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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 June 2019

Before:

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

BETWEEN:

ROYAL MAIL PLC

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

WHISTL

Intervener

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HEARING – DAY 1

APPEARANCES

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

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

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

Monday, 10 June 2019

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(10.30 am)

THE CHAIRMAN: Good morning, Mr Beard. Before you start,
a little bit of housekeeping, if I may.

First of all, welcome everybody to the CAT. You're
going to introduce everybody?

MR BEARD: I will.

THE CHAIRMAN: Am I right that there's nobody here who isn't
in Monckton Chambers?

MR BEARD: I haven't fully checked.

THE CHAIRMAN: Not a monopoly of any kind.

MR BEARD: That's a healthy market share.

THE CHAIRMAN: And I'm sure there will be only an
appropriate level of collusion, amongst the teams, that
is.

We're going to do this in the normal way. We will
have comfort breaks halfway through, if that's okay.

MR BEARD: Yes.

THE CHAIRMAN: The usual time. It's 10.30, so if we can
work to that.

We have a timetable. Are there any changes to the
timetable?

MR BEARD: No. I think we're all planning on working to the
timetable as it was set out and agreed following on from
the PTR.

1 THE CHAIRMAN: Right. There are various logistic issues in
2 relation to the hot tub when we come to it. We don't
3 need to deal with those now. Can I take it they're
4 being addressed and if there are any problems, come back
5 to us or to the referendaires, please.

6 MR BEARD: Yes. In terms of logistics --

7 THE CHAIRMAN: Bundles.

8 MR BEARD: Bundles and positioning of people.

9 THE CHAIRMAN: Position of people: we'll rely on everybody's
10 good sense for that. There will be purdah arrangements
11 appropriately. And I think there's one issue, just to
12 note, when we get to the individual experts, after the
13 hot tub, we'll have to find a room. There's another
14 hearing going on on 1 and 2 July, so some of the
15 break-out rooms will be used, but we have another room
16 available. So we have covered that one, but it may not
17 be quite what you're used to.

18 MR BEARD: I'm grateful.

19 THE CHAIRMAN: One thing I want to mention is not next week
20 but the week afterwards, we have a visit from
21 Mr Justice Lam, who is the President of the Commission
22 Tribunal of Hong Kong, and he has expressed some
23 interest in sitting in on this for a couple of days.
24 I hope that's acceptable. It's not unusual. He's
25 a distinguished man and he's in the field. He will

1 obviously be subject to the usual rules of
2 confidentiality.

3 He's asked if he can have some papers to just
4 acquaint himself with this very simple case. We thought
5 the skeletons would be acceptable. As he's going to be
6 around during the hot tub, it seemed also appropriate to
7 us that he should have the joint reports of the experts
8 and the issues for the hot tub provided he agrees to
9 keep them completely confidential.

10 If there's any objection to that, could we know in
11 a reasonable time, please.

12 MR BEARD: I can't believe there will be, but of course I'll
13 check.

14 THE CHAIRMAN: He'll sit somewhere over there and I'm sure
15 he will conduct himself with appropriate decorum.

16 MR BEARD: He's just handed down his first two judgments in
17 Hong Kong?

18 THE CHAIRMAN: He has just handed down his first two
19 judgments, yes. Criminal standard of proof in
20 Hong Kong. How different it would be here, wouldn't it.

21 MR BEARD: I'm not sure. We shall see.

22 THE CHAIRMAN: That's a rhetorical remark. We don't have to
23 agree or disagree.

24 I think that's my housekeeping list. Would you like
25 to commence now, Mr Beard?

1 Opening submissions by MR BEARD

2 MR BEARD: Mr Chairman, members of the tribunal, thank you.

3 I appear today for Royal Mail Group with Ms Osepciu
4 and Ms McAndrew. For Ofcom, Mr Holmes appears with
5 Ms Morrison and Mr Grubeck. And in the middle,
6 Mr Turner appears on behalf of Whistl with, on his
7 right, Mr Bates and, on his left, Ms Mackersie.

8 With a striking lack of imagination, my intention is
9 to make some introductory remarks and then work through
10 the grounds in these opening submissions. I won't
11 obviously be dealing with matters comprehensively. Of
12 course this tribunal is going to hear extensive evidence
13 from certain people in due course, and therefore I will
14 refer to certain matters but recognise that those are
15 not going to be fleshed out in opening and instead focus
16 more on structure and a number of the legal issues.

17 As the tribunal is aware, this is our appeal under
18 Section 46 of the Competition Act. This case concerns
19 what is a colossal penalty in relation to an
20 infringement finding covering a period of six weeks
21 which pertained to pricing that was never charged, paid
22 or otherwise implemented.

23 It is, in human rights terms, a criminal sanction
24 that's been imposed and we say quite wrongly and
25 unfairly. The tests that Ofcom have used are not just

1 novel but incorrect. Ofcom has found that Royal Mail
2 abused a dominant position by issuing contract change
3 notices pursuant to its access contracts, and those CCNs
4 announced a range of future access price changes,
5 including a price differential between two different
6 price plans. As I say, those prices were not
7 implemented, the contracts were not changed.

8 Royal Mail had wanted to ensure that nothing it did
9 could breach competition law or the regulatory scheme
10 under which it operated. It sought to ensure that its
11 approach could be properly justified, but more than
12 that, it actually built in a safety valve mechanism to
13 the contractual scheme to ensure that it would not do
14 anything unlawfully to harm competition.

15 Now, Ofcom has sought to suggest that Royal Mail had
16 a purpose to act to drive Whistl out of business. What
17 the evidence will show is that Royal Mail was concerned
18 not only that it was always on the right side of the
19 law, notwithstanding the huge pressures on its business,
20 but it actually took steps to ensure that no problematic
21 pricing would ever come into effect.

22 Yes, Royal Mail was concerned about the impact of
23 direct delivery competition on its business. Yes, it
24 was concerned it wouldn't be able to fund the universal
25 service obligation it was under, and yes, it was well

1 aware the competition law applied to it. But no, this
2 was not a breach.

3 And in all of this, it is important to emphasise the
4 legal certainty. Dominant undertakings don't ask for
5 sympathy, but they do ask for clarity, that they are
6 able to understand how they can judge which side of the
7 line they stand on, how they can regulate their
8 behaviour. The approach of Ofcom is unclear as to how
9 Article 102 works, both what the theory of harm here is
10 to constitute breach and what the threshold test of
11 breach amounts to in this context.

12 Now, I'm conscious that you've seen an awful lot of
13 paper in these proceedings, so in this opening I thought
14 it would be useful to start by focusing perhaps on, at
15 least at the outset, Ofcom's most recent offering, its
16 skeleton.

17 So in looking at ground 1, I'm going to start by
18 considering Ofcom's skeleton. You'll find that in the
19 core bundle, or you may have it loose. It's the first
20 core bundle and it's the second tab, tab B.

21 What you see in that skeleton argument --

22 THE CHAIRMAN: I'm not with you yet.

23 MR BEARD: I'm so sorry. C1, I'm so sorry.

24 THE CHAIRMAN: I'm getting old, Mr Beard.

25 MR BEARD: No, my Lord. None of us are.

1 THE CHAIRMAN: Right, I'm with you.

2 MR BEARD: It starts off dealing with the conduct at issue
3 and then moves quickly on to ground 1. When it talks
4 about the conduct at issue in those first couple of
5 paragraphs, obviously there's a little bit of noise
6 about market definition and dominance, and then it sets
7 out what it alleges the abuse is in this case, and it
8 talks about it introducing a price differential.

9 Now, we see this language in the decision as well.
10 If we can leave the skeleton open, but then turn on to
11 the decision itself, which is also in the core bundle,
12 the first core bundle, at tab 1. If we could just go on
13 through to 9.1, paragraph 9.1, so it's quite a long way
14 through the decision itself. In the internal numbering
15 it's page 729.

16 THE CHAIRMAN: This is the decision?

17 MR BEARD: It's the decision.

18 Now, if we look at that paragraph:

19 "On the basis of the analysis in the preceding
20 sections of this document, Ofcom has decided that Royal
21 Mail contravenes Section 18 of the Competition Act and
22 Article 102 ..."

23 I refer throughout to Article 102, obviously there
24 is no difference between Section 18 and Article 102 for
25 these purposes.

1 "... in at least the period from 10 January 2014
2 ..."

3 Which was when the CCNs were announced, being the
4 date on which the CCNs were issued.

5 "... until at least 21 February 2014, being the date
6 on which the CCNs were suspended once Ofcom opened its
7 investigation."

8 So that's the six weeks I have referred to.

9 "We have not found it necessary to find a finding on
10 whether Royal Mail's conduct continued on amount to an
11 abuse beyond that date. We have concluded that the
12 price differential was reasonably likely to have
13 continuing effects after the date of suspension."

14 Well, there are just a couple of things I think it's
15 important to highlight there. The finding of abuse, as
16 I say, is six weeks. Although the somewhat
17 pusillanimous language of "at least" is used, that's the
18 only finding of abuse here. But it's also notable that
19 in relation to this paragraph, you don't actually see
20 the definition of the conduct being referred to. You
21 have the price differential, but that is all.

22 If we then go back in the decision to section 7,
23 which is at internal page number 177, so this is the
24 abuse of a dominant position section. Obviously I'm not
25 taking the tribunal through the entirety of the decision

1 at this stage, indeed I will not do so in these opening
2 submissions. You will be familiar with the structure of
3 it, setting out the background to the contract change
4 notices, some chronology, legal framework, market
5 definition, and then we come to this abuse section.

6 If we look at 7.3, at the start of the abuse
7 section, what we see is:

8 "We have undertaken an in the round assessment of
9 all of the circumstances of the case to determine
10 whether, at the time the price differential was
11 introduced ..."

12 Ie when the CCNs were issued.

13 "... Royal Mail's conduct was reasonably likely to
14 give rise to a competitive disadvantage, restriction of
15 competition. In particular we have considered the
16 factors identified by the CJU in case law and we have
17 identified the following relevant factors."

18 Then we go on to 7.4:

19 "We have also considered the evidence available as
20 to how the introduction of the price differential
21 impacted the bulk mail delivery market in practice."

22 Now, one might be forgiven for reading all of that
23 and thinking, well, we're talking about actual prices
24 here.

25 If we go on to 7.7, subsection C considers the

1 nature of the conduct in question in the context of the
2 effective markets:

3 "We find that by introducing the price differentials
4 in the CCNs, Royal Mail used its position as an
5 unavoidable trading partner for operators active in the
6 retail market for bulk mail to penalise those of its
7 access customers who also sought to compete with it by
8 undertaking end-to-end delivery activities. Royal Mail
9 did this in order to protect and enhance its position of
10 dominance in the bulk mail delivery market. In this
11 regard:

12 "In paragraphs 7.44 [through broadly] to 7.78, we
13 find that in introducing the price differential, Royal
14 Mail applied dissimilar conditions to equivalent
15 transactions with its access operator customers charging
16 higher prices for the same bulk mail delivery services
17 when supplied under the APP2/ZPP3 price plans than it
18 charged under the NPP1 plan."

19 Then it goes on in (b) and (c), just to note that
20 paragraphs 7.47 to 7.64 explain that Royal Mail's access
21 customers who chose to expand their operations would
22 need to use APP2 or ZPP3. And then in paragraphs 7.87
23 to 7.122 we find that the difference in treatment
24 applied by Royal Mail can't be explained or justified.

25 We'll come back to all of those points.

1 But what is clear is that when one looks at the
2 assessment of what the conduct was, it's to do with
3 application and charging of prices here. You see this
4 carried right through into the penalty section. If you
5 go on to section 10, and in particular section 10,
6 paragraph 10.6.1 on 298, it sets out what it's found and
7 what it's going to penalise:

8 "In this case we have found that Royal Mail abused
9 its dominant position by introducing the price
10 differential which amounted to unlawful price
11 discrimination ..."

12 This is at the heart of one of Ofcom's key problems
13 with this case, and it's central to it. Price
14 discrimination, as is found by Ofcom and as is penalised
15 as described in 10.61, is the application of charging
16 the implementation of pricing, it is not what would have
17 happened if the pricing had been implemented.

18 Because Article 102 doesn't prohibit conduct that
19 would have been likely to have adverse effects on
20 competition if it had been implemented, article 102
21 prohibits actual conduct which either has actual or
22 likely adverse effects on competition. I'm going to go
23 through the law in relation to this because it is key to
24 the confusion, the tangle, that Ofcom has got into in
25 relation to this position.

1 Before I do that, I just want to illustrate how it's
2 shifted its position. We can probably put away the
3 decision just for the moment but that core bundle we'll
4 be coming back to and referring to the skeleton.

5 If we could go to bundle RM8. Now, in RM8 you have
6 the statements of objections, and we'll come back to why
7 it matters that there are two of them in due course.
8 But I'm happy to just look at the second of them which
9 is in tab 2. So this is the statement of objections of
10 2 October 2015.

11 If we go to paragraph 1.15, what you'll see there is
12 1.15:

13 "In investigating the allegations made by Whistl,
14 Ofcom has considered whether Royal Mail has, by issuing
15 the contract change notices which contained price
16 differential, discriminated against access operators
17 contrary to the Chapter II prohibition in 102."

18 Then it talks about:

19 "The Chapter II prohibition in 102 prohibit the
20 abuse of dominant position. Section 1.18.2(c) of the
21 Competition Act and Article 10.2(c) specify that conduct
22 may constitute an abuse if it consists of a dominant
23 undertaking applying dissimilar conditions to equivalent
24 transactions with other trading partners, thereby
25 placing them at a competitive advantage."

1 Then:

2 "Case law establishes that such discriminative
3 conduct may amount to an abuse where there's no
4 objective justification."

5 Then 1.17:

6 "We have gathered a significant amount of evidence
7 from Royal Mail and Whistl. On the basis of this
8 evidence we consider that Royal Mail has engaged in
9 discrimination which amounts to an abuse of a dominant
10 position."

11 Then with we go over the page to 1.20:

12 "Having undertaken an assessment of Royal Mail's
13 conduct, our provisional conclusion is that by issuing
14 the contract change notices and the access letters
15 contract which notified access customers of the
16 introduction of the differential in pricing between the
17 price plans, Royal Mail abused its dominant position."

18 What's worth noting in those paragraphs is that that
19 word "introduced", that takes on prominence in the
20 decision, isn't used there. It's all about issuing the
21 contracts and issuing the contract change notices that
22 were notified.

23 Now, of course, three years on, when the decision
24 has come out, nothing has actually changed. It's just
25 a different description. And of course what it is is an

1 attempt to gloss this fundamental problem. The price
2 differential was not introduced in the sense of being
3 brought into practice, but it is a clever shift of
4 language because of course "introduced" can mean brought
5 into effect, but it also can mean presented. And, of
6 course, it was presented in the CCNs but it wasn't
7 brought into practice.

8 Now, that shift in language between the SO and the
9 decision doesn't change anything of substance. It is
10 a clever semantic attempt to bridge the gap between what
11 actually happened, the non-implementation, and the
12 infringement, but it doesn't solve that fundamental
13 problem. Changing the description doesn't change the
14 conduct. It doesn't mean that the price differential
15 was put in place or brought into practice, and that is
16 what is required for the purposes of 102, as we'll see.

17 So if we go back to Ofcom's skeleton argument and
18 pick it up under the heading "Ground 1" on page 2.

19 THE CHAIRMAN: I'm putting the statement of objections away;
20 is that all right?

21 MR BEARD: Yes, thank you. We'll come back to those, but
22 not for a little while.

23 So picking it up at paragraph 3 in the skeleton,
24 Ofcom summarises our position as being:

25 "Abusive price discrimination does not occur when

1 the pricing has not applied."

2 Then it attacks what it refers to as the first limb
3 of this argument, which is our contention on law that
4 a finding of discriminatory pricing is only possible
5 where a price has been charged or paid. And they are
6 right that we do rely on the text of Article 10.2(c)
7 which refers to applying similar conditions. I won't
8 take you to it because it will come out in the law as we
9 go through. And:

10 "An absence of case law finding abusive price
11 discrimination in other circumstances."

12 We certainly rely on that too.

13 Then their answer, such as it, is comes in
14 paragraph 5:

15 "The first limb of ground 1 is incorrect in law and
16 its characterisation of the decision. As to the law,
17 Article 102 is concerned with market conduct, yes.
18 Whereas in the present case a dominant firm has taken
19 all the necessary steps to implement a given strategy,
20 there can be no serious question that this is capable of
21 mounting to an abuse."

22 Well, yes, there can be a very serious question
23 whether or not a strategy to put in place a price
24 differential does amount to an abuse when those prices
25 aren't implemented. Certainly, and this is critical,

1 where you're making a finding of price discrimination,
2 which is what you do in the decision, infringement by
3 way of price discrimination, it's more than just
4 a serious question. Ofcom are going the wrong way.

5 It is not sufficient to talk about all the necessary
6 steps, and of course as we'll come on to see it's a very
7 odd characterisation in circumstances where the safety
8 valve was in any event built into the contractual
9 arrangements, but it's just not true. The fact that the
10 dominant firm may have taken necessary steps to
11 implement a pricing change, they refer to a strategy,
12 but a pricing change is what we're talking about here,
13 is more than just a question. It is the wrong approach.

14 Then it says:

15 "It is to be judged by reference to its purpose and
16 likely future effects as at that time."

17 Well, as we'll come on to see, first of all,
18 Article 102 is an objective test. Yes, you can take
19 into account as part of the relevant evidence, evidence
20 of intent or otherwise, strategy or otherwise. We don't
21 demur in relation to that. But the objective test has
22 to be met. And when it's talked about likely future
23 effects, this is the germ of a fatal flaw in Ofcom's
24 analysis. It confuses likely conduct with likely
25 effects. You have to have actual conduct and then you

1 can have likely effects of the actual conduct, but they
2 have not identified actual pricing conduct.

3 Then it goes on to say:

4 "This much is common ground."

5 I don't know who with because it's not us.

6 "The fact that its effects in whole or in part are
7 blocked by the subsequent intervention of a third party
8 doesn't exclude the application of Article 102."

9 Now, as we'll come on to see, that proposition is
10 correct in relation to effects analysis. It is not
11 correct if the conduct in question doesn't occur because
12 of some other events.

13 Then we move on to 5(b) where it's talked about the
14 assessment of conduct being one of substance and not
15 form. Well, yes, we entirely agree. Article 102 is
16 concerned with substance and not form. And what we say
17 is the substance was the prices were not implemented or
18 charged.

19 And we also agree that it's not just a matter of
20 pigeonholing, but I'll come back to that issue of
21 pigeonholing, because what Ofcom are saying is you're
22 obsessed with Article 102(c), the subcategory of
23 Article 102(c), and actually we look at this in broader
24 terms, we think about Article 102 in broader terms. And
25 our simple answer to that is if you look at what

1 Article 102(c) says, it's just talking about the basic
2 test of discrimination. There's no magic in it. And if
3 you're talking about price discrimination, you have to
4 apply that approach.

5 Before I get into those issues, I want to look at
6 the law.

7 If I may, the case I'm going to start with is at
8 authorities bundle 5, tab 61. Now, this is the
9 Irish Sugar case, and I'm not going to work through all
10 the details of the factual background. There were in
11 all of these cases we're dealing with different factual
12 circumstances. There's no doubt about it.

13 What we're dealing with in the Irish Sugar case was
14 a finding by the Commission in relation to Article 102
15 that a whole series of abuses had been entered into by
16 Irish Sugar -- sorry, by the sugar producers, and those
17 included both selective pricing and price
18 discrimination.

19 The best place in fact probably to pick it up is at
20 paragraph 105. So this is the abuse by Irish Sugar of
21 its dominant position in industrial and retail sugar
22 markets.

23 In its third and fourth pleas in law, the applicant
24 criticises the analysis of the six types of abusive
25 conduct which it is accused of adopting both in the

1 industrial sugar market in Ireland, selective low
2 pricing to potential customers and price discrimination
3 and on the retail market (border rebates ... and
4 selective prices)."

5 So there's a fair suite of infringements alleged,
6 but what I just want to focus on is in relation to the
7 industrial sugar market abuses, selective low pricing
8 and price discrimination.

9 If one turns to paragraph 111, we see a paragraph or
10 some words that are repeated over and over again in 102
11 cases:

12 "The case law shows that an abuse is an objective
13 concept referring to the behaviour of an undertaking in
14 a dominant position which is such as to influence the
15 structure of the market, where as a result of the very
16 presence of the undertaking in question, the degree of
17 competition is already weakened and which through
18 recourse to methods different from those governing
19 normal competition in products or services on the basis
20 of the transactions of commercial operators has the
21 effect of hindering the maintenance of the degree of
22 competition still existing on the market or the growth
23 of that competition."

24 That's quoting paragraph 91 of the old
25 Hoffmann-La Roche case relating to abuse pertaining to

1 vitamin sales, and in particular rebates on vitamin
2 sales.

3 THE CHAIRMAN: I remember it well.

4 MR BEARD: It will be reappearing at various points in the
5 case law story.

6 "It follows that Article 86 of the treaty prohibits
7 a dominant undertaking from eliminating a competitor and
8 thereby reinforcing its position ..."

9 So no elimination of the competitor to reinforce its
10 position.

11 "... by having recourse to means other than those
12 within the scope of competition on the merits. From
13 that point of view not all competition on price can be
14 regarded as legitimate."

15 Then 1.12:

16 "Whilst the finding ... dominant position exists
17 doesn't in itself imply any reproach to the undertaking
18 encouraged, it has a special responsibility in respect
19 of the causes of that position not to allow its conduct
20 to impair ... undistorted competition. Similarly,
21 whilst the fact that an undertaking is in the dominant
22 position it can't deprive it of its entitlement to
23 protect its own commercial interests when they're
24 attacked, and whilst such an undertaking must be allowed
25 the right to take such reasonable steps as it deems

1 appropriate to protect those interests, such behaviour
2 can't be allowed its purposes to strengthen that
3 dominant position and thereby abuse it."

4 1.13:

5 "In this case, the Commission accuses the applicant
6 as part of a sustained and comprehensive policy of two
7 different types of abusive conduct. First, it finds
8 a series of discriminatory prices by the applicant in
9 relation to the fixing of prices on both the industrial
10 sugar market, selective prices, and the retail sugar
11 market."

12 Then secondly, it identifies product swaps on the
13 retail market.

14 Then at 1.14:

15 "With particular reference to the applicant's
16 practices in relation to price fixing ..."

17 So that's the fixes of prices which amount to
18 discrimination, which is referred to in 1.13:

19 "... the case law shows that in determining whether
20 a pricing policy is abusive, it's necessary to consider
21 all the circumstances, particularly the criterion rules
22 governing the grant of the discount ..."

23 Because that was what was at issue here.

24 "... and to investigate whether in providing an
25 advantage not based on any economic service justifying

1 it, the discount tends to remove or restrict the buyer's
2 freedom to choose the sources of supply, to bar
3 competitors from access to the market, to apply
4 dissimilar conditions to equivalent transactions with
5 other trading partners or to strengthen the dominant
6 position by distorting competition."

7 So again, Hoffmann-La Roche, this time paragraph 90,
8 Michelin, 73.

9 "The distortion of competition arises from the fact
10 that the financial disadvantage granted by the
11 undertaking in a dominant position is not based on any
12 economic consideration justifying it that tends to
13 prevent the customers of that dominant undertaking from
14 obtaining their supplies from competitors."

15 So it's the actual financial advantage that is the
16 concern in relation to this sort of discriminatory
17 pricing that's being identified here.

18 "One of the circumstances may therefore consist in
19 the fact that the practice in question takes place in
20 the context of a plan by the dominant undertaking aimed
21 at eliminating a competitor."

22 So what's being said there is you've got to identify
23 the actual conduct, the actual pricing when you're
24 talking about price discrimination, but one of the
25 circumstances that you may take into account when

1 assessing that practice is whether it's undertaken in
2 the context of a plan to eliminate a competitor.

3 That goes back to what I was saying earlier. If you
4 have a plan, an intent, a purpose to eliminate
5 a competitor, that is a relevant consideration in
6 relation to the assessment of the practice. But it is
7 not sufficient on its own. You need that practice. You
8 need that financial advantage in this context.

9 THE CHAIRMAN: Mr Beard, nor is it the only consideration.

10 MR BEARD: Of course not. It's not.

11 THE CHAIRMAN: It's just an example.

12 MR BEARD: Yes, of course it is.

13 THE CHAIRMAN: I mean, you could probably find tens, if not
14 more than tens, of cases which recite this general
15 statement --

16 MR BEARD: Yes.

17 THE CHAIRMAN: -- of the special responsibility of
18 a dominant company.

19 MR BEARD: I'm referring to this one, and I'm not going to
20 refer to the paragraphs in all the other cases.

21 THE CHAIRMAN: And then take us into the specific facts. It
22 might be helpful, and I'm sure you're going to do this,
23 to relate these general propositions to the specific
24 facts of this case.

25 MR BEARD: Yes, I'm going to do that, but I do want to keep

1 going with Irish Sugar because there are particular
2 observations in Irish Sugar about price discrimination
3 that are germane to this case.

4 THE CHAIRMAN: Keep going with Irish Sugar then.

5 MR BEARD: I shall:

6 "Finally, it should be noted that Article 86(c) ..."

7 Obviously the predecessor numbering for 102(c):

8 "... expressly provides that abusive practices may
9 consist of applying dissimilar conditions to equivalent
10 transactions with other trading parties, thereby placing
11 them at competitive advantage."

12 So what is being said there is that under
13 Article 102 you have that series of examples, (a), (b),
14 (c) and (d), and what it is saying is that 102(c)
15 recognises that one type of abusive practice is applying
16 dissimilar conditions to equivalent transactions and
17 that's precisely the wording of 102(c).

18 It's at 116:

19 "It is in the light of those principles the court
20 must assess the reality and the lawfulness of the
21 practices found."

22 Then it goes on to look at the particular practices
23 in question, and the first set of practices it looks at,
24 which are under this heading of "Fixing of Prices" that
25 have been referred to at 113, is the selectively low

1 prices to potential customers of ASI.

2 What I just want to draw the tribunal's attention to
3 here is that according to the contested decision, there
4 was a note of March 1988 from the sales director setting
5 out the policy of selective low pricing for the period
6 1986 to 1988, and the Commission maintained that that
7 amounted to an abusive infringement over that period.
8 The court disagreed.

9 If you turn over the page at 120:

10 "The evidence adduced by the Commission in the
11 contested decision does not prove the reality of the
12 infringement. Apart from the fact that the applicant
13 denies having applied such prices to potential ASI
14 customers on the industrial sugar market, the note from
15 the SDL sales director doesn't indicate that the
16 applicant actually adopted such conduct between 1986 and
17 1988. Whilst the note certainly reveals the pricing
18 policy that the sales director intended to pursue, it
19 gives no account of the application of such policy
20 between 1986 and 1988, precisely because it was intended
21 to outline future policy. Moreover, the passage
22 concerning SDL's attitude before that note was written
23 does not in any way refer to selective prices being
24 charged to ASI customers."

25 Then it quotes the note.

1 So the conclusion at 124 is:

2 "In those circumstances, that aspect of the
3 infringement decision must be annulled insofar as it
4 found that the applicant infringed Article 86 by
5 granting selectively low prices between 1986 and 1988."

6 So what is being said there is that it is not good
7 enough just to look at intent, at policy, you actually
8 have to consider whether there were actual prices, and
9 that fits precisely with the language of the case law
10 preceding it.

11 Then if we go on just for completeness to the
12 section on price discrimination, which is starting at
13 paragraph 150, page 3033, bottom right-hand corner, what
14 we see there is that in contrast there is a finding of
15 price discrimination because there's no issue as to the
16 application of the prices in question.

17 We see at 157, just over the page, 3035:

18 "Contrary to the applicant's allegations, the
19 Commissioners prove not only on the basis of its
20 industrial bulk sugar price list as at 30 June 1994, but
21 also on the strength of documents of the applicant
22 indicating its change of attitude towards two of its
23 customers ... before and after they market their own
24 brand of sugar on the retail market, that the applicant
25 charged sugar packers who competed with it on the retail

1 market discriminatory prices for industrial sugar and
2 has also proved that the applicant granted PFAs to its
3 customers who exported their processed sugar products
4 outside Ireland."

5 158:

6 "In any event, the applicant has not demonstrated
7 that its price list of 30 June did not accurately
8 reflect prices actually charged for industrial sugar."

9 So there we have very clearly a situation where in
10 relation to pricing practices, all of the language that
11 is being used is about actually charging the prices in
12 question. We have a specific example under the head of
13 these selectively low price abuse findings of
14 a situation where it specifically says the reason we're
15 overturning the Commission decision is because those
16 prices were not applied or charged. Then when it comes
17 to consider discrimination, that is precisely the focus
18 that is brought to bear in relation to the finding of
19 discrimination.

20 So this is not just a case that is using language
21 generally, it's using it specifically and for good
22 reason in terms of the overall analysis of the
23 infringement under appeal in relation to that matter.

24 So I'm not going to trail through all of the cases
25 that talk about prices being applied or implemented or

1 the operation.

2 If I may, I would give you the reference to our
3 notice of appeal at paragraph 4.13. In that paragraph
4 what you will see is citation in relation to Compagnie
5 Maritime Belge, in relation to British Airways, indeed
6 in relation to Post Danmark, which I'll come back to,
7 that prices in question had to be actually implemented,
8 actually put into operation.

9 I can give the bundle references. Compagnie
10 Maritime Belge that's quoted is authorities 5, tab 55,
11 paragraph 149. Michelin, which I didn't mention but
12 which is referred to there, authorities 7, paragraph 64,
13 that was applied, prices applied. British Airways,
14 authorities 7, that's at paragraph 297.

15 I would also refer the tribunal to our reply at
16 paragraph 3.14 where we also pick up the relevant case
17 law language.

18 I'm going to come on to two further cases which
19 simply illustrate this point, perhaps helpfully, since
20 these are matters we will be come back to. So the first
21 of them is the Deutsche Telekom authority which is in
22 authorities bundle 8. So we can put authorities
23 bundle 5 away and move to authorities bundle 8. It's at
24 tab 88.

25 So this is a case concerning Article 82. One can

1 see just under "Keyword Summary" at the top of page 54,
2 it includes consideration of pricing practices of
3 a dominant undertaking, and in particular margin
4 squeeze.

5 There are two topics that Deutsche Telekom are
6 relevant for. At the moment I'm going to refer to it
7 just in relation to the question of application.

8 If we pick it up at paragraph 140, that's page 28 of
9 54, you will see:

10 "The second ground of appeal put forward by the
11 appellant is divided into three parts relating
12 respectively to the relevance of the margin squeeze test
13 for the purpose of establishing abuse within the meaning
14 of Article 102, the adequacy of the method of
15 calculating margin squeeze and the effect of the margin
16 squeeze."

17 If we could just go on to paragraph 172, which is
18 within the "Findings of the Court" section, it says:

19 "As regards the abusive nature of the appellants'
20 pricing practices, it must be noted that subparagraph
21 (a) of the second paragraph of Article 102 expressly
22 prohibits a dominant undertaking from directly or
23 indirectly imposing unfair prices."

24 So whilst 102(c) talks about applying, 102(a) talks
25 about imposing.

1 "Furthermore, the list of abusive pricing practices
2 in Article 102 is not exhaustive so that the practices
3 there mentioned are merely examples of abuses of a
4 dominant position."

5 Again, no issues with that.

6 "The list of abusive practices contained in that
7 provision doesn't exhaust the methods of abusing
8 a dominant position prohibited by the treaty. In that
9 regard it must be borne in mind that prohibiting the
10 abuse of a dominant position insofar as trade between
11 Member States is capable of being affected ..."

12 Then we get into Hoffmann-La Roche, Michelin and so
13 on.

14 175:

15 "It is apparent from the case law that in order to
16 determine whether the undertaking in a dominant position
17 has abused such a position by its pricing practices, it
18 is necessary to consider all the circumstances and
19 investigate whether the practice tends to remove or
20 restrict the buyer's freedom to choose his sources of
21 supply and so on."

22 176:

23 "Since Article 82 thus refers not only to the
24 practices which may cause damage to consumers, but also
25 those that are detrimental to them through their impact

1 on competition, a dominant undertaking as has already
2 been imposed has a special responsibility."

3 So all of this is concerned with the practical
4 application and concerns in relation to the actual
5 prices.

6 And then what we see in 177:

7 "It follows from this that Article 82 prohibits
8 a dominant undertaking from inter alia adopting pricing
9 practices which have an exclusionary effect on its
10 equally efficient actual or potential competitor. That
11 is to say, practices which are capable of making market
12 entry very difficult or impossible for such competitors
13 and making it more difficult or impossible for its
14 co-contractors to choose between various sources of
15 supply, thereby strengthening its dominant position [and
16 so on] by using methods other than those which come
17 within the scope of competition on the merits.

18 "In the present case it must be noted that the
19 appellant doesn't deny that even on the assumption that
20 doesn't have the scope to adjust its wholesale prices
21 for local loop access services ..."

22 Which is where the alleged margin squeeze arose.

23 "... the spread between those prices and its retail
24 prices for end user services is more than capable of
25 having an exclusionary effect on equally efficient

1 competitors since their access to the markets is at the
2 very least made more difficult."

3 What's important here is all of this is to do with
4 the practical application of the pricing.

5 THE CHAIRMAN: Obviously, Mr Beard, you're going to develop
6 this aspect?

7 MR BEARD: Yes. This is the second strand.

8 THE CHAIRMAN: Just as a simple lawyer myself, are you
9 saying that where the dominant company, and you are not
10 contesting that Royal Mail is dominant --

11 MR BEARD: For these purposes we're not.

12 THE CHAIRMAN: -- wishes to introduce different pricing,
13 a different pricing structure or whatever, and that new
14 pricing structure, if implemented, would be capable of
15 having anti-competitive effects, then the authority
16 can't do anything until you've actually implemented the
17 pricing. Is that what you're putting to us?

18 MR BEARD: No, we're not saying that. What we're saying is
19 that doesn't amount to price discrimination.

20 THE CHAIRMAN: It might amount to something else.

21 MR BEARD: There are two issues here. First of all, you
22 have of course got a situation where in this case you
23 have a mechanism that was put in place to ensure that it
24 didn't come to pass.

25 THE CHAIRMAN: Let's leave the mechanism to one side. I'm

1 really just asking the question in a broad --

2 MR BEARD: The second point to make of course is that where
3 you have concerns about people putting forward pricing
4 before it is implemented, it is in those circumstances
5 that you have a system of ex-ante control introduced by
6 the legislature in order to deal with these matters.

7 THE CHAIRMAN: In this economic sector?

8 MR BEARD: In this economic sector, but in relation to
9 a number of economic sectors.

10 THE CHAIRMAN: What about the situation where there is no
11 such --

12 MR BEARD: If there is no such ex-ante regulation, then the
13 answer is that where you don't have pricing, you do not
14 have a price discrimination or a pricing practice abuse.
15 That is correct. That means that a regulator could not
16 find a pricing practice abuse in relation to those
17 matters. That is different from whether or not
18 a regulator could do anything about the intentions or
19 whether a third party could act in relation to those
20 intentions. After all, you have a whole scheme by which
21 a third party can enforce on a quia timet basis before
22 courts.

23 THE CHAIRMAN: That's mechanisms. I'm just looking at the
24 principles.

25 MR BEARD: Yes, but that is --

1 THE CHAIRMAN: The principle is that there might be an
2 abuse, but it's not --

3 MR BEARD: It's not a pricing abuse. What you could have,
4 and it's an entirely new species of abuse, not one that
5 is identified here, and I'll come on to deal with
6 this --

7 THE CHAIRMAN: Is it an entirely new species?

8 MR BEARD: Well, it would be a new species, because what you
9 would be identifying is a situation where someone
10 putting forward a change amounted to abusive conduct and
11 had actual or likely effects on the markets. And it
12 would be the statement of intent, the fact that you are
13 putting forward a future change in pricing, rather than
14 the pricing itself, which would have to be identified as
15 the relevant conduct.

16 That's why in part Ofcom are wrong when they
17 repeatedly say of our case that we're maintaining that
18 putting forward a contract change notice cannot amount
19 to conduct for the purposes of 102. We don't say that
20 at all. What we say is it can't amount to a pricing
21 abuse in relation to these matters, and it does matter
22 because of the way in which findings are made in
23 relation to this case, what the decision is, and how the
24 decision is analysed, because of course it is all
25 focused on whether or not there's a price differential,

1 and whether or not that can be justified, and whether or
2 not that can or should have likely effects.

3 But here we do not have that price differential. So
4 we accept that there may be theoretically a situation
5 where that sort of conduct can give rise to findings of
6 abuse, but that would be (inaudible) abuse. We don't
7 have that in any of the case law. We didn't have that
8 in any of the learning at all.

9 THE CHAIRMAN: You're saying it's entirely novel, never been
10 done before, and doesn't apply in this case?

11 MR BEARD: Yes. It is not simply the novelty we object to.
12 We say that the scope of 102, when you are looking at
13 pricing abuses, is focusing on implemented pricing. We
14 have to look at what is done in the decision. The
15 decision looks at whether or not there's discriminatory
16 pricing. And we say that is not something that gives
17 rise to a finding of abuse in relation to a situation
18 where that pricing is never implemented. That's why all
19 of these cases matter.

20 Because we would -- if it were the case that you
21 have a situation where simply announcing the fact that
22 you were going to make a change, or indeed putting
23 forward a contract change notice -- of course,
24 a contract change notice doesn't actually change the
25 contract, what it's doing is starting the process by

1 which a contract will be changed.

2 THE CHAIRMAN: It is a formal step, though.

3 MR BEARD: It is a formal step. There's no doubt about
4 that.

5 THE CHAIRMAN: It's not a vague memorandum.

6 MR BEARD: No, it's not a vague memorandum. That's
7 absolutely true. It's certainly not just a vague step,
8 and it's certainly not just a mere announcement. It is
9 more than a mere announcement of an intent to price, it
10 is an announcement of what is going to happen in
11 relation to a contract in the future in relation to
12 pricing.

13 But it's clear that the fact that it is in
14 a contract can't make the difference for the purposes of
15 the analysis under Article 102. First of all, in basic
16 terms, because Article 102 is concerned with substance,
17 not form, and the substance we're talking about here is
18 the substantial pricing that is being changed. The
19 form, whether or not it exists in a contract or not that
20 is extant, is not critical.

21 Indeed, you can test that and think about it by
22 saying if you were to put forward a contract change
23 announcement or notice saying I'll change prices unless
24 X occurs, you would still need to consider that whether
25 or not you were talking about an existing customer or

1 a new customer, and of course a new customer wouldn't be
2 privy to that contract at all. What the new customer
3 would know is that in the future the prices it could
4 obtain would be different from those that it could
5 obtain now, but it wouldn't in those circumstances be
6 a situation where you could properly say that the new
7 customer or indeed the existing customer -- because it's
8 testing the proposition in relation to the contractual
9 arrangement -- that the new customer is somehow subject
10 to price discrimination. It just doesn't make any sense
11 from the point of view of Article 102.

12 Just going back to the idea of 102 being about
13 substance, you're looking at what the economic effect on
14 the market potentially is here, and you're focusing on
15 those prices having that economic effect.

16 If you have a situation where, for example, you say,
17 well, I'm going to change my prices in X months to all
18 my existing customers, or indeed to new customers,
19 unless X occurs, then if X occurs the pricing does not
20 happen. In those circumstances, you can't say that
21 there is a price discrimination case in relation to
22 these matters.

23 Now, what is said in certain points, and in
24 particular by Whistl, is, well, we would think about
25 what we're going to do in relation to these matters

1 because once we've heard that the prices are going to
2 change, we take that into account because we're rational
3 operators. Of course they do. We have no issue with
4 that. They take that into account, they take all sorts
5 of other market intelligence into account. They take
6 all sorts of other proposals that are coming forward
7 into account. They take all sorts of matters into
8 account. But in order to say that that particular
9 contract change would amount to an abuse, you would have
10 to carry out a wholly different analysis from that which
11 has been carried out by Ofcom in this decision, because
12 in reality what you are talking about there is a concern
13 about an impact on the market generated by uncertainty.

14 THE CHAIRMAN: I think you've answered my question, which is
15 that there could be an abuse, but you don't think it
16 quite fits the way the decision has been constructed.

17 MR BEARD: Not quite. The decision is fundamentally about
18 pricing and the pricing didn't apply.

19 THE CHAIRMAN: You are saying it does not fit the way the
20 decision is constructed?

21 MR BEARD: Yes, we do absolutely. But I think we do go
22 further and say the idea that those sorts of change
23 notices for a contract or announcements of intended
24 pricing, whether conditional or otherwise, amount to an
25 abuse, would be a very long step forward for 102 and it

1 is one that one would need to explore very carefully and
2 have very clear evidence as to why it was that simply
3 putting forward a change that had not yet occurred
4 itself amounted to an abuse of 102.

5 THE CHAIRMAN: Please carry on.

6 PROFESSOR ULPH: Could I just ask. If you had the
7 circumstances where in order to implement the price
8 change you were somehow contractually obliged to make an
9 announcement of a contract change notice, put aside any
10 issues about whether there are conditions in that
11 notice, but part of the practice of changing the prices
12 is to issue that notice, how does that fall under your
13 analysis?

14 MR BEARD: You still don't have the prices change at the
15 point when --

16 PROFESSOR ULPH: I understand that.

17 MR BEARD: So in terms of the fact that you have
18 a contractual scheme that requires you to give notice,
19 which may be by dint of the contract arising under
20 a regulatory system or it could just be a commercial
21 arrangement. I mean, commercial arrangements, long-term
22 contracting arrangements in ordinary third party
23 commercial situations often require long notice periods,
24 and particularly if you're talking about pricing terms,
25 indeed, you may have a whole arbitration process that's

1 built in to the contractual scheme.

2 Well, the fact that you are required to give that
3 notice if you want to do it doesn't mean that you're in
4 any way in danger of breaching Article 102 at that time
5 by reference to pricing, because there is none. Indeed,
6 if one thinks about those sorts of long-term contracts
7 which do have arbitral provisions, so someone comes
8 forward and says "I want to change this and that within
9 the contract and there's a reasonable endeavours to
10 reach an agreement as to how the contract is going to be
11 changed", if the two parties can't in good faith
12 negotiate that change, then there may be mechanisms for
13 a third party to get involved.

14 The idea that if the third party then says "That
15 isn't the right way of dealing with those matters under
16 this contract, those price changes can't occur", that
17 you will have committed beforehand a potential abuse of
18 102 in relation to pricing simply illustrates how gross
19 the extension of 102 would have to be in order to cover
20 that situation or indeed the present situation.

21 The central point is that saying you're going to do
22 something, whether under a contractual scheme or
23 otherwise, is different from actually doing it.

24 Whilst we're in this bundle, could I just briefly
25 turn to TeliaSonera, which is at tab 90. We are going

1 to come back to it.

2 If I could just deal with a couple of cases and then
3 I will have reached perhaps a useful point at which to
4 pause.

5 I'm just particular picking up TeliaSonera since
6 we're passing. It's talking about actual
7 implementation.

8 Then if we could go back to tab 87, I want to just
9 deal with the AstraZeneca case because AstraZeneca
10 features very large in Ofgem's case.

11 THE CHAIRMAN: One regulator is quite enough, Mr Beard.

12 MR BEARD: Yes, I'm sorry. In Ofcom's case.

13 What AstraZeneca was concerned with, and
14 Mr Chairman, members of the tribunal, you're probably
15 fairly familiar with AstraZeneca. At the time when it
16 came out, the Commission decision and subsequently the
17 judgments of the court, it was felt that this was quite
18 a potential extension of the scope of Article 102,
19 concerning as it did a situation where AstraZeneca was
20 criticised for the actions it engaged in in relation to
21 regulatory authorities pertaining to medicines and
22 intellectual property.

23 What it concerned in particular was an allegation
24 that AstraZeneca had abused its dominant position in
25 relation to the market for certain drugs by the manner

1 in which it had acted pertaining to obtaining
2 supplementary protection certificates, which are a form
3 of intellectual property protection, in relation to
4 relevant drug compounds.

5 One can see that picked up at paragraph 295, very
6 small numbering in the bottom right-hand corner, page 43
7 of 142.

8 THE CHAIRMAN: Mm-hm.

9 MR BEARD: What we see there is in relation to the first
10 abuse, if one goes over the page, 308, first plea,
11 alleging an error of law. So criticism that there
12 wasn't a precedent for this, this was novel, and
13 therefore there wasn't any good basis and various other
14 arguments put forward.

15 The findings of the court in relation to these
16 matters begin at 352, so that's page 53. We see on 352
17 down to 354 repetition of that case law we've already
18 referred to.

19 Then at 355:

20 "In the present case the court observes that the
21 submission to the public authorities of misleading
22 information liable to lead them into error and therefore
23 to make possible the grant of an exclusive right to
24 which an undertaking is not entitled, or to which it is
25 entitled for a shorter period, constitutes a practice

1 falling outside the scope of competition on the merits
2 which may be particularly restrictive of competition.
3 Such conduct is not in keeping with the special
4 responsibility of an undertaking."

5 The point to emphasise here, it is the "submission
6 to the public authorities" that is found to be abusive
7 of the relevant information. There is an actual action.

8 356:

9 "It follows from the objective nature of the concept
10 of abuse that the misleading nature of representations
11 made to public authorities must be assessed on the basis
12 of objective factors and that proof of the deliberate
13 nature of the conduct and of bad faith of the
14 undertaking is not required for the purposes of
15 identifying an abuse of dominant position."

16 So there it was being said by AstraZeneca, well, you
17 have to actually find intent before you find an abuse,
18 and what the court is saying is no, you don't.

19 357:

20 "The court would point out the question whether
21 representations made to public authorities ..."

22 So that's actual representations:

23 " ... for the purposes of improperly obtaining
24 exclusive rights are misleading and must be assessed in
25 concreto and that assessment may vary according to the

1 specific circumstances of each case. In particular, it
2 is necessary to examine in the light of the context in
3 which the practice in question has been implemented that
4 practice was such as to lead the public authorities
5 wrongly to create regulatory obstacles to competition.
6 For example, by the unlawful grant of exclusive rights
7 to the dominant undertaking."

8 So what is being emphasised there is that it is
9 those representations, the actual requests being made to
10 the public authorities for the intellectual property, so
11 the specific actions that are being undertaken that are
12 misleading, which is wrong.

13 359 talks about the intent point again:

14 "The court would also point out in the light of the
15 applicant's arguments set out in 309 through 314 above
16 that although proof of the deliberate nature of conduct
17 liability to deceive is necessary, it may be relevant."

18 So we're picking that up point up again.

19 Then 360:

20 "Lastly, the mere fact that certain public
21 authorities did not let themselves be misled and
22 detected the inaccuracies provided in support of the
23 application for exclusive rights, or that competitors
24 obtained, subsequent to the unlawful grant of the
25 exclusive rights, the revocation of those rights is not

1 a sufficient ground to consider that the misleading
2 representations were not in any event capable of
3 succeeding."

4 So what's being said there is you had to engage in
5 the actual misleading conduct, but if the effects of
6 that conduct or the likely effects of that conduct,
7 which would be anti-competitive, wrongly obtaining these
8 exclusive rights, is stopped by either the actions of
9 a regulator or some other third party, then in those
10 circumstances it doesn't matter, you have still got an
11 abuse. But you still needed the actual conduct, the
12 misleading submissions, because that's what finding of
13 abuse is concerned with.

14 That's why in 361 it says:

15 "Consequently, the Commission applied Article 102
16 correctly in taking the view that the submission to the
17 patent offices of objectively misleading representations
18 by an undertaking in a dominant position which were of
19 such a nature as to lead those officers to grant it
20 supplementary protection certificates to which it is not
21 entitled or to which it is entitled for a shorter
22 period, thus resulting in a restriction or elimination
23 of competition constituted an abuse of that position."

24 And:

25 "... whether or not those representations were

1 objectively misleading must be assessed in the light of
2 the specific circumstances and context."

3 362:

4 "The court rejects the applicant's argument that a
5 finding of abuse of dominant position requires that an
6 exclusive right obtained as a result of misleading
7 representations has been enforced."

8 So it's saying what is key is that actual action of
9 submitting misleading representations.

10 What's instructive, if we move on, is in relation to
11 the timing of this finding of abuse that is upheld,
12 because the Commission had said, well, actually what was
13 going on was that instructions were being given by the
14 company to their patent attorneys to make these
15 submissions and that that was when the abuse started.

16 But if we look at 369, it says:

17 "As regards the date on which the abuse of the
18 dominant position, if established, is deemed to have
19 started, the Commission took the view, in the case of
20 Germany, Belgium, Denmark, the Netherlands and UK, the
21 abuse started to be implemented on 7 June 1993 when the
22 final instructions for the SPC application in respect of
23 omeprazole were sent to the patent attorneys in those
24 countries. As the applicants observe, the Commission
25 thus puts the commencement of the alleged abuse of a

1 dominant position at a point in time even before the SPC
2 applications were filed with the patent offices."

3 So AstraZeneca said to its patent attorneys, "Go,
4 make these applications. They may be misleading, make
5 them". Now, if that isn't necessary steps, I don't know
6 what is.

7 But the court then says no, that is wrong.

8 "The court considers, however, that instructions
9 sent to patent attorneys to file SPC applications cannot
10 be regarded as equivalent to the filing of the SPC
11 applications themselves before the patent offices. The
12 desired outcome of the alleged misleading nature of the
13 representations, namely the grant of the SPC, can arise
14 only from the time when the SPC applications are filed
15 before the patent offices, and not when the patent
16 attorneys, who in this case have only an intermediary
17 role, receive instructions regarding those
18 applications."

19 THE CHAIRMAN: Does that case actually help you, Mr Beard?
20 How do you relate it to the facts of this case? Could
21 one not say -- I'm just speculating -- that the
22 instructions for the preparation of the CCN is
23 equivalent to the instructions to the patent attorney
24 and the publication of the CCN is the actual equivalent
25 to the actual filing? Couldn't you look at it that way?

1 MR BEARD: Well, if you did, you would be wrong to use that
2 analogy, because here what you have is a finding that
3 the pricing was discriminatory.

4 THE CHAIRMAN: I've got that. We made that point before.

5 MR BEARD: That is the key to the analysis here. Because if
6 the pricing is discriminatory, the prior steps to the
7 pricing actually being implemented are equivalent to the
8 instructions to the patent attorneys.

9 THE CHAIRMAN: AstraZeneca is a case which doesn't fit any
10 of the paragraphs of Article 102.

11 MR BEARD: No, it doesn't.

12 THE CHAIRMAN: So you said it was new in the sense that it
13 was pushing the boundaries.

14 MR BEARD: Yes.

15 THE CHAIRMAN: Right?

16 MR BEARD: Yes.

17 THE CHAIRMAN: So the essence of the finding is that there
18 is some general inchoate anti-competitive impact of
19 filing the misleading information. So in that context
20 the question of where the infringement started is
21 important, but it's secondary. And I note that the
22 court didn't strike the decision down on that basis, it
23 said it might go to the fine, but it wasn't sufficient
24 to make the finding null; is that right?

25 MR BEARD: No, that's right. But what it's doing is

1 identifying there the point that I have been emphasising
2 throughout that it is the implementation of the
3 particular conduct that you have to focus on. And yes,
4 this was a new finding of abuse, but what the court is
5 there doing is identifying precisely what it is that you
6 can legitimately find, even in this extended notion of
7 abuse, what you can legitimately find constitutes actual
8 conduct giving rise to abuse in this situation. So it's
9 not talking just in general terms, it's saying it is
10 that actual submission to the regulatory authorities
11 that gives rise to the new type of abuse.

12 We say in circumstances where you're talking about
13 a finding that there has been discriminatory pricing,
14 this is clear authority setting out why it is that you
15 actually have to have implemented pricing in order to
16 get to that finding of abuse.

17 If what you were instead saying was, well, actually
18 there's an alternative case here which is to do with
19 just making announcements or making changes that will
20 come into effect in relation to contracts in future that
21 constitute an abuse, the analysis you would have to
22 undertake in order to reach that conclusion would be
23 very different.

24 You would not be dealing with a situation where you
25 say, well, look, the price differential is X, that puts

1 these people in a differential position and renders
2 them, as Ofcom says, in difficulty in competing as
3 against Royal Mail. What you would have to be doing is
4 asking yourself whether, in circumstances where only the
5 change notice is put forward, that notice in and of
6 itself caused actual or likely effects, and not the
7 discrimination, because the real problem with the
8 uncertainty is, particularly in circumstances where you
9 have a situation where you have the safety valve, that
10 uncertainty is generated actually as a fear of legality,
11 not a fear of illegality in this context.

12 So that if you're really concerned about what's
13 going on as Whistl or somebody else, what you're really
14 concerned about in relation to some notional price
15 differential is that actually it's okay, because that's
16 when you face what you say are the putative
17 disadvantages of it, and that is completely different in
18 the situation of saying, well, actually this price
19 differential is unlawful.

20 THE CHAIRMAN: Is that a good moment to stop?

21 MR BEARD: Yes.

22 THE CHAIRMAN: It's always nice to stop on a paradox, isn't
23 it, Mr Beard? Five minutes.

24 (11.47 am)

25 (A short break)

1 (11.56 am)

2 MR BEARD: I'm going to go back to a couple of cases, but
3 just picking up the discussion that we had prior to the
4 short break, I think it's worth emphasising two things.

5 First of all, whilst novelty is in no way a bar to
6 a finding of abuse, we don't see any precedent in
7 relation to the sort of abuse that the tribunal is
8 articulating as a theoretical possibility here, and the
9 reason I put it in those terms is because that is
10 plainly not what is found as the abuse in the decision.
11 Because of course what is being found in the decision is
12 essentially a finding that you treat the price
13 differential as certain for the purposes of assessing
14 its likely effects. You're treating it as applied but
15 of course that isn't the case.

16 If you were going to go down this route of
17 articulating a different finding, you would need to
18 explain why the generation of uncertainty by issuing
19 a CCN, for example, was materially different from any
20 other uncertainty that you could generate by other sorts
21 of announcements of intended price changes in order to
22 delineate it. And there's no account presented of why
23 the use of the CCN mechanism in these circumstances
24 would lead to a saliently different or illegitimate form
25 of uncertainty as compared to other changes that you

1 could make. And as I indicated beforehand, in reality
2 where we're looking at uncertainty here, we're looking
3 at a fear of legality on the part of those that are
4 concerned, and the idea that you can commit an abuse by
5 creating a concern as to the legality of what you're
6 putting forward would be a very bold proposition and one
7 that would need some very clear reasoning in this
8 regard.

9 THE CHAIRMAN: So there's no general category of abuse of
10 threatening to make life very difficult for a potential
11 entrant?

12 MR BEARD: No, not one that has ever been recognised or
13 articulated in those terms previously or recognised in
14 any decision-making or indeed case law.

15 THE CHAIRMAN: So if I'm in a dominant position and the new
16 entrant comes along that is not in a trading
17 relationship with me, and I say "If you enter my market
18 I will undercut you so you will not make any profits",
19 that's not an abuse or it is an abuse?

20 MR BEARD: I'm not trying to --

21 THE CHAIRMAN: Even if you don't do it.

22 MR BEARD: Because the categories of abuse are not closed,
23 the nature of your sabre-rattling is not something that
24 I will speculate on as to whether or not it can or can't
25 constitute an abuse. But you would have to think very

1 carefully before the sound of the sabre being rattled
2 constituted an abuse, because you would have to explain
3 why it was that just that noise, just that threat, was
4 the basis for the problem, and you can't treat the
5 rattling of the sabre in the same way as if you've
6 actually brandished it and hacked bits off your
7 competitor, to take the metaphor perhaps a little far.

8 THE CHAIRMAN: To its logical conclusion.

9 MR BEARD: But nonetheless, there is a significant
10 difference between threatening and wounding, and that is
11 the salient difference that we're talking about here.

12 So we are not saying in no circumstances can there
13 be abuse by way of threat. That's not what we're
14 saying. What we are saying is that the finding here is
15 not an abuse by way of mere threat, it is an abuse by
16 way of price discrimination. In other words, it is an
17 abuse by way of wounding. And we say that cannot
18 possibly be correct.

19 We see that, if I may, if we go to the MEO case in
20 authorities bundle 9, at tab 108. MEO was a case
21 concerning price discrimination. The precise niceties
22 of how one categorises MEO as price discrimination one
23 can come back to later. But all I wanted to do in
24 relation to the MEO judgment itself, preliminary ruling,
25 is look at paragraph 22, and then through to 25/26.

1 So 22:

2 "By its questions, the referring court asked in
3 essence whether the concept of competitive disadvantage
4 for the purposes of subparagraph (c) ..."

5 So this is the: there is conduct but is there
6 competitive disadvantage from its conduct?

7 "... must be interpreted to the effect that it
8 requires an analysis of the specific effects of
9 differentiated prices being applied by an undertaking in
10 a dominant position on the competitive situation
11 position of the undertaking affected and, as the case
12 may be, whether the seriousness of those effects should
13 be taken into account."

14 The simple answer is yes.

15 If one goes down to 25:

16 "In order for the conditions for applying
17 subparagraph (c) of the second paragraph of Article 102
18 to be met, there must be a finding not only that the
19 behaviour of an undertaking in a dominant market
20 position is discriminatory, but also that it tends to
21 distort that competitive relationship, in other words to
22 hinder the competitive position of some of the business
23 partners of that undertaking. In order to establish
24 whether the price discrimination on the part of an
25 undertaking in a dominant position vis-a-vis its trade

1 partners tends to distort competition on the downstream
2 market, as the Advocate General submitted in essence in
3 paragraph 63 of his opinion, the mere presence of an
4 immediate disadvantage affecting operators who were
5 charged more compared with the tariffs applied to their
6 competitors, does not, however, mean that the
7 competition is distorted or capable of being distorted."

8 So what's being said here is, yes, you do need to
9 consider the specific effects of the differentiated
10 prices. Even if the differentiated prices are to be
11 treated as discriminatory, you then have to look at the
12 specific effects, and it is inherent in that that they
13 must be implemented prices.

14 MR FRAZER: Correct me if I am wrong, but in the MEO case
15 there was no question of the prices having been
16 discharged or not, so the only relevance was prices
17 which had been charged.

18 MR BEARD: This is true.

19 MR FRAZER: This wouldn't have arisen in part of the
20 discussion.

21 MR BEARD: That is absolutely fair, those were prices that
22 had been charged. So it is absolutely right, this is
23 not an authority which says: and we are making clear
24 explicitly that uncharged prices cannot be
25 discriminatory. I must accept that. There are no cases

1 that say that in terms.

2 What I'm saying is that the predicate of all of this
3 analysis is there are charged prices, and then you look
4 at the specific effects. And what you find when you're
5 looking at the language of this case is that if you look
6 at where it's saying, well, you do need to analyse the
7 specific effects, and even if there are specific effects
8 you can't assume a competitive disadvantage, we say the
9 predicate of that is you must have the prices in place
10 because otherwise how can you sensibly be answering the
11 questions in the way that you are doing?

12 So, Mr Frazer, it's absolutely correct that I don't
13 have the specific and explicit language, but this answer
14 doesn't make sense unless you're dealing with
15 a situation where you have actual prices. Because you
16 see what it says in 26. If you had a situation where
17 the prices weren't charged, it is difficult to
18 understand how the test which is: was there an immediate
19 disadvantage, is it enough to constitute a competitor
20 disadvantage, immediately disadvantage coming from the
21 pricing, how could that make sense as a test if it's not
22 actually required to be linked to the pricing?

23 MR FRAZER: I understand, thank you.

24 MR BEARD: So 27:

25 "It is only the behaviour of the undertaking in

1 a dominant position if the behaviour of the undertaking
2 in the dominant position tends, having regard to the
3 whole of the circumstances, to lead to a distortion of
4 competition between those business partners that the
5 discrimination between trade partners which are in
6 a competitive relationship may be regarded as abusive.
7 In such a situation it cannot, however, be required in
8 addition that proof be adduced of an actual quantifiable
9 deterioration of the competitive position of the
10 business partners taken individually."

11 So what it's saying there is you don't actually have
12 to have the actual effects proved in those
13 circumstances; likely effects are sufficient. Again, we
14 accept that. That's entirely consistent with
15 AstraZeneca, it's entirely consistent with the other
16 relevant case law.

17 Whilst we are in this bundle, if I may, I'll just
18 pick up a quote that Ofcom relies upon in relation to
19 the Post Danmark II case in this context. So it's
20 tab 103 in authorities bundle 9.

21 I think Ofcom refer to paragraph 65 and emphasise
22 that you can have an abuse as long as the effect is not
23 purely hypothetical, is the quote they use, drawn from
24 this case. So as long as the effect is not purely
25 hypothetical then you can have an abuse.

1 With respect, that is a misreading in response to
2 our point on ground 1, because what that is concerned
3 with is the likely or actual effects test, it's not
4 concerned with the conduct test. You can see that in
5 relation to paragraph 63:

6 "By question 2 and the second paragraph of question
7 3 which should be answered together, the referring court
8 asks, in essence, whether 102 must be interpreted as
9 meaning that in order to fall within the scope of that
10 article, the anti-competitive effects of a rebate
11 scheme ..."

12 So it's talking about a rebate scheme here.

13 " ... such as that at issue in the main proceedings,
14 must on the one hand be probable and on the other
15 serious or appreciable."

16 Then it's in those circumstances where it goes on to
17 say:

18 "As regards in the first place the likelihood of an
19 anti-competitive effect, it is apparent from the case
20 law in 29 above, that in order to determine whether
21 a dominant undertaking has abused its position by
22 operating a rebate scheme ..."

23 So it's operating the rebate scheme, that's the
24 conduct part.

25 " ... it is necessary inter alia to examine whether

1 the rebate tends to remove or restrict the buyer's
2 freedom to choose his sources of supply, to bar
3 competitors from access to the market, to apply
4 dissimilar conditions to equivalent transactions or to
5 strengthen dominant position."

6 It's then that they say:

7 "In that regard, the anti-competitive effect of
8 a particular practice must not be purely hypothetical."

9 Again, we accept that. We recognise that.

10 But to suggest that as long as you cross a threshold
11 of saying, well, the effects aren't purely hypothetical,
12 you can make a finding of abuse is to confuse things.
13 You're confusing likely conduct with likely effects.

14 And I won't go back to 79 and 80 of the Advocate
15 General's opinion but that is made good there. Those
16 are the paragraphs that are then cited.

17 Just one other case whilst we are in this bundle.
18 If we could go on to tab 117, this is actually an old --
19 a decade old Ofcom decision, it's not a judgment at all.
20 Therefore, I recognise this is not of any sort of
21 binding authority and is not instructive, therefore, as
22 to the nature of the law which I have been articulating,
23 but it is nonetheless instructive at least. Because
24 what we have here in 1.1 in the executive summary,
25 page 8, is just a consideration by Ofcom of a complaint

1 about some network charge change notices. So these are
2 notices that would be put out by BT in relation to what
3 it was going to charge for network access in relation to
4 mobile calls -- sorry, in relation to a whole range of
5 number translation services, both origination and
6 termination. Those are called NCCNs, not merely CCNs.

7 If one goes over to 1.10 on page 9, what you see
8 there is Cable & Wireless was there complaining that the
9 price increases that these network charge change notices
10 put forward allegedly imposed a margin squeeze,
11 discriminated in favour of BT, were excessive and
12 increased their costs.

13 I'll just mention it since we're passing. 1.15:

14 "On the question of discrimination by BT, in
15 launching this investigation Ofcom was concerned by
16 public statements made by BT which appeared to indicate
17 that BT had charged different rates to other
18 communications providers than to BT. BT also appeared
19 to consider internally that it had discriminated in its
20 charge to other operators."

21 Then at 1.16:

22 "Ofcom considers that in the circumstances of the
23 NCCN 500, the relevant test for determining whether BT
24 was discriminating in favour of itself is whether BT
25 would have been able to make a profit had it paid the

1 charges notified in NCCN 500 taking into account the
2 profits earned on all the relevant services, ie whether
3 its conduct amounted to a margin squeeze."

4 The only reason I just mention those paragraphs,
5 because I don't want to have to come back to this, is
6 because there is a debate later on whether or not
7 discrimination and margin squeeze are different.

8 THE CHAIRMAN: Is this decision being put forward as an
9 example of a case where Ofcom -- no infringement
10 because --

11 MR BEARD: Yes, because --

12 THE CHAIRMAN: -- intended charges had not been implemented?

13 MR BEARD: Yes, I'm just going to come on to that. That was
14 just a passing reference, I'm sorry.

15 2.41 on page 19. I should say, Ofcom rejected the
16 whole of the complaint, but it's just this point about
17 timing that I wanted to pick up.

18 2.41, "NCCN 500":

19 "On 1 April 2004 BT issued NCCN 500, notifying
20 a number of increases to its charges to third parties
21 with effect from 1 May 2004."

22 So it's a month's notice there and the scale of the
23 price rises is described in 2.42.

24 But what you then find is the consideration, 2.48,
25 the whole of the consideration of this is:

1 "The price increases that are the subject of this
2 investigation were therefore in effect from May 2004 to
3 December 2005."

4 So what's instructive there, and I don't put it
5 forward as authority, but at that point Ofcom is
6 recognising that here you have a situation where
7 announcements are being made, but actually they're only
8 assessing potential abuse from the time when the prices
9 came into effect, and we say that was the right way of
10 doing things.

11 THE CHAIRMAN: But they don't say any more than that.

12 MR BEARD: No, and I can't place more weight on it than
13 that, but it's just instructive in this regard.

14 When it comes to the consideration of ground 1, what
15 we're saying is not that we're trying to pigeonhole the
16 case or somehow delimit the scope of Article 2, we're
17 focusing on what has been done here.

18 We recognise that in all sorts of cases, going right
19 back to United Brands, but Attheraces is another one
20 where you have all sorts of excessive, unfair,
21 discriminatory prices being considered. We've seen it
22 in Irish Sugar, we've seen it in other cases that we've
23 been touching upon, that there can be a range of pricing
24 practices at issue.

25 What we say is that in relation to any finding of

1 infringement in relation to any pricing practice, you
2 have to have the pricing, and to that extent
3 discriminatory pricing is not special; albeit we do note
4 that when it comes to consideration of discriminatory
5 pricing, we find it very difficult to understand why it
6 is pigeonholing the accusation to focus on
7 Article 102(c), because, after all, Article 102(c)
8 itself is simply setting out the terms of
9 a discrimination test. It's not doing anything
10 specifically clever. It's saying that you can have an
11 abuse "by applying dissimilar conditions to equivalent
12 transactions with other trading partners, thereby
13 placing them at a competitive disadvantage".

14 We don't see how that's a pigeonhole, that's simply
15 a description of discrimination. And if what Ofcom are
16 saying is, well, we can have discrimination that doesn't
17 fall within that definition, frankly, we don't
18 understand that.

19 So if we go back to Ofcom's skeleton, if I may,
20 paragraph 6(a):

21 "Ofcom considered the likely effects the
22 differential would have if the new prices had been
23 charged."

24 Well, that's the 100% certainty of the application
25 of the pricing. This was unimpeachable in law. The

1 assertion doesn't add anything. It's wrong.

2 "By issuing the CCNs, Royal Mail had done all that
3 was needed to introduce the price differential."

4 Well, it had put forward the notice that meant that
5 if there wasn't a triggering of the safety valve that it
6 had put in place, they could have come into force, but
7 that is very different from actually charging those
8 prices.

9 "The new prices would enter automatically into
10 effect, absent third party intervention."

11 We'll come back to quite how the safety valve was
12 built in in a moment.

13 "Royal Mail had acted and the likely effects of its
14 conduct fell to be assessed without regard to the
15 contingencies of the reactions of third parties."

16 This is citing AstraZeneca. But just look at that:

17 "Royal Mail had acted and the likely effects of its
18 conduct fell to be assessed without regard to the
19 contingencies of third parties."

20 Royal Mail had acted by the CCNs, but the likely
21 effects of its conduct weren't the prices in those
22 circumstances. That is what is being conflated here.
23 And when it talks about "they fell to be assessed
24 without regard to the contingencies of the reactions of
25 third parties", that proposition is correct in relation

1 to the effects, it is not correct in relation to
2 conduct.

3 "Ofcom's assessment of effects was not, however,
4 confined to the impact of the differential in the price
5 differential if charged. Ofcom also assessed the likely
6 effects of the price differential during the initial
7 notice period, before it entered into effect and if
8 subsequently suspended."

9 Well, that isn't actually true when we look at the
10 decision.

11 "Ofcom found that the price differential could be
12 expected to disrupt and delay entry from the moment the
13 CCNs were issued, notwithstanding their suspension."

14 And it there cites the decision, paragraph 1.24(h).
15 So it's worth just turning up that paragraph in the
16 decision. It's at -- if I can start on page 4 of the
17 decision, under "Royal Mail's conduct amounted to an
18 abuse of its dominant position". You'll see 1.24 is by
19 way of summary only, (a) is to do with the general
20 conditions of the competition on the bulk mail market,
21 and (b):

22 "We have found that the price differential amounted
23 to discrimination against access operators."

24 That's pricing discrimination. That's what is being
25 found there.

1 "Due to the rules and restrictions Royal Mail apply
2 to the different price plans, an access operator that
3 sought to enter the bulk mail delivery market beyond
4 a limited scale would have had to move on to those other
5 pricing plans."

6 Then (c), no legitimate justification. (d),
7 contemporaneous documents. (e), analysis of
8 profitability. (f), consideration of the prevailing
9 features of the market.

10 Then (g):

11 "By introducing the price differential, Royal Mail
12 used its position as an unavoidable trading partner for
13 access operators effectively to penalise."

14 So this is the partial rather extreme language that
15 we'll come back to that somehow is suggested to make
16 what we did more wrong. Again, it's an attempt to use
17 description without proper analysis as to what was going
18 on in those circumstances.

19 But (h) is key:

20 "To the extent that it is relevant that the price
21 differential was suspended as a result of Ofcom opening
22 this investigation, we found that the suspension didn't
23 prevent the price differential from having continuing
24 effect in the bulk mail delivery market. On the
25 particular facts of this case, we found that the

1 introduction of the price differential was reasonably
2 likely to distort competition from the point at which
3 the CCNs were issued."

4 If it's relevant, the price differential could have
5 continuing effects. But the price differential was
6 never applied. It just isn't coherent.

7 What Ofcom really wants to say is one of two
8 things: if the suspension was lifted, then the price
9 differential would have occurred and would have had
10 likely effect, or the fact of the announcement of the
11 price differential in the CCN itself had an effect even
12 if there was no pricing.

13 But that's not the price differential. It is the
14 announcement of the price differential. It is the
15 prospective change in contract. It's not even the
16 change in contract, it's taking the step that would
17 change the contract. And the idea that in those
18 circumstances you can refer to that as being the price
19 differential having continuing effect is just wrong.

20 THE CHAIRMAN: You say that when they say in the decision
21 that the price differential was introduced, you say it
22 wasn't introduced?

23 MR BEARD: It wasn't introduced, not in the meaningful sense
24 that's required for 102. So you would have had to have
25 thought about the range of other issues if you were

1 going to consider how the non-implemented -- how the
2 suspended CCN had ramifications thereafter.

3 Now, the next part of this in relation to ground 1
4 I do want to just grapple with is suspension.

5 THE CHAIRMAN: How long are you going to go on with
6 ground 1, do you think?

7 MR BEARD: I hope to be done in the next 20 minutes on
8 ground 1.

9 THE CHAIRMAN: Before lunch?

10 MR BEARD: Yes.

11 THE CHAIRMAN: We will try not to interrupt you too much.

12 MR BEARD: Now, I want to just focus on the suspension issue
13 because obviously that is a key part of why Ofcom say
14 that actually one should look at this as if the price
15 differential was applied, because they say look at
16 AstraZeneca. In AstraZeneca the submissions were made
17 and the fact that the authorities weren't beguiled by
18 those submissions means that there were no effects, and
19 yet in AstraZeneca there's still a finding of abuse.

20 Now, we say that's the wrong approach, we say you
21 have got to find that actual conduct in the first place,
22 and the proper analogy between AstraZeneca and this case
23 is between the actual pricing and the actual
24 submissions.

25 But then we do look at the particular circumstances

1 in which this safety valve was put in place. Ofcom
2 refers to it as being Royal Mail outsourcing its
3 responsibility as a dominant entity. It's quite
4 a remarkable proposition that Royal Mail comes forward
5 and says, look, the contract we're dealing with, we want
6 to ensure that there isn't a risk that what we do is
7 either in breach of competition law or would create
8 considerations and concerns in relation to the ex-ante
9 regulatory scheme, as it's referred to, the broader
10 regulatory scheme.

11 To say that is outsourcing its responsibility is
12 a remarkable starting point, again linguistically. But
13 just as if would have been the same had Royal Mail,
14 after hearing various complaints from people, just
15 unilaterally decided not to proceed, the suspension
16 mechanism meant similarly you didn't have any activity
17 undertaken at all.

18 And it is worth just referring to the history of the
19 creation of this term. We've set it out in our notice
20 of appeal in particular at paragraphs 4.40 to 4.47. In
21 short order, Royal Mail came forward and said, look,
22 we'll put in place a clause here to make sure that there
23 isn't any risk that anything adverse happens in this
24 market that would otherwise, if implemented, operated,
25 fall foul of competition law, or indeed engage concerns

1 that you might have under ex-ante regulatory schemes, in
2 particular the universal service provider access
3 obligations and conditions.

4 You can see this if we go to core bundle 4A, there
5 are a couple of documents that it's worth just looking
6 at. The first one is at tab 5. This is a meeting
7 between Royal Mail and Ofcom. You'll see the attendees.
8 One of the attendees from Royal Mail was one of the
9 witnesses, Ms Whalley. From Ofcom there were various
10 people, in particular I'll just note that
11 Mr Chris Rowsell was there.

12 So this is back in 2012. This was at a time when
13 Royal Mail was putting forward a series of proposals
14 about changes to access, pricing and arrangements, and
15 as you will see from paragraph 1, Ofcom had received
16 concerns in relation to these matters and was awaiting
17 the outcome of the process. The next two paragraphs
18 primarily talk about Royal Mail's representatives, one
19 of their representatives' reactions.

20 But you'll see in paragraph 4:

21 "At this time Royal Mail considers that there's
22 value in commitment pricing but many customers would
23 only be prepared to do so for two years at the most.
24 Current thinking therefore was that there would be no
25 commitment-based pricing introduced in April 2013 but

1 Royal Mail maintains the view that some commitment-based
2 pricing was desirable in the future."

3 Then it goes on:

4 "... there will be no commitment-based pricing ..."

5 In paragraph 5.

6 "... and there will be no pricing distinction
7 between NGPP and ZGPP proposals."

8 That was the proposals on the table at the time, but
9 there are going to be contract changes.

10 Then 6:

11 "In the new contracts, Royal Mail is seeking to more
12 easily vary and terminate the agreements. Some
13 customers have expressed concerns about Royal Mail
14 having too much control. To address this concern,
15 Royal Mail is proposing to make it easier to vary the
16 contracts but to pause any notice of proposed changes if
17 customers believe the variation is not fair and
18 reasonable. This will allow customers to raise
19 a dispute with Ofcom, during which time Royal Mail will
20 pause implementation of the variation until an Ofcom
21 decision is reached. Royal Mail is also considering
22 a low cost mediation process provided we do not get
23 hundreds of claims."

24 So what's going on here is modification of the
25 access contracts more generally being proposed, noise in

1 the market about what that might result in, Royal Mail
2 taking these matters into account, considering that some
3 changes that it was thinking about aren't going to be
4 made, but in particular saying we want to ensure that
5 there is a mechanism there that, no matter what sort of
6 complaint we're talking about, there is a pause
7 mechanism built into these contracts change processes so
8 that people can come forward, and all they need to do is
9 come forward and complain. That's all. That's it, and
10 then it's paused. As soon as you complain, it's paused.

11 Could you go on two tabs to tab 7, we pick it up at
12 paragraph 5. So this is a different Royal Mail
13 participant:

14 "... then took Ofcom through the changes to the
15 variation and termination provisions which will allow
16 Royal Mail greater scope to vary and terminate the
17 agreements unilaterally. She explained that Royal Mail
18 were proposing to allow long notice periods for both
19 provisions. She added that such notice period would be
20 paused if a customer complained to Ofcom or another
21 regulator that variation or termination wasn't fair or
22 reasonable until such time as a regulator took
23 a decision."

24 So it's building in long notice periods and ensuring
25 that people can object well in advance, and it will be

1 paused and there will be no implementation. And this
2 was a key part of the changes being made.

3 Then 6:

4 "Both CR and MS suggested that Royal Mail should
5 limit the scope for pausing variation and termination
6 notices only to cases where Ofcom issued a formal
7 notification on its website that it had launched
8 an investigation or accepted to resolve a dispute
9 between Royal Mail and a customer and that the notice
10 period would start up again once the matter had been
11 formally closed."

12 So Royal Mail is coming forward with a comprehensive
13 safety valve mechanism that covers any sort of objection
14 that could even imaginably fall within the scope of
15 competition law issues, as well as broader regulatory
16 issues. It is raising it with Ofcom, and Ofcom is
17 saying, actually, don't make it too wide. Don't just
18 have it in relation to any complaints. Have it so that
19 when Ofcom decides that the complaint is worth
20 investigating, it's only then that the suspension
21 occurs.

22 THE CHAIRMAN: This is an agreed note of these meetings, is
23 it?

24 MR BEARD: I believe so.

25 THE CHAIRMAN: It's actually made by Royal Mail.

1 MR HOLMES: Sir, just for completeness, the Ofcom note is at
2 the following tab, of this meeting.

3 THE CHAIRMAN: Anything different in that? A bit shorter.

4 MR BEARD: No one has at any time questioned the accuracy of
5 these notes from Royal Mail.

6 THE CHAIRMAN: I'm not questioning the accuracy, I'm just
7 asking what the status is.

8 MR BEARD: Yes. That's as far as I can go with it.

9 I do think though it is worth then going on. If
10 I may just pick up bundle Royal Mail 7B at tab 84. You
11 can put this one away.

12 THE CHAIRMAN: Mr Beard, this mechanism, what you're saying
13 is this is the counterpart to increased freedom to vary
14 conditions?

15 MR BEARD: Yes. It is. There was a more general process of
16 variation. I'm not going through all of the variations.
17 There were prices changes and all sorts of condition
18 changes made in these access contracts at that time.

19 THE CHAIRMAN: RM7 --

20 MR BEARD: B at tab 84.

21 This is an analyst briefing undertaken, as we
22 understand it, by Ed Richards, who was then the chief
23 executive of Ofcom, with other Ofcom personnel on the
24 call, July 2013.

25 I'm only just going to take you to one passage in

1 it. At 336 external numbering, 24 on the internal
2 numbering, the question is raised by an individual from
3 one of the investment banks, presumably an analyst or
4 researcher, halfway down 336 about termination
5 provisions, picking up the point, Mr Chairman, that you
6 were just raising. Then the response is actually given
7 by Mr Rowsell, who was at those meetings.

8 But it's actually further on that I wanted to go to,
9 on 337, just before the next question. Mr Rowsell's
10 final comment here:

11 "This is quite a good example of that because our
12 understanding is that, in the renegotiation of
13 a contract, the way this termination right for Royal
14 Mail, which applies also to changes to contract terms,
15 was put into the contract, Royal Mail, to allay some of
16 the concerns of the access operators, said that, if
17 someone were to bring a regulatory dispute to Ofcom
18 about the subject or about the notice, they would stop
19 the clock for the period of the dispute being resolved.
20 That, again, is not something we were involved in. That
21 was Royal Mail engaging with its customers to make sure
22 it gained greater commercial freedom, but not giving
23 everything away."

24 It was Royal Mail that built in the safety valve.
25 Ofcom wanted it to be tighter. It is quite

1 inappropriate in those circumstances for Ofcom to be
2 maintaining before this tribunal that this was some kind
3 of attempt to outsource its responsibility. Royal Mail
4 consulted on these matters. It was careful about what
5 it was doing. It took proper responsibility, and these
6 suspension provisions were intended to ensure that no
7 one in the market was wrongly or unlawfully or
8 improperly affected by any changes to these contracts
9 and that this mechanism was intended to ensure that was
10 the case.

11 That is important in these circumstances. All else
12 left to one side, Royal Mail plainly envisaged that
13 there was a full safety valve protection mechanism and
14 that it understood that, to ensure that it would not end
15 up breaching competition law, it would not simply be
16 outsourcing its responsibility. It took responsibility.
17 It took decisions. But it, Ofcom, and all relevant
18 market participants knew about the suspension provision
19 that meant that none of these changes would be
20 implemented if there were any concerns about them.

21 On Royal Mail's side it was that if there were any
22 concerns that raised a complaint. Ofcom said no, make
23 it more restrictive. Make it such that if we decide
24 it's sufficiently important, then it's suspended.

25 Now they seek to pray in aid the restriction they

1 proposed, and say, "It's because we got involved". That
2 is quite wrong.

3 So we say the suspension provisions that were built
4 in reinforce why it is that non-implementation of
5 pricing means that there is not an abuse here.

6 Ofcom cannot say that in those circumstances what we
7 have is a situation of abusive conduct by Royal Mail,
8 the effects of which are then stopped by Ofcom. The
9 safety clause, the safety valve mechanism meant that
10 those changes to the contract would not occur if there
11 were concerns in relation to them, and that was why the
12 suspension mechanism worked as it did.

13 If we then go back to the Ofcom skeleton at
14 paragraph 6(b), which is where I was when I referred to
15 decision paragraph 1.24(h), Ofcom goes on in 6(b) to
16 say:

17 "A rational economic operator or investor could not
18 ignore the implications of a pending differential and
19 could not be sure as to the outcome of
20 an investigation."

21 There it cites parts of the decision at 7.222 and
22 223.

23 Well, let's be clear. It is right that you can't be
24 sure of the outcome of Ofcom's consideration of these
25 matters. But if you're confident that there is

1 something wrong with the proposed changes, and given the
2 fact that Ofcom have shown no little zeal in
3 scrutinising these matters, your working assumption
4 would be that anything that gives rise to concern,
5 whether under competition law or under the ex-ante
6 scheme, is not going to be permitted and that it would
7 only if Ofcom somehow got things badly wrong that there
8 would be a problem.

9 Now, what we see in 7.222 and 7.223, if I may, in
10 the decision, page 247, is at 222:

11 "As a matter of law, the existence of contractual
12 provisions allowing for unilateral prices changes to be
13 suspended during a dispute or investigation does not
14 relieve Royal Mail from its special responsibilities as
15 a dominant undertaking."

16 We agree. It was part of our responsibility that
17 we'd built this mechanism in. 223:

18 "Further, and in any event, we do not accept that
19 rational operators would behave in the manner contended
20 by Royal Mail. On the contrary, Royal Mail's
21 submissions in this regard are unrealistic."

22 In other words, that they would take into account
23 what Ofcom was actually doing in relation to these
24 matters and recognise the suspension.

25 As I say, we recognise that rational operators will

1 not ignore all sorts of things. They are constantly
2 looking for market intelligence. What we're considering
3 is whether or not there was discrimination which was
4 likely to restrict competition even if not charged or
5 paid. But where the pricing is not in place, any
6 restriction isn't by way of the pricing. A pricing
7 restriction, as I've already said, would be reducing the
8 comparative level of NPP1 prices so that people on APP2
9 think that they're at a disadvantage. It's the prices
10 restricting the competition in those circumstances.

11 At that point, you analyse, well, when these come
12 in, could they give rise to a restriction because I'll
13 make a loss? But it's the loss, the financial impact,
14 going back to what was considered in Irish Sugar, that
15 matters. That's the relevant effect. It's back to that
16 distinction in AstraZeneca between the actual conduct
17 and the effects in question.

18 It's worth just going back in the decision to
19 paragraph 7.203 because this is under the section on
20 suspension. What you see in that section is Royal
21 Mail's representations, 7.205.

22 The first is no issue under 102(c) because not
23 applied.

24 Second, at 206:

25 "... Royal Mail argues that our approach [Ofcom's

1 approach] to conduct ..."

2 Assessing hypothetical conduct, and third:

3 "As the suspension of the price differential ... was
4 expected by operators , and the CCNs were in practice
5 suspended, rational operators would not have responded
6 at all to the changes and/or altered their behaviour in
7 anticipation of being affected by them."

8 Then the responses come. Sorry, 208 sets out some
9 of the basis on which Royal Mail made those submissions.

10 Then if you go over to 209, the assessment, you will
11 see at (a) that's trying to deal with the first of the
12 issues on legal principle. It talks about the
13 importance of looking at the relevant acts. We say,
14 well, when you're talking about price differentials and
15 price discrimination, it's the pricing that's the
16 relevant acts.

17 Then at (b) the case law of the European courts
18 makes it clear that competition authority doesn't have
19 to wait until the anti-competitive conduct has an actual
20 concrete impact. Absolutely that is what the case law
21 says in relation to actual conduct.

22 At (c) the intervention of third parties such as
23 Ofcom can't be relied upon to avoid responsibility for
24 conduct.

25 Well, that's just not right. If the conduct doesn't

1 occur, then there isn't a breach. In any event, in
2 circumstances where it's being said that Ofcom ride in
3 on a white charger and save the market, that is just
4 a misrepresentation of what was actually happening here.

5 THE CHAIRMAN: So what do you say when they received
6 a complaint that had been the basis on which Ofcom would
7 have assessed the legality or illegality of the conduct
8 that your clients had announced that they were going to
9 implement?

10 MR BEARD: Well, because in circumstances where what the
11 contractual provision does is look at whether or not
12 it's fair and reasonable, then they can look at matters
13 in the round. They can clearly take into account all of
14 the concerns that might arise in relation to the
15 universal service provision access conditions, which
16 include in particular discrimination issues. No doubt
17 about that. But they can also --

18 THE CHAIRMAN: Just on this point of the fact that the
19 proposed price changes had not been implemented --

20 MR BEARD: Yes.

21 THE CHAIRMAN: -- and they would not be implemented while
22 they were investigating complaints --

23 MR BEARD: No.

24 THE CHAIRMAN: -- so they would have to do it on the basis
25 that, if these conditions were implemented, these would

1 be the effects.

2 MR BEARD: Yes.

3 THE CHAIRMAN: You're not really disputing that?

4 MR BEARD: No, I wouldn't dispute that because that is the
5 way that the contractual mechanism worked. So that you
6 didn't ever end up with a situation where you actually
7 had relevant conduct that ended up constituting
8 a breach.

9 THE CHAIRMAN: I think Ofcom -- I'm not arguing Ofcom's case
10 for it, far from it. But in 7.227 they make the point
11 that that means that they could never conclude that the
12 conduct was illegal. They could only conclude that the
13 conduct would be illegal if implemented.

14 MR BEARD: Yes. In relation to the pricing, that would be
15 right. Therefore, what you have is a contractual
16 mechanism whereby they can object to it in circumstances
17 where you're essentially bringing the consideration
18 forward through that contractual mechanism to stop
19 a situation where you actually carry out the conduct
20 which is likely to have or actually has adverse effects
21 on the market.

22 More than that, of course, the consideration could
23 be of the nature of the CCN itself. You could
24 potentially consider whether or not that in and of
25 itself constituted a competition infringement, as we've

1 discussed already. But of course we say that would be
2 a very ambitious approach.

3 THE CHAIRMAN: But they wouldn't do that in the context of
4 the complaint --

5 MR BEARD: No, I don't think there would be a need for that.

6 THE CHAIRMAN: -- because the purpose of deciding on
7 the complaint would be a what if ruling.

8 MR BEARD: Yes. There is a mechanism to deal with what ifs
9 here, and Royal Mail built that in.

10 PROFESSOR ULPH: Can I just ask, I was a competitor,
11 a potential entrant, my concern would be about being
12 foreclosed by Royal Mail. Now, it's quite possible
13 Ofcom could consider the case under competition law,
14 decide that that was foreclosure, but nevertheless say
15 it was objectively justified in order to protect UPS.

16 MR BEARD: Yes.

17 PROFESSOR ULPH: How would I, as a potential entrant, react
18 to that? I personally don't care about the UPS but I'm
19 still being affected by the action even though Ofcom --

20 MR BEARD: Well, you're not yet being affected by the
21 action, of course, no, because it's at the point at
22 which the pricing comes in on the basis of what would
23 have been said to have been objective justification in
24 those circumstances. Then you would have to consider
25 what your challenge options would be, whether it's

1 challenges to the process under the contract, whether or
2 not it's challenges to Ofcom -- I recognise that this is
3 part of the contractual mechanism -- or it would be
4 going to court in relation to these issues. We
5 recognise that.

6 PROFESSOR ULPH: But it's still not being prevented by the
7 mechanism.

8 MR BEARD: Well, if what is being said by the rival is that
9 Ofcom has got it wrong, in other words this is a case
10 where you're the rival and you say, well, I have
11 complained, so everything is suspended, Ofcom reaches
12 its conclusion and concludes it's fine for the reasons
13 you're articulating, there's no objection here, Royal
14 Mail is justified in doing what it wants to do, but
15 I still object to that, then in those circumstances what
16 you have is a situation which is very much the same as
17 any situation outwith the regulatory scheme, which is if
18 there's going to be a contractual change that you object
19 to, you can either put a regulator on notice, saying,
20 well, actually, when this comes in, I want you to do
21 something about it urgently, well, that's not going to
22 be particularly sensible in circumstances where Ofcom
23 has already been involved.

24 At that point you're going to be saying, well, I'm
25 going to go to court because I don't agree with Ofcom.

1 THE CHAIRMAN: I was going to say it sounds like the
2 situation that preceded the Albion Water litigation.

3 MR BEARD: That may well be correct. The problem with the
4 Albion Water litigation is that --

5 THE CHAIRMAN: I'm not saying there's any parallel between
6 this and that.

7 MR BEARD: I think that might well be right in the sense
8 that there you had Ofwat saying it's fine and then you
9 had to turn up, but in those circumstances you did have
10 the pricing arrangements put in place. So you had
11 a different situation. So Ofwat was adjudicating on
12 what was really there, not what was going to be there.

13 But yes, in terms of a clearance that is then
14 challenged, that's right. The fact that you have
15 a clearance then being challenged doesn't somehow leave
16 any kind of lacuna in how competition law works here or
17 the regulatory protections.

18 When we're here looking at --

19 THE CHAIRMAN: But all that establishes is that the notional
20 clearance by the regulator doesn't close off the
21 competition uncertainty.

22 MR BEARD: No. It never will. Well, it will only at the
23 point when time for appeal or any further challenge
24 lapses and there's no further change in circumstances,
25 so you can bring court proceedings. At that point,

1 I suppose there would be. But up until then, the truth
2 is that everybody lives with uncertainty all of the
3 time, and in regulated industries you live with a range
4 of uncertainties that are both commercial and
5 regulatory.

6 THE CHAIRMAN: Under your mechanism, if Ofcom had no grounds
7 for action within three months or a relatively short
8 term, the prices would have been reimposed. The
9 suspension would have been lifted.

10 MR BEARD: Well --

11 THE CHAIRMAN: You don't have to wait for appeal.

12 MR BEARD: No, sorry, under the mechanism it's only if Ofcom
13 thought it was a complaint worthy of further
14 investigation. Once that occurs, then the suspension is
15 perpetuated. What we actually see in this case --

16 THE CHAIRMAN: Until what?

17 MR BEARD: Until Ofcom has reached a final decision.

18 THE CHAIRMAN: But not subject to appeal or whatever. It's
19 just a decision on the contractual wording of the
20 suspension provision.

21 MR BEARD: It's not an autonomous regulatory decision. So
22 it would be dealt with under the terms of the contract.
23 So if Ofcom reaches a final determination, or doesn't,
24 then it is right that the contractual terms would then
25 begin to operate and you would challenge them as per

1 other contractual terms.

2 I think that must be right in those circumstances
3 because the function that Ofcom is taking on in relation
4 to this is a function that Royal Mail could have
5 retained to itself. It could have said: We are going
6 to be the unilateral arbiters of these things. We're
7 going to issue the notices. If we get complaints and we
8 think there's something in them, we'll suspend the
9 notices.

10 At that point, again, on Ofcom's case it appears
11 that Royal Mail would have committed an abuse up until
12 the point where it's suspended these matters, responding
13 to complaints, or it could have had a panel of wise folk
14 who act as arbitrators in relation to these matters.

15 In the end what was done, given that we're operating
16 in a regulated industry and that clearly matters that
17 are aired in the context of the access contracts can
18 give rise to concerns by Ofcom who have a range of
19 autonomous powers that they can bring to bear, but it's
20 sensible Ofcom operated in that role, and Ofcom was
21 entirely willing to do so. As I say, as we've seen,
22 Ofcom actually said, well, actually don't let just
23 anything trigger a suspension. We'll decide what the
24 threshold should be.

25 MR FRAZER: Can I just bring you back to what you said a few

1 minutes ago about that mechanism.

2 MR BEARD: Yes.

3 MR FRAZER: I think you said that what Ofcom could have done
4 is investigate the CCNs and say: if you bring these
5 prices into effect, they would be discriminatory. That
6 would be one outcome.

7 MR BEARD: Yes.

8 MR FRAZER: Could they have done that under the submissions
9 you made this morning about the extent and the scope of
10 competition law? No prices having been brought into
11 effect at this point, it's not discriminatory. It might
12 be discriminatory in the future, but it's not at the
13 moment. Are you saying that that that could have been
14 investigated under competition law or not at all?

15 MR BEARD: Well, it could be certainly investigated under
16 the terms of the contractual suspension provision
17 because what was being asked under that was: are there
18 any concerns about these clauses if they're put into
19 effect? So there's no issue there.

20 Furthermore, in relation to the ex-ante regime that
21 exist, plainly there can be findings that things are
22 going to happen that aren't.

23 In relation to competition law, what they couldn't
24 do was find that at the moment when the thing was
25 suspended and prior to that, there had been

1 a competition infringement. They couldn't find that.

2 MR FRAZER: And what could they do under --

3 THE CHAIRMAN: I thought you said that they could but that
4 it wouldn't be a price-based infringement.

5 MR BEARD: Sorry, yes, I was focusing on a price-based.

6 Yes, I apologise. That is quite right, in relation to
7 the price-based finding. In relation to the
8 announcements, plainly they can, yes, because we're not
9 denying that a CCN being issued is a form of conduct.
10 What we're saying is it's not pricing conduct.

11 So in relation to your -- to nuance it quite
12 properly, they couldn't make a finding that there had
13 been a pricing competition infringement, but
14 theoretically they could explore whether or not there
15 was a non-pricing infringement, but we say we don't
16 understand on what basis you would do that.

17 MR FRAZER: Thank you.

18 THE CHAIRMAN: I'm conscious we have interrupted you more
19 than I undertook to do and you're probably behind now.

20 MR BEARD: I wonder -- I'm just conscious of the time --
21 whether the sensible thing to do would be to pause now
22 and I'll see whether or not there's anything else I need
23 to wrap up on ground 1, and we just move on to ground 2
24 after the short adjournment.

25 THE CHAIRMAN: That would suit us very well, Mr Beard.

1 Thank you.

2 (12.55 pm)

3 (The short adjournment)

4 (1.55 pm)

5 THE CHAIRMAN: Mr Beard.

6 MR BEARD: Mr Chairman, there is one thing that, just coming
7 out of the discussions before or submissions before
8 lunch, I thought it might be worth briefing touching on,
9 which is actually what the suspension clause looks like.
10 Because I was describing it, but it might be worth just
11 picking it up.

12 It's in various places in the bundles but I'll pick
13 it up, if I may, at the Whistl bundle WH1. It's under
14 tab 4 midway through, but I think best is the page
15 reference, 524.

16 THE CHAIRMAN: The Whistl bundle?

17 MR BEARD: Yes, it's the statement of intention bundle.

18 I've got it as WH1, I'm sorry.

19 THE CHAIRMAN: Where are we? Which tab are we?

20 MR BEARD: Okay. I've got another reference for it. RM7/1,
21 if that's easier.

22 THE CHAIRMAN: So not the Whistl bundle?

23 MR BEARD: Sorry. At tab 1. So this is actual contract,
24 tab 1. So this is the actual access letters contract
25 that was signed off on 27 March 2013 between Royal Mail

1 and TNT. This clause, however, is absolutely identical,
2 I think, throughout the relevant contracts.

3 If we go on to page 16. I think it's 13.8.
4 Clause 13 is all about changes, but 13.8 says:

5 "If any regulatory body makes a formal public
6 notification that it has opened an investigation into us
7 or accepted to resolve a dispute referred to it
8 involving us through formal proceedings ..."

9 So this is essentially adopting Mr Rowsell's
10 approach to the characterisation of the clause, that
11 it's when a regulatory body opens an investigation; and
12 (b):

13 "... the outcome of the investigation or formal
14 proceedings is reasonably likely to affect our rights to
15 change your contract ..."

16 So a finding in the investigation could change
17 rights:

18 "... or it would be reasonable to expect to us take
19 that outcome into consideration in deciding whether or
20 not we were acting fairly and reasonably in changing
21 your contract."

22 It's a very broad provision, so that even if
23 an investigation is not making some sort of formal
24 finding, what it does is it says if the outcome could
25 "reasonably" mean that we should take the outcome into

1 consideration, so that could include the reasoning:

2 "... in deciding whether we were acting fairly and
3 reasonably in changing your contract, then the relevant
4 notice period ..."

5 Which is referred to above.

6 "... shall be suspended as between the parties until
7 the regulatory body determines that the investigation or
8 formal proceedings has been concluded and makes
9 a decision or issues directions regarding ... or our
10 decision to change your contract."

11 So it is very, very broadly worded indeed, even
12 though in (a) the trigger is being tightened up. And of
13 course what it means is that if you've got any ex-ante
14 related concerns to do with the operation of ex-ante
15 regulation, which is broadly what people primarily think
16 about and we will see was thought about in the context
17 of these contract change notices, not just in relation
18 to the price differential but also the zonal price
19 changes, that if you have those sorts of concerns you
20 can ensure they're properly ventilated. And even if you
21 don't get some sort of binding finding, some sort of
22 almost infringement finding, albeit that in ex-ante
23 terms that wouldn't necessarily be right, but the
24 reasoning is relevant, then that would be taken into
25 account.

1 THE CHAIRMAN: This is all in the clause that says we may
2 change this contract without your consent.

3 MR BEARD: Yes, because that was the -- as it was described
4 in the context of that meeting, that is what was what
5 was going on. In other words, liberalisation of the
6 ability to change, subject to a whole group of
7 provisions, including the long notice provisions in 13.2
8 and 13.3, but then with this caveat at the back.

9 But I thought it was important, in particular given
10 Mr Frazer's questions about how this operated, who what
11 could be taken into account, that the tribunal actually
12 saw the breadth and scope of this and therefore its
13 ambit.

14 Of course, it was always anticipated that these
15 sorts of processes would be dealt with rather quickly
16 and of course that transpires not always to be the case,
17 and indeed we'll come on to the significance of that for
18 these proceedings in due course.

19 THE CHAIRMAN: With the benefit of hindsight, it has not
20 been the case.

21 MR BEARD: Hindsight, foresight, mm-hm, yes.

22 I'll move on to ground 2, if I may.

23 So ground 2, this concerns the question whether or
24 not the conduct in question was discriminatory, and of
25 course the passing observation to be made is of course

1 that the analysis that we're carrying out here is what
2 is alleged to be discriminatory? It is the pricing.

3 The test, there is no magic about the discrimination
4 test. I think we all concur that it is applying the
5 same terms to different situations without
6 justification, or implying different terms to comparable
7 situations without justification.

8 You're no doubt fairly familiar from all of the
9 paperwork about the history of the development of the
10 access contracts. It's set out in section 2 of our
11 reply to the SO, is one of the places where that is
12 usefully found. That's RM9, bundle 9, tab 2, so section
13 2 of our reply, and there's also material in section 3
14 of the decision.

15 As you know, the access contract was developed under
16 the licensing and price control regime overseen by
17 Postcomm until 2011, at which point there was a new
18 regulatory arrangement put in place and new legislation
19 put in place. In the course of that, the universal
20 service provision access conditions were put in place
21 that were applied to Royal Mail, including relating to
22 fair and reasonable and non-discriminatory provision of
23 access to customers. So although access customers sign
24 up to the same core contract, having that broad fairness
25 and nondiscrimination provision in place, they do have

1 a choice of which price plans to take, and at the
2 relevant time there were three of them. The two
3 national price plans, NPP1 and APP2, and the zonal price
4 plan, ZPP3.

5 Now, again, I'm not going to go through all the
6 details of the differences between them, but just in
7 broad terms, I am sure the tribunal is familiar with the
8 idea that customers on NPP1 pay a uniform national price
9 and are required to have a similar distribution of mail
10 to that of Royal Mail in each of the 83 relevant
11 standard selection codes, effectively 83 areas across
12 the country. There are certain tolerances and there
13 will be surcharges that are applied if those tolerances
14 aren't met.

15 Now, customers on APP2, they also pay a uniform
16 national price, but they're not required to post
17 nationally on the same distribution as Royal Mail.
18 Instead, they're required to post mail in line with
19 Royal Mail's posting profile across four much broader
20 zones which are London, urban, suburban and rural.
21 Again, there are tolerances and surcharges where the
22 tolerances aren't met, but in relation to these much,
23 much wider areas, four areas, rather than 83.

24 Customers of course on ZPP3 pay a different sort of
25 pricing in the sense that they pay a price per item that

1 reflects a situation where the item is being posted to
2 be delivered in a particular zone. So there isn't
3 a restriction on the overall profile of posting under
4 ZPP3. The price for each zone is calculated by applying
5 a broadly percentage increase or decrease, what's known
6 as the zonal tilt, to the APP2 national price, depending
7 on whether or not the zone is more expensive or cheaper
8 to serve than the national average.

9 Of course, as you know, an important part of the
10 CCNs was a proposed change to the zonal tilt, which we
11 will be coming back to no doubt in the course of
12 evidence, and which was the subject of extensive
13 consideration by Ofcom using its so-called ex-ante
14 powers rather than competition powers in relation to the
15 zonal tilt, and the outturn of that consideration is in
16 the bundle and we'll go to that in due course.

17 Now, just in terms of what customers can do with
18 those three price plans, you can combine either of the
19 national price plans with zonal price plan. You can't
20 be on both of the national price plans because of course
21 they offer a national price to a particular profile, so
22 it doesn't make sense. But you can have -- you can be
23 on NPP1 and ZPP3, or use APP2 and ZPP3.

24 PROFESSOR ULPH: Just to clarify, is that what you mean by
25 arbitrage?

1 MR BEARD: Well, to some extent I suppose one can see that
2 as being arbitrage, yes, but that's recognised as
3 something that goes on all the time and is part of the
4 way in which these price plans work. So yes, there is
5 a degree of arbitrage in relation to those matters.

6 PROFESSOR ULPH: Thank you.

7 MR BEARD: So that's the outline, the basic pattern of the
8 price plans. The key question then -- key questions
9 then are: is there an issue about comparability and is
10 there an issue about justification here? We say yes,
11 there's an issue about both in relation to Ofcom's
12 finding of discrimination in respect of the price
13 changes for NPP1 and NPP2, the introduction of the price
14 differential.

15 Now, what we say is the appropriate way of assessing
16 the application of the discrimination test is that you
17 look, broadly speaking, at the demand in question and is
18 it relevantly comparable, and we say, well, some
19 customers do want to be able to post nationally on the
20 sort of profile that Royal Mail has and can commit to
21 doing so. Others want more flexibility in the way that
22 they're going to post.

23 What we see is that from the two different national
24 price plans, NPP1 and APP2, what you get is different.
25 With NPP1, because you're having to commit to the

1 profile across the 83 SSCs, you have much less
2 flexibility in relation to your posting than you do in
3 relation to APP2 and, as you know, the situation would
4 have been, had the CCNs actually come into force, that
5 you would under NPP1 also have been under a forecasting
6 requirement, in other words that you indicated what your
7 profile of posting was going to be two years out in
8 relation to NPP1.

9 Now, we recognise, of course, that all customers --
10 each customer will have a particular combination of
11 pricing conditions, requirements, flexibility, whatever
12 else that it would like to be able to secure from
13 Royal Mail, but the key point we make is that there
14 isn't an obligation to provide that sort of bespoke
15 pricing for each type of demand.

16 What we say is that in broad terms what you see is
17 demand from customers who can meet that more detailed
18 spread requirement under NPP1 and demand from customers
19 who want to retain the sort of flexibility that the
20 zonal profiling permits them in terms of their delivery.
21 And we say that in those circumstances, broadly
22 speaking, what you have are customers who are in
23 a different position wanting NPP1 as compared to
24 customers wanting NPP2, because of the nature of their
25 demand, and we do say that is the way that one should

1 look at comparability.

2 Ofcom doesn't do that. Ofcom takes a very different
3 approach to how you should assess comparability. It
4 says that all customers are materially in the same
5 position and that the price plans don't matter for these
6 purposes because you should look at the position of
7 individual delivery of letters. They refer to this in
8 decision, just for your notes, at paragraph 7.75.

9 What they say is that for an individual letter, the
10 process of delivery is essentially the same. It goes
11 into an inward sorting system, it's dispersed and then
12 eventually delivered to the relevant address, and since
13 that's the same under each price plan, one should treat
14 the relevant demand as relevantly comparable.

15 We say there's an obvious fallacy in that. You're
16 not talking about single letter postings at all. None
17 of these plans are talking about single letter postings.
18 What we're interested in is working out whether it's
19 legitimate for Royal Mail to recognise there are broadly
20 different types of demand and provide price plans
21 accordingly, to which we say the answer is yes and yes.

22 We're not, and I should say this clearly, we are not
23 saying that any difference between customers is relevant
24 and can justify any difference in price. So the case
25 law that's cited as 5.47 to 50 in the decision -- that's

1 Purple Parking, Arriva and Clearstream -- we don't say
2 any of that -- we're not taking issue with that case
3 law. We're not saying that you can pick out any
4 difference between customers and discriminate between
5 them to any extent just because they have some sort of
6 difference. We're asking whether or not they are
7 relevantly comparable for the purposes of assessing the
8 pricing of them, and under one of these national price
9 plans, APP2, you have wide-ranging flexibility and under
10 the other you don't. So the starting point is that
11 these different price plans reflect different demand
12 characteristics on the parts of different customers.

13 So we say those transactions aren't the same, and
14 it's no answer to say, well, you could have designed
15 these price plans differently. The products in question
16 are different because the demand is different. Indeed,
17 in many ways the whole process starts from the wrong end
18 of the telescope. What is odd here in many ways is the
19 fact that you have the same pricing for national plans
20 which have very different conditions attached to them.

21 You can see actually why NPP1 customers might be
22 saying, hang on a minute, why are we paying the same as
23 APP2 customers in circumstances where we're subject to
24 a whole range of greater restrictions than they are?
25 That would seem to be the orthodox way of approaching

1 this.

2 We know that the reason we've ended up with the
3 situation of two sets of national price plans, with very
4 different conditions which nonetheless have the same
5 prices, is an incident of previous regulation and a lot
6 of market noise about any variations being made that
7 meant that earlier proposals for variations were not
8 pursued. But it is an incident of a strange regulatory
9 history that we've ended up with two national price
10 plans that are different but priced in the same way.

11 Now, Ofcom in their skeleton say we'll try to draw
12 out these differences between demand and the differences
13 between the price plans; this is just trying to recreate
14 some sort of justification by reference to value. We're
15 not doing that. I'll come back to value justifications.
16 We are starting with the first part of a discrimination
17 test, comparability, and we say demand is key, that's
18 recognised in Irish Sugar in particular at
19 paragraph 164, and that this approach of trying to
20 explore the journey of a single letter is not the way of
21 analysing these questions, as I say.

22 Just for your notes, we've set out in our reply at
23 paragraphs 4.11 and 4.12 the regulatory history that has
24 resulted in these prices being -- these plans being
25 dealt with in the same way.

1 Now, at one point we made the cardinal mistake of
2 using an analogy in one of our submissions. We refer to
3 airline tickets and how airline tickets are differently
4 priced depending on whether or not they're fixed or
5 flexible and suggested that that was a useful analogy
6 for the difference that you might expect between fixed
7 and flexible national pricing plans.

8 Apparently, that analogy is highly dangerous,
9 according to Ofcom, and they take issue with it in their
10 skeleton argument. They say it's wholly inapt because
11 airlines are engaged in benign price differentiation
12 strategies.

13 Now, I'm not going to comment on the goodness and
14 righteousness of airline pricing. I think there are
15 differing views about those sorts of issues. But the
16 idea that this is not in any way a relevant analogy is
17 simply wrong. It is recognising that where you have
18 a flexible solution, it has a different set of
19 ingredients as compared to a fixed and more restrictive
20 solution. And in that regard it does, as well as
21 indicating a difference in demand, a lack of
22 comparability, it does also indicate a difference in
23 value attached to the different positions.

24 So we say it is relevant to consider these matters
25 in that way. What Ofcom say is:

1 "Airlines may set different prices for different
2 ticket types as part of pricing discrimination schemes
3 of a type that are widespread in the economy and which
4 can be an expression of vigorous competition between
5 airlines."

6 That may be true, but there's an awful degree of
7 circularity about that critique of what we're talking
8 about. The objective, they say, is to:

9 "... apply higher prices and margins to consumer
10 groups that place higher value for the services and less
11 on those that do not, thereby increasing revenues and
12 profits from the totality of sales."

13 I think what they're trying to get at there is some
14 sort of Ramsey pricing, the idea that you vary prices in
15 order to get a greater total output. But whether or not
16 that's what they're after, it's not apposite, because
17 what that is talking about is different prices for the
18 same service. What we're talking about is a difference
19 in the nature of the service that you're --

20 THE CHAIRMAN: Mr Beard, I think all they're saying is
21 there's more than one airline and they are competing
22 with each other.

23 MR BEARD: To that extent I'm not going to demur.

24 THE CHAIRMAN: And there's not more than one Royal Mail, at
25 least not in the relevant market.

1 MR BEARD: Well, there's not more than one Royal Mail, but
2 Royal Mail faces all sorts of competition, as we'll see,
3 in relation to all sorts of aspects of its business.

4 THE CHAIRMAN: But the analogy point.

5 MR BEARD: Yes. But the point I'm making, though, is that
6 they deny there's a suggestion -- what we were merely
7 saying was if you have a situation where you get greater
8 flexibility in relation to a particular product or
9 service, that will (a) tap into a different type of
10 demand, and (b) have a different value for people. Both
11 of those propositions are true and both of them are
12 propositions that suggest that you would end up with
13 different pricing in relation to these matters.

14 THE CHAIRMAN: And the flexibility between APP2 and NPP1 is
15 that the zones are broader, so you can be less bound --

16 MR BEARD: Yes.

17 THE CHAIRMAN: -- by the 83 areas which you would otherwise
18 be bound by.

19 MR BEARD: Yes.

20 THE CHAIRMAN: That's the flexibility. And then the
21 obligations are that under NPP1, under this new system,
22 you would have had to have provided forecasts.

23 MR BEARD: Yes, that's true.

24 THE CHAIRMAN: Anything else?

25 MR BEARD: Well, there are a range of other issues to do

1 with the precise tolerances and so on, but I think for
2 the purposes of this discussion those are the key
3 issues.

4 The key point in relation to flexibility, and the
5 reason I say you'd actually start from looking at it the
6 other way round, is that that that flexibility is very
7 significant, four zones as compared with 83, because you
8 don't have to commit to posting in relation to vast
9 numbers of SSCs as long as you get your balance across
10 the four zones.

11 THE CHAIRMAN: Whistl have worked that out, I think.

12 MR BEARD: I think they may have done. That may be true.

13 The extent to which they've fed that into how you do
14 your proper legal analysis of discrimination I think is
15 a separate and additional question. We say they haven't
16 got it right.

17 PROFESSOR ULPH: There must be an issue here also about any
18 value that customers place on having a single price as
19 distinct from having a whole range of prices for
20 different zones. If they just valued flexibility, if
21 flexibility was the only thing that they valued, they
22 should all be on ZPP3, because that's the most flexible
23 price plan.

24 MR BEARD: Yes, I agree. I'm not demurring that there can
25 be degrees of value and degrees of flexibility, and ZPP3

1 is undoubtedly more flexible. And if you want to have
2 no profile commitment then ZPP3 obviously makes the
3 greatest sense for you.

4 PROFESSOR ULPH: It must be triggering off some of the
5 difficulties of having multiple prices against having
6 a fixed price package.

7 MR BEARD: I think that's almost invariably going to be
8 true. If you don't have a market where -- or you're not
9 providing bespoke prices to every customer, there must
10 be some sort of trade off there, that's true.

11 PROFESSOR ULPH: Perhaps there's more than just a value of
12 flexibility going on here.

13 MR BEARD: Yes. Sorry, I am not demurring. I was making
14 a much more simple point, which is you start off with
15 two price plans that have identical prices and that is
16 somewhat surprising in circumstances where you have
17 clearly different dynamics.

18 THE CHAIRMAN: But you're saying that's historic?

19 MR BEARD: The reason why they are set at the same level is
20 historic, but the point I'm making is that when you're
21 trying to analyse whether or not NPP1 and APP2 should be
22 seen as comparable or relevantly different, or more
23 exactly the customers taking NPP1 and APP2 as in
24 a materially different position, it's very dangerous to
25 say, ah, well, look, they're on the same prices at the

1 moment. Because that's an historical accident. When
2 you actually look at the plans they're dealing with,
3 they have different conditions in them. That's the
4 point I'm making. And therefore we say they're
5 relevantly different.

6 THE CHAIRMAN: But the conduct that is being criticised in
7 this case is a change from the position where the two
8 national price schemes are the same.

9 MR BEARD: That's true. But in order to decide whether or
10 not something is discriminatory, you do need to decide
11 whether or not you're dealing with relevantly comparable
12 situations.

13 THE CHAIRMAN: I understand that, but --

14 MR BEARD: So I'm not in any way disagreeing with you,
15 Mr Chairman. That is absolutely the conduct we're
16 looking at. But if we're asking ourselves whether these
17 two sets of customers are in a materially similar
18 position, then if the question is -- if the answer is
19 no, they're not, they happen to be on the same prices at
20 the moment, but the change you're testing is going to
21 create a variance between them, in those circumstances
22 the test you would have to carry out is whether the
23 magnitude of the change in the price was properly
24 justified in the extent of difference between the two
25 sets of customers, and that is not what Ofcom have done.

1 Ofcom have said they are comparable and the change is
2 therefore not justified.

3 THE CHAIRMAN: So on your argument it doesn't really matter
4 where they start from. You say we should judge them
5 where they end up, see whether they are justified.

6 MR BEARD: Well, I take on the decision, is always my
7 starting point in these situations.

8 THE CHAIRMAN: In your position that's probably what I would
9 do.

10 MR BEARD: I'm sorry if I'm not being radical enough in my
11 thinking in this challenge, but starting with the
12 decision, what we have is a decision that says these two
13 groups of customers are comparable. And they do it on
14 the basis that the route of a letter is the same.
15 That's obviously not the right approach.

16 Then when you actually look at the package of
17 conditions that you're dealing with here, they are
18 relevantly different. My analysis doesn't have to be
19 particularly sophisticated in order take on the basis on
20 which Ofcom have approached this. It isn't sound.

21 I'm doing this focusing on the comparability bit.
22 I'm going to move on to justification as well, assuming
23 that you should treat them all as relevantly comparable.

24 So we say, as I say, that the approach that has been
25 undertaken by Ofcom in the decision in section 7, and

1 just for your notes it's in section -- section 7C which
2 begins at 192, paragraph 744. This was paragraph I took
3 to you in opening which was identifying what the
4 mischief of the infringement finding is.

5 The key part that I'm focusing on at the moment,
6 I'll come back to the sub-heading above 7.47, "Lower
7 prices would not have been available in practice to
8 customers that competed". I'm actually focusing on the
9 equivalent transactions finding above 7.65.

10 The point I'm making here is that although there is
11 this focus on specific letters, and in 7.71 it's said:

12 "Although they're framed differently, the NPP1 and
13 APP2 profile requirements therefore refer to different
14 characteristics of the same underlying benchmark
15 profile."

16 Ofcom are getting this analysis wrong. Because, as
17 I say, they start from the wrong position, focusing on
18 individual letters. They don't recognise the
19 differences in relation to the plans. And then here at
20 7.71 what they're saying is, well, look, if you had
21 a posting profile that met NPP1, you would pay the same
22 price if you posted identically on APP2. And we say
23 that's true, because that's how the maths is done in
24 relation to the pricing. But that doesn't tell you
25 whether or not these are relevantly comparable for the

1 reasons I have already articulated. Because if you do
2 the same profile on APP2, you aren't fixed with the same
3 restrictions.

4 So we say none of the arguments that they put
5 forward in relation to these issues on equivalence are
6 sound.

7 I've already dealt with the issues in relation to
8 7.4 and 7.5 which are essentially look at the path the
9 mail follows, which is obviously interesting but not
10 informative.

11 So we say the comparability exercise is flawed. But
12 it's also wrong when you come to the justification
13 exercise. In other words, if you treat them as
14 relevantly comparable -- I'm sorry, there is one
15 additional point I should make that is picked up in
16 their skeleton argument, less so, I think, in the text
17 of the decision.

18 There's a suggestion that we've contended that APP2
19 imposes greater risks of under-recovery of total costs
20 than NPP1. It's a somewhat technical point. Ofcom take
21 issue with that and we don't really understand why,
22 because all we're saying is that because of the
23 flexibility under APP2 you can end up with a situation
24 where customers are posting in the more expensive SSCs
25 within a particular zone.

1 Now, if you think of the pricing on APP2 on an
2 average basis recovering costs, that's not necessarily
3 quite right, but broadly think of it in those terms,
4 that doesn't mean that actual customers can't end up
5 posting in such a way as to really result in very
6 significant under-recovery of costs, whereas on NPP1 you
7 are much more constrained as to how you can shift your
8 posting profile. So we don't really understand that
9 criticism.

10 But let me move on to the issues on justification.
11 What we'll see when we get into the evidence, and I'm
12 not going to deal with it today in any detail, is that
13 what happened was there was an awful lot of work
14 undertaken or thinking done by Royal Mail in
15 mid-2013/later 2013 asking what sorts of changes could
16 be made to access contracts to increase revenues given
17 the difficulties which were clearly perceived with, in
18 particular, the financeability of the USO, again an
19 issue we'll come back to.

20 What we'll see is that the relevant earnings before
21 interest and tax that Royal Mail was making at that time
22 was below even the bottom of the range that Ofcom said
23 was appropriate, and we'll also see that Ofcom were
24 saying, look, before we do any intervention you need to
25 take your own commercial decisions. You're now under

1 a new regime, you've got commercial freedom, in fact
2 you're a privatised entity. In those circumstances, you
3 try and solve your problems before we do.

4 But in those circumstances there was a range of
5 considerations being undertaken, and one of the issues
6 that was being considered was this possibility of
7 a price differential along with issues on zonal tilt and
8 a whole range of other matters.

9 But what was also recognised was that in order for
10 that sort of price differential to be brought in, to be
11 implemented, given the scheme of regulation that exists
12 in postal services, and given the universal service
13 post -- the universal service provider access
14 conditions, you're never going to have a situation where
15 you can bring in arrangements unless Ofcom are satisfied
16 that they are going to be happy with them, otherwise
17 Ofcom can step in beforehand and stop you doing it or
18 subsequently change the parameters of your pricing.

19 So it was clear that before such changes could be
20 made they would need to be justified, and what we see in
21 the relevant documentary material is Royal Mail
22 considering what sorts of justifications there might be
23 for the price differential.

24 I'll just take you to one or two documents, if
25 I may. If we could take up core bundle 4A. I was going

1 to go to tab 14. I'm not going to go through this
2 document in any detail. This is "Letters pricing
3 strategy, business objectives and initial view of
4 pricing options", and it was prepared for a meeting on
5 23 July 2013. In the end it wasn't considered at that
6 meeting, but in any event ...

7 I just wanted to go to the final page where there is
8 a range of options, pricing options, being considered.
9 If we just pick up the first one, the first option is:

10 "Introduce a price differential between the two
11 national price plans, create a financial incentive for
12 providing a national mail distribution.

13 "Possible risk: it is difficult to cost justify
14 a price difference."

15 So here there is plainly consideration of whether or
16 not there will be cost justification, justification of
17 any sort in relation to the price differential. This is
18 early in the thinking.

19 Then as we move on, what we see is that not only was
20 there work done internally with Royal Mail, but external
21 advisers were brought in to assist Royal Mail in
22 thinking about these issues, and we see one of the early
23 documents from the economists at Oxera at tab 19.

24 So what we see is Royal Mail recognising that in
25 order -- given the structure that exists in relation to

1 the contractual scheme, given the fact that you have the
2 safety valve, given the fact that you have the ex-ante
3 scheme of regulation, you're going to be needing to
4 justify changes you make to this access contract. Oxera
5 are beginning their working looking at what sort of
6 justifications might exist for such a change.

7 Now, I think Ofcom try and suggest that this is all
8 part of some nefarious scheme, but what you're actually
9 seeing is Ofcom -- is Royal Mail, with Oxera,
10 recognising that they need to explain why it is that
11 there would be justification for a price differential in
12 relation to the national price plans, at that time
13 referred to as NPP1 and NPP2.

14 What you see there is consideration of
15 justifications for a price differential, "Cost-based
16 justification", so what savings would be made by
17 Royal Mail in relation to the different price plans that
18 could justify the difference in prices, and you will see
19 under "Cost based justification", the argument would be
20 that:

21 "NPP1, where measurement of the compliance with the
22 national fall-to-earth profile are done at a level of
23 SSCs combined with [some] urban ratios ..."

24 Don't worry about those, those are other tolerances.

25 "... would provide considerably greater planning and

1 operational benefits to Royal Mail than NPP2 where
2 measurement and compliance with the national
3 fall-to-earth profile are done at a more aggregate zonal
4 level ..."

5 That's the four zones.

6 "... or indeed PP3 ..."

7 That's the pay-as-you-go, what became ZPP3.

8 "The main reason for this benefit would be the
9 greater certainty and forecasting accuracy that NPP1
10 would provide relative to NPP2 or PP3 as a result of the
11 reduced variance in the distribution of volumes relative
12 to the national fall-to-earth profile measured by
13 geographic SSCs and also the zones."

14 So what they're talking about is forecast and
15 planning benefits arising because of the metrics that
16 are actually used in the plans being a differentiator.

17 I'm not going to go through the remainder of that.
18 But if one just turns over the page, you've got value
19 based justification. So you've got cost-based
20 justification, value-based justification:

21 "Under a value-based justification, the argument
22 would be that an operator that's on NPP2 has
23 considerably greater flexibility in meeting the
24 fall-to-earth national profile because measurement and
25 compliance are done at a very different aggregate

1 level."

2 So they are looking at two different ways of
3 considering justifications for the price differential.

4 And as you see at 3, they go on to thoughts on how
5 to quantify and model these justifications, and you've
6 got issues concerning the cost justification, the sorts
7 of analysis. And then at 3.2, quantifying the
8 value-based justification, possibly using some option
9 value type assessments.

10 So that's the earlier thinking in relation to these
11 matters.

12 As thinking carries on, what you see is something of
13 a refinement over time of the sorts of options that are
14 being considered by Royal Mail. So if you go on to
15 tab 25, this is a September 2013 document, "Proposed
16 actions on access contracts to protect the USO". There
17 you see more in actions 1 and 2 taking further steps,
18 under point 1, to:

19 "Clearly differentiate PP1 as a national price plan
20 by introducing additional requirements and tighter
21 tolerances."

22 And those requirements would include forecasting.

23 2:

24 "Introduce a price differential between PP1 and the
25 other plans which are more clearly described as zonal."

1 Then there are other options that are also being
2 considered, albeit you'll see from the left-hand side
3 with longer timelines attached to them.

4 I am going to skip forward, if I can, and go to the
5 next bundle very briefly. So what you're seeing is
6 further consultation and consideration of these issues.

7 If we could go to C4B. I'm so sorry, might
8 I trouble you to go back to C4A again? I'm so sorry.
9 My note is slightly confused. I missed a reference.

10 I want to go to tab 27 because what we're seeing is
11 Royal Mail thinking about these things, getting advice,
12 and I have just shown you further development of
13 different options. And then just -- I'm not setting out
14 this in any way comprehensively, but if one goes to
15 tab 27, what you have after that list of various options
16 is consideration of them by Oxera, "Economic assessment
17 of the proposed actions on access contracts".

18 If one picks it up in the executive summary, you've
19 got some general observations on actions 1 to 8, which
20 were the actions I just showed you in that table.
21 You've got some comments on action 1 which were further
22 requirements and tighter tolerances. And then I just
23 wanted to pick up on action 2, which was about that
24 potential price differential between PP1, PP2, PP3.

25 What is being said here by Oxera from an economic

1 perspective is, look, the risk of complaint following
2 this action is very high because it's essentially the
3 same action which Royal Mail consulted on the year
4 before and triggered a letter of complaint from TNT, so
5 that was being recognised as the reality of the
6 situation.

7 "We consider that the rationale for this price
8 differential, when articulated as a discount offered in
9 return for a commitment from customers to post in every
10 SSC of the UK according to national profile is clear,
11 simple to articulate, and intuitively appealing.
12 Customers would have a choice as to whether they wished
13 to commit to this profile and receive a benefit in doing
14 so or use the flexible pay-as-you-go zonal variance.
15 This would be an argument that Ofcom would be compelled
16 to take seriously. Whether Ofcom will be willing to
17 accept this argument as an objective justification for
18 an action which has the potential to restrict
19 competition in the downstream market is difficult to
20 predict. This is in large part because the traditional
21 justification under competition law for price
22 differential typically requires evidence of differences
23 in costs and we understand that Royal Mail has not been
24 able to clearly identify these differences. Therefore,
25 a value based argument would be novel and one for which

1 to our knowledge there's no competition law precedence."

2 So they're still thinking about the two schemes.
3 They're concerned to ensure that there's a proper
4 costing justification -- cost justifications still
5 recognising value-based arguments, and then they say:

6 "A key factor that has the potential to influence
7 Ofcom's willingness to accept the value based argument
8 is the extent to which the level of price differential
9 proposed will actually have a material impact on TNT's
10 direct delivery plans. Work and evidence demonstrating
11 that the price differential will not have an
12 exclusionary extent is it therefore paramount and
13 important although we appreciate this is somewhat
14 counterintuitive from a commercial perspective as
15 ideally you would you want to show the opposite."

16 THE CHAIRMAN: They clearly have a sense of irony, don't
17 they?

18 MR BEARD: Yes. Irony that reads so much less well when put
19 down in the context of litigation, of course, but
20 nonetheless it is an aspect of, I think, what we all
21 facetiously refer to as the Alice in Wonderland aspect
22 of competition law, that you end up advising people that
23 if they're doing very well then they should be concerned
24 about competition scrutiny.

25 But nonetheless, what is being said here is a view

1 from economists in relation to how these sorts of
2 justifications might be put forward and talking about
3 their view about how Ofcom might deal with these issues.

4 Of course, as a matter of law and how these things
5 then pan out we will be coming back to, and to some
6 extent I have already touched upon certain issues. But
7 nonetheless what we are seeing there is the iterative
8 process of options, considerations and counsel as to
9 justification.

10 If we could then go to C4B, I apologise for going
11 back. Again, I anticipate that there will be many of
12 these documents in between that will be gone to over the
13 next few weeks, but if we could just move forward, just
14 given time, to the position in relation to Royal Mail's
15 consideration at tab 70. This is a note from
16 16 December 2013, so very late on in the process. This
17 is the pricing strategy board note.

18 You'll see at the bottom there the proposed changes
19 for access letters being considered. 9:

20 "Royal Mail focusing on financial sustainability
21 against a backdrop of continuing sharp decline in letter
22 volumes. Also believe direct delivery has potential to
23 undermine financial sustainability. Access customers
24 either using NPP1 ..."

25 There's a reference there to 86 SSCs, in fact it's

1 83 that are material for NPP1. That's just a minor
2 wrinkle.

3 THE CHAIRMAN: Direct delivery means competition?

4 MR BEARD: Direct delivery means the competition in relation
5 to the end delivery, rather than competition in relation
6 to access services, for example, where there's very
7 extensive --

8 THE CHAIRMAN: Which you've already got.

9 MR BEARD: Yes, very extensively.

10 "In the light of the changing market conditions
11 we're proposing a number of commercial responses. Given
12 the need for the USO to be sustainable and affordable
13 and earn a commercial rate of return, any response that
14 involves significant revenue dilution ..."

15 Such as price cuts, not across the board price cuts,
16 not realistic, package of the responses being put
17 forward, price differential.

18 And in (a):

19 "The price differential will reflect cost benefits
20 to Royal Mail and value to customers and we are
21 considering a range between 0.2 and 0.5p. Costing
22 analysis currently under review. Final price difference
23 will be ratified by disclosure committee. Arranged for
24 6 January."

25 There are other changes there, zonal price plans and

1 long-term forecasts.

2 THE CHAIRMAN: Just to be clear, what does a response -- an
3 across the board access price cut, what would that
4 actually mean?

5 MR BEARD: Across the board access price cut, in other words
6 reducing the prices for access providers for all plans,
7 I think.

8 THE CHAIRMAN: That's presumably what Ofcom would regard as
9 benign price behaviour; is that --

10 MR BEARD: I don't like to work out whether or not Ofcom
11 consider these sorts of things benign in all the
12 circumstances of this industry, but I suppose -- I'm
13 sure Mr Holmes will answer, but it wouldn't be benign if
14 the impact of that was to jeopardise the USO, for
15 example. But I leave it to Mr Holmes to describe what
16 constitutes benign --

17 THE CHAIRMAN: I'm sure he will. One of the points lurking
18 around in the stratosphere, as it were, is that
19 Royal Mail's response was to raise prices for the new
20 entrant.

21 MR BEARD: Yes.

22 THE CHAIRMAN: Whereas there's some argument that if they'd
23 somehow -- if you had cut prices in some other way, that
24 would have been better?

25 MR BEARD: We just don't understand this at all.

1 THE CHAIRMAN: You don't understand it?

2 MR BEARD: We don't understand this idea that you can
3 characterise things as particularly lower pricing
4 practices, particularly when you're talking about price
5 discrimination. Price discrimination is a relative
6 difference between prices. One is lower, one is higher.
7 You have to work out counterfactually what the prior
8 price would have to have been in those circumstances,
9 and it doesn't make any sense to try and create
10 a taxonomy of Article 102 tests such that lower pricing
11 practices are dealt with in one way and other sorts of
12 discrimination in another way --

13 THE CHAIRMAN: We are a long way away from the price to the
14 consumer here.

15 MR BEARD: Yes, you are a long way away from the price to
16 the consumer, and there are a whole range of other
17 considerations that are going to be material. Frankly,
18 you can easily come up with a situation where you think
19 about effectively treating the price to NPP1 as
20 a discount. Indeed, what we'll see is that in various
21 circumstances that's precisely what was done.

22 You have also got a situation where various price
23 practices, moving one element of it, for instance, in
24 relation to margin squeeze practices, you can either
25 raise one element or drop another to potentially have an

1 adverse effect on competition. It's not clear why
2 lowering and raising is per se a good thing.

3 Mr Holmes, I think, says, well, we can see where
4 pricing practices can engender consumer welfare. Well,
5 with respect, that would be a remarkable test that you
6 would then be applying in relation to Article 102, that
7 one can just in the round consider whether or not there
8 is an aggregate increase in consumer welfare.

9 Of course, if you're doing that, you would have be
10 to doing it in relation to a counterfactual, and that
11 counterfactual doesn't have to assume that prices remain
12 as they are.

13 We'll come back to that in relation to --

14 THE CHAIRMAN: Just so that we don't lose track of the
15 argument completely, what we're being told is that
16 Royal Mail's reaction was to consider raising the access
17 price for the APP2 contract.

18 MR BEARD: That's what -- that's how it's characterised.

19 Throughout the documentation it's --

20 THE CHAIRMAN: Prices either went up or they didn't.

21 MR BEARD: Well, the prices changed, undoubtedly. It's
22 actually Whistl in its complaint that originally says
23 what's happening is they're discounting prices to NPP1
24 customers and we don't like that.

25 THE CHAIRMAN: That's probably a characterisation rather

1 than exactly what happened, or what's going to happen.
2 MR BEARD: I think there are two things to raise here. One
3 is we don't accept this is the sensible way of looking
4 at it when you talk about a differential. More
5 particularly, the idea that you can structure how you
6 analyse 102 cases by reference to those sorts of
7 descriptions is plainly wrong. Because that's not just
8 making the sort of labelling errors that were chastised
9 in Intel, that's making a whole new world of labelling
10 errors, where the perspective on your creative writing
11 and description of particular clauses become
12 determinative of what the fundamental approach to the
13 analysis would be, and that can't be the right approach
14 here.

15 THE CHAIRMAN: Please continue.

16 MR BEARD: 79, if I may. I'm just really rolling forward.
17 It is connected to the previous document. This is
18 a disclosure committee draft paper.

19 So here we have the fuller consideration of issues
20 concerning justification, potential price changes,
21 assessed by the disclosure committee or discussed -- put
22 forward for discussion by the disclosure committee,
23 following on from that PSB document.

24 You can see the thinking that is going on in
25 Royal Mail on pages 1 and 2 in particular. If one looks

1 over the page at page 2, what you have is a discussion
2 about justifications for introducing price
3 differentials. They're referring to avoidable costs,
4 value to consumers, and quantification of the cost
5 differential. Then further on in 3 you've got
6 justification for the zonal price changes. And over the
7 page, considerations of competition and regulation.

8 So these are the factors that are being assessed at
9 that stage. I will come back to that, but just given
10 the time I'm going to move through. I just wanted
11 to ...

12 So what we have here is a range of considerations,
13 both in relation to costs and value being justifications
14 for the changes. But it is right that when it came to
15 a final assessment of whether or not the price
16 differential could be put in place, the focus was on the
17 cost justification. That is in part because of concerns
18 that the novelty of value justification, the
19 difficulties of quantification, and a reluctance on the
20 part of Ofcom to consider these issues properly meant
21 that focusing on cost justification was the way that
22 would need to be put forward if this price differential
23 were to be justified and not to be stopped either
24 through the complaint and suspension mechanism, or
25 through some ex-ante regulatory steps that Royal Mail --

1 that Ofcom would take in any event.

2 THE CHAIRMAN: There's no reference in this paper, is there,
3 to the suspensory --

4 MR BEARD: No, there isn't.

5 THE CHAIRMAN: This looks like a paper which says we've
6 weighed it all up, we've looked at what the
7 justifications might be, the differences in cost and
8 value might be. And I'm looking at 3.4, it says:

9 "Taking competition law, and our regulatory
10 conditions into account, we have ensured that the zonal
11 prices set out above will cover the associated long
12 running incremental costs."

13 I accept that's the zonal -- the ZPP3. But the
14 whole tenor of this document is that there is
15 justification for these increases.

16 MR BEARD: Yes, absolutely, because of course --

17 THE CHAIRMAN: So it's not that they will be okay if Ofcom
18 decides the complaint in our favour --

19 MR BEARD: No, sorry. What this document is doing is
20 Royal Mail is looking at whether or not there's
21 a justification for these price differentials. It is
22 doing so because it knows that it will come under
23 scrutiny from Ofcom in relation to these matters.

24 The routes by which that scrutiny will arise are
25 discussed in this document, because what this document

1 is doing is trying to work out whether there's a proper
2 justification for the price differentials on the basis
3 that, even if Ofcom scrutinises it, Ofcom will clear
4 this.

5 So it's not concerned with the process of Ofcom
6 scrutiny, it's concerned with the substance of the
7 justification.

8 THE CHAIRMAN: It does say it would expect a Competition Act
9 complaint to take around two years with the shorter time
10 period. It's the regulatory option --

11 MR BEARD: Yes, all of that is true, that's absolutely true
12 and prescient, but in relation to the parts that you're
13 referring to, what it's trying to do is look at the
14 substance. It knows that there are going to be
15 processes that has will mean that Ofcom can get
16 involved, and it will get involved before anything is
17 implemented. But that's not material to the decision as
18 to whether or not there's a justification for it because
19 it's not being put forward on the basis it will fail,
20 it's being put forward on the basis that it should
21 succeed.

22 So as I say, there's consideration here of those
23 issues, and what we say is that the approach --

24 THE CHAIRMAN: Is that the end of the documents?

25 MR BEARD: Yes, I'm sorry. I'm not going to -- enormously

1 entertaining though they are, I'm going to pause with
2 those.

3 The question that Royal Mail was considering here
4 was: was there a cost justification? And we say yes,
5 there was a cost justification in relation to these
6 issues, these arrangements, and in particular the
7 two-year forecasting requirement that was being
8 introduced in particular did provide value.

9 Now, in its skeleton argument Ofcom suggest that
10 these points are being barely sustained by Royal Mail.
11 I apologise if our skeleton drafting is not emphatic
12 enough. They are very much being sustained. Indeed, we
13 don't see any good basis for suggesting that the
14 forecasting arrangements in question didn't bring to
15 bear significant cost benefits to Royal Mail. That
16 isn't the position at all.

17 Indeed, what really Ofcom is objecting to is that
18 those forecasting requirements included in the new NPP1
19 terms were not made available to Whistl. That's really
20 what they care about here. And that's really what
21 Whistl is moaning about.

22 What it wanted was to remain on an APP2 type
23 contract with that zonal flexibility but provide
24 forecasting data that meant that there was a reduction
25 in its price. That is broadly what is being said by

1 Ofcom, essentially that you should have not just NPP1
2 with forecasting requirements, but you should have
3 hybrid APP2 with forecasting requirements, and we say it
4 is plainly not discriminatory to have put in place
5 arrangements in relation to forecasting for a plan which
6 is focused on SSCs and the forecasting requirements are
7 for SSCs and where you have a reasonable expectation
8 that the customers on those plans are going to be able
9 to meet those forecasting requirements and a situation
10 where you have to create a new hybrid price plan,
11 because that is the practical import of what Ofcom is
12 talking about here. Because Ofcom is not saying that
13 all APP2 customers can meet those forecasting
14 requirements two years out for 83 SSCs in circumstances
15 where they don't have to meet an SSC level profile at
16 the moment.

17 THE CHAIRMAN: That's a matter of evidence, isn't it? They
18 either can or they can't.

19 MR BEARD: They either can or they can't meet these? The
20 question is whether or not Ofcom has made out
21 a situation which suggests that this amounts to
22 discrimination --

23 THE CHAIRMAN: I appreciate that, but just on the question
24 of forecasting the question is: is it possible for
25 a customer on APP2 to offer binding forecasts?

1 MR BEARD: With respect to Ofcom, Ofcom haven't said that
2 APP2 customers can meet those forecasting requirements.
3 They've said that Whistl could. They've been fixated
4 with Whistl in relation to this, understandably.
5 They're vociferous complainants. Whistl are not the
6 only APP2 customer.

7 And we don't deny that there may be APP2 customers
8 that could meet forecasting requirements and Whistl may
9 be one of them. But we don't accept, and Ms Whalley
10 sets out good reasons why we don't accept, that all APP2
11 customers would reasonably be expected to meet those
12 forecasting requirements. So we say there is a simple
13 failure in this discrimination analysis here.

14 THE CHAIRMAN: The forecasting requirements are intended to
15 be a benefit to Royal Mail.

16 MR BEARD: Yes, they are.

17 THE CHAIRMAN: Not a burden imposed on them from other --

18 MR BEARD: No, that's of course right. We're not denying
19 that.

20 THE CHAIRMAN: I think the question is, and it's an
21 empirical one: if there is a benefit, why not pursue it?

22 MR BEARD: Because what you would have to do is put forward
23 a different pricing plan in relation to APP2 because you
24 would have to have not a single set of terms for APP2
25 anymore. Because you have a situation where you have

1 customers who have that flexibility because they are
2 dealing with four zones.

3 THE CHAIRMAN: That goes to the granularity of the
4 forecasting, doesn't it?

5 PROFESSOR ULPH: It does go to the granularity of the
6 forecasting, yes. But there's no doubt that the
7 benefits to Royal Mail come because of the SSC
8 granularity of the forecasting. I don't think that's in
9 dispute.

10 THE CHAIRMAN: Okay.

11 MR BEARD: So I think what is said is but Whistl could hit
12 SSC granularity of forecasting even though it wouldn't
13 have the same map of distribution under NPP1, and we say
14 that's not the answer here.

15 THE CHAIRMAN: No doubt we'll hear more about that.

16 MR BEARD: I'm sure indeed we will.

17 So we can actually see this rather clearly in
18 paragraph 16 of Ofcom's skeleton argument because what
19 it says is that the difficulty with Royal Mail's attempt
20 to justify its conduct is not that it failed to impose
21 forecasting requirements on APP2, rather it failed to
22 invite Whistl to provide such information in exchange
23 for more favourable pricing.

24 But that would have meant a different APP2 pricing
25 structure. It would have meant a new price plan.

1 PROFESSOR ULPH: Can this be covered off by having
2 a discount in the price plan? You say here is
3 a discount if you provide this information?

4 MR BEARD: Well, that would be a very different -- what you
5 would have to have is where you've got a situation where
6 APP2 is covering four zones, you would then have to
7 include in it a discounting structure that was
8 predicated on SSC forecasting that wasn't part of the
9 overall structure in relation to APP2 at all. And we
10 say we're not under an obligation, and it's not a breach
11 of discrimination, not to promulgate a discount in
12 relation to APP2 in relation to these circumstances.
13 Because what we've got is we say non-comparable parties,
14 and then it's said they're comparable. Okay, we
15 disagree, but treat them as comparable, the customers
16 under NPP1 and APP2, and then it's said, and you don't
17 have a justification for the difference in pricing. And
18 we say no, actually we do, because we've put in place
19 these forecasting requirements as part of the changes
20 for NPP1 because we reasonably expected those customers
21 as a group would be able to meet them, and that
22 justifies the difference in price.

23 The fact that we don't provide discounts to other
24 people in relation to restructuring of plans more
25 generally doesn't render that somehow unlawful

1 discrimination. That is the essence of the position as
2 between us.

3 THE CHAIRMAN: Just in your response to paragraph 16(c),
4 you're really saying that Royal Mail was absolutely
5 blind to whether Whistl could or could not provide this
6 information because you're saying that's really not
7 Royal Mail's responsibility to seek it?

8 MR BEARD: We're not blind to it. I think there was
9 a meeting at which there was some discussion about the
10 possibilities of in due course forecasting information
11 being provided. So it's not a matter of blindness,
12 wilfully or otherwise.

13 When we're concerned about is whether, having two
14 price plans, as we did, we were entitled to modify one
15 of them in circumstances where the terms of that plan
16 changed, and those changes justified the difference in
17 pricing as between the two price plans. We say in those
18 circumstances we weren't required to modify APP2. That
19 is the simple position in relation to all of this.

20 As I say, if it's of use in relation to relevant
21 evidence, the statement of Ms Whalley in particular,
22 she's in RM2 or she's in the core bundle at C2, tab 1,
23 paragraphs 208 to 210.

24 I think the other point that I'm now coming to in
25 relation to this is there's a fundamental error here on

1 the part of both Ofcom and indeed Whistl that they had
2 to stay on APP2 if they were rolling out direct
3 delivery.

4 Therefore, insofar as Whistl as a direct delivery
5 entrant and competitor was able to be on NPP1 and stay
6 on NPP1 as it rolled out, then again there can't be
7 either any need for any further discounts to be provided
8 in relation to APP2 or any justification for the finding
9 of discrimination. It would only be if Whistl were
10 supposedly trapped on APP2 that the issue that
11 Professor Ulph raises could ever be potentially material
12 to any of this analysis.

13 There again we say actually that is flawed, and
14 we've set out in our submissions why it is that in fact
15 Whistl was not only eligible for NPP1 under its changed
16 terms, but also would be able to roll out very
17 extensively indeed up to the full extent of its business
18 plan in order to be able to continue to benefit from the
19 terms under NPP1.

20 THE CHAIRMAN: Doesn't that depend on its arbitraging which
21 you say you don't like?

22 MR BEARD: Well, no, that's not the case in fact, because
23 there are -- (a) in relation to arbitrage, we know it
24 exists, and in circumstances where the two sets of price
25 plans, so the national plans and zonal plans, exist, and

1 people, we know, are using both of them, that in those
2 circumstances the arrangements that are put in place are
3 not abusive.

4 If what's being said is, well, some time down the
5 line arbitrage could be further constrained by you, that
6 is not the infringement that's found against us. That
7 is a suggestion that we could do something that
8 presumably is being suggested to be unlawful at some
9 later date.

10 THE CHAIRMAN: But you've advanced as a proposition that
11 Whistl could roll out to the extent of their plan under
12 NPP1.

13 MR BEARD: Yes. Well, there are two issues there. One is,
14 yes, they can use arbitrage and we recognise that is the
15 case, but second of all, it's important to recognise
16 that they've made a mistake, both they and Ofcom, as to
17 the eligibility criteria for NPP1.

18 The easiest way to deal with that is to just turn to
19 our reply at paragraph 4.27.

20 I'm conscious of the time. Is now a good moment --

21 THE CHAIRMAN: How are you doing with ground 2?

22 MR BEARD: I've got this eligibility material and then some
23 short further remarks and I'll be done probably within
24 20 minutes, but I'm happy to pause.

25 THE CHAIRMAN: I think we might pause for five minutes now.

1 that is adopted here to discrimination is just flawed by
2 Ofcom because it doesn't try and look at an assumed
3 basis that all of the price changes are taken into
4 account.

5 So if the right approach is to look at CCNs in the
6 round, then the decision just gets nowhere because it
7 doesn't engage with that properly at all, and you'd need
8 to carry out a completely different analysis.

9 So what I was going to do in order to try and just
10 assist in speeding the plough slightly in relation to
11 the ability of Whistl, or indeed any direct delivery
12 operator, to continue to benefit from the terms of NPP1
13 under the new arrangements, if they've been put in
14 place, I thought the easiest way might be to just
15 provide the tribunal with some references and work
16 through the terms of the reply.

17 If I may, picking it up at paragraph 4.23, page 26
18 in the reply.

19 THE CHAIRMAN: Which bundle?

20 MR BEARD: Sorry, the reply is probably best found in core
21 bundle C1 at tab 5. It is also in RM11.

22 So what is being argued by Ofcom, as is set out in
23 the preceding paragraph, is essentially that it's
24 impossible for a direct delivery operator to roll out on
25 NPP1, hence the language of penalty and the extreme

1 terms that are used.

2 If we pick it up in 4.22, we say that there are
3 fundamental errors of fact and assessment. Now, the
4 first point is one I've already traversed which is that
5 it's not our case that Whistl itself couldn't meet the
6 forecasting requirements.

7 The second point is though that Whistl in particular
8 was offered the opportunity and incentive to provide
9 that information by moving to NPP1, and what was done
10 was that the arrangements under NPP1 would allow Whistl,
11 without incurring any surcharges, to roll out to six
12 SSCs. If it paid surcharges it could roll out to 13
13 SSCs before it became just between the two national
14 plans more profitable to move on to APP2. So that's up
15 to 13 SSCs.

16 Then we do recognise, as is pointed out in
17 4.24(c)(ii), that the target of 31 SSCs that it had been
18 indicating could be met through arbitraging of NPP1 and
19 ZPP3 price plans, without needing to move on to APP2.
20 So in those circumstances, Whistl could both move on to
21 NPP1 and stay there in relation to an extensive roll-out
22 of its operations.

23 Now, to the extent that that is true, these
24 discrimination points, as I have indicated, simply fall
25 away, because if Whistl or other direct delivery

1 operators could do that, then the benefits that might be
2 afforded by accepting the tighter tolerances and
3 forecasting restrictions on NPP1, but having
4 a comparatively lower price than APP2, would be afforded
5 to them, and in those circumstances the arguments in
6 relation to discrimination arises.

7 As we indicate in 4.24:

8 "As regards the ability of access operators to
9 engage in arbitrage, Ofcom has not challenged the
10 evidence that Whistl could have rolled out on NPP1 up to
11 31 SSCs by employing an arbitrage strategy between NPP1
12 and ZPP3. Ofcom's sole response is to argue that no
13 rational operator would rely on a strategy of
14 arbitrage."

15 We don't really understand that. The defence
16 doesn't seek to challenge or engage with the evidence
17 that's been set out in the notice of appeal that parties
18 have been exploiting arbitrage opportunities between
19 plans for many years and are still doing so, and it is
20 a strategy that would be relied on by rational
21 operators. And it's not the case, as also claimed in
22 the defence, that its tipping point would be reached at
23 13 SSCs, at which point entry delivery operators would
24 be forced to choose between limiting roll-out or paying
25 higher prices.

1 Just going back to the point, Mr Chairman, you
2 raised beforehand, if what's being suggested is at some
3 point in the future Royal Mail might make further
4 changes in the terms of NPP1 and/or ZPP3 in order to
5 reduce the scope for arbitrage, then of course they
6 would have to bring forward further contract change
7 notices.

8 THE CHAIRMAN: I didn't actually make that point. I just
9 said that I didn't understand Royal Mail to like
10 arbitrage.

11 MR BEARD: No. Well, I'm sure there are all sorts of things
12 that Royal Mail doesn't like that may make its life
13 harder and may mean that it earns less. But it
14 recognises that however much it dislikes them, it has to
15 live with them. There is a big difference between it
16 living with them and it liking them, and I'm not
17 pretending that it likes arbitrage, but it recognises it
18 exists. And it also recognises that if in these
19 circumstances arbitrage is a rational strategy that
20 enables the roll-out, for the purposes of this
21 assessment the tribunal must work on the basis that that
22 arbitrage opportunity is available because of course in
23 order to snuff it out, which is what is being suggested,
24 there would need to be further contract changes.

25 THE CHAIRMAN: To what extent was the possibility of

1 arbitrage occurring and considered in the
2 pre-announcement strategy discussions?

3 MR BEARD: By whom?

4 THE CHAIRMAN: Within Royal Mail. The contemporary
5 documents.

6 MR BEARD: I think that's probably something I'll leave to
7 Ms Whalley to comment on.

8 THE CHAIRMAN: I think that would be a relevant point when
9 you get round to it.

10 MR BEARD: Certainly.

11 So that is the overall framework in relation to
12 these issues, and it is important because, as I say,
13 because of the error in approach that's been adopted
14 here, what you are seeing is a failure to recognise that
15 actually direct delivery operators can continue on NPP1
16 in any event.

17 One particular error that is made is in relation to
18 the terms of the eligibility criteria for NPP1. If you
19 turn over the page in the reply, what you see is, with
20 relevant footnote references, the description of Ofcom's
21 and Whistl's respective cases in relation to eligibility
22 criteria, and Ofcom states in its defence that:

23 "NPP1 would in practice have been unavailable to
24 a direct delivery entrant given the applicable
25 surcharges and other contractual conditions, and that if

1 an entrant expanded its roll-out beyond six SSCs this
2 would trigger surcharges and/or other adverse
3 contractual consequences such as being deemed ineligible
4 for the plan."

5 That, with respect to Ofcom, is just wrong. It is
6 misreading of the eligibility criteria. Whistl asserts
7 the conditions of NPP1 required that:

8 "... inter alia the access customer use all
9 reasonable endeavours to match Royal Mail's SSC
10 distribution profiles and prove to Royal Mail's
11 reasonable satisfaction it would have a reasonable
12 likelihood of meeting the national spread benchmark."

13 So that's the spread across the 83 SSCs and the
14 urban density benchmark.

15 "It is not possible to see how an access operator
16 could satisfy these requirements if it was choosing not
17 to use Royal Mail's access service for delivering mail
18 to certain SSCs, especially if the number of such SSCs
19 exceeded six."

20 What we then explain in the following paragraphs, in
21 particular at 4.31 onwards, is that this is in fact
22 a misinterpretation of the proper operation of the
23 eligibility criteria in the national pricing plan
24 because what that plan does is, as set out at 4.32, say
25 that you may only opt for the NPP1 plan if you're able

1 to prove to our reasonable satisfaction that you have
2 a reasonable likelihood of meeting the national spread
3 benchmark, so to that extent the quotation by Whistl is
4 sound.

5 But where they err is that they then don't recognise
6 that once you're on NPP1, and you have to meet the
7 profile commitment, the criteria are rather different.

8 Specifically, clause 3.1 says:

9 "The geographic spread and urban density of your
10 daily postings under this price plan will be measured
11 against the spread benchmark. You agreed to use all
12 reasonable endeavours to meet the spread benchmark."

13 But then it goes on to explain:

14 "Breach of paragraph 3.1 of this price plan shall
15 not constitute a material breach for the purposes of
16 clause 8.2 of the general access terms, but shall
17 entitle us to levy a national spread surcharge or urban
18 density surcharge in accordance with paragraphs 5 and 7
19 of the price plan."

20 So what happens is, if you get on to the price plan,
21 which it is recognised that Whistl would be able to do,
22 and indeed there were meetings at which it was said to
23 Whistl "You can be on NPP1, indeed Royal Mail will help
24 you to be on NPP1". Once you are on NPP1, you can
25 continue to roll out. You will not trigger surcharges

1 up to six SSCs, but once you do start triggering
2 surcharges, once you move beyond the position of not
3 meeting a national spread benchmark, because you're on
4 NPP1 you'll trigger surcharges. You will not be kicked
5 off NPP1.

6 At that point, what you have to consider is whether
7 or not the surcharges in question mean that it would be
8 rational for you to shift over to APP2.

9 As we'll see, it's plain that those don't require
10 you to switch over to APP2 as a rational operator, and
11 indeed Mr Harman has looked at these matters in some
12 detail and we will come on to that in due course.

13 THE CHAIRMAN: I appreciate that. But I suppose the
14 question that arises is: if a company such as Whistl
15 means to roll out to 31 SSCs, is it realistic for
16 Royal Mail to come to a view that they have a reasonable
17 likelihood of meeting the national spread benchmark and
18 the urban density benchmark? You say they have?

19 MR BEARD: Yes, because what you do is you use existing
20 posting data as the basis for this. So the fact that
21 you're going to roll out to various --

22 THE CHAIRMAN: The future is not the point?

23 MR BEARD: The future is not the key to this, no.

24 So once you're on, you're on. You get the benefits
25 or restrictions of NPP1, you have to take the rough with

1 the smooth in relation to NPP1. But then once you move
2 beyond certain thresholds in relation to the national
3 spread benchmark, you trigger surcharges, you don't
4 trigger eviction.

5 That is the way in which the clause works. That was
6 indeed how we understood that Ofcom had understood it
7 back in the SO, and I'll just give you the reference to
8 that. In relation to the SO, which is RM8, tab 2, at
9 paragraphs 7.54 and 7.55, we had thought that Ofcom
10 understood how these arrangements worked.

11 In the reply we've not only set out the relevant
12 contract terms, we've also set out guidelines on access
13 contracts at 4.37 onwards. Then at 4.40 through to 4.47
14 we've explained why it is that Whistl would have been
15 able and eligible to switch to NPP1. Then we explain in
16 4.48 onwards why it is that Whistl could have continued
17 to roll out on NPP1, because essentially the reasonable
18 endeavours requirement to hit spread benchmark wouldn't
19 play any role in determining whether an access operator
20 which was initially qualified to be on NPP1 was eligible
21 to remain there. In other words, the reasonable
22 endeavours requirement, reasonable endeavours to hit the
23 national spread benchmark, related only to the question
24 of whether an operator that was already posting on NPP1
25 would be required to pay surcharges rather than being

1 pushed off NPP1. And paying surcharges on NPP1 didn't
2 make an operator ineligible until you hit a surcharge
3 volume of 15% of your mail. That's clause 11.1 in the
4 schedule.

5 Ms Osepiciu reminds me that we've actually quoted it
6 helpfully at 4.36 in the reply.

7 THE CHAIRMAN: So that actually then terminates the
8 eligibility?

9 MR BEARD: Yes, that then terminates the eligibility. But
10 the critical point in relation to that is that 15% of
11 total mailings would have enabled Whistl to roll out
12 right to the full extent of its 2013 business plan.

13 THE CHAIRMAN: At some cost.

14 MR BEARD: At some cost?

15 THE CHAIRMAN: At some increased cost.

16 MR BEARD: Well, some increased cost in the sense that there
17 would be surcharges, yes. We'll come back to this in
18 relation to profitability.

19 THE CHAIRMAN: I dare say we will, yes.

20 MR BEARD: But nonetheless, the fact that you have to pay
21 surcharges in relation to it doesn't mean that it's
22 irrational for you to roll out as a rational operator
23 and use NPP1 for those purposes. Indeed, that's the
24 analysis that Mr Harman has carried out.

25 THE CHAIRMAN: So you're saying that when Ofcom say in

1 practice it would have been unavailable, you're saying
2 that's wrong. It would have been available in
3 practice --

4 MR BEARD: It is just wrong.

5 THE CHAIRMAN: -- even if it was not particularly
6 attractive.

7 MR BEARD: Well, we are saying it is rationally attractive
8 for someone.

9 THE CHAIRMAN: Not attractive; less unattractive.

10 MR BEARD: Less unattractive we can see. But less
11 unattractive an abuse does not make, is our position.

12 THE CHAIRMAN: I might hold you to that.

13 MR BEARD: Certainly. That is what we'll come on to in
14 relation to profitability. A reduction in profitability
15 doesn't mean that there's any competitive disadvantage.
16 But here the point is that if it is rational for you to
17 roll out because you will make profits, you will make
18 your returns, over the scheme of your business plan,
19 then you keep going. The fact that you have to pay some
20 more, there isn't any competition law objection to that.

21 THE CHAIRMAN: As you say, we shall get into that.

22 MR BEARD: But for the purposes of this, we do say rational
23 operator continues to roll -- can continue to roll out
24 using NPP1. Yes, arbitrage would be used, and no, it's
25 not good enough to say we don't like arbitrage in

1 circumstances where, as can be seen from all of the
2 history of attempts to change the access contracts,
3 there is very intense scrutiny of any potential change
4 and very close involvement of Ofcom in any potential
5 change. So one can't assume that somehow these
6 arbitrage opportunities are being stymied.

7 More particularly that's not the decision here.
8 That is not the decision. You can't just say, well,
9 they will probably try and stop you arbitraging. If
10 you're going to say that you couldn't roll out across
11 your business plan because arbitrage would not be
12 available, that is a point that had to be made out, and
13 it's not made out here.

14 So if I may, I'm just going to go back to one
15 paragraph in the decision, just to finish off on
16 discrimination issues, and that's just paragraph 7.106.

17 So 7.106, I just go to that because it's the
18 assessment in relation to Royal Mail's cost
19 justification, just to finish off on discrimination:

20 "We don't consider that the price differential
21 introduced by Royal Mail can be justified by reference
22 to any potential cost savings. First, the cost savings
23 on which Royal Mail's cost justification relies would
24 only in practice result from declines in volumes
25 associated with end-to-end competition."

1 Now, I haven't gone into that in detail. It is
2 certainly right that our cost assessments focused on
3 savings that could be made where end-to-end competition
4 rolled out, but it isn't actually true that savings
5 would only be made in relation to end-to-end
6 competition.

7 You can think of an example. For instance, a bank
8 that is active in a particular part of the country
9 decides it's going to move to emails rather than real
10 mail would potentially result in a very significant drop
11 in traffic which was predictable. Local authorities
12 putting their communications online in particular areas
13 could result in significant drops. So it's not right to
14 say that the only cost savings would result in declines
15 in volumes associated with end-to-end competition, but
16 as I say, costs -- costings done did focus on direct
17 delivery operator changes.

18 The second point, in (b):

19 "As explained in 7.47 to 7.64 above, NPP1 customers
20 would be very unlikely to undertake their own end-to-end
21 delivery activities in competition with Royal Mail given
22 the adverse contractual consequences this would entail.
23 It follows that the volume change forecasts that
24 Royal Mail required only NPP1 customers to provide would
25 not in fact have enabled Royal Mail to realise these

1 cost savings of the kind described above."

2 That again is wrong because even if you're focusing
3 on direct delivery operators, for the reasons I have
4 already articulated, they could rationally roll out and
5 therefore cost savings could be made.

6 "Third, and in any event, there is no reason to
7 suppose that APP2 customers could not have provided
8 valuable forecasts in relation to anticipated volume
9 reductions, in particular SSCs."

10 Well, this is unevidenced. There is no basis for
11 this. Indeed, it is counter-intuitive that the APP2
12 customers would be able to do this in circumstances
13 where they didn't have to provide SSC-specific and
14 spread delivery.

15 Obviously shortly before they actually drop the mail
16 through the inward mail sorting centre, they will know
17 which SSCs mail is going to, but they don't -- the whole
18 essence of APP2 is they don't have to commit.

19 In relation to Whistl, we recognise that the
20 forecasts might be available, but as I say, Ms Whalley
21 deals with the consideration of APP2 customers in that
22 regard And Ofcom do not have a proper answer to that.

23 "Fourth, Royal Mail's failure to seek forecast
24 information from APP2 customers is particularly stark,
25 given its calculations of the cost savings that it

1 considered could be achieved by obtaining such
2 information were in fact based on the roll-out plans of
3 an APP2 customer, Whistl, in the Manchester area."

4 Well, this doesn't take anyone any further.

5 We recognised that what we were doing when we were
6 doing some of the costing assessments was using what
7 costs we thought we could have saved if we'd known that
8 Whistl was about to roll out direct delivery in
9 Manchester two years ahead rather than six weeks ahead
10 or even shorter, as it turned out to be the case in
11 Manchester. But that doesn't tell you anything about
12 whether or not it was appropriate to seek forecast
13 information from APP2 customers, but more importantly
14 than that, it doesn't tell you that placing that
15 forecasting requirement on NPP1 customers, which does
16 give rise to cost savings, is inappropriate.

17 So the short point that is made at the end that
18 somehow we're penalising operators is not made out, and
19 that is in the context of the broader points I have made
20 in relation to comparability, justification, and indeed
21 errors about the scope of roll-out that was available to
22 direct delivery competitors in relation to these
23 matters.

24 So that is the outline on ground 2. I was going to
25 move on now to ground 3, unless -- I'm sorry.

1 THE CHAIRMAN: No, I think you can go on.

2 MR BEARD: So essentially I'm going to cover six topics in
3 relation to ground 3. The first will be the role of the
4 AEC test and how the decision deals with AEC.

5 The second will be why the profitability test is the
6 wrong test, the profitability metric that is used by
7 Ofcom is wrong as a test.

8 The third is why factually Ofcom have erred in the
9 application of that assessment.

10 The fourth point I'll pick up is why the suggestion
11 that market development support of quantum analysis is
12 both misconceived and wrong, and I will also pick up
13 causation issues.

14 Finally, although it doesn't fit perfectly neatly
15 in, I'll also pick up some of the points regarding
16 intent and strategy that Ofcom relies upon in relation
17 to its findings on competitive disadvantage.

18 So I'll start with the AEC issues or some of them.

19 Now, I'm obviously conscious that there's going to
20 be a more wide-ranging economic discussion in relation
21 to AEC and you have reports from, in particular,
22 Mr Dryden for Royal Mail in relation to these matters.

23 I want to focus on some of the legal issues in
24 particular in relation to these matters so I'm going to
25 be going back to some of the law. Obviously, in making

1 these submissions I proceed on the basis that there is
2 otherwise unlawful discrimination, contrary on our
3 submissions on grounds 1 and 2, and what we are here
4 assessing is whether or not there is competitive
5 disadvantage being created by reason of the alleged
6 unlawful price discrimination.

7 So the question we're asking ourselves is: is the
8 discriminatory conduct by a dominant entity which has or
9 is likely adversely to affect competition?

10 Now, it's quite interesting to see just how the
11 decision proceeds in dealing with these issues in
12 section 7, because the decision itself, if one picks it
13 up in section D, after the discrimination section -- in
14 section 7D at page 216, after the discrimination
15 section, the first part that's then dealt with is
16 strategy at D. Then we only come on to likely
17 distortive effects of the price differential at 7.138 on
18 page 223.

19 Now, as a preliminary observation, this is just the
20 wrong way round in terms of focusing on what the problem
21 is here. And it's not just a matter of the order in
22 which you consider these matters.

23 What clearly happened here was Ofcom convinced
24 itself and distracted itself from the key question about
25 competitive disadvantage by deciding this was all some

1 kind of grand nefarious strategy. Royal Mail wanted to
2 stymie competition, Whistl had stopped operating and
3 that was enough here.

4 Whether or not it's a distraction or otherwise, the
5 relegation of the effects of the analysis until after
6 the supposed strategy findings is nonetheless
7 instructive.

8 As I say, I'll come back to the strategy section in
9 a bit, but looking at 7.138 onwards, which is the core
10 focus of ground 3, what we see critically at 7.182 is
11 the disowning of the use of as efficient competitor
12 analysis in a consideration of the actual or likely
13 effects of the discriminatory conduct.

14 In particular, at 7.184, we see three reasons being
15 given. 7.184:

16 "In summary, we explain that on the particular facts
17 of this case, Ofcom wasn't required as a matter of law
18 to undertake an AEC EEO test, nor was it relevant to the
19 conduct of issue. EEO tests and other price/cost tests
20 have been found to be relevant by the CJEU in situations
21 where dominant undertaking has engaged in a low pricing
22 practice, such as selective prices, predatory prices or
23 some types of margin squeeze."

24 Now, I'll come on to explain why that's wrong but
25 I have already touched on the issue. The idea that one

1 designates some sort of conduct as low pricing practice
2 and says no, you don't look at EEO tests here in
3 relation to pricing. That's just the wrong approach and
4 we will see that in the case law.

5 Then (b):

6 "A price/cost test of any design wouldn't assist in
7 assessing the likely effects of a particular type of
8 price discrimination in issue here. The price
9 discrimination didn't involve lowering any prices that
10 provided benefits to consumers."

11 That is very much the same point as made in (a).

12 "The concern to be assessed is whether, by
13 penalising entry in the manner described earlier in
14 subsection (e), Royal Mail made entry into the bulk mail
15 delivery market significantly more difficult, thereby
16 reducing incentives to enter, making entry less likely
17 to occur."

18 So if you use strident language of talking about
19 penalising entry, then suddenly this lowering prices
20 becomes significant and you don't have to worry about
21 EEO assessments at all. We say that's based on
22 a fundamental misconception and is wrong.

23 Then (c):

24 "A comparison of the impact of the price
25 differential on an EEO's costs fails to reflect economic

1 reality in the circumstances of the case."

2 Well, there are two broad points that I'm going to
3 pick out when we're going through the law.

4 First of all, it is clear that AEC tests are highly
5 relevant to the assessment of pricing practices,
6 including this sort of pricing practice. Indeed, trying
7 to relabel it as not low pricing and therefore outside
8 the ambit of consideration of the AEC is misconceived.
9 But the second and critically important point is that in
10 this case what Ofcom is essentially saying is AEC
11 analysis is irrelevant because Royal Mail came forward
12 with material setting out an AEC analysis, and these
13 points are saying it doesn't matter, we can ignore it.

14 Now, there is one paragraph that they put forward in
15 the alternative which we will spend time on, 7.200,
16 where they say without prejudice to that reasoning, we
17 think the material put forward is wrong, and we will
18 deal with that certainly, but that's it. And that is
19 a fundamental failing in Ofcom's approach in relation to
20 the analysis of effects here.

21 You don't have to reach a conclusion that AEC
22 analysis is the beginning and end consideration of
23 effects. You don't even have to reach a conclusion as
24 to what specific weight should be given to AEC analysis
25 in the circumstances. But as we will see in the law, it

1 is highly relevant, highly important, and something that
2 has unjustifiably not been properly dealt with by Ofcom.

3 If we keep going through the sections here, we see:

4 "Summary of Royal Mail's case that it's necessary to
5 assess foreclosure by reference to a price/cost test."

6 Well, we do say it was necessary when we put forward
7 price/cost test information properly to consider and
8 assess those matters, and we do say that what the
9 price/cost test, the AEC test, does is it does provide
10 a relevant degree of legal certainty in relation to the
11 way in which you distinguish between foreclosure and
12 anti-competitive foreclosure, and that is something that
13 we will come on to identify in the case law.

14 More than that, what we see is that just above
15 paragraph 7.191, Ofcom has gone so far as to say:

16 "A price/cost test is not necessary or appropriate
17 to the facts of this case."

18 As I say, what they do in particular in 7.192, in
19 referring back to their legal framework section,
20 section 5, is make mistakes as to the way in which the
21 case law sets out the importance of these
22 considerations. I'm going to go through that next.

23 But just turning on, they say, 7.193, that there are
24 lots of other considerations. Well, there may be other
25 considerations. It may be that an EEO test is not

1 determinative of whether there's anti-competitive
2 foreclosure but it is certainly highly relevant.

3 The second point that they make in objection 2, the
4 use of an AEC test that's neither necessary nor
5 appropriate, 7.196:

6 "As we have outlined above, the price differential
7 is not a case of pure primary line or first degree
8 discrimination."

9 It's labelling. That doesn't determine whether or
10 not an AEC test is relevant.

11 Then if we go to the third point they raise, 7.199:

12 "As we have explained in detail in subsection 7(b)
13 above, the relevant market in this case was
14 characterised by high barriers to entry."

15 I'll come on to explain why it is that that isn't an
16 answer either. The fact that given Royal Mail was, as
17 they put it, overwhelmingly dominant and benefited from
18 significant economies in scale and scope and was an
19 unavoidable trading partner with control over an
20 indispensable input is no answer to ignoring an AEC
21 test.

22 Then, as I say over the page, we get these
23 remarkably brief observations at 7.200 on all the
24 material that has been provided by Royal Mail on why its
25 approach is not economic reality.

1 The first of those, 7.200(a):

2 "The EEO test advanced by Royal Mail is based on
3 Royal Mail's [underlined] cost."

4 Of course it is. That's how you do an AEC test.
5 That's what the case law says you do. It's no
6 objection.

7 Then (b):

8 "The sensitivity analysis conducted by Royal Mail's
9 advisers assumes a roll-out profile based on
10 Royal Mail's estimates of the likely operating costs of
11 a new entrant."

12 The sensitivity analysis was an alternative that
13 tried to move away from Royal Mail's costs and looked at
14 other estimates.

15 It says:

16 "However, each of the scenarios examined by
17 Royal Mail's advisers is still based on Royal Mail's
18 downstream costs."

19 Again, it's no criticism.

20 Then (c):

21 "Other relevant factors aren't considered.
22 Royal Mail's assessment of the notional as efficient
23 entrant also fails to capture a number of other factors
24 which are relevant to an access operator's as to whether
25 to enter."

1 (i):

2 "A potential entrant and its investors would take
3 into account risk as well as expected profitability."

4 Yes, it certainly would. It's part of an AEC test.

5 "Price differential reduced the upside potential for
6 higher profits from entering into bulk mail delivery and
7 increased the downside in the event that entry proved
8 unsuccessful."

9 Yes, true. The AEC test covers that.

10 (c) (ii):

11 "As discussed in section 6, Royal Mail had a number
12 of advantages unrelated to cost, such as reputation,
13 experience and VAT status. These would make it more
14 difficult to attract customers even if an entrant could
15 match retail prices."

16 Again, that is what AEC tests do. They deal with
17 those issues.

18 So I'll come back in some more detail on these
19 points, but the actual consideration of the material
20 that's put forward in two substantial reports from
21 Mr Dryden and Mr Harman is abject in 7.200. So it all
22 depends on saying it was completely inappropriate to do
23 an AEC test. And that is just wrong.

24 We can see how it was that Ofcom got this so wrong
25 by going back to the SO. If we could pick up RM8,

1 tab 2. So this is again the second of the SOs,
2 2 October 2015.

3 Under the heading "Legal Framework" on internal page
4 numbering 98, internal 93, you see "Legal Framework"
5 begins at 7.10 and there's some discussion of various
6 cases, a number of which we've already touched on.

7 Where I actually want to pick it up is 7.22:

8 "The recent Intel judgment concerning the
9 application of 102 in the context of rebate systems
10 sheds more light on the issue of what's required to
11 demonstrate that conduct is anti-competitive."

12 So here is Ofcom saying Intel tells us how we should
13 consider Article 102 in the context of this case:

14 "In that judgment the general court identified
15 a third category of rebate systems consisting in the
16 grant of a financial incentive that is not directly
17 linked to a condition of exclusive or quasi exclusive
18 supply from dominant undertakings but which has, by its
19 mechanism of application, fidelity-building effects. In
20 examining such cases and consistent with the case law
21 cited above, the general court held it is necessary to
22 consider all the circumstances, particularly the
23 criterion and rules governing the grant of financial
24 incentives and to investigate whether improving an
25 advantage not based on any economic service justifying

1 it, the financial incentive tends to remove or restrict
2 a buyer's freedom to choose its sources of supply, to
3 bar competitors from access to the market or to
4 strengthen dominant position.

5 "Royal Mail has submitted that an effects analysis
6 should be conducted by reference to the costs of an as
7 efficient competitor and that the relevant test is the
8 price/cost test using average variable cost or long run
9 incremental cost data. On the basis of its application
10 of such test, Royal Mail argues this there is a no
11 foreclosure effects in this case.

12 "The general court has, however, confirmed in Intel
13 it is not always necessary to (i) establish that the
14 conduct will lead to the exit of equally efficient
15 competitors from the market, (ii) to carry out
16 a price/cost test to establish the potential for
17 anti-competitive effects or (iii) to establish that an
18 operator is or would be forced to charge negative prices
19 as a result of the conduct in question.

20 "In relation to Post Danmark, the general court in
21 Intel confirmed that the obligation in that case to
22 carry out a price/cost analysis on an equally efficient
23 operator basis was attributable to the fact that it was
24 impossible to assess whether a particular level of price
25 was abusive without comparing it to prices and costs."

1 I should say that's -- yes.

2 Then in relation to 7.26:

3 "Most recently, the opinion of Advocate General
4 Kokott in Post Danmark II."

5 Yes, sorry, 7.25 is reference to Post Danmark I.

6 "Most recently, the opinion of Advocate General
7 Kokott's in Post Danmark II elaborated on the issue
8 further, explaining EU law doesn't support the inference
9 of an absolute requirement always to carry out an as
10 efficient competitor test for the purposes of assessing
11 price based exclusionary conduct from the point of view
12 of competition law."

13 7.27:

14 "These precedents make it clear it is not necessary
15 to carry out a price/cost test to establish an
16 infringement finding. The case law indicates the nature
17 of the evidence required to establish an infringement
18 depends on the nature of the conduct under
19 consideration. Particularly in the case of price-based
20 exclusionary conduct, it is relevant to consider whether
21 it's possible to determine the price is abusive, other
22 than by comparing it to other prices."

23 So that is their primary consideration of the
24 position.

25 If we then go on, we pick it up, page 107 internal

1 numbering, "The relevance of applying a price/cost
2 test". What you see in 7.70 onwards is consideration of
3 whether or not there's any relevance to a price/cost
4 test here.

5 Picking it up just at 7.71:

6 "We have explained above that as a matter of law it
7 is not necessary in all cases to carry out a price/cost
8 test. Case law indicates that the nature of the
9 evidence required may depends on the nature of the
10 conduct. For reasons explained below, we do not
11 consider an assessment of Royal Mail's conduct in this
12 case should be undertaken by reference to a price/cost
13 test of the sort put forward by Royal Mail."

14 We don't think you should.

15 Then 7.74, I'm just moving through it:

16 "The case law is clear that it is not always the
17 case that an EEO must be entirely foreclosed from the
18 market in order for conduct to be found abusive. Whilst
19 a positive finding that an equally efficient operator
20 would be excluded from the market may be sufficient to
21 establish the anti-competitive effects of abusive
22 conduct, the absence of such finding does not establish
23 that the conduct in question produces no
24 anti-competitive effects. The absence of such finding
25 is less likely to be relevant where concerns relate to

1 the level of one price relative to another price, rather
2 than the absolute level of price."

3 It's just worth noting in that paragraph all of the
4 footnotes are to the Intel judgment that was referred to
5 earlier. It's worth just picking those up. If we go to
6 the authorities bundle, 8, tab 98, we have got the epic
7 work which is the general court judgment in Intel.

8 THE CHAIRMAN: Have we finished with the statement of
9 objections?

10 MR BEARD: Yes, on the basis that I'm going to go to those
11 paragraph references now.

12 So the paragraph references in particular cited in
13 7.74 were 88, 150 and 152 of Intel.

14 So if we just turn those up, 88 is on page 12 of
15 223. It's obviously discussing this in the context more
16 generally of --

17 THE CHAIRMAN: I think I'm not with you. Which tab is it
18 in?

19 MR BEARD: It's tab 98, I'm sorry, sir. Tab 98 in
20 authorities bundle 8.

21 THE CHAIRMAN: The general court?

22 MR BEARD: This is the general court. Because this is what
23 was being relied on in the SO.

24 What we see at 88 in that context, in the context of
25 what's being considered here, whether or not exclusive

1 rebates by their very nature are capable of foreclosing
2 competitors:

3 "It should be observed that a foreclosure effect
4 occurs not only where access to the market is made
5 impossible but also where that access is made more
6 difficult. See Michelin II. A financial incentive
7 granted by an undertaking in a dominant position in
8 order to induce a customer not to obtain in respect of
9 part of its requirements concerned by the exclusivity
10 condition supplied from its competitors is, by its very
11 nature, capable of making access to the market more
12 difficult for those competitors."

13 So "by its very nature".

14 If we move on to the next reference that is relied
15 on in that paragraph in the SO, paragraph 150.

16 Just picking it up at 149:

17 "It should be borne in mind foreclosure effect
18 occurs not only where the access to the market is made
19 impossible for competitors, it is sufficient that access
20 be made more difficult."

21 150:

22 "It must be stated that an AEC test only makes it
23 possible to verify the hypothesis that access to the
24 market has been made impossible and not to rule out the
25 possibility it's been made more difficult. It is true

1 that a negative result means that it is economically
2 impossible for an as efficient competitor to secure
3 contestable share. In order to offer a customer
4 compensation for the loss of exclusivity rebate, that
5 competitor would be forced to sell its products at
6 a price which would not even allow it to cover its
7 costs. However, a positive result means only that an as
8 efficient competitor is able to cover its costs. In the
9 case of the AEC test carried out in the contested
10 decision proposed by the applicant, only the average
11 avoidable costs, that doesn't mean there's no
12 foreclosure effect. The mechanism of exclusivity
13 rebates as described in paragraph 93 above is still
14 capable of making access to the market more difficult
15 for competitors even if that access is not economically
16 impossible."

17 Then 152, which was the third of the references:

18 "That conclusion is not undermined by TeliaSonera,
19 Deutsche Telekom or Post Danmark. The applicant submits
20 that it follows from those judgments that the key
21 criterion is whether a competitor as efficient as the
22 dominant undertaking could continue to compete with the
23 dominant undertaking. However, it should be borne in
24 mind that those cases concerned margin squeeze practices
25 or low price practices."

1 That's discrimination in Post Danmark:

2 "The obligation resulting from those judgments to
3 carry out price and cost analyses is attributable to the
4 fact that it is possible to assess whether a price is
5 abusive without comparing it with other prices and
6 costs. A price cannot be unlawful in itself. However,
7 in the case of an exclusivity rebate, it is the
8 condition of exclusive or quasi exclusive supply to
9 which its grant is subject rather than the amount of the
10 rebate which makes it abusive."

11 So these are the paragraphs relied upon, and of
12 course what we know is that when we turn on to the next
13 chapter in the story in relation to Intel, actually that
14 approach was rejected.

15 We need to go to authorities bundle 9 at tab 106.

16 Now, it's a terse judgment, Intel. We can pick it
17 up just above 108, page 15 of 21, tab 106.

18 MR FRAZER: Sorry, which paragraph?

19 MR BEARD: I was just going to pick it up above 108, page 15
20 of 21.

21 So the first ground of appeal is alleging that the
22 general court erred in law by failing to examine the
23 rebates at issue in the light of all the relevant
24 circumstances. In particular, what is said by the
25 appellant there is that it failed to carry out and

1 consider an as efficient competitor analysis that had
2 been put to the Commission, the Commission in its
3 decision had considered, and the general court said did
4 not need to be considered.

5 The findings of the court in relation to this ground
6 begin at 129:

7 "In the first place, by the first two parts of its
8 first ground of appeal, Intel, supported by ACT, argues
9 in essence that the general court accepted that the
10 practices at issue could be considered an abuse of
11 dominant position within the meaning of 102 without
12 examining all the circumstances of the present case and
13 without assessing the likelihood of that conduct
14 restricting competition."

15 Then:

16 "In the second place, by the third part of its first
17 ground of appeal, Intel criticised the general court's
18 analysis, carried out for the sake of completeness ...
19 concerning the capacity of the rebates and payments
20 granted to [various computer manufacturers] ..."

21 This was concerning supply of computer chips:

22 "... to restrict circumstances in the circumstances
23 of the case."

24 132:

25 "It submits, in particular, that, since the

1 Commission applied [the AEC] test, the general court
2 should have examined Intel's line of argument alleging
3 that the application of that test was badly flawed and
4 that, it had been correctly applied, it would have led
5 to the conclusion contrary to that which the Commission
6 reached, namely that the rebates at issue were not
7 capable of restricting competition.

8 "In that respect, it must be borne in mind that it
9 is in no way the purpose of Article 102 to prevent an
10 undertaking from acquiring, on its own merits, the
11 dominant position in the market. Nor does that
12 provision seek to ensure that competitors less efficient
13 than the undertaking with the dominant position should
14 remain on the market."

15 Noting Post Danmark 1:

16 "Thus, not every exclusionary effect is necessarily
17 detrimental to competition. Competition on the merits
18 may, by definition, lead to the departure from the
19 market or the marginalisation of competitors that are
20 less efficient and so less attractive to consumers from
21 the point of view of, among other things, price, choice,
22 quality or innovation.

23 "However, a dominant undertaking has a special
24 responsibility not to allow its behaviour to impair
25 genuine, undistorted competition ...

1 "That is why Article 102 prohibits a dominant
2 undertaking from, among other things, adopting pricing
3 practices that have an exclusionary effect on
4 competitors considered to be as efficient as itself and
5 strengthening its dominant position by using methods
6 other than those that are part of competition on the
7 merits. Accordingly, in that light, not all competition
8 by means of price may be regarded as legitimate ...

9 "In that regard, the court has already held that an
10 undertaking which is in a dominant position in the
11 market and ties its purchasers -- even if it does so at
12 their request -- by an obligation or promise on their
13 part to obtain all or most of their requirements
14 exclusively from that undertaking abuses its dominant
15 position within ... Article 102."

16 This is all from Hoffmann-La Roche. This is
17 paragraph 89. "However", this is 138:

18 "... that case law must be further clarified in the
19 case where the undertaking concerned submits, during the
20 administrative procedure, on the basis of supporting
21 evidence, that its conduct was not capable of
22 restricting competition and, in particular, of producing
23 alleged foreclosure effects."

24 It's worth emphasising there that these are the
25 alleged anti-competitive foreclosure effects. 139, the

1 parenthesis was there was a correction after the
2 judgment was initially given, hence the parenthetical
3 comment:

4 "In that case the Commission is not only required to
5 analyse, first, the extent of the undertaking's dominant
6 position on the relevant market and, secondly, the share
7 of market covered by the challenged practice ..."

8 So what's the scale of dominance? What's the share
9 of market coverage?:

10 "... as well as the conditions and arrangements for
11 granting the rebates in question, their duration and
12 their amount; it is also required to assess the possible
13 existence of a strategy aiming to exclude competitors
14 that are at least as efficient as the dominant
15 undertaking from the market.

16 Then 140:

17 "The analysis of the capacity to foreclose is also
18 relevant in assessing whether a system of rebates which,
19 in principle, falls within the scope of the prohibition
20 laid down in 102 may be objectively justified. In
21 addition, the exclusionary effect arising from such
22 a system, which is disadvantageous for competition, may
23 be counterbalanced, or outweighed, by advantages in
24 terms of efficiency which also benefit the consumer.
25 That balancing of the favourable and unfavourable

1 effects of the practice in question on competition can
2 be carried out in the Commission's decision only after
3 an analysis of the intrinsic capacity of that practice
4 to foreclose competitors which are at least as efficient
5 as the dominant undertaking."

6 Then it goes on to talk about the fact that in this
7 case there was consideration of the AEC analysis by the
8 Commission, and at 143:

9 "It follows that, in the decision at issue, the AEC
10 test played an important role in the Commission's
11 assessment ...

12 "In those circumstances, the general court was
13 required to examine all of Intel's arguments concerning
14 that test."

15 In consequence, the judgment is quashed and remitted
16 to the general court.

17 Now, the headline point is that the SO relied on law
18 that's wrong.

19 The second key point is that Intel in the ECJ is
20 doing in essence two things. It's saying labelling
21 practices is not the way that you assess whether or not
22 they have anti-competitive effects. They have to look
23 at all the relevant circumstances.

24 Secondly, when you're doing that, the as efficient
25 competitor benchmark is highly relevant because you see

1 all the way through this decision, and in particular at
2 133 and 139, that what has to be assessed is whether or
3 not the arrangements in question would adversely affect
4 competitors that are as efficient as the dominant
5 undertaking. Competition law is not there to protect
6 less efficient competitors.

7 The third point to draw from Intel is that where an
8 undertaking submits during the administrative procedure
9 material based on supporting evidence saying that the
10 conduct is not capable of restricting competition, and
11 by "capable of restricting composition" what is being
12 talked about here is does it have likely restrictive
13 effects, you must proper analyse that. That's 138.

14 The reality is Ofcom have just gone wrong here.
15 They have tried to triangulate so that they don't have
16 to engage with the AEC analysis and that is precisely
17 what the ECJ was saying do not do. Don't start
18 saying: this is a high pricing practice, not a low
19 pricing practice. This is not like a margin squeeze,
20 it's like something else. It's saying: don't use labels
21 of that sort. They're not helpful. It is saying that
22 AEC is important. So sidelining it, as Ofcom has sought
23 to do, was wrong.

24 But most critically, perhaps, for the purposes of
25 this appeal, it is absolutely clear that you properly

1 have to engage with an AEC analysis when it's been put
2 forward to you and 7.200 just doesn't do that.

3 So it may be understandable why Ofcom has gone wrong
4 here. It may be that it relied on the general court in
5 the SO and it didn't want to have to engage further in
6 relation to the AEC analysis that had been put forward
7 because it had already followed that line. But it
8 needed to and it hasn't done so and it doesn't have
9 a justification for doing so in these circumstances.

10 As I say, this isn't a case where we have to stand
11 here going: it's the AEC, it's absolutely determinative.
12 What we're saying is you needed properly to analyse what
13 had been put forward.

14 It's not, for instance, adequate as is suggested in
15 some of the Ofcom submissions, to say, well, you know,
16 this is a case involving intention.

17 Now, we dispute Ofcom's analysis of intention, but
18 if intention mattered, and intention meant you did in
19 a sense AEC, Intel would never have been decided in this
20 way because in Intel what was found was that there was
21 a global strategy that had been concealed in order to
22 foreclose AMD. So that analysis would not stand up at
23 all.

24 The reality is Ofcom have tried to pick on other
25 cases and tried to sideline Intel and sideline the

1 thrust of Intel, not just the specifics of it. When the
2 general court, they thought, helped them, they said it
3 was terribly instructive in the SO. When the ECJ
4 doesn't, it's all to be distinguished.

5 THE CHAIRMAN: Are you going to deal with Ofcom's point on
6 Post Danmark II?

7 MR BEARD: Yes, I'm going to deal with Post Danmark I and
8 Post Danmark II and MEO. I'm sorry.

9 THE CHAIRMAN: Don't apologise.

10 MR BEARD: I think I'll deal with Post Danmark I first, if
11 I may. I'm not going to go through the Attorney
12 General's opinion in Intel. It's broadly in the same
13 direction but it actually just doesn't go as far as the
14 ECJ does, in effect. It's brief, as a virtue, Intel.

15 THE CHAIRMAN: You can take we've read it.

16 MR BEARD: If we can go back to bundle 7 -- no, bundle 8,
17 I'm sorry, tab 93 for Post Danmark I.

18 One thing that is just worth mentioning -- I'll come
19 back to it when I deal with Post Danmark II itself -- no
20 reference to Post Danmark II in the court's judgment.
21 There are references to Post Danmark II in the AG's, and
22 it's understood that because Post Danmark II came out
23 just before the hearing in relation to the Intel case,
24 that actually those were matters that were specifically
25 canvassed. So the focus on Post Danmark I is therefore

1 instructive in Intel.

2 THE CHAIRMAN: Bundle 8?

3 MR BEARD: Bundle 8, tab 93, sir.

4 So this is Post Danmark I. This is selective
5 pricing, price discrimination.

6 If we pick it up just at paragraph 22, perhaps 21,
7 I think one of the members of the Supreme Court referred
8 to the European tradition of transition jurisprudence,
9 which I think was a polite way of it being highly
10 repetitive.

11 Paragraph 21 again is one that we've seen before in
12 broad terms, referring to Michelin, Compagnie Maritime
13 Belge and TeliaSonera. Then at 22:

14 "Thus, not every exclusionary effect is necessarily
15 detrimental to competition. Competition on the merits
16 may, by definition, lead to the departure from the
17 market or the marginalisation of competitors that are
18 less efficient and so less attractive to consumers from
19 the point of view of, among other things, price, choice,
20 quality or innovation."

21 So you can see why that was particularly cited by
22 the ECJ Grand Chamber in Intel. It's worth bearing in
23 mind this is also a Grand Chamber case, Post Danmark I.

24 If we then go to 25:

25 "... Article 82 prohibits a dominant undertaking

1 from, among other things, adopting pricing practices
2 that have an exclusionary effect on competitors
3 considered to be as efficient as itself and
4 strengthening its dominant position by using methods
5 other than those are are part of competition on the
6 merits. Accordingly, in that light, not all competition
7 may be regarded as legitimate."

8 26:

9 "In order to determine whether a dominant
10 undertaking has abused its dominant position by its
11 pricing, it is necessary to consider all the
12 circumstances and to examine whether those practices
13 tend to remove or restrict the buyer's freedom as
14 regards choice of sources of supply, to bar competitors
15 from access to the market, to apply dissimilar
16 conditions to equivalent transactions ... thereby
17 placing them at a competitive disadvantage."

18 There's reference back to Deutsche. Then 30:

19 "Moreover, contrary to the line of argument forward
20 by the Danish Government, which has submitted
21 observations in these proceedings in support of the
22 Konkurrenceradet's position in the main proceedings, the
23 fact that the practice of a dominant undertaking may,
24 like the pricing policy in issue in the main
25 proceedings, be described as 'price discrimination',

1 that is to say, charging different customers or
2 different classes of customers different prices for
3 goods or services whose costs are the same or,
4 conversely, charging a single price to customers for
5 whom supply costs differ, cannot of itself suggest that
6 there exists an exclusionary abuse."

7 So what we've got here is the same sort of
8 considerations, indeed considerations that are later
9 approved in Intel, but specifically being engaged with
10 in the context of price discrimination.

11 Then we've got discussion of what was going on in
12 relation to that case, and a consideration in particular
13 at 36 and 38 about whether or not costs were being
14 covered and therefore whether or not this could have
15 anti-competitive effect in the context of the
16 consideration of as efficient competitors. So 38:

17 "Indeed, to the extent that a dominant undertaking
18 sets its prices at a level covering the great bulk of
19 the costs attributable to the supply of the goods or
20 services in question, it will, as a general rule, be
21 possible for a competitor as efficient as that
22 undertaking to compete with those prices without
23 suffering losses that are unsustainable in the long
24 term."

25 So AEC considerations in relation to price

1 discrimination. I highlight it merely because (a) it is
2 the strand of authority that is approved and developed
3 in Intel focusing on as efficient competitors; (b) it is
4 to do with price discrimination.

5 THE CHAIRMAN: It's to do with postal services.

6 MR BEARD: It is also to do with postal services, but I'm
7 also careful not to obsess just about the particular
8 facts of the matter that we're dealing with today. It
9 is about the overall legal framework that we're looking
10 as well.

11 So two other authorities, I was going to go to MEO
12 and Post Danmark II. I will also deal with very briefly
13 Deutsche Telekom.

14 But in relation to Post Danmark II -- I'm just
15 conscious of the time. I'll go to it perhaps first
16 thing tomorrow, if I may, but just as a headline, in
17 relation to Post Danmark II, obviously we're dealing
18 with the same entities in Post Danmark I. What we see
19 from Intel is that where AEC material has been put
20 forward, it cannot be ignored.

21 What we actually see in Post Danmark II is an
22 emphasis on AEC, not some other test, not reasonably
23 efficient competitors or less efficient competitors.

24 What Ofcom relies on Post Danmark II for is
25 a suggestion that there's an exception to the use of an

1 AEC test where somehow it is impossible that an AEC
2 could emerge.

3 Now, we say that two things in relation to that.
4 Even if it is an exception, it must be necessarily very
5 narrowly construed.

6 Secondly, it is in fact in the context of a case
7 where the statutory and monopoly applied generally
8 across the whole state and meant that only a portion of
9 delivery was ever open for competition. So the
10 circumstances were markedly different.

11 Secondly, it is critical that the decision in this
12 case doesn't make any finding that an AEC is impossible.
13 I'll come back to that, but there is nothing there.
14 There are various comments about the market structure,
15 but there is not a finding that it is impossible.

16 In circumstances where you would be dealing with an
17 exception, that would critically be required for proper
18 analysis of impossibility, but I think it is important
19 to bear in mind that we don't accept that that exception
20 is good law. Intel is very careful not to endorse or
21 refer to Post Danmark II at all whilst it does
22 specifically refer to and endorse Post Danmark I.

23 What it's saying is that this is a test you're
24 applying to see whether or not efficient competitors are
25 being kept out by the pricing. It had that case very

1 well in mind. As I say, the Attorney General refers to
2 it. But in circumstances where you're dealing with
3 precisely the same organisation, what Intel says is Post
4 Danmark I approach of focusing on as efficient
5 competitors is the appropriate approach, and they
6 weren't including any qualifications to that.

7 So we say that even dealing with Post Danmark II at
8 its highest, it doesn't assist Ofcom but, as I've said,
9 the key thing is not just looking at the particulars of
10 Intel, but the broad thrust of what Intel is requiring
11 is much more important in this regard.

12 I'm conscious of the time. I've got a couple more
13 cases on this topic and then I'll move on.

14 THE CHAIRMAN: We will resume with those tomorrow at 10.30.

15 Thank you everybody.

16 (4.30 pm)

17 (The hearing adjourned until Tuesday, 11 June 2019 at
18 10.30 am)

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