, I think it's RM7B in the folders. So no specific questions, as I say, were asked of Ms Whalley or Dr Jenkins about this, and the time at which these sorts of assumptions had changed.

But what we see in this, this is a deck of documents. There was actually a presentation to Ofcom on 10th December that was prepared by Royal Mail, and so it was prepared in advance of that --

MR HOLMES: (Inaudible).

MR BEARD: Sorry?

MR HOLMES: It's all right.

MR BEARD: So this is a presentation being made to Ofcom in relation to this, in relation to the state of the USO, and why -- if -- this is part of the submissions being made by Royal Mail, saying, "Well we actually want some regulatory action, please do something."

If we look on slide 3, what's being said is "Look, upstream competition developed terribly rapidly in spite of market decline. That's creating significant problems for us."

You see that in the bullets at the bottom of page 3:

"Upstream competition has grown rapidly."

Then it says:

"Within 5 years ... it currently represents 81% of pre-sorted mail [so this is access service]. This greatly reduces the risk of TNT's direct delivery investment. It means that expansion can happen readily as TNT already has a customer base which it can switch, usually at will, rapidly into its direct delivery network."

So it's talking about the investment process which TNT is undertaking.

Then we see at page 9, slide 9 --

THE CHAIRMAN: Sorry, what does "risk of TNT's direct delivery investment" mean, in your opinion?

MR BEARD: Well, here, it is the commitment into the expanded roll-out.

THE CHAIRMAN: So it is TNT's direct delivery?

MR BEARD: Yes, it's undoubtedly in relation --

THE CHAIRMAN: It's not TNT's investors' risk?

MR BEARD: No, I'm just going to come on to that. I'm so sorry -- yes, that's quite right.

THE CHAIRMAN: I thought you were suggesting it was the latter.

MR BEARD: No, it's not. It's -- wherever the source of the money is, it's TNT's investment.

THE CHAIRMAN: It doesn't mean the risk to Royal Mail, it means the risk to TNT.

MR BEARD: Yes, what it's saying is, because there's been enormous explosion in access services, it makes it much easier and reduces the risk for TNT in relation to the DDL operation. That's what it's saying there.

Then if we go on, we see at page 9:

"Given market share potential, the scope for roll-out of TNT's direct delivery network could be higher than we previously anticipated."

So here is Royal Mail talking about the levels of roll-out that it expects from -- or range of roll-outs

that it might otherwise expect from TNT, that's obviously been the subject of consideration prior to this. And if you pick up the bullet just below the graph:

"TNT Post UK has said it's currently seeking an investment of 50-80 million, which will enable it to finance a rapid expansion of its direct delivery network."

Then we go over the page and we see at 10 a discussion of the various modelling exercises that have already been undertaken by Royal Mail. And as I say, what one sees here is an assumption of an extensive roll-out under scenario 1 with no investment. And then, in scenario 2, with a £50 million investment, and scenario 3, a £100 million investment.

Of course we see that later in the other board documents on 6th January and so on, but the point I'm making here is that this was the position that was actually being presented to Ofcom on 10th December, so the position of Royal Mail in relation to what one understood by way of the scope for investment, and the likelihood of investment and how one modelled, was a very different from the position in relation to traffic lights.

Now, in exchanges during the course of closing,

Professor Ulph asked whether or not this was a changing of mind. I was careful not to say it was necessarily a changing of mind, because it's only to be treated as a changing of mind if you see that re the traffic light modelling as being -- as saying, "We do not expect any investment at that time". And we say that's not actually what the traffic lights slides show, particularly with the existence of the third chart, because it was unclear. And Ms Whalley was very fair in saying, "No, we didn't know what the position was at that time", but clearly by December, and in the presentation being made then, Royal Mail's position was very different.

And therefore, to be assuming that one can read from the traffic lights document some sort of intent on the basis that there would not be investment, and you could keep Whistl limited in the way that Mr Holmes suggested, and this was the evidence of that intent, is stretching that document and the modelling in it way beyond any inference you can properly make.

I think that it's also important -- I'll just give you the references -- that Dr Jenkins's own evidence supports the proposition that Royal Mail had become more and more conscious of the likelihood of accelerated development by Whistl and its obtaining investment. You

can see her evidence, in particular, Day 7, page 127, line 17 onwards, and 128, lines 13 to 14, where she says that there were discussions about the possibility of investment with Royal Mail later in the process. And again, of course, although that was the evidence that was given, there was no follow-up questioning about the input into the process later on by Dr Jenkins, who was heading the project.

Of course, in the absence of evidence beyond that traffic light document, what we saw was Mr Holmes turning to Oxera material to say, "Aha, the Oxera material shows that Royal Mail had this sort of nefarious intent". And you just don't see that. That is not what one sees in the Oxera material at all.

But let's just take a pause there. The idea that you can decide that Royal Mail had this intent on the basis of Oxera material is just a huge leap that is not one that is sensible or appropriate. Of course, we have seen, since we are in C4A, we have the document at tab 27, the 3rd October note, which of course does include language that Mr Holmes suggests is somewhat suggestive, I think he puts it, as being -- of intent on the part of Royal Mail to limit the position of Whistl, but really -- it may be a poorly judged joke on the part of the author, but the comments here, if one looks at

page 2, which we've been to on a number of occasions, where what is being said by Oxera is you'll need objective justifications for any price rise, and then further down:

"A key factor that has the potential to influence Ofcom's willingness to accept the value-based argument ..."

So this is when you're thinking about value-based and cost-based arguments:

"... is the extent to which the level of price differential proposed ..."

At that time they were thinking about 0.3p.

"... will actually have a material impact on TNT's direct delivery plan."

So that's the actual pricing having an actual impact at these sorts of levels, what would it be?

"Work and evidence demonstrating the price differential will not have an exclusionary effect is therefore of paramount importance."

Now, what in that remotely implies that either Royal Mail or Oxera are on some kind of project to limit Royal Mail? There is a poorly judged joke, although we appreciate it is somewhat counter-intuitive from a commercial perspective, as ideally you'd want to show the opposite. But that, that is not evidence of intent,

either on the part of Oxera or on the part of Royal Mail, and you have the evidence of Dr Jenkins in this regard.

I just give you a couple of references of quotes. The section, Day 7, page 72, running from line 24 and across into page 73, where in particular, she says:

"Throughout this period, even with those -- the price changes that Royal Mail were considering, it was our understanding that there was scope for efficient entry."

So she was thinking about it in terms of the manner in which you would ensure that people could efficiently enter, and therefore you weren't improperly limiting competition, and Day 7, page 73, from line 12 onwards, culminating in:

"Our analysis that we were doing at the time confirmed, in our view, that there was always scope for an efficient entrant to enter in the direct delivery area."

So that's what Oxera was thinking about. That's the approach on which they proceeded. That's what she sets out in her witness statement in particular at paragraphs 8.1 and 8.3.

Now of course, faced with the dearth of material that had actually been relied on in the decision, or

referred to in the decision, in cross-examination of Ms Whalley, Mr Holmes had decided to put documents in relation to an email exchange in respect of a completely different option that had been considered, and the point he made was, again, about what was said by Oxera.

I just quote what he said in his closing. It's from page 56 of yesterday's transcript, lines 6 to 8. He says that what one can get from this is that there was an intention to limit roll-out, it is "manifest on the face of the option E note, as it was originally provided by Oxera".

So the height of his points on option E are "Look at what Oxera said in the original note. That is a smoking gun in relation to Royal Mail's intent."

We say that is just, again, a truly remarkable submission. You can't take Royal Mail's intention from what an Oxera document said at a point when Royal Mail hadn't commented at all on it. What it clearly illustrates, however, is the poverty of the remainder of the material on which Mr Holmes is seeking to rely, from the decision that he sees it as necessary to after these additional documents.

He then says: Aha, but then people from Royal Mail comment on this and say that is not the appropriate language that should be used.

Well, there's no surprise there. Because what the Royal Mail team was saying was: actually, that isn't what we intended. And they corrected it.

Now, he says that, in those circumstances, what's going on is document sanitisation. And that, again, is somehow evidence of nefarious intent on the part of Royal Mail.

So, you're in this wonderful Catch-22 situation where, if Oxera come forward with something you say is wrong about your intent and you correct it, then in those circumstances that, in itself, is evidence of the very proposition that you're saying Oxera should take out, and he does that by saying, "Ah, but they referred to the fact that these matters will be disclosable."

Well, that doesn't make any difference. As was made very clear by Dr Jenkins when she was questioned about these matters, her understanding of what was going on here was that Royal Mail was making clear what basis it considered should be dealt with -- that Oxera should be proceeding on. And it was correcting Oxera and saying that was not the right intent.

It is, however, in talking about all of this material, still relevant to say that it was wrong and improper to seek to rely on this material that he only put to Ms Whalley for the first time during the period

of her cross-examination. Documents that she'd never seen before, and had never been referred to in the decision. Now, we're not going to refer again to those points on rights of defence from UPS and Solvay, you have those particularly cited in relation to our ground 5, but let's just take note of what Mr Holmes said in his closing.

This is page 76 from yesterday's transcript:

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

So his case is here it's fine to put in this additional material because it only came out in the appeal.

Now, with respect to Mr Holmes, that is not a fair characterisation, because the case was put by Royal Mail in relation to issues of intent way back in the response to the. SO, and I refer the tribunal there to our

response to the SO, paragraphs 8.10H and I, and paragraphs 8.77 through to 8.89. And with thanks to the anticipation of Ms McAndrew, that's RM9 at tab 2. This was in response to a finding in the SO that Royal Mail's aim in developing the price differential was to deter further expansion by Whistl.

You can see that in the SO, which is in bundle RM8 at tab 2, paragraph 7.64.

Since I'm on these issues about evidence and -- the way that I think Mr Turner put it -- constitutional issues, if I may, I will just turn to authorities bundle 1, and pick up one or two points on these supposedly constitutional issues.

Now, Mr Turner took you first to the Napp case. Just to be clear, in relation to Napp, which is in authorities bundle 1 at tab 10, it's true that the facts were different. But when we come to the analysis of what's going on and the consideration of principles, it is just worth noting one of the key paragraphs that Mr Turner skipped over when going through Napp. That's just at 133, page 31. So, as Mr Turner rightly put it, what was being argued in Napp is that what's known as the Ermakov test that applies in judicial review should apply strictly in these proceedings.

The Ermakov test being focused on the impossibility

of any supplementing of a decision of in the course of judicial review proceedings.

At 133 he says -- the tribunal says:

"On this point, for the same reasons that we consider that our discretion to allow the Director to submit further evidence should be exercised only sparingly, we accept Napp's basic submission that, in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit."

So where you're putting forward new reasons or, indeed, a wholly new case, this tribunal may well comment on material it's heard but it doesn't mean that it's justifiable to approach matters on that basis. And the reason for that is articulated in the principles that are set out in paragraph 66 of Argos. That's at tab 13. Now Mr Turner mentioned paragraph 66 but he didn't take the tribunal through those principles.

So this is, in the context of these sorts of

appeals, drawing on the authorities of Napp and Aberdeen Journals, these are the principles distilled by the then president in this case.

"(1) The Director should normally be prepared to defend the decision on the basis of the material before him when he took the decision. The decision should not be seen as something that can be elaborated on, embroidered or adapted at will once the matter reaches the Tribunal. It is a final administrative act which fixes the Director's position. An attempt to strengthen by better evidence a decision already taken should not in general be countenanced.

"(2) Were it otherwise, the important procedural safeguards envisaged by Rule 14 ..."

So that's the predecessor rule to the statement of objections rule:

"... of the Director's Rules would be much diminished or even circumvented altogether. There would be a risk that appellants would be faced with a 'moving target'. The Tribunal would not be adjudicating on the decision as taken, but on a 'bolstered version'."

We say that is precisely what has been going on in this case.

"(3) There is therefore a presumption against permitting the Director to submit new evidence that

could have been made available in the administrative procedure.

"(4) That presumption may be rebutted, notably, where what the OFT wishes to do is to adduce evidence in rebuttal of a case made on appeal, as distinct from evidence that is intrinsic to the proof of the infringement alleged in the decision.

"(5) On the other hand, where the new evidence goes to an essential part of the case which it was up to the OFT to make in the decision, the Tribunal will not admit evidence that was not put to the parties in the course of the Rule 14 procedure ... This approach applies where the evidence in question goes to 'an essential part of the case ... which it is up to the Director to establish' ..."

And we'd say, given that the case being put here is about intent, that would be relevant here.

"... or is relied on 'to support a primary finding in the decision' ..."

So it's a much broader statement:

"... or is sought to be adduced 'for the purpose of upholding an essential element in the decision'.

"(6) The Tribunal should resist a situation in which matters of fact, or the meaning to be attributed to particular documents, are canvassed for the first

time at the level of the Tribunal, when they could and should have been raised in the administrative procedure and dealt with in the decision.

"(7) If there is relevant evidence sought to be adduced on appeal which has not been the subject of the Rule 14 procedure, the Tribunal has power to remit the matter to the Director for the Rule 14 procedure to be followed, if satisfied that the interests of justice so require."

We say that is the set of principles that apply here. We recognise that that does not provide bright lines in the context of a merits appeal. We have never said that the factual or expert evidence adduced is somehow to be ignored in all of this. Not at all. But the extent to which one can depart from the decision and rely on additional material, whether factual or expert, is conditioned by those principles of fairness and the fact that in this administrative procedure you have the requirement to provide the statement of objections, which is what is being referred to there.

Just one final authority on these issues, if I may. It's in our written submissions bundle. It's the additional authority of Enron that was handed up. It's in tab 10 in our written submissions bundle. I only want to go to one paragraph of it.

Now Enron -- I'm sorry.

Tab 10. I'm just going to go to one paragraph right at the end of the document. Enron was a case concerning -- a follow-on action based on a finding of abuse of dominance by the rail regulator. And what was being said by the defendant, English Welsh & Scottish Railway, was that in fact there wasn't a good finding -- or there was a finding of infringement but that the finding of infringement made was not such as to give rise to potential liability to the claimant, Enron Coal Services Limited.

And there was a discussion about how one looks at decisions and reads them more generally, but I just want to pick up Lord Justice Carnwath, as he then was, at paragraph 64, because what he's saying is that when you're looking at a regulatory decision -- now obviously it's in the context of relying on it for the purposes of a follow-on damages claim, but we say the position must be a fortiori when you're dealing with the position of a regulatory decision imposing a criminal sanction in relation to a dominant undertaking. He says:

"I agree fully with the reasoning and conclusions of Patten LJ. I would emphasise (as he does in para 31) the need for a determination by the regulator of an infringement as a foundation for liability under

section 474. It is not enough to be able to point to findings in the decision from which an infringement might arguably be inferred. By the same token, it is important that in drafting such a decision the regulator should leave no doubt as to the nature of the infringement (if any) which has been found."

Then he goes on:

"In this case, although there may be some ambiguity in parts of a necessarily complex document, the conclusion ... makes quite clear that the 'competitive disadvantage' ... related to ECSL's position in negotiations, not to the price levels ..."

This is partly driven by the fact that competition decisions made under UK law, they're rather differently structured from the way we see them in European cases, where you have a neat operative part at the end, which tends to define the relevant infringement, albeit there are arguments about precisely how one interprets those. You don't see that in these decisions.

But what that means is it becomes all the more important that a regulator is super clear about what it is that it is saying is an infringement. And we would say, if you are moving into the territory of talking about signalling as giving rise to an abusive infringement, which is what the case is now against us,

it was absolutely imperative that that was completely clear on the face of the decision. And as we'll come to see again, that is not the case.

So those are some observations in relation to standards and in relation to relevant approach to interpretation of a decision.

THE CHAIRMAN: I suppose we do need to be clear from you, Mr Beard, what you think is open to us to do, then? If your supposition argument is correct, and we were to find infringement, for example, or suggest that an infringement finding was justified, what are the limitations on what we can do, in your opinion?

MR BEARD: Well, it depends on the terms on which you're suggesting that an infringement might be found unfortunately, so there isn't an simple answer. If you're saying --

THE CHAIRMAN: I did say on your argument, but the argument is that the case has changed -- (overspeaking) --

MR BEARD: Well, then you can't, is the answer.

THE CHAIRMAN: You can't do?

MR BEARD: No, you can't. You have to send it back. That's the position.

THE CHAIRMAN: That's your position?

MR BEARD: Yes.

That's reflective of the extensive administrative

process that we have. Otherwise what's the point of a statement of objections? That dance that is undertaken fulfils no function apart from being decorative.

THE CHAIRMAN: So the advantage of a full merits appeal system allowing the tribunal to substitute its own decision is an illusion; is that right?

MR BEARD: No, it's not an illusion, it isn't an illusion, because of course what you're doing in having a full merits appeal is enabling you to test the materials that are being relied upon by the regulator, in particular, and here, individuals who are in a position to comment on matters factually in relation to those findings, test their evidence, so when Mr Turner says, well, you can't assess the demeanour of a witness and the comments that they make about the veracity and interpretation of particular positions at particular times, that's just not true. Of course those matters can be dealt with, and of course if there are pieces of economic analysis in the decision, and an appellant comes forward and puts forward expert material, saying those are the wrong, then of course that expert is there to be cross-examined, whether directly or through other means, in relation to that.

But what it does mean is that there are limits on

how far this tribunal can go, having heard merits, factual and expert, in terms of coming up with a new formulation of a decision. Because if that were to be the case, you would have sidestepped the proper statement of objections process. And so there is still a real value in a full merits appeal in order to test evidence robustly. But that does not mean it is at large before this tribunal.

Useful contrast in some ways can be drawn with the process before the General Court in Luxembourg, where it is very rare for there to be witness evidence, and expert evidence with cross-examination. And one of the great criticisms of that is the Commission comes forward with material, it makes all sorts of factual assertions. There is no opportunity, properly, to criticise or test those factual assertions or put people forward that the court can hear saying: that is not the way these things work, this is not what was happening and this is wrong.

That process is one that quite sensibly, in our jurisdiction, we have not followed. And in those circumstances, there is real value to a merits appeal.

THE CHAIRMAN: I think some people have suggested we should.

MR BEARD: Some people on the left-hand side of this court have been very emphatic about these matters, and that's entirely true, but we are not in that category.

That is not the position in relation to these issues at all.

The position we adopt is that we recognise and indeed welcome the fact that there is a merits appeal, but that still has to have limits placed upon it.

So, just for completeness, I should mention the Gestmin case, I think it was Mr Justice Leggatt, as he then was. Nothing in that case suggests that somehow there's a general licence to throw any old documents at a witness or circumvent these requirements of fairness and due process, particularly that exist in an administrative procedure such as this tribunal is dealing with. So that doesn't assist in any way.

As to Mr Holmes's comments about Ms Whalley's evidence, we say that his assertions during the course of evidence that she was being evasive I think are unfair, that in relation to the answers she gave, she was not, as Mr Holmes put it, giving revealing evidence as to what the underlying intent was, and it was a nefarious intent. She was very clear in these circumstances that she recognised that in circumstances where you're dealing with a zero sum game that if you have a situation where you are seeking to protect volumes in the interests of protecting the financeability of the USO, you will have an impact on

others, and that can be seen as two sides of the same coin. It does not suggest any form of nefarious intent.

Mr Holmes at one point referred to the idea that because what was being suggested was a cost justification for the pricing measures, in those circumstances, that was at odds with the idea of retaining volumes.

And we say that's just not the case. Obviously, what is clear from the evidence was that Royal Mail was thinking about cost and value justifications for these price differentials, but in doing so, it was considering the overall position that it wanted to retain volumes on its network and be able to finance the USO accordingly.

Again, that is not a question of any intent illegitimately to limit Whistl. It was instead evidence of intent to try to react to the impact of direct delivery competition, but do so in a manner that was lawful and appropriate.

Now, if I move briefly -- I hope -- through the grounds. In relation to ground 1, it very clear now, from both from Mr Holmes, who emphasised the key feature of the conduct being signalling, and indeed Mr Turner, who is treating this as a signalling infringement, and indeed tries to extend scope of the infringement temporally, that it is the signalling in the CCN that is

important here. And the reason we emphasise ground 1, and why ground 1 is correct, is because what we see in the decision, as I've already adverted to in relation to the intent section, is a failure to carry out what has been characterised as essentially the second step in relation to the analysis.

In other words, it seems to be accepted that you have to do the analysis that says if the pricing were to be implemented, that would be unlawful. And in doing so, you need to look at the likely effects of that pricing if it were implemented. This is Ofcom's case.

But it's then said there's a further element, which is, even if that pricing is unlawful, we can say that the notification of the pricing is unlawful, at which point we say, well, you cannot treat the likely effects of pricing, if it is implemented, as the likely effects of the notification. They are simply two different exercises.

Interestingly, Mr Turner said they were just equal. He said in his closings this morning, if you have a situation where there is unlawful pricing being put forward, the likely effects of those prices, they are equally the likely effects of the notification. And with respect to Mr Turner, that is just plainly wrong. You cannot equate a notification, an announcement or,

indeed, a threat with the outcome of the conduct. You need to carry out a separate exercise.

That exercise is what we don't see in the decision. That is what is missing in the decision. In both the evidence of Mr Harman, and indeed of Mr Parker, it's talked about as being an uncertainty question, and I can understand why, as Professor Ulph put it, it's not really about uncertainty, it is actually about increasing certainty. They talk about if it as uncertainty because they aren't prices that are in place, it is to do with proposals.

But I don't want to get hung up on that nomenclature; what is important is to think about what actually happened here.

Now, in this case what happened was in December 2013 you had an announcement of a price differential being made to the market. Mr Holmes referred to this as being a natural experiment. In fact, it wasn't a natural experiment, Whistl had actually assumed what it thought the level of the price differential would be, and so that announcement was actually the impact of an announcement of a price differential, in other words, Whistl taking steps to consider how it might defer steps in its business plan and proposing the MAC clause.

You subsequently have the CCNs, which have a whole

range of price changes in them, and it's absolutely right that the MAC clause was then triggered.

But it's not enough, in those circumstances, to say it was the price differential that did that when you're talking about the whole of the CCNs, nor is it, as we've made clear, enough just to talk about it as being a material contribution.

But let's take a step back and think about the effects analysis. What is the nature of the infringement and effects analysis that's needed to make that case out? Now, obviously, as I've said, what you have is the need to show that if the pricing, if implemented, would amount to an infringement. You have to do that. That's all to do with the pricing. And that's actually what we see in section 7.

We see it in section 7 in the intent section. That's to do with the pricing. We see it in relation to the materiality analysis, that's all to do with the actual pricing. And of course, the AEC section is really about how you assess that pricing.

But the notice itself, the notice itself, that second part, what are the effects of the notice itself? You don't see that. You do not see that analysis. And it is important to just go back to the decision in this regard, because if we look at section 7E, which is

obviously the key section dealing with likely effects, we can see that none of the analysis there is focusing on the notification itself.

You can pick it up in 7.138. Introduction:

"In this part we explain, based on an assessment of all the circumstances carried out in line with the legal framework in section 5, our conclusion that the introduction of the price differential ..."

Well, I've made this point before, that looks like you're talking about the pricing.

"... in the CCNs in January 2014 was reasonably likely to distort competition. That is, it was reasonably likely to give rise to a competitive disadvantage within the meaning of Article 102(c)."

In other words, it would be discriminatory.

Now, as we've already canvassed, the idea of 102(c) covering infringements by signalling your notice is something that we say is just not right, because it's to do with the application of conditions, and in this case it would be the pricing conditions.

But then if we look at 7.139, you see the three sets of findings that are relied upon. A:

"The price differential amounted in effect to a penalty."

So that's the pricing, not the notification.

Then B:

"By reducing the incentive of competitors to enter or expand in the bulk delivery market beyond a limited degree, the price differential was likely to cause harm."

So, again, its' the pricing there.

And C:

"Given the nature of the discrimination in issue ..."

So, again, we're talking about the actual pricing.

"... the type of foreclosure effect we're concerned with and the prevailing conditions of competition in the market at the time this conduct took place is neither necessary nor appropriate for us to carry out an AEC test."

So all of those elements are to do with the pricing itself.

Then of course we see those reflected in the next three sections because we have then the section that asserts that the pricing's a penalty and then talks about materiality, which is the only concrete analysis that we see here.

Then we get to the second point, which is to do with how you characterise the actual discrimination. Then you've got the AEC analysis. Then in the fourth

section, which is on 241, you've got this consideration of the suspension, and it said the suspension doesn't mean that the pricing, the price differential, can't give rise to an abuse.

But that doesn't solve the problem. It isn't an analysis of the likely effects of the notification. It just doesn't exist. And actually the only thing we see is the footprint in 7.224, where you see there:

"Operators knew that the price differential could be suspended. The price differential was in fact suspended. This doesn't mean, however, that the introduction of unlawful prices would be incapable of having any anti-competitive effects on the market."

Now, that's as high as the finding goes. It does not mean that the introduction would be incapable of having any anti-competitive effects on the market. But that's not actually a finding, even there, of any likely effects of the notification. And what we then see is, in A, consideration of these issues, which we've been through, but just picking up in the middle, where it says:

"In circumstances where its unavoidable trading partner is announced, the price terms on which it intends to operate, a rational operator would not proceed on the assumption that the price differential

could have no implications for them."

But there's a big difference between saying a price announcement would have no implications for you, and saying that you have likely anti-competitive effects by way of a notification and announcement. And that is just not found here.

What you then see in the remainder of that paragraph is actually a description of the consideration of the sorts of risks that are needed. So what we say is the core element of this decision, section 7, what it does is it focuses on the likely effects of the pricing, and it never does the second stage, which is the way in which Ofcom, in support of Whistl, are now putting the case, which is: never mind the pricing, just look at the notification itself. I say never mind the pricing, to be fair they're saying: we have to do that analysis first.

But what we are talking about here is that second stage which they appear to accept is necessary and it's not done. And it becomes particularly important when Ofcom are saying things like: well, the reason you can take it into account, of course, is because these contract change notices change the legal terms on which they were dealing.

But of course that's wrong, as a matter of law.

And it's wrong to suggest that it's discriminatory and contrary to 102(c), as we've discussed. And indeed, what you end up with is a situation where you don't have limiting principles because you're into this world of signalling and statements by a dominant undertaking, allegedly amounting to an abuse. Even if they are making the possibility of a price change more likely, you still don't have limiting principles here.

What it doesn't do, of course, is grapple with the fundamental problem that you need to identify the change in the level of certainty that a notification would require. Here it's very important because, of course, in December you had the in-principle announcement which did relate to price differential where you saw reactions, which is not part of the finding of infringement, notwithstanding what Mr Turner tries to say. It is not part of the finding of infringement, and it can't be dragged in as some sort of contextual element.

If you're working out what the change in impact was of the CCNs, which is the finding here, it has to be as compared with the situation previously. There's no analysis of that. Of course, there's also no analysis of the fact that Whistl here considered that the pricing would be suspended when there was a complaint.

So in those circumstances, what is a change in the level of certainty in relation to these pricing proposals? What are the likely effects of that? We just don't see that in the decision.

Just to be clear, the further material in section 7F that's referred to, you can see this in 7.230, there's a reference to contemporaneous evidence, but 730 makes it very clear that 7F is setting out how:

"Royal Mail explains that the contemporaneous evidence discussed below supports our assessment that Royal Mail's conduct was reasonably likely to distort competition in the bulk mail market."

Of course, what's being said here is "We've made the finding. This material is supportive."

Our point is they haven't properly made the finding in relation to the likely effects of the notice, rather than in relation to the pricing itself.

Just whilst we're in the decision, I just want to flick back to section 5, which is the legal section, and just go through some of the subheadings very quickly there, starting on page 118, legal framework. You've got chapter 1102. You've got dominance over the page at 119, and then you've got a discussion of abuse starting with examples of abuse, and there are references here to 102 and 102(c) that we went to earlier.

Then we go over to 125, and we see the heading being just above 5.34 "Abusive Discrimination". We have a discussion of what Ofcom says are the relevant provisions in relation to abusive discrimination. We do not see anywhere there a discussion, citation of case law, of the way in which it is suggested you can have abuse by way of signalling, announcement or notice. There is nothing of that sort in that section.

Then, of course, we come on at 131 to anti-competitive effects. Of course, again, what we have is a general discussion of effects case law, scale of effects that are required, and then we move through, in particular, looking at things like competitive disadvantage in the context of 102(c), the AEC price cost test, and so on. And just to pick up, there is, at 143, a sub-subheading: "Response to particular points made by Royal Mail". Here, one of the points that is raised is the -- well, Royal Mail raises various points, talking, in particular, about the need for, if you're dealing with 102(c), for prices to be charged or paid.

It is just worth picking up the answer that's given in relation to that at page 5.100. It says:

"As a matter of law, we're required to consider the likely effects of Royal Mail's conduct at the time the relevant acts were committed, and what happened

subsequently might be informative."

Then it cites Microsoft. As we've set out in the notice of appeal and our reply, and I adverted to in opening, Microsoft says: if you've engaged in, in that case, a refusal to supply, an actual refusal to supply, a regulator can intervene before the effects have come to pass or been completed.

What that case does not suggest is that in the context particularly of 102(c), you can look at likely effects before you have actual conduct.

So the answer being given here to the challenge that's posed, which is 102(c), you've got to have them charged and paid, which is both in the language of 102(c) and the case law, they say: "No, no, no, no. It's fine, because you look at Microsoft, and that talks about you don't need to worry about whether the effects have finally come to pass in order for them to be relevant likely effects."

That's a misreading of the law.

Just couple of brief other points that Mr Turner raised this morning. He talked about the persistence of Royal Mail in relation to wanting to maintain a price differential, and referred to various paragraphs, including paragraphs 4.204 to 4.207. It's very instructive. What he is saying is that this persistence

in wanting to defend the price differential is itself infringing. The analogy with the position in ITT Pro Media is obvious. That was a case where a party said, "We have not breached competition law, we're going to defend it in court." And they kept doing it, and they kept doing it, and they kept doing it.

And what was said by the party on the other side was, "You're actually using the court process as a form of abuse, because you're persisting in defending your conduct."

And the court said in theory, it is possible that using the litigation process can amount to an abuse, just as in theory, announcements, notices and proposals can amount to an abuse. But the circumstances in which that should be permitted are very rare indeed.

Actually, here, by talking about Royal Mail persisting in its defence of its position, it's getting very close to those positions in relation to ITT Pro Media.

Just to pick up one other point, I think, Mr Chairman, you referred to circularity issues in relation to suspension in passing. To be clear, we say that if conduct doesn't come into being, it doesn't matter what the reason is, you don't have the relevant conduct here, you don't have the relevant pricing

conduct. We have, of course, accepted that the notice, insofar as it is conduct, did occur. But we do emphasize that there is no circularity here in circumstances where what is being said is that the pricing would be suspended. We go further and say, contrary to points that are made elsewhere in submissions, there's no contradiction here, because what you have in this context is a situation where the objections that can be taken by way of complaint can be to fair, reasonable, non-discriminatory pricing under the regulatory regime, and it is then a situation where a suspension will be put in place. It's not just concerned with competition law.

Those are our submissions in relation to ground 1.

Briefly dealing with ground 2, I just note, although Mr Holmes, on various occasions, has sought to dismiss the value justification account, it did persist as a relevant factor in the consideration of Royal Mail right through to the time when it made its decision. You can see that from the 6th January board paper, page 2. I'll give you the reference: C4B at 79. It is clearly relevant.

More particularly, it does, as we've set out in our closing submissions, set out why it is that there is a case on product differentiation here. The answer that

seems to be given is an odd one. The key proposition now, even though there was no cross-examination at all upon this issue by Mr Holmes or Mr Turner, was that in fact APP2 prices would never have been charged to any customers by Royal Mail. Never have been charged.

And Professor Ulph, I think you rephrased the proposition slightly this morning and said is it the position that it's necessary to -- maybe it was yesterday -- you have to show that the market will actually sustain a higher price, and that's essential to whether or not there's product differentiation in the analysis?

In other words, if there were APP2 customers who would pay those prices, or would have paid those prices, then that would indicate that you did have at least scope for product differentiation considerations here.

Now, Mr Turner and Mr Holmes suggest there is clear documentary evidence that those prices would never be charged. It is worth just turning up the one document that has been referred to, in that connection, by Mr Holmes. And I assume this is what Mr Turner says is clear. It's at C4A, tab 25.

Just whilst I'm passing through this document, if I can just pick up page 4, Mr Holmes referred you to various of the bullet points referring to

justifications.

It's worth noting that on the right-hand side in that box at the top of page 4, second bullet is "Price differential can also be justified."

So of the first bullet is cost justification:

"... can also be justified in terms of additional value."

But the point I wanted to go on to was in the annex, where Mr Holmes seemed to suggest that this detailed customer analysis suggested that no one would pay APP2 prices. Well, with respect, that is just not what this shows at all. If one turns on to the customers that are on PP2, which starts on page 23 -- I'm not going to name them -- there's a question posed as to whether they'd switch plans from PP2. And what is posed is a question at the bottom of that.

"... would pay surcharges on PP1 which would be broadly the same (...read to the word...) price difference on PP2. Could switch volumes to a PP1 operator?"

That's it. And we see it each time in relation to each of these customers. With respect, that is not evidence that no one was going to pay those prices.

PROFESSOR ULPH: I wanted to clarify the point I was trying to make.

MR BEARD: I'm sorry.

PROFESSOR ULPH: About the market bearing a higher price. The issue you're trying to test is the following one, that if you think there's differences between two products, and you stick the price of one of them up, will enough customers be willing to carry on paying that higher price that you actually generate more revenue on that? So the fact you'd have some customers who carry on doing it doesn't prove that this is a commercially rational strategy.

MR BEARD: No.

PROFESSOR ULPH: The issue is how many of them stay.

MR BEARD: Yes.

PROFESSOR ULPH: I'm getting a lot of a relatively inelastic demand for the market to bear that higher price.

MR BEARD: I agree that it must depend on numbers, if one is going to reformulate the test, as you did, Professor. That's entirely true.

I make two points. None of this appears in the decision, and the second point is this is the best document that is put forward to say these other customers would never pay these prices. That's been the case that's been put, and I am saying evidentially, this is just hopeless. As I say, was not a question that was asked in cross-examination.

Two other quick points in relation to ground 2. First in relation to arbitrage, one clarification. Mr Holmes, in his closing, referred to the fact that changes were made to the urban density benchmark, and he referred to his annex 2 to the decision.

Just to be absolutely clear -- I'm not sure that Mr Holmes disputes this -- those changes were made pursuant to CCNs which had to be notified and therefore would be subject to any challenge or confirmation process.

MR HOLMES: That's not in dispute.

MR BEARD: I'm grateful.

Therefore, the suggestion that arbitrage could somehow be snuffed out is not correct. When we're talking about arbitrage in this context, I wasn't talking about the more sophisticated analysis that Mr Holmes was referring to in relation to MPP1; we're simply talking about the allocation of volumes between two plans in order to take advantage of differentials. In those circumstances, what we say is that you see evidence of that from those charts that we submitted. We know that other customers were engaged in this. Much smaller operators, I think, than Whistl, back in 2013. We say, therefore, there was scope for arbitrage. But we do make clear, as I think I made clear in the course

of submissions, that when we look at Mr Harman's work, it doesn't depend on any arbitrage factor.

When we look at the eligibility consideration, what we see is, quite apart from the fact that there is just a failure in the decision properly to engage with the interpretation of the eligibility condition -- and to be fair to Mr Holmes, he said he doesn't hang his case on it and left it to Mr Turner to deal with -- dealing with Mr Turner's points on how you should interpret the eligibility provision, he started with saying once you had a requirement to put forward two-year forecasts, then the reasonable likelihood of meeting the MPP2 threshold would then be focusing on those forecasts.

That, with respect to Mr Turner, is plainly a wrong way of approaching the interpretation of the clause. The clause pre-existed all the forecasts. It wasn't being changed by the forecasts. What it was to do with was existing profile of mailing. We know that in particular because Ms Whalley was specifically asked about these matters. She gave evidence on these matters, Day 5, page 121, line 24 through to 122, line 22, and also on Day 6 from page 120, line 1 onwards.

Mr Turner also suggested that the 15% surcharge was somehow an irrelevant other component that didn't matter for the interpretation. We say that again is wrong, as

a matter of contractual interpretation. You get on to MPP1, although, on the face of it, what you have is the reasonable likelihood test set out in clause 3.2, in fact the only reason you'll be required to exit at any point would be if 15% of your volumes was subject to surcharge, which, as we know, exceeded the 31 SSCs.

The reason that matters, for contractual interpretation, is if Mr Turner was right, and it was constantly about the way your business plan was set, that provision would never bite and never have real operation, because if you couldn't meet the reasonable likelihood, the fall-to-earth requirements for MPP1, you would be moving away from those thresholds long before 15% of your volumes were subject to surcharge. So the two things are linked, for the purposes of contractual interpretation, and he doesn't grapple with that.

The other points he makes about the position of Ms Whalley, we say that, properly read, that cross-examination does not suggest that she is accepting that you do anything other than consider the existing profile of someone seeking to be on MPP1. Furthermore, the views of Ms Whalley, and indeed Mr Polglass and Mr Wells, in relation to these matters, are not determinative of the position. But it is very striking, nonetheless, that we had a situation where, on

17th December 2013, there was a meeting between Whistl and Royal Mail, as we know, at which it was specifically said to Whistl: "We can help you move on to MPP1."

In those circumstances, it is particularly strange, at that point, to be saying: "Well, actually we weren't ever eligible, because it was equally plain, at that point, that Whistl did have plans that were for a much wider roll-out."

In those circumstances, the position being adopted by Whistl is inconsistent with what it maintained, at the time, that it was pushing forward with the roll-out in circumstances where Royal Mail was saying, "We can accommodate you on MPP1."

And it is not right to say that Mr Polglass was not cross-examined in any way about these matters. Day 8, page 90. And in relation to Mr Wells, Day 10, page 45 through to 46. In particular, Mr Wells was asked about whether or not he made any enquiries of Royal Mail as to whether there were any eligibility concerns in the light of that meeting, and he made it clear he didn't make any attempt to do so. So that's ground 2.

Ground 3 I will try to deal with relatively speedily. I'm conscious that I am drifting beyond the time I suggested I would take.

THE CHAIRMAN: How far are you drifting?

MR BEARD: I think I'm going to be about half an hour, probably. I'm sorry.

THE CHAIRMAN: Maybe we should pause, I think.

MR BEARD: I'm grateful.

(3.12 pm)

(A short break)

(3.24 pm)

MR BEARD: So, ground 3.

First of all, Mr Holmes I think now seeks to distinguish Intel on two particular bases. First of all, although it's not trailed anywhere in the decision, the analysis of Advocate General Kokott in Post-Danmark II takes on a profound importance, in that her reading of an interpretation of paragraph 136 -- or, sorry, her reading of the words "among other things", that are then used by the court in paragraph 136, Mr Holmes says is instructive, that in fact in relation to pricing practices the case in Intel is not emphasising the importance of the AEC test, and in fact pricing practices that nonetheless comply with an AEC test may well be found to have an exclusionary effect.

There are obviously two or three points to make in relation to that. Advocate General Kokott's interpretation of the words -- and it's her stress --

are not in any way binding subsequently in relation to Intel, particularly in circumstances where, when one looks at the structure and reasoning of Intel, in particular paragraphs 133 and 134, what it is doing is emphasising how you need to have clear lines in relation to the assessment of anti-competitive foreclosure.

That, of course, fits with the points we have made in relation to legal certainty.

It is, in fact, worth noting that when you go through the cases which are footnoted to Advocate General Kokott's particular interpretations of those words, she refers first of all to Post-Danmark I, which is, of course, separately and independently referred to by Intel, in particular in 133 and 134, without any sort of emphasis or gloss. And then she refers to other cases which don't actually use the "other", "amongst other things" language at all, and indeed, some of them are talking about margin squeeze cases and so on, where we know that AEC tests have been adopted.

What is going on once again is seeking to latch on to two criteria in Post-Danmark II. The first is not applying AEC tests in circumstances where there's an impossibility of an AEC emerging, which we say is inconsistent with the reasoning in Intel, and secondly, emphasising the importance of less efficient competitors

offering competitive pressure in the market.

Now, as Mr Dryden has quite fairly and properly explained, it is feasible that less efficient competitors can offer competitive impacts in the market. We recognise that. That is not the question here. The question is what should the test for ex post enforcement be, and we say that is clearly set out by dint of the terms of Intel, 133. And of course, it is with the bearing in mind at paragraph 140 that says in relation to the assessment of any potential efficiencies, you can only ever undertake that exercise if the AEC analysis consideration has been done.

So that's not just about doing an objective justification test, what it's doing is emphasising how you can't carry out any balancing unless you've done that, which again reinforces that overall thrust of Intel. As we put it in our initial closing, it is resolving the dispute between Post-Danmark II and Post-Danmark II very much in favour of Post-Danmark I, and of course in line with the earlier European Commission guidance, which of course has not been referred to in relevant paragraphs. Paragraphs 21, 23-27 of that guidance, nowhere appear in the decision.

Mr Matthew maintained that he had it in mind. With respect, that really doesn't fulfil even the

requirements of section 60 to have regard to relevant material in decision-making. It does not appear there.

What we end up with instead, if we accept the approach that is being adopted by Ofcom and by Whistl, is that we have to have some sort of prior gating question, now, Mr Matthew and indeed the decision talks about whether or not something is a low pricing practice. It's not us that came up with that term. That's Ofcom and Mr Matthew, supported by Whistl. And we say it is plain that that is untenable, and the resounding silence in oral closings from either Mr Holmes or, indeed, Mr Turner in support of that distinction is itself resonant.

There have been attempts to turn that gating question from being LPP, low pricing practice, versus non-low pricing practice, into whether or not it's vigorous pricing competition, drawing on the language of the guidance, in an attempt to suggest that that is the consideration. Again, that gating question is nowhere required in Intel and indeed creates precisely the sort of vagueness that is problematic.

Mr Turner and indeed Mr Holmes tried to say, "Ah, well, it's competition on the merits, you can tell then". But we are lapsing back into nothing more than an "I know it when I can see it" test, and that is

precisely what Intel and the cases referred to on legal certainty, and for instance the cases such as Deutsche Telekom talking about legal uncertainty in the use of AEC emphasises it is not appropriate. You need clear thresholds.

Yes, there can be arguments about the precise way in which you do an AEC but nonetheless it is the relevant threshold or assessment. And Mr Dryden explained, as I say, why that's the case.

But let's assume you're against me on all of that, as Intel being determinative, using an AEC test. Let's assume you're against me and that there are qualifications here. And that one can refer to Post-Danmark II in this regard. It doesn't solve the problem that Ofcom faces that it just treated the AEC test as completely irrelevant.

Nothing in Post-Danmark II suggests that you should just ignore an AEC in these circumstances, because of course in Post-Danmark II, there wasn't an AEC analysis done. You can see that from the Advocate General's opinion in paragraph 14.

It's said, as I say, where you've got the impossibility of an actual AEC emerging, but that's exactly the same in all of these AEC type cases, whether it is margin squeeze cases we've referred to, whether

it's conditional pricing practices, including Intel. The practical ability of an AEC to emerge is not considered and not required. And indeed, the fact that you would be talking about entrants you had to grow, precisely the case in margin squeeze cases, in conditional pricing practice cases, and therefore no good reason for differentiating, as Mr Turner sought to suggest earlier today.

Frankly, Ofcom just does have no answer to this. Intel is absolutely clear that if someone has come forward in the context of pricing practice case with this material, it needs to be properly analysed. It is not sufficient to just say it's not relevant.

Mr Holmes ends up falling back on the suggestion but the Commission did it in Intel so it was an appeal case against the General Court failing to consider what the Commission had done. But if it didn't matter, the General Court would have been fine.

And of course, when you look back at the decision itself, what it's doing is first of all saying, "Well, we can presume" -- which is the way the General Court went -- and then, in the alternative, "We carry out an AEC analysis". And what's being said by the court is that that is not something that it is sufficient to do here.

Going back to the decision itself, and considering the answers in the decision, what we see is, when we go through the key parts of that decision, that the reasoning on which Ofcom decides the AEC is irrelevant don't stack up. 7.200 is all about, well, the AEC doesn't reflect the actual position of an entrant. That's true of all AEC analyses. All of them. And in particular, it's true of Intel.

I would commend those passages in the Intel decision, just for your notes, authorities 10, tab 119, running from 1002 through in particular to 1012, pages 302 to 304, which talk about the fact that there is no expectation that the AEC test there would somehow mirror the position of AMD or any particular entrant in the chip(?) market.

We also know that the reasoning in 7.199, which is based on, "Well, look at the structure of the market", that is not a distinguishing criterion. I went through how it is in fact cases, whether it is margin squeeze or conditional pricing practice such as Intel exhibit all or potentially more structural impediments to entry and development of entrants than the current market, and yet still AEC tests are appropriate.

Then we've got 7.198, which hinges on the low pricing practice test. As I say, that hasn't even be

properly defended.

It's not consistent with cases on margin squeeze, it's not consistent with the position in relation to conditional pricing practices, which of course, as we know, was precisely how an independent economist for Whistl saw this when he was first asked about this position:

"How do you characterise it?"

"I see it as a conditional pricing practice."

That was Mr Parker's report when the initial complaint was submitted.

Because what is going on here is a falling back on a labelling mechanism, whether its' low pricing practice or vigorous price competition or competition on the merits, it's a labelling mechanism, it's using no counterfactual exercise, and it is using presumptions of net adverse effects on consumer welfare, and none of those approaches are justified in the light of the relevant case law.

Indeed, as I say, the approach being adopted here, which goes on to suggest that the AEC has a whole range of problems when it is applied, and whether or not it does accurately reflect reality, is proving far too much in the context of AEC tests being accepted and used in these other cases, because those criticisms would apply

just as much there.

Now Mr Holmes spent an awful lot of time in the first part of his closing emphasising how he saw the pricing as a penalty. Again, we're lapsing into labelling. Calling people names is not a good way of determining anything. He didn't ever grapple properly with the problem with whether or not a relatively difference in pricing should be seen as a discount or otherwise. I do refer you back again to Mr Parker's report. First take of an independent economist: it's a discount. C4B, tab 95, his report.

But the critical thing is that both Mr Matthew and in particular Mr Parker accept that in order to decide whether something is a discount, you have to carry out a counterfactual exercise, and none has been done here. None has been done here. None has been attempted. Mr Matthew could not tell you what the pricing would have been otherwise.

It's based on assumptions, it's based on "I know it when I can see it."

And Mr Dryden, as I say, has explained why that gives rise to real problems in circumstances where, particularly in a situation where you're dealing with a monopolist that exhibits all sorts of non-monopolistic characteristics, like for instance not exhibiting

monopoly profits, actually being a multi-product firm, with a very large range of common costs, which means it has these break-even thresholds it has to meet as well, that productive inefficiency can result, albeit indirectly, in an adverse impact on consumer welfare, and that a balancing exercise is required. Indeed, as Mr Dryden and Mr Parker agree in this regard.

Of course, by going down the route that Ofcom, with Whistl support, is going, you end up with a range of problems about how this works over time. What Mr Dryden I think has referred to as a glide path issue. If you're not using an AEC and you're allowing less efficient competitors in, to what extent do you have to allow less efficient competitors in?

Mr Parker starts talking about 1p, 2p, 3p. What level of assessment do you modify any test in order to assess what level of inefficient or less efficient entry you permit?

And more particularly, how do you unwind from that as the conditions in the market change? What is the trajectory for allowing differential pricing over time? If you're prohibited at the moment because a particular threshold is in place, as conditions in the market change, how do you expect that these matters are going to alter? What sort of point do you look at where,

actually, an AEC test becomes relevant again, or some variant on it?

Of course, if you were dealing with these in terms of an ex ante regime, those are the sort of issues you can deal with as part of a policy assessment, but trying to set the test ex post leaves you with a whole huge range of problems in these circumstances.

So the suggestion that one starts tinkering with the AEC, what one can do with it, how one can do these things, that creates in itself problems in an ex post world.

Interestingly, Mr Turner said, "Never worry, never worry, we've done the work, actually the AEC tests failed."

With respect to both Mr Turner and Mr Parker, that's not right. (a) it's predicated on all sorts of assumptions about the eligibility criteria we've touched on. It also depends on other assumptions such as the levels of 1p, 2p or 3p, inefficiency you permit in the circumstances, and indeed, it also depends on assuming that you fail an AEC test if you fail in the first SSC that you would be rolling out to, which again, we don't accept would be the correct way of looking at these matters.

So we say yes, you should have looked at the AEC of

Ofcom. Mr Turner says, well, actually we can do AEC analysis. We say what he's done is not sound, and certainly this tribunal can't reach a conclusion that somehow we have failed the AEC test.

One or two brief additional points in relation to it. I think it was suggested by Mr Holmes that Mr Matthew didn't accept that the present case was in the fuzzy category. Actually, it is worth looking at his evidence, Day 11, pages 49 to 52 in particular, but also page 160 and page 175, where he does talk about the practice for which AECT would be a safe harbour, presumptively objectionable practices and then a grey area. And then he goes on talking about how this case fits all the criteria, but it does appear he's referring to the fuzzy case albeit that Mr Holmes says you should read these things differently.

That then takes me beyond the legal structure and the value and importance of the AEC test, subject to one technical issue ...

Oh, I'm so sorry, I've given you the wrong reference. The key reference for Mr Matthew is just Day 11, pages 49 to 52. The other references were to Mr Holmes's material.

There is one technical issue I should pick up from Mr Turner's submissions. It goes back in part to the

start of Mr Holmes's oral closings, where it was suggested that Royal Mail had economies of scale and scope. There are two points to make there. That is true in relation to mail market. Albeit that Mr Holmes's proposition didn't recognise the additional costs and burdens that Royal Mail also has in that regard. But the technical point is that there is a difference here between the position in relation to the mail market and the bulk mail increment. And that is why Mr Turner, in his submissions about the shape of a cost curve -- average incremental cost curves was actually talking about apples and pears, because it is right that the mail -- in relation to mail overall, those -- the LRICs change. But in relation to the position in relation to the bulk mail increment, the position is that they are flat across SSCs, and almost flat within SSCs.

Mr Turner criticised reference to this LRIC document. I just want to be clear. It's in the bundle because this is a document that is officially provided by Royal Mail to Ofcom setting out how it is putting forward its LRIC model, because that is relevant to a whole range of cost controls. And given that issues arose in relation to these matters, we thought it was important that the tribunal was aware that there was

actually some concrete modelling done on this. And in fact, of course, what it does do is it deals with the DLRIC, so there is an element of common cost even in that LRIC model in any event.

I think in relation to those technical matters, and in respect of the details of the AEC assessment, I don't have further points to raise.

In relation to the materiality test, Mr Harman's main point of course, and we've got this set out in our closing but I also commend Mr Harman's reports, are that using this materiality metric, which is the only metric that is being used for any sort of quantitative assessment of likely effects, albeit obviously in relation to pricing, that material, it descends into little more than, as Mr Matthew put it, a sizeable chunk test.

We say that is wrong. It is contrary to the relevant legal thresholds that were set out in Attheraces, where of course you were dealing with a 50% drop in profits, and the court was standing there going: well, yeah, okay, so you lost 50% of your profits. Does it change the competitive dynamics in the market?

That is the question that is not answered by any of Ofcom's metrics, and that is precisely what Mr Harman has sought to do with the metrics that he uses. It's

not some arbitrary collection of numbers that are just being thrown at one another. The metrics that Ofcom use do not engage with whether or not there's an adverse effect on competition, whereas the metrics that Mr Harman uses do.

Now, we have heard from Mr Turner, and extensively in closing, about how all the points that he criticises Mr Harman for in relation to the materiality analysis had previously been raised. Now, with respect, that is simply not correct. He took you in relation to paragraph 176 and 177 of his closings to the joint statement. Now, the joint statement is instructive, because what he adverted to there, particularly at pages 20 through to 22 in the internal numbering, was nothing to do with his own expert's material, Mr Parker. He's picking on bits relating to Mr Matthew's evidence, and with respect, the point that is being dealt with in 176 and 177 of his submissions is different from that put forward by Mr Matthew, and it is a new point that is being argued in 176 and 177 of the closings. What is being said there is not something that was traversed by Mr Matthew, and certainly not by Mr Parker, because in 176 it is saying that the approach that he has adopted is fundamentally misguided because:

"The measure in question is not to be properly

regarded as a definitive extra business cost, it's to be added in to a business plan as a matter of accountancy where all other assumptions about the rate of business progress are held constant. It's a competitive event which would disrupt the underlying growth earnings severely."

That is a different approach, that delineation in categorisation is not one adopted by Mr Matthew. Mr Matthew in that section is dealing with something very different in relation to Mr Harman's IRR threshold, and so the fact that he can point to criticisms by Mr Matthew of the IRR threshold are not suggestive of the idea that this particular point is anything other than new. It plainly is new.

As to, for example, the points he made about paragraphs 181 through to 183, where he talks about expert opinions that he is then being criticised for, again, what is being said here has never previously been put to Mr Harman. And in those circumstances, the points being dealt with in 182 and 183 are also matters that would otherwise be the sorts of issue that quite properly Mr Harman would want and appropriately be able to comment on. That is also true, for example, of the position in relation to paragraph 197, where it is suggested that, in fact, Mr Harman has completely missed

some additional major risk factor. Again, not a proposition that's been put previously, being raised with the first time in closing, not something that can be dealt with.

The suggestion now from Mr Turner that relying on probability analysis by Mr Harman is inappropriate, particularly striking, of course, in circumstances where Mr Parker himself puts forward that analysis. And of course, Mr Holmes didn't cross-examine Mr Parker in relation to any of that. So that is not challenged, yet Mr Turner now stands up and says, "Even though it's common ground between my expert and Mr Harman, I'm going to challenge Mr Harman". That is not right and that is not fair in the circumstances.

Then finally, in relation to certain of the paragraphs later on which he referred to, where he talked about the evidence of Mr Polglass, and refers to the evidence given by Mr Polglass orally and under cross-examination, quite remarkably, Mr Turner says, "Ah, well, it's dealt with my Mr Polglass so Mr Harman doesn't need to comment."

That, with respect, is completely getting the issue the wrong way round. The reason why we have witnesses of fact before we have experts is so that the experts can hear what is said by the fact witnesses and take

that into account in either modifying, qualifying, or reaffirming their assessments.

The fact Whistl want to rely on Mr Polglass's evidence against Mr Harman is just a profound manifestation of the unfairness here. Mr Harman has not been in a position to say, "Well, I hear what Mr Polglass says on this, my view is the following", or "It factors into my analysis in the following way when we're talking about these various business matters."

So ironically, the points that Mr Turner makes about Mr Polglass and his evidence actually go to show why it is inappropriate for these submissions to be pursued against Mr Harman in the way that they are. We have no objection to Mr Turner relying on Mr Polglass. Of course that is appropriate. But in order to say Mr Harman is getting these things wrong and you can just rely on Mr Polglass is not fair, in all the circumstances.

THE CHAIRMAN: In which paragraphs --

MR BEARD: I was thinking in particular paragraph 207, I think, in relation to that. But it then goes on. It's from 207 onwards.

THE CHAIRMAN: I thought that's what you were referring to. I think, to be fair, Mr Turner simply said that those are matters of fact, which you wouldn't expect an expert

to be able to state without having been there at the time.

MR BEARD: Of course, of course. That's entirely right. The point I make is the extent to which those are then relied upon as undermining Mr Harman's position, that, again, is problematic because of course --

THE CHAIRMAN: I don't think he's saying they should be -- well, I would not take him to be saying that they undermine Mr Harman's position. It is simply a question of whether we prefer one evidence to another.

MR BEARD: Well, it does give the tribunal a problem here. I don't think one can get away from this. Insofar as the factual matters put forward through the process of cross-examination amplify or vary the material that Mr Harman saw when he was preparing his reports, there is a problem with that if it is then said that the value of Mr Harman's report is diminished because it is inconsistent with that factual material.

THE CHAIRMAN: The point, surely, that Mr Harman made some statements of fact as well as statements of expert opinion as being aired right from the beginning in this case, that's not a new point to us.

MR BEARD: No, that undoubtedly -- we're not taking that. The point I'm making is that Mr Harman --

THE CHAIRMAN: That's as far as I'm going at the moment.

MR BEARD: Well, then, that may well be that there is no issue.

My concern is that obviously Mr Harman carries out analysis of the business plans, and the impacts and the plausibility of various aspects of the business plans, and the vulnerabilities that Whistl had. If what's being said by Whistl is that Mr Harman's analysis there is flawed because actually, look at what Mr Polglass said in the course of the witness evidence, then that is problematic. If he's not going that far, then obviously we can move on.

That concludes my observations in relation to ground 3.

On ground 4, you already have my submissions in relation to that. Just to be clear, in relation to ground 4, it isn't some admission of some nefarious intent at all. We've explained the position in relation to intention. In any event, it is inevitable, in circumstances where the predicative of ground 4 is that you're not succeeding in grounds 1 to 3, you have to treat as findings against you the position in relation to matters relation grounds 1 to 3, and therefore some of the language used in ground 4 necessarily accepts that. But that doesn't cut across anything that I've said in relation to the nature of intent.

Just to pick up the point that Mr Holmes raised in relation to the position on EBIT, with respect to him, the position is absolutely clear. In relation to EBIT, it was the only indicative measure that was being put forward in 2012/2013. If Mr Holmes is suggesting there was anything more than that, that is not borne out by the relevant documentary material. We've dealt with that and cited the relevant guidance in paragraphs 223A and B of our written closings.

So in those circumstances, we say those matters are important. We do note, of course, as I did in the course of referring to Intel, that in order to carry out any such assessment in the light of Intel, what is said is one must, in the circumstances, have regard to the AEC analysis. That's paragraph 140 of Intel.

I'm not going to add anything in relation further to G5, ground 5, albeit that I do emphasise there the importance of --

THE CHAIRMAN: Can we just, still on ground 4 --

MR BEARD: Yes, please.

THE CHAIRMAN: You drew our attention earlier to presentation to Ofcom in December 2013. I think it's in RM7B and 54?

MR BEARD: 54? Yes, 54. I have it.

THE CHAIRMAN: I think you were asking us to take this

presentation in the context of your arguments over intention, right? Is that the context in which you --

MR BEARD: Yes. It's particularly in relation to the question of whether or not the traffic lights documents are suggesting that there was an intent to limit the scope of Whistl's roll-out, and that that is evidenced by the fact that the assumptions made on slide 10 relate to no investment and no profitability. And all I was saying in relation to those was actually, as Ms Whalley explained, that wasn't the working assumption. Therefore it wasn't an intent or expectation, and that things changed over time, and we see evidence later of more recognition of the need for -- or the likelihood of --

THE CHAIRMAN: Is this meant to be evidence of the change having taken place?

MR BEARD: Well, it's --

THE CHAIRMAN: Or evidence of change to come?

MR BEARD: Well, the position here is obviously that 10th December, a deck is being put forward to Ofcom where you have a situation where it's clear from, in particular slide 9, that the working assumption is that TNT is seeking an investment of £50-80 million specifically.

So, contrary to any suggestion that there's no

thought of investment, that curve that involved a faster roll-out, which might well require foregoing a reasonable rate of return for two or three years was somehow irrational to consider. In fact it's clear that these things were well in mind by December.

THE CHAIRMAN: This document sets out Royal Mail's estimate, presumably, at the time, of how it saw things were likely to happen, and it asked Ofcom to do something about it. That's basically it, isn't it?

MR BEARD: Yes.

THE CHAIRMAN: Yes. And it included statements about rapid development of direct delivery?

MR BEARD: Yes.

THE CHAIRMAN: "It's unclear how quickly we would be able to introduce our commercial response due to potential challenge."

MR BEARD: Yes.

THE CHAIRMAN: That's presumably why we're here, still.

MR BEARD: Yes.

THE CHAIRMAN: Then a fairly comprehensive set of conclusions which I suppose go to your ground 4.

MR BEARD: Well --

THE CHAIRMAN: Having said that, Ofcom didn't do anything on the basis --

MR BEARD: No, Ofcom didn't do anything on the basis of it.

We entirely accept that they didn't.

THE CHAIRMAN: Ofcom must have thought that even with all this information, the USO was safe.

MR BEARD: Yes. They clearly didn't act, and therefore, by not acting, that is undoubtedly the position. And we say that was wrong, for the purposes of ground 4. And we say that Ofcom is not the ultimate arbiter, as we have set out previously. It is not simply a matter for Member States and regulators as Ofcom and Whistl have set out.

THE CHAIRMAN: I'm not sure we focused on this document very much up until now.

MR BEARD: No, it was something I highlighted in light of the fact that Mr Holmes, in his closing, picked up this point that actually, around 6th December, no one really knew about -- there was no intimation that Royal Mail was considering or concerned about investment going to Whistl, and therefore a more accelerated roll-out. And therefore we simply identified it as a document that was provided to Ofcom at around that time.

THE CHAIRMAN: Okay. Thank you. Ground 5 -- or 6.

MR BEARD: Ground 6, yes.

So ground 6. The first thing to emphasise in relation to this -- and I suppose, in relation to questions of intent and negligence and novelty, and so

on -- is that the way in which the case is now framed by reference to signalling the notification and so on, not only is it plainly novel, but also having regard to the Lundbeck threshold that we set out in our appeal, the idea that we couldn't have been unaware that what we were doing by issuing the notification, which is the key test, was contrary to competition principles, rather than specifically the law, I think is a proposition that just doesn't stand up to any scrutiny.

You ask any dominant company: could we issue a notice to change in circumstances where we had these protective provisions in place, could we defend our position in front of the regulator, even though we weren't implementing them? That would have been abusive. Plainly, that wasn't the case. You don't have evidence to make that out.

So we say, given the way that the case is now framed, plainly those considerations in relation to intent, negligence and novelty take on even more significance.

In relation to the level of penalty imposed, Mr Holmes in particular said: "Well, the main thing is we essentially put in place a vast discount from the level at which we would have penalised you if we hadn't put in place a proportionality reduction, taking into

account our seriousness threshold and our relevant turnover threshold."

I think it's what behavioural economists refer to as a "serious framing issue" in the sense that if you say that really the penalty should be absolutely colossal, but we will give you something that's enormous but not so big, there is justice being done and proportionality at work. You are, in a way, missing the substantive point in relation to the question of proportionality.

We've explained very clearly why we say the 20% is plainly an excessive starting point. I reiterate that with emphasis where we're talking about a signalling and announcement notification infringement, which is what is being canvassed.

In relation to the turnover issues, I am concerned that here we have from Mr Dryden, in his second report -- and just for your notes, that's in the concurrent evidence bundle at tab 4 -- an extensive consideration of the issues in relation to what is the affected turnover, which is the relevant criterion for the consideration in relation to the starting point.

Here we have a summary of conclusions at 1.10 talking about issues concerning the product dimension and geographic dimension. He set out his key considerations. He provided further evidence in

relation to these questions of market definition in his fourth report at section 11. That's in the consolidated evidence bundle at tab 6.

Then, of course, there are further summarised responses to the points further taken by Ofcom in the defence in his fifth report, which is found in the second consolidated expert bundle, and in particular -- sorry, that's at the tab 7 in that second bundle. In particular section 12.5, dealing with -- section 12, dealing with these matters.

He does highlight, in particular, there at 12.5, the rather wonderful proposition that is put forward in the defence in answer to a number of -- or attempted answer to a number of Mr Dryden's criticisms, where he says that the geographic and product market definition account is unsound. He says:

"I note that the defence states that the approach I proposed would have involved a complex, uncertain and imprecise calculation of the estimated impact of the infringement, which, even if implemented, would not have, in practice, made any difference to the penalty imposed."

It's a wonderful piece of logic. It is very difficult to understand how the exercise would have been uncertain and complex, and yet would inevitably have

resulted in precisely the same number that Ofcom ended up with.

In any event, I don't just rest on that proposition. The key point is that in relation to none of this material was Mr Dryden challenged. None of it. Therefore, we do commend all of that material particularly to the tribunal, in considering whether or not the relevant turnover thresholds have properly been assessed. We say they have not. And that is why, looking at the seriousness and turnover, you started with such a colossal number in relation to a notification infringement that lasted six weeks.

An outlandish level of penalty. Yes, there was a very substantial reduction for proportionality, but it doesn't get close to what, overall, is an appropriate and proportionate penalty in the context of this case. Having regard to all the circumstances, having regard to the suspension mechanism that we put in place, having regard to the fact that, in the circumstances, we did look to see, and sought to obtain, proper justifications for the changes that we were putting forward, it was not any sort of very assertive price signal in the circumstances. And in fact, it was an appropriate approach and one that, in Ofcom's decision, they have struggled to grapple with, because they have conflated

the pricing with the notification.

Indeed, we see that in the penalty section where they end up emphasising price discrimination, which of course would be contrary to 102(c), something that we say is not made out in this case.

Unless I can assist the tribunal further, I'm grateful for the indulgence, and those are our submissions.

THE CHAIRMAN: I think we have no further questions.

MR TURNER: Sir, I have two references to give you.

On Mr Harman and the use of arbitrage, the reference is footnote 146 and Harman 5. Second, on the new document which has just been deployed in reply, the RM7, tab 54 document, we've been looking at slide 9. It's the top bullet, on the issue of economies of scale and bulk mail delivery relating to an entrant.

THE CHAIRMAN: Thank you. I think our judgment will be reserved. [Laughter]

It will come out as quickly as possible, without giving any commitment at this stage.

It remains for me to thank everybody for the assiduous way in which this case has been presented and argued, on the whole good humoured, I think. And also we've had one or two hiccups along the way, which I think, in the end, we've all dealt with with

commendable civilisation and harmony. I wish that were true always. It isn't always true.

So thank you very much, everybody, and see you again when it comes to costs, I expect.

MR BEARD: Thank you very much.

(4.06 pm)

(The hearing adjourned)

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