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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13 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 4

A P P E A R A N C E S

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

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

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

Thursday, 13 June 2019

(10.00 am)

THE CHAIRMAN: Here we are, bright and early. Only in legal circles will 10 o'clock be counted as early.

MR HOLMES: We are grateful to the tribunal for its indulgence in beginning early.

Opening submissions by MR HOLMES (continued)

MR HOLMES: So I come now to the grounds.

Ground 1 alleges that Ofcom made a basic --

THE CHAIRMAN: Can I just interrupt you. The timing today is what?

MR HOLMES: I shall be-- subject to questions -- about an hour, and then Mr Turner will be on his feet for the remainder of the day.

THE CHAIRMAN: Subject to questions sounds a bit ominous.

Okay. So you've got most of the day, Mr Turner.

MR TURNER: It will probably be most of the day.

THE CHAIRMAN: Please, grounds.

MR HOLMES: The error that's alleged under ground 1, as the tribunal knows, is that Ofcom found a pricing abuse but is unable to point to pricing conduct, and this requires prices to be charged or paid.

Mr Beard said in opening that the contract change notices were not actual pricing conduct but only intended or expected pricing conduct, and that cannot

1 amount to pricing discrimination.

2 Ground 1 is, in my submission, incorrect for the
3 following five reasons.

4 First, Mr Beard starts from the wrong place.
5 Article 102 requires a substantive consideration of
6 conduct to see if it has likely anti-competitive effects
7 and the labels do not matter. Calling the conduct
8 "pricing conduct" does not change the analysis.

9 Secondly, we say that the issuance of the contract
10 change notices clearly was conduct of a kind that can
11 sustain a finding of pricing discrimination.

12 The contract change notices are the formal
13 contractual step by which Royal Mail implements changes
14 to its pricing in the market. By issuing the CCNs in
15 this case, Royal Mail did all that it needed to do to
16 introduce discriminatory pricing, and unless Royal Mail
17 withdrew the notices, or a third party intervened, the
18 prices would become payable automatically when the
19 notice period expired.

20 It had thereby acted to amend its pricing, applying
21 dissimilar conditions to equivalent transactions. In my
22 submission, Ofcom was right to consider, as part of its
23 analysis of likely effects, how the price differential
24 would impact upon competitive entry when charged.

25 We say that this is supported by the analysis in

1 AstraZeneca to which Mr Beard took you. The
2 infringements at issue in that case involved the
3 submission of misleading SPCs, supplementary protection
4 certificates, to public authorities in order to gain
5 unwarranted patent protection. In some of the
6 jurisdictions where this happened, the public
7 authorities noticed the error and did not grant the
8 certificates.

9 AstraZeneca objected before the general court that
10 in those circumstances there could be no abuse. If we
11 could first go to the general court's judgment briefly,
12 it's authorities bundle at tab 87.

13 Mr Beard has shown you a number of paragraphs
14 already. I just want to add a few further references.

15 Paragraph 320 gives a flavour of the types of
16 argument that were being advanced in those proceedings.

17 "As regards the countries in which no SPCs were
18 granted, Denmark and the United Kingdom, the applicants
19 submit that the Commission erred in law in considering
20 that AstraZeneca committed an abuse of its dominant
21 position. Insofar as those patent offices of those
22 countries rejected the applications and no SPCs were
23 therefore granted, AstraZeneca's conduct could not have
24 had any effect on competition in those markets.
25 Consequently, the applicant's dispute the Commission's

1 arguments and state that it is necessary for the conduct
2 to be capable of having an effect on competition.

3 A mere application for an SPC is in itself not capable
4 of having any actual effect on competition.

5 At the very most, these were acts preparatory to an
6 abuse or an attempted abuse."

7 You see very clearly the similarity between the
8 submission that was being made there and the one that's
9 advanced by Mr Beard in these proceedings.

10 Then turning forward to paragraph 360, a passage
11 that Mr Beard did show you, the arguments are firmly
12 rejected by the general court. It held that:

13 "The mere fact that certain public authorities did
14 not let themselves be misled and detected the
15 inaccuracies in the information provided in support of
16 the applications for exclusive rights, or that
17 competitors obtained, subsequent to the unlawful grant
18 of the exclusive rights, the revocation of those rights
19 is not a sufficient ground to consider that misleading
20 representations were not in any event capable of
21 succeeding. As the Commission rightly observes, where
22 it is established that behaviour is objectively of such
23 a nature as to restrict competition, the question
24 whether it is abusive in nature cannot depend on the
25 contingencies of the reactions of third parties."

1 We say that the issuance of the CCNs was capable of
2 restricting competition by which we mean was likely to
3 have restrictive effects and the fact that the CCNs were
4 suspended by intervention of third parties does not
5 remove them from the ambit of Article 102.

6 The general court's judgment was upheld on appeal to
7 the Court of Justice, and the no conduct argument didn't
8 feature prominently, but it is addressed specifically by
9 the Advocate General in his opinion, and that is at
10 tab 96.

11 You see that the argument was kept alive by the
12 European Federation of Pharmaceutical Industries. So at
13 paragraph 56, the judgment records --

14 PROFESSOR ULPH: Which paragraph?

15 MR HOLMES: Tab 96 of the same bundle.

16 PROFESSOR ULPH: Which paragraph?

17 MR HOLMES: Paragraph 56:

18 "EFPIA also takes issue with the general court for
19 having held that a misleading misrepresentation may
20 constitute abuse even if it had no external effect
21 because the error was corrected by patent office or by
22 third parties using correction mechanisms such as
23 opposition proceedings or invalidity litigation."

24 So that's the resuscitation of the argument that the
25 general court rejected, and it's dealt with at

1 paragraph 68 by the Advocate General:

2 "I consider that the general court correctly found
3 that paragraph 360 of the judgment under appeal that the
4 fact that certain public authorities did not allow
5 themselves to be misled or that competitors obtained the
6 revocation of the SPCs does not mean that the misleading
7 representations were not capable of having
8 anti-competitive effect at the time they were made.

9 I thus consider that EFPIA's claim at point 56 above
10 should be rejected. In the case at hand, were it not
11 for the intervention of third parties, it is plausible
12 that the SPC applications would have resulted in the
13 grant of SPCs and given rise to regulatory obstacles to
14 competition. Contrary to the appellant's submissions
15 before this court, this is not a situation where the
16 conduct would only restrict competition if a series of
17 further contingencies were to occur, rather, this is
18 clearly more akin to a situation where conduct would
19 restrict competition unless further contingencies such
20 as the intervention of third parties occurred to prevent
21 that happening."

22 Just for completeness, the judgment of the court is
23 at tab 97. I'm afraid I'll have to give you the
24 reference subsequently because I have lost it, but the
25 court confirmed the well-established proposition that

1 effects, likely effects, are to be judged by the
2 circumstances at the time that the conduct took place.
3 But it didn't specifically address this point.

4 We say that the present case is on all fours with
5 AstraZeneca. In AstraZeneca the application for an SPC
6 would result in unmerited additional patent protection
7 with likely harmful effects on competition unless
8 a third party intervened. In that case, the patent
9 authorities objected to the application.

10 In the present case, the contract change notices
11 would result in the discriminatory prices being charged,
12 with likely harmful effects on competition, unless third
13 parties intervened. In this case, customer complaint
14 and Ofcom investigation.

15 Contrary to Mr Beard's submission, the conduct in
16 this case bears no resemblance to the instructions sent
17 to the patent attorneys to file SPC applications which
18 the general court in AstraZeneca distinguished from the
19 actual filing of SPCs.

20 We agree with the proposition which you put to
21 Mr Beard in this connection, namely that the conduct
22 comparable to such instructions would instead have been
23 Royal Mail instructing its lawyers to prepare the CCNs.

24 The CCNs crossed the line between preparatory acts
25 done by a company internally or with its own advisers

1 and formal external measures to change pricing in the
2 market.

3 So the correct comparison is with the filing of the
4 SPCs, which is of a similarly formal or external nature.

5 Nor for the same reason is the case analogous to the
6 passage in Irish Sugar where the Commission was found to
7 have erred by relying on an internal policy note
8 suggesting an intent to price in a certain way. The
9 CCNs were issued to the market to implement new pricing.

10 Finally, under this head, Royal Mail is also wrong
11 to characterise the CCNs as mere announcements. They
12 were not. They were the necessary mechanism to
13 introduce the differential. The announcement came
14 earlier, as you saw from the signalling emails which
15 I showed you from December 2013.

16 The third point in relation to ground 1 is that
17 although Mr Beard went to a number of cases, he was not
18 able to point to any good authority to show that prices
19 must be charged or paid for a pricing abuse to occur.
20 He took the tribunal to a series of cases that referred
21 to prices being paid, but that simply reflected their
22 own particular facts.

23 None of the cases contain any statement of principle
24 to the effect that a pricing abuse cannot arise until
25 prices are actually charged or paid.

1 The fourth point is that Royal Mail mischaracterises
2 Ofcom's analysis in their decision. Ofcom did not
3 confine its analysis to the effects that price
4 differential would have if and when implemented. Ofcom
5 also examined the effects that the introduction of the
6 differential would be likely to have from the moment of
7 the issuance of the CCNs, including in the event of
8 their subsequent suspension, and it went further than
9 that, and also looked at the actual effects on the
10 market that followed.

11 If we could briefly consider the analysis in their
12 decision, it's begins at 7.212. This is core bundle 1,
13 page 246 of the external numbering.

14 MR FRAZER: Sorry, the paragraph number in the decision is?

15 MR HOLMES: 7.212, is where the discussion starts.

16 MR FRAZER: Thank you.

17 MR HOLMES: You see Ofcom's overall conclusion summarised at
18 7.212:

19 "We do not agree that the price differential as
20 introduced was incapable of having any anti-competitive
21 effects on the market because it was expected to be and
22 was in fact suspended as a result of the initiation of
23 Ofcom's investigation."

24 At paragraph 7.213, you see the point that:

25 "Royal Mail's submissions are inconsistent with the

1 position it adopted at the time as shown in the internal
2 documents. These suggest that Royal Mail was well aware
3 at the time it decided to introduce the price
4 differential that Ofcom might open an investigation, and
5 that the price differential might be suspended as
6 a result."

7 You saw the Jon Millidge email to the board which
8 showed that:

9 "Specifically, in response to Whistl's letter of
10 8 January ..."

11 There's then a reference to that email, and to the
12 possibility that Whistl might find it difficult to
13 attract new customers, given the market uncertainty that
14 may be created, and the possibility that Whistl's
15 financing may be conditional on an absence of regulatory
16 or commission law dispute ongoing. A prediction that
17 proved remarkably prescient in view of the material
18 adverse consequences clause that was included as
19 a result of the December signalling email in the
20 contract with LDC.

21 At 7.214:

22 "The point is that Royal Mail anticipated that even
23 if there were a suspension, this would not prevent the
24 price changes having an impact on Whistl or the market
25 more generally."

1 There is then consideration of the formal nature of
2 the contract change notices, and the AstraZeneca point.
3 Simply to note also, we should pick up -- you'll see
4 that there is also a reference to some of the other
5 documents I showed you, the intention to send a clear
6 signal and a very assertive signal.

7 The fact that Royal Mail was aware that a direct
8 delivery investor was being sought and identified by
9 Whistl. That's shown by the internal documents. It
10 knew that Whistl needed external investment. And that
11 investor confidence in direct delivery was an important
12 factor in assessing whether roll-out would occur, and
13 that any new entrant would need to convert and/or build
14 its customer base in order to support and sustain its
15 roll-out.

16 The last point is relevant because of the indication
17 in the Jon Millidge email that one possibility of which
18 Royal Mail was aware at the time was that Whistl's
19 ability to gain customers, attract new customers, might
20 be disrupted as a result of the contract change notice.

21 All of these points suggest, as indicated by the
22 email quoted above, that the introduction of the price
23 changes was reasonably likely to be factored into
24 Whistl's business plans at the price differential was
25 introduced:

1 "Our review of Whistl's internal documentation and
2 findings in relation to its response to the price
3 differential shows that Royal Mail's understanding of
4 the position as quoted above corresponds with the
5 reaction of Whistl."

6 So this isn't a separate analysis, this analysis
7 stands together with and is supported by the subsequent
8 consideration of what actually happened.

9 The second point, as I say, is just the point that
10 the CCNs are a formal document. They're not mere
11 announcements, and that AstraZeneca therefore suggests
12 that they constitute conduct for these purposes.

13 Then at 7.221, Ofcom explains why rational economic
14 operators were reasonably likely to alter their
15 behaviour notwithstanding that they thought Royal Mail's
16 actions to be unlawful.

17 At 7.224 you see a range of factors identified:

18 "The CCNs couldn't ignore the implications of the
19 CCNs based on their own views as to the legality of the
20 price differential. The provision of access by
21 Royal Mail is an indispensable input for the services
22 provided by access operators on the bulk of that
23 service. In circumstances where it's unavoidable
24 trading partner has announced the price terms upon which
25 it intends to operate, a rational operator would not

1 proceed on the assumption that the price differential
2 could have no implications for them. This would be
3 particularly the case in circumstances where an operator
4 was considering making significant investments in the
5 market which involved decisions as to what risk to incur
6 in the light of projected future profits. Operators
7 would have to consider the risks, if any, to their
8 business plan on a number of scenarios: (i) a complaint
9 was not in fact made; (ii) the complaint might not give
10 rise to an investigation; (iii) even if Ofcom decided to
11 investigate, the complaint would inevitably take at
12 least some time to be resolved, giving rise to
13 uncertainty in the market."

14 We saw the two-year estimate in Royal Mail's
15 internal documents of how long this would tie things up.

16 And four:

17 "The outcome of the investigation could not be
18 predicted with any confidence."

19 THE CHAIRMAN: Mr Beard called that fear of legality.

20 MR HOLMES: Fear of legality. Anyone who has advised
21 a party ex-ante knows that it is impossible to advise
22 with certainty as to the outcome of any regulatory
23 investigation.

24 THE CHAIRMAN: Those who do are either fools or knaves,
25 I think.

1 MR HOLMES: So as a matter of commercial reality, there is
2 risk and the risk needs to be factored into the
3 planning.

4 THE CHAIRMAN: I just want to take you back to, I think,
5 your previous point.

6 On your submission the CCNs are a formal stage in
7 the process of changing prices that Royal Mail is
8 allowed to do under the then current version of the
9 settlement with Ofcom.

10 So where is the line to be drawn? We've said an
11 internal memorandum, that wouldn't do. We've seen
12 several internal memoranda. There's no suggestion that
13 that they, although they got out into the marketplace,
14 created actionable uncertainty, as it were. So it has
15 to be a formal step. That's what you're saying.

16 If Royal Mail had announced: this is what we're
17 anything thinking of doing, we are now consulting on it,
18 it's possible that none of this will ever be
19 implemented, subject to what Ofcom says, that wouldn't
20 cross the line; is that right?

21 MR HOLMES: I'm cautious of making any firm pronouncements
22 about where the line exactly falls. You can see that
23 signalling to the market may, in some circumstances,
24 create substantial market uncertainty.

25 If it were part of a strategy, as indicated by

1 internal documents --

2 THE CHAIRMAN: I'm giving you an incomplete proposition.

3 But you are attaching importance to the formal role of
4 the CCNs in the price change process, as regulated.

5 MR HOLMES: I think it can give the court absolute
6 confidence that wherever the exact stepping off point in
7 the sort of continuum between thinking about something
8 and finally achieving the prices, wherever you land on
9 that continuum, this case falls on the side of
10 crystallised conduct for the purposes of Article 102,
11 because this was not just a formal step, it was the
12 formal step.

13 THE CHAIRMAN: But the required formal step.

14 MR HOLMES: The required formal step.

15 THE CHAIRMAN: You can't put your prices up without doing
16 this.

17 MR HOLMES: Yes. So without wanting to be definitive about
18 what other cases might suggest, we think that this case
19 very clearly does constitute conduct of a kind on
20 which --

21 THE CHAIRMAN: So you're declining to speculate, Mr Holmes.
22 Very wise.

23 Some of the material you draw our attention to in
24 the decision also talks about the effects after
25 suspension.

1 MR HOLMES: Yes.

2 THE CHAIRMAN: So, again, hypothetical question: if
3 Royal Mail had suddenly realised in a Pauline moment
4 that things had gone wrong and it had withdrawn the
5 proposals immediately, Ofcom received a complaint,
6 withdrawn, as opposed to suspended, would we be here
7 now?

8 MR HOLMES: So I think there would still, in principle, have
9 been a potential infringement of Article 102 to be
10 assessed by reference to the effects at the time the
11 action was taken.

12 THE CHAIRMAN: So the fact the announcement has taken place
13 in the CCN form --

14 MR HOLMES: With the fact that the CCNs had been issued,
15 yes.

16 THE CHAIRMAN: We might not be here now.

17 MR HOLMES: Ofcom would have clearly needed to consider
18 matters from the perspective of its administrative
19 priorities. In circumstances where Royal Mail had
20 quickly acted to remove the threat that was hanging over
21 the market, the uncertainty, so that there was no
22 indication of any likely ongoing effects, then clearly
23 Ofcom would have had to look long and hard about whether
24 to proceed with a lengthy and complex investigation.

25 THE CHAIRMAN: There's a certain amount of interplay between

1 Royal Mail and Whistl and Ofcom on this. Each party
2 played its part in the uncertainty, I suspect.

3 MR HOLMES: Well --

4 THE CHAIRMAN: Would you disagree with that?

5 MR HOLMES: If you're looking for the source of the market
6 uncertainty, it was Royal Mail's introduction of the
7 CCNs through formal contractual mechanism. Royal Mail
8 itself anticipated that a competition investigation
9 would take time. That's inevitably the case.

10 For the period during which the uncertainty is
11 relevant, which is the period until the exit from -- the
12 LDC's decision not to proceed with the investment,
13 Whistl's abandonment of its roll-out plans, that
14 uncertainty was highly likely to continue, regardless of
15 how long Ofcom's investigation actually took.

16 I'm not sure that I would accept that one can
17 attribute any of the negative consequences which are
18 identified as likely in the decision and which are found
19 in fact to have eventuated, that any of those would have
20 been affected by the speed of Ofcom's reactions or any
21 steps taken by Whistl.

22 THE CHAIRMAN: I suspect we'll come back to that, but don't
23 let me hold up your flow.

24 MR HOLMES: I'm grateful.

25 MR FRAZER: If it's convenient, could I just take you back

1 to the AstraZeneca analogy.

2 MR HOLMES: Yes.

3 MR FRAZER: Royal Mail submitted that the CCNs had baked
4 into them a suspension and the potential for an Ofcom
5 review, that it wasn't, as it were, a contingent third
6 party, as the public authorities were in AstraZeneca,
7 but it was somehow a fundamental part of the price
8 change process.

9 Does that affect your use of AstraZeneca as an
10 analogy insofar as the role of the contingent third
11 parties are concerned?

12 MR HOLMES: We would say not. I was just coming to the
13 suspension clause.

14 MR FRAZER: In that case, please continue.

15 MR HOLMES: Let me see give you my submissions upon it and
16 we can see whether we need to take it further.

17 Before I do so, to conclude on the factors that
18 informed Ofcom's assessment of the likely effect of the
19 CCNs even if suspended, you see that there's the need to
20 factor in risks, and then the point to which you were
21 adverting, sir, at (c). Royal Mail was at this time
22 loudly pro-claiming its innocence. It made it clear to
23 the market that it wanted to press ahead as soon as
24 possible and that it didn't think that there was any
25 problem with its pricing and it withdrew 14 months after

1 issue, and a rational operator would have been uncertain
2 as to whether Royal Mail would proceed to implement the
3 CCNs, at least until the point that changes were
4 informed.

5 It's therefore incorrect to say that Ofcom
6 considered only the likely effects of the price
7 differential as if the prices were charged or paid. It
8 presented an evidence analysis, showing that the notices
9 were likely to be effect, despite being suspended, and
10 there's nothing inappropriate with or lacking from that
11 analysis.

12 As you, sir, noted in a document of Royal Mail's,
13 that the length of the investigation anticipated by
14 Royal Mail was substantial.

15 Fifthly, Mr Beard suggested that to find an
16 infringement based on uncertainty, Ofcom would have had
17 to prepare a different decision with different analysis,
18 and I think the crux of this, if I understand it
19 rightly, is that Ofcom should somehow have factored into
20 its assessment some quantified consideration of the
21 likelihood of its finding being -- of the conduct being
22 found unlawful.

23 This seems just surreal to us. As a matter of
24 common sense, an operator will need to take the price
25 change into account and the uncertainty and risk that

1 flows from it, and can't be certain of the outcome, and
2 Ofcom can't conclude that there are no likely adverse
3 effects on the basis that it would have found the
4 conduct unlawful. That leads to circularity.

5 Mr Beard appeared to accept, when asked, that
6 rational operators would, of course, take even the bare
7 pricing announcement into account.

8 Then there were these issues in relation to the
9 suspension clause. We say that the suspension clause
10 can't award the application of Article 102, and that's
11 for the reasons I have already discussed. On the one
12 hand, if Ofcom is right that the issuance of the CCNs
13 amounted to actual relevant conduct, its effects fall to
14 be assessed that moment and Royal Mail can't rely on the
15 fact that a third party intervention means that those
16 effects weren't realised. We say that that follows from
17 AstraZeneca.

18 On the other hand, Ofcom found that the introduction
19 of a price differential would be likely to have effects
20 despite being suspended. To that extent there's the
21 existence and operation of the suspension clause is not
22 relevant.

23 There's then the point that Ofcom had encouraged
24 Royal Mail to make the suspension contingent on Ofcom
25 opening an investigation as opposed to merely a third

1 party complaint, but we really don't see where that
2 points goes for the purposes of ground 1. Ofcom makes
3 no criticisms of the design of the suspension clause.
4 Its point is that the suspension clause cannot prevent
5 Article 102 applying to the conduct and can't stop Ofcom
6 from considering what effects the conduct would have had
7 it borne its full fruit or what effects it would have if
8 suspended.

9 We say that Royal Mail did engage in conduct by
10 issuing the CCNs. Ofcom rightly analysed the effects of
11 that conduct with and without the suspension, and the
12 fact the suspension occurred doesn't invalidate Ofcom's
13 finding of infringement. I hope that that addresses
14 Mr Frazer's question.

15 Ground 2 challenges Ofcom's analysis of
16 discrimination. Ofcom's case on this point is very
17 simple. Prior to the conduct at issue, there were two
18 price plans in which the same average prices were and
19 always had been applied. Royal Mail introduced
20 a difference in price between the two and the result was
21 that an access customer on an APP2 would pay more than
22 an access customer on NPP1 to get its bulk mail
23 delivered, although the services supplied were the same.
24 We say that this is classic price discrimination.

25 As Royal Mail explained in the disclosure committee

1 paper on 6 January 2014, the access proposal, pricing
2 proposals, involve price discrimination, ie Royal Mail
3 is choosing to charge different customers different
4 prices for the same services. We agree with that.

5 Royal Mail challenges Ofcom's discrimination
6 analysis in three ways. The first is to say that the
7 transactions are not equivalent. Royal Mail alleges
8 that the two plans simply cater for customers with
9 differing demand characteristics and differing
10 willingness to pay, reflecting the greater flexibility
11 of APP2. This is the new incarnation of the value
12 justification which Royal Mail developed at the time of
13 the -- as one of the two possible rationales for the
14 price differential at the time of this devising it.

15 But the test is clear that the transactions don't
16 need to be identical in all respects. They need only be
17 materially equivalent, and the case law shows the need
18 to take a common sense practical approach to
19 equivalence, grounded in the market realities. Courts
20 have resisted efforts by dominant undertakings to
21 complicate the comparison by introducing distinctions
22 based on extraneous characteristics.

23 Can we turn in that regard to Mr Justice Mann's
24 judgment in the Purple Parking case, which is at
25 authorities bundle 2, tab 26.

1 The case has no pages, but I want to take you to
2 paragraph 134.

3 You see the heading at the foot of the preceding
4 page, "Equivalence of transactions". At paragraph 134
5 Mr Justice Mann outlined that the claimant's case, that
6 is Purple and Meteor's case, is simple. It was the
7 provision of access to Heathrow's -- they say that the
8 transaction is access to Heathrow's facilities for the
9 purpose of conducting meet and greet activities.

10 Heathrow, by contrast, argued that there was no
11 effect and there's no identifiable common transaction.
12 It pointed to the different uses made by the claimants
13 and itself in respect of the services and differences in
14 the business models operated by the three companies.

15 At paragraph 135, Mr Justice Mann rejected the
16 over-elaborated concept of the transaction in terms of
17 its purpose. He emphasised that one has to take
18 a common sense -- a realistic and commonsense -- view of
19 the transaction.

20 Each of the participants is going to be using the
21 access in issue for their own particular purposes and
22 they will also have different business models.

23 But that did not mean that the underlying
24 transactions were not equivalent. That's all I need to
25 take from Purple Parking for now, so we can put that

1 away.

2 We say that the same position is apparent from the
3 court of first instance's, and now the general court's
4 judgment, in Irish Sugar. Mr Beard took you to that,
5 but we need to go back to it. It's in volume 5 of the
6 authorities at tab 61.

7 Mr Beard has shown you paragraph 150 which sets out
8 the findings in the contested decision on that case in
9 relation to price discrimination. It's apparent from
10 that paragraph that the Commission's core concern was
11 that Irish Sugar did not offer rebates on its price for
12 industrial sugar to any customer that competed in sugar
13 packing. This bears an obvious analogy to this case,
14 the present case, where a price differential is also
15 conditioned on whether customers enter and compete on
16 a neighbouring market. The rebates at issue in
17 Irish Sugar were not linked to the volume of purchases,
18 nor the distance between the customer and the applicant.
19 They instead had an anti-competitive impact on
20 Irish Sugar's competitors insofar as they obtained their
21 supplies of industrial sugar from it.

22 The justifications offered by Irish Sugar are
23 ex-post attempts to justify its discrimination against
24 sugar packagers. You see that at the bottom of the
25 paragraph. This was because reasons such as that the

1 rebates from the start-ups or fast growth rebates
2 applied equally to at least two of the sugar packers who
3 were denied the rebates.

4 Again, the court will see the immediate analogy for
5 a cost justification in this case.

6 Whistl, just like the sugar packers in that case,
7 met the criteria that supported the cost justification,
8 could have provided the evidence.

9 At paragraph 154 the court records Irish Sugar's
10 argument to the effect that any conduct discriminating
11 between sugar packers on the retail market and other
12 customers of Irish Sugar was justified because the
13 purchases by processor customers, namely customers that
14 did not pack sugar, were the only purchases that reduced
15 the applicant's structural oversupply and this provided
16 a service to Irish Sugar that sugar packers did not
17 provide.

18 For the purposes of applying Article 102, the
19 equivalent nature of the transaction is not determined
20 solely by reference to the nature of the product sold or
21 the supply costs borne by the supplier. That's the
22 argument advanced.

23 At paragraph 164 of the judgment, the court rejects
24 Irish Sugar's arguments.

25 "First, the court must reject the distinction which

1 the applicant draws between the services offered to its
2 customers by reference to the effect which they produce
3 on its own market position. Such reasoning effectively
4 implies that services which are identical at the
5 commercial level all conditions being taken into account
6 not equivalent within the meaning of Article 102(c),
7 depending on whether or not, for whatever reason, they
8 share in the economic objectives which the undertaking
9 which holds the dominant position has determined for
10 itself. Such a definition is not compatible with that
11 adopted by the case law in dealing with equivalent
12 transactions in that two buyers of the same quantity,
13 the same product, pay a different price according to
14 whether or not they are competitors of their supplier in
15 another market.

16 "In any event, the applicant has not shown that
17 purchases of customers who were not sugar packers were
18 more capable of reducing its structural overcapacity,
19 unless one takes into account the consideration that
20 purchases from competing sugar packers prevent it from
21 itself discharging those quantities of sugar on the
22 retail market, which would show that it exploited its
23 dominant position on the industrial sugar market to
24 place competitors on a derivative market at
25 a disadvantage. It should be stressed that the

1 applicant does not deny that the services offered to its
2 sugar packer customers and its other customers are
3 otherwise perfectly comparable at a commercial level,
4 all conditions being taken into account."

5 We say that Ofcom's findings in the decision are
6 consistent with these authorities.

7 Applying common sense, it's clear that the price
8 differential leads to different terms being applied to
9 transactions that are equivalent. We saw from the
10 history of the price plans that they were designed to
11 perform the same function, to offer an average price by
12 reference to Royal Mail's posting profile in order to
13 ensure that price reflected underlying costs. Indeed,
14 APP2 was intended to be the replacement for NPP1.

15 The plans were being used by UK Mail and by Whistl,
16 the two big access operators who were involved in the
17 same business. The price differential by purpose and
18 effect subjected Whistl to less favourable terms unless
19 it moved to the cheaper plan with significant adverse
20 consequences for its plans to challenge Royal Mail's
21 core delivery monopoly. We say, in those circumstances,
22 the transactions are to be regarded as equivalent.

23 The second point advanced by Royal Mail is the cost
24 justification and on this we say that Royal Mail has no
25 real answer to the obvious difficulty that its cost

1 justification relied on advance information about direct
2 delivery roll out, but did not apply to the very company
3 engaged in such roll out, namely Whistl.

4 Now, Royal Mail's answer is to say that it's not
5 required to impose forecasting requirements on all APP2
6 customer, but that argument doesn't help it. Royal Mail
7 wants to rely on a cost justification to argue that the
8 price differential was not discriminatory. To do this,
9 it has to show that there is a good reason why the price
10 differential is made available to some customers but not
11 others.

12 The fact that customers on the cheaper plan could
13 provide information that helped save costs would only
14 help to justify the differential if customers on the
15 more expensive plan could not provide such information.
16 We know that Whistl, representing a proportion of APP2
17 that you've seen, and overall Royal Mail's largest
18 customer, could have provided the information but was
19 not asked to do so. The reason why is obvious when the
20 internal documents are considered. The real goal here
21 was to deter entry, not obtain advance information about
22 it.

23 Royal Mail's final argument is the arbitrage point.
24 It says that a direct delivery competitor could avoid
25 the differential and stay on NPP1 if it engaged in

1 arbitrage on a massive and unprecedented scale.

2 The difficulty with this argument is that Royal Mail
3 had made clear to customers, including Whistl, that it
4 was planning to cut arbitrage. Just by way of example,
5 if you could take up the decision and turn to
6 paragraph 7.83, you see a sample of the relevant
7 material:

8 "The potential of arbitrage between the different
9 plans already existed prior to the introduction of the
10 price differential and Whistl's commencement of an
11 end-to-end service. Royal Mail had, however,
12 consistently characterised such arbitrage as an unfair
13 and inappropriate use of the price plans. It had
14 communicated that view both publicly to the market at
15 large as well as directly to Whistl in the period
16 leading up to the issuing of the CCNs. For example, in
17 November 2013, Royal Mail used its contractual powers
18 explicitly to attempt to close down such arbitrage
19 opportunities. At that time, following complaints from
20 two wholesale customers that their competitors were
21 using a form of arbitrage, Royal Mail took action to
22 reduce the potential for arbitrage on APP2. In a letter
23 to its access customers, Royal Mail publicly explained
24 that the price plans allowed for an unintended
25 opportunity for customers to use the permitted

1 tolerances to exploit arbitrage which, if practised, can
2 have a detrimental revenue impact on Royal Mail and
3 ultimately reduce the targeted financial contribution of
4 access to Royal Mail's universal service."

5 Then:

6 "On 26 November 2013 Whistl wrote to Royal Mail
7 setting out its concerns that NPP1 was also being used
8 for arbitrage and proposed that amendments to the
9 tolerances and profile requirements of NPP1 should be
10 considered to prevent arbitrage. Royal Mail welcomed
11 this input and invited further evidence, noting that we
12 are exploring our measures to reduce arbitrage and those
13 measures would impact upon both price plans. Our aim is
14 to reduce the opportunity of arbitrage across all price
15 plans and as a result to ensure we receive a cost
16 reflective price for the services we provide to our
17 access customers."

18 Based on this material, Ofcom concluded, at 7.84,
19 that:

20 "While the arbitrage strategy described by
21 Royal Mail might theoretically have been possible, no
22 rational end-to-end operator would seriously have
23 considered relying upon such arbitrage as a viable
24 long-term plan to avoid the adverse consequences of the
25 price differential."

1 At 7.85, Ofcom makes the point that:

2 "Royal Mail's internal modelling at the time did not
3 envisage Whistl engaging in arbitrage."

4 When you put this point to Mr Beard yesterday, sir,
5 there was no evidence to which he could point.

6 THE CHAIRMAN: Mr Beard said we should just take the
7 situation as it was and ignore attempts to cut arbitrage
8 further in our assessment. You would disagree with
9 that, presumably.

10 MR HOLMES: I would disagree.

11 The question here is whether it is realistic to say,
12 assuming one finds discrimination, that the
13 discrimination would not lead to a competitive
14 disadvantage to Whistl because Whistl could roll out on
15 the basis of arbitrage, thereby remaining on NPP1 and
16 enjoy the benefit of the lower price.

17 Now, for that argument to be accepted, one would
18 have to believe that a rational operator and investor in
19 Whistl's position would have proceeded with a plan built
20 around arbitrage possibilities between the plans in
21 circumstances where you've seen the communications
22 between Whistl and Royal Mail. Royal Mail saying we're
23 doing everything we can to close down arbitrage. We're
24 acting to block it.

25 MR BEARD: I'm very sorry to stand up. The arbitrage

1 argument applies in relation to discrimination. It's
2 not in relation to competitive disadvantage. Indeed, as
3 we'll come on to see, in relation to competitive
4 disadvantage, the assessments are carried on without
5 reference to arbitrage.

6 MR HOLMES: Perhaps Mr Beard could clarify at what stage of
7 the discrimination argument arbitrage therefore arises.

8 MR BEARD: Yes. You don't have discrimination if, in fact,
9 an operator such as Whistl can carry out its business
10 plan on NPP1.

11 THE CHAIRMAN: I understand that point. I don't think
12 Mr Holmes accepts it, and I think this is another point
13 in dispute.

14 MR HOLMES: Yes.

15 THE CHAIRMAN: Let's move on.

16 MR BEARD: I just wanted to clarify which ground it went to.

17 THE CHAIRMAN: I think I was ahead of you, Mr Beard. Just
18 this once.

19 MR HOLMES: If we could turn then to ground 3. For the
20 purposes of opening, I propose to canvas three issues.

21 First, does the case law require a competition
22 authority to apply an AEC test in all pricing cases?

23 Secondly, what steps is a competition authority
24 required to undertake where a dominant undertaking
25 brings forward its own AEC test in a pricing case?

1 Thirdly, is it possible to dispense with an AEC test
2 only where it would be impossible for an entrant to
3 achieve the same efficiencies as the dominant
4 undertaking?

5 We say that the answer to the first question is no.
6 There's clearly no requirement in all cases to apply an
7 AEC test. The correct approach is as set out in
8 Advocate General Whal's opinion. You set out all the
9 circumstances first and see what is needed. We say that
10 is clear from all of the relevant cases. We should
11 return briefly to Post Danmark I, volume 8, tab 1.

12 PROFESSOR ULPH: Which bundle are we looking at?

13 MR HOLMES: Tab 93.

14 This was a request for a preliminary ruling from
15 a Danish court, and the national proceedings concerned
16 the unlawfulness of prices charged by Post Danmark to
17 a Danish incumbent for delivering unaddressed mail,
18 a market on which it competed with a company called
19 Forbruger-Kontakt.

20 Paragraph 6 identifies three big supermarkets who
21 were, until 2004, customers of Forbruger. But Post
22 Danmark won that business and paragraph 7 notes that in
23 the case of Co-op, this followed negotiations where the
24 supermarket played Post Danmark and Forbruger off
25 against one another. So Post Danmark was in that case

1 competing vigorously on price.

2 By contrast, you'll recall that we saw yesterday
3 that Royal Mail considered selective price reductions to
4 meet competition from Whistl in this case, but rejected
5 such a competitive response because of its desire to
6 avoid revenue dilution. Forbruger complained after
7 losing its contracts, and there was then
8 an investigation, and the Danish competition authority
9 found that Post Danmark had infringed Article 102 by
10 practising a targeted policy of price reductions among
11 other things.

12 At paragraph 13, the judgment notes that there was
13 no evidence that Post Danmark had intentionally sought
14 to eliminate competition. Paragraph 15 explains that
15 there was an appeal on the finding of infringement based
16 on selectively low prices, and the Appeal Court referred
17 questions to the Court of Justice about how Article 102
18 should be applied, and those are set out at
19 paragraph 18.

20 First, is pricing below average total cost but above
21 average incremental costs abusive absent evidence of
22 intention? Secondly, and if the answer depends on the
23 circumstances: what circumstances should the national
24 court take into account?

25 The court begins with comments similar to those

1 which I showed you in Advocate General Whal's
2 introductory remarks. At paragraph 21, you see the
3 statement that it is in no way the purpose of
4 Article 102 to prevent an undertaking from acquiring on
5 its own merits a dominant position. Nor does the
6 provision seek to ensure that competitors less efficient
7 than the dominant undertaking should remain on the
8 market. Paragraph 22 records that not every
9 exclusionary effect is necessarily detrimental to
10 competition. Competition on the merits may by
11 definition lead to departure or marginalisation of
12 competitors who are less efficient and therefore less
13 attractive to consumers from the point of view of, among
14 other things, price, choice, quality or innovation.

15 Paragraph 24 notes that Article 102 applies to
16 conduct involving recourse to methods different from
17 those governing normal competition on the basis of the
18 performance of commercial operators.

19 These remarks are, of course, particularly apposite,
20 given the fact situation before the national court,
21 which concerned a dominant firm competing hard on price.
22 This was classic, vigorous competition, and what the
23 court was doing was making clear that vigorous
24 competition on the merits is a good thing, and that
25 Article 102 will not block it simply to preserve the

1 position of less efficient competitors. As I submitted
2 yesterday in relation to the similar comments in
3 Advocate General Whal's opinion, to say that Article 102
4 will not intervene in all cases where conduct harms
5 a less efficient competitor is not the same thing at all
6 as saying that it will never intervene to prevent
7 conduct harmful to a less efficient competitor in an
8 appropriate case.

9 Conduct may be harmful to competition and consumers
10 even where it would not result in the exclusion of an
11 as-efficient-competitor.

12 To take one extreme example, imagine that a dominant
13 firm makes a payment to a competitor to persuade it to
14 exit the market. Such conduct could not be defended as
15 lawful simply by showing that an as-efficient-competitor
16 would find it profitable to stay on the market absent
17 the payment.

18 The statement of principle at paragraph 25 of the
19 judgment is therefore carefully caveated. Each case
20 depends on its circumstances. Paragraph 25:

21 "The court states that 102 prohibits the dominant
22 undertaking from, among other things, adopting pricing
23 practices that have an exclusionary effect on
24 competitors considered to be as efficient as itself in
25 strengthening its dominant position by using methods

1 other than those that have passed competition on the
2 merits. Accordingly, not all competition by means of
3 price may be regarded as legitimate."

4 We say that competition by means of price shows
5 where the court's focus was here. It was on vigorous
6 price competition of a kind that we do not see in this
7 case.

8 At paragraph 26, there's a reminder that in all of
9 these cases there is the need to consider all of the
10 circumstances. Paragraphs 27 and 28 refer to the
11 court's predatory pricing case law. Since 1991 this has
12 confirmed that it's typically necessary to check whether
13 price is below cost, where the conduct in question --
14 sorry, to check whether prices below cost in order to
15 test what the court calls a policy of low prices at
16 paragraph 29.

17 Then paragraph 31 onwards:

18 "The court considers the specific context of the
19 case giving rise to the reference, to see whether they
20 amount to predatory conduct or to legitimate low
21 pricing."

22 Paragraph 36, you see that for two of the
23 supermarkets the prices were above average total cost
24 and therefore not abusive. At paragraph 37, the Co-op
25 group price covered the great bulk of costs. At

1 paragraph 38:

2 "To the extent that a dominant firm covering the
3 great bulk of its costs it will, as a general rule, be
4 possible for an as-efficient-competitor to compete
5 without suffering losses that were sustainable in the
6 long term."

7 Low pricing that goes below total cost but only
8 slightly isn't generally abusive.

9 At paragraph 38, the court notes that the competitor
10 stayed in the market and won back the Co-op and Spar
11 contracts. It's then left to the national court to
12 assess whether there are any anti-competitive effects,
13 bearing in mind the potential for objective
14 justification.

15 We say this case is consistent with the contextual
16 approach described by Advocate General Wahl, which shows
17 that the AEC test will be highly relevant in cases
18 involving vigorous competition on price, or to use the
19 language of the court in Post Danmark II, it will be
20 highly relevant in low pricing cases, but the case also
21 reflects the need to conduct a careful investigation of
22 the circumstances, and it provides no support for the
23 proposition that the AEC test is the touchstone in all
24 cases for determining whether conduct is likely to have
25 exclusionary effects to the detriment of consumers.

1 The next case is Post Danmark II, and I would like
2 to begin with the Advocate General's opinion at
3 authorities bundle 9, tab 102.

4 You'll see that in paragraph 1, this is a case
5 involving rebate schemes.

6 Paragraph 2 explains in the second sentence that:

7 "The crux of the issue here is whether Post Danmark
8 engaged in an exclusionary practice by granting rebates
9 of up to 16% on the distribution of direct advertising
10 mail, provided that its customers reached certain
11 standardised volumes or turnover thresholds over
12 a reference period of one year."

13 Then at paragraph 3:

14 "In particular, the court will have to clarify in
15 this case whether for purposes of assessing the
16 anti-competitiveness of rebate schemes from the point of
17 view of Article 82, it is legally necessary to carry out
18 a price/cost test in which the commercial conduct of the
19 dominant undertaking is compared with that of an equally
20 efficient competitor."

21 This case raises directly the question of whether an
22 AEC is necessary in all rebate cases.

23 At paragraph 8, you see that Post Danmark had the
24 incumbent operator had a market share of 95% in the bulk
25 mail market, which was the relevant market, and

1 paragraph 9 explains that Post Danmark's only serious
2 competitor in the bulk mail market exited the market
3 after substantial losses.

4 However, as Advocate Kokott observes, there is was
5 a dispute over the attributability of that exit to the
6 rebate scheme.

7 Paragraph 14, then, outlines the domestic authority
8 didn't carry out price/cost test in the form of an AEC
9 test. It states:

10 "This was not an appropriate assessment criteria,
11 given that because of the special features that
12 characterise it, there cannot be an
13 as-efficient-competitor on the Danish postal market."

14 We say it's important to appreciate that in
15 addressing this case, the court had in mind the specific
16 findings of the competition authority that there was no
17 possibility of an as-efficient-competitor.

18 Paragraph 14 then outlines that the domestic
19 authority -- I'm sorry, I have done that.

20 Paragraph 16 sets out the questions referred. You
21 will see that question 1 asks what guidelines should be
22 used to decide whether the application by a dominant
23 undertaking of a rebate scheme constitutes an abuse.

24 The third subparagraph asks the court to clarify
25 what relevance, if any, the dominant undertaking's

1 prices and costs have, relevance of an
2 as-efficient-competitor test, and more generally,
3 paragraph 4, the court is requested to clarify what
4 relevance the characteristics of the market have in this
5 connection.

6 The analysis of the point of legal principle then
7 appears beginning at paragraph 56. At paragraph 61 the
8 AG's conclusion is set out that:

9 "In my view Article 102 does not support the
10 inference of any legal obligation requiring that
11 a finding to the effect that a rebate scheme operated by
12 a dominant undertaking constitutes abuse. It must
13 always be based on a price/cost analysis such as the AEC
14 test."

15 At 62, Advocate General Kokott notes that:

16 "It is true that the court has on occasion called
17 for an AEC test to be carried out in connection with
18 pricing practices other than rebates. Insofar it is
19 held that Article 102 prohibits a dominant undertaking
20 from, among other things [and she emphasises those
21 words] adopting pricing practices that have an
22 exclusionary effect on competitors considered to be as
23 efficient as itself."

24 However, that case law does not support the
25 inference of an absolute requirement always to carry out

1 an AEC test for the purposes of assessing price based
2 exclusionary conduct from the point of view of
3 competition law.

4 On the one hand, that case law is specifically
5 concerned with pricing practices by dominant
6 undertakings, such as low pricing policies, loss leader
7 pricing, for example, or margin squeezing, through the
8 reduction of the cost price ratio, which are by their
9 very nature closely related to the cost structure of the
10 undertakings in question.

11 On the other hand, the form of words chosen by the
12 court, "among other things," in French "notamment",
13 makes it clear that it cannot always be assumed that an
14 abuse of dominant position exists, only where the
15 exclusionary effect is felt by undertakings which are as
16 efficient as the dominant undertaking.

17 She acknowledges in paragraph 62 -- now, we say
18 paragraphs 61 and 63 are key because, as you'll see,
19 they are endorsed in the court's subsequent judgment.

20 Paragraph 64 then makes clear that:

21 "With specific regard to rebate schemes, the court
22 has never yet made their classification of an abuse
23 within the meaning of Article 102 conditional upon
24 a price/cost test. On the contrary, so far as such
25 rebate schemes are concerned, it was held until very

1 recently that the absence of a comparison of prices with
2 cost does not constitute an error of law. The court
3 should maintain that position in the present case too.
4 It will of course not be inconceivable in theory to make
5 a finding of price post exclusionary conduct routinely
6 conditional on the carrying out of an AEC test, and
7 therefore to prescribe such a test you could do it.
8 However, such a reorientation of the case law warrants
9 some scepticism."

10 She then sets out the reasons why:

11 "On the one hand, the additional value of expensive
12 economic analyses is not always apparent and can lead to
13 the disproportionate use of the resources of the
14 competition authorities and the courts which are then
15 unavailable for the purposes of effectively enforcing
16 the competition laws in other areas."

17 So you may not need to do one. Where you don't,
18 because the evidence is already clear, it would be
19 a waste of time and money to do so.

20 At 67:

21 "It is wrong to suppose that the issue of price
22 based exclusionary conduct can be managed simply and in
23 such a way as to ensure legal certainty by applying some
24 form of mathematical formula based on nothing more than
25 price and cost components of the businesses of the

1 undertaking concerned. Corporate data is not uncommonly
2 open to different interpretations."

3 We would just interject, sir, that that is
4 particularly relevant once one departs from an AEC test.
5 It's hard enough even just using the dominant
6 undertaking's prices and costs. There's uncertainty,
7 doubt, difficulty there. But once one injects the need
8 to make adjustments because of specific characteristics
9 that are unique to the dominant undertaking, you're
10 very, very far from a touchstone certainty the dominant
11 firm can rely upon.

12 At 68:

13 "A finding of abuse in the context of Article 102,
14 as in other contexts, always requires an evaluation
15 which takes into account all of the relevant
16 circumstances of the individual case in question and
17 must not be confined to an examination of price and cost
18 components alone. On the contrary, there are many other
19 factors such as the specific modus operandi of a rebate
20 scheme and certain characteristics of the market on
21 which the dominant undertaking operates. It may also be
22 relevant to a finding abuse. In fact, there may be much
23 more informative than a price/cost analysis."

24 We say that this is exactly consistent with the
25 approach outlined by Advocate General Wahl in the Intel

1 case, where the tribunal will recall Advocate
2 General Wahl ran through the market context first before
3 concluding as to whether the AEC test had to be
4 considered in that case.

5 In the specific circumstances of that case, he found
6 that it did.

7 At paragraph 69, the Advocate General Kokott in this
8 case continues:

9 "The fact of taking into account all the relevant
10 circumstances of the individual case and considering
11 whether there was any objective justification,
12 adequately ensures that the legal requirements
13 applicable to a finding of abuse within the meaning of
14 Article 102 do not [regard] economic realities."

15 THE CHAIRMAN: Disregard.

16 MR HOLMES: "... do not disregard economic realities.

17 "If the abusive nature of the rebate scheme operated
18 by a dominant undertaking is immediately shown by an
19 overall assessment of the other circumstances of the
20 individual case as I have described above, there is no
21 need from a legal point of view to carry out
22 a price/cost analysis such as an AEC test.

23 "It follows a fortiori that Article 102 is not
24 capable of giving rise to an obligation to carry out an
25 AEC test where, because of the way the market is

1 structured, it is impossible for another undertaking to
2 be as efficient as the dominant undertaking because of
3 the particular competition prevailing on the relevant
4 market, or because the level of the dominant
5 undertaking's costs are specifically attributable to the
6 competitive advantage which its dominant position
7 confers upon it.

8 "In such cases it would make from the outset no
9 sense to carry out some form of price/cost analysis in
10 order to examine whether the rebate scheme operated by
11 the dominant firm has an exclusionary effect on a purely
12 hypothetical as-efficient-competitor. If no competitor
13 can be as efficient as the dominant undertaking, then by
14 extension an AEC test will not provide any reliable
15 conclusions as to whether or not there are likely to be
16 any exclusionary effects on the market."

17 Two points here. It's obvious why the Advocate
18 General is addressing this particularly stark case of
19 a situation where it's impossible, clearly impossible,
20 to match the dominant undertaking.

21 That's because the findings of the national
22 competition authority were exactly to that effect.
23 She's looking at the circumstances of the case as they
24 emerge from the order for reference, from the
25 information provided by the national court, and she's

1 saying, well, here there's a clear and obvious reason in
2 the particular circumstances of this case why an
3 as-efficient-competitor test would make no sense in her
4 assessment.

5 That conclusion follows an analysis where she is
6 careful to make clear that one needs to look at all of
7 the circumstances before arriving at a conclusion as to
8 the necessity of an AEC test. Again, exactly parallel
9 with Advocate General Wahl.

10 Then the final point at paragraph 73:

11 "On a market in which competition is so weakened by
12 the presence of a dominant undertaking that
13 as-efficient-competitors cannot even establish
14 themselves there, the competitive pressure exerted even
15 by less efficient undertakings must not be
16 underestimated. Maintaining that pressure is one of the
17 fundamental objectives pursued by Article 102. It is
18 after all essential to ensure that the market structure
19 and the choices available to customers do not
20 deteriorate further because of the commercial conduct of
21 the dominant undertaking."

22 So an emphasis there on the need not to
23 underestimate the potential in some market contexts for
24 even a less efficient competitor to produce the
25 efficiency benefits for consumers. We'll see that in

1 the case of a monopoly, there is an issue in relation to
2 the expert evidence which the tribunal will consider
3 about the scope for benefits to flow to consumers as
4 a result of a less efficient competitor entering the
5 market.

6 So that's Advocate General Kokott.

7 Turning on to the judgment in Post Danmark II, if we
8 could pick up at paragraph 29, that is a the next tab,
9 tab 103, paragraph 29. The court begins:

10 "In order to determine whether the undertaking of
11 a dominant position has abused that position by applying
12 a rebate scheme such as that in issue in the main
13 proceedings, the court has repeatedly held that it is
14 necessary to consider all the circumstances,
15 particularly the criteria and rules governing the grant
16 of the rebate, and to investigate whether, in providing
17 an advantage not based on any economic service
18 justifying it, the rebate tends to remove or restrict
19 buyers' freedom to choose these sources of supply, to
20 bar competitors from access to the market, to apply
21 dissimilar conditions ...

22 "Having regard to the particularities of the present
23 case, it is also necessary to take into account in
24 examining all the relevant circumstances, the extent of
25 Post Danmark's position, and the particular conditions

1 of competition prevailing. In that regard, it first has
2 to be determined whether those rebates can produce an
3 exclusionary effect, that is to say whether they are
4 capable of making market entry very difficult or
5 impossible for competitors of the undertaking in
6 a dominant position, and secondly, of making it more
7 difficult or impossible, for the co-contractors of that
8 undertaking to choose between different sources of
9 supply or commercial partners."

10 Then at paragraph 39, the court notes that the
11 extent of Post Danmark's dominant positioning and
12 particular conditions of competition prevailing on the
13 bulk mail market, the order for reference states that
14 Post Danmark held 95% of that market, and the rebates
15 covered 70% of all the bulk mail.

16 Structural advantages by the statutory monopoly
17 which covers 70% of all bulk mail.

18 Then at 40:

19 "An undertaking which has very large market share
20 is, by virtue of that share, in a position of strength
21 which makes it an unavoidable trading partner. That
22 fact, together with factors mentioned in paragraph 39
23 above which constitute clarifying a competitive
24 situation on the relevant market, supports the
25 conclusion that competition on that market was already

1 very limited."

2 In relation to the circumstances of the case, the
3 degree of market power is highly significant, as is the
4 position of any competitor.

5 Then turning to the as-efficient-competitor test,
6 you see at paragraph 53 an identification of what the
7 as-efficient-competitor test is. Then at 55, a note
8 that it's specifically been applied to low pricing
9 practices in the form of selective prices or predatory
10 prices, and to margin squeeze.

11 At 56:

12 "As regards the comparison of prices and costs in
13 the context of Article 102 to a rebate scheme, the court
14 has held that the invoicing of negative prices, that is
15 to say prices below cost prices for customers, is not
16 a prerequisite of a finding that of retroactive scheme
17 operated by a dominant undertaking is abusive."

18 In other words, you don't have to show that an
19 as-efficient-competitor would be excluded:

20 "In that same case, the court specified that the
21 absence of a comparison of prices charged with costs did
22 not constitute an error of law."

23 You don't need to undertake an AEC test:

24 "It follows that as the Advocate General stated in
25 points 61 to 63 of her opinion, it is not possible to

1 infer from Article 102 or the case law of the court that
2 there is a legal obligation to requiring finding to the
3 effect that a rebate scheme operated by a dominant
4 undertaking is abusive to be based always on the
5 as-efficient-competitor test. Nevertheless, that
6 conclusion ought not to have the effect of excluding on
7 principle recourse to the as-efficient-competitor test
8 in cases involving a rebate scheme for the purposes of
9 examining its compatibility with Article 102."

10 Then paragraphs 59 and 60, the point that:

11 "In a situation such as that in the main
12 proceedings, characterised by the holding by the
13 dominant undertaking of a very large market share and by
14 structural advantages conferred by the statutory
15 monopoly, applying the as-efficient-competitor is of no
16 relevance inasmuch as the structure of the market makes
17 the emergence of as-efficient-competitor practically
18 impossible.

19 "Furthermore, in a market such as that at issue in
20 the main proceedings, access to which is protected by
21 high barriers, the presence of a less efficient
22 competitor might contribute to intensifying the
23 competitive pressure on that market, and therefore to
24 exerting a constraint on the conduct of the dominant
25 undertaking."

1 Here again, one instance in which an
2 as-efficient-competitor test will not be appropriate,
3 having regard to the circumstances, is where it is
4 impossible to replicate the costs of the dominant
5 undertaking.

6 We don't read this judgment as suggesting that that
7 is the only circumstance. On the contrary, the earlier
8 emphasis to all the circumstances suggest that this
9 is merely a relevant circumstance in this case, informed
10 by the clear conclusions of the competition authority
11 conveyed in the order for reference that there would be
12 no possibility of an as-efficient-competitor.

13 At paragraph 61, the overall conclusion:

14 "The as-efficient-competitor test must be regarded
15 as one tool amongst others for the purposes of assessing
16 whether there is an abuse of a dominant position in the
17 context of a rebate scheme."

18 We say that's true under 102 generally. It's one
19 tool among others.

20 PROFESSOR ULPH: Can I just ask, paragraph 59.

21 MR HOLMES: Yes.

22 PROFESSOR ULPH: Would you accept that that could be read as
23 saying that, even in the absence of any action by
24 a dominant firm, entry by an as-efficient-competitor is
25 impossible? So it's essentially the conditions in the

1 market that are preventing entry.

2 MR HOLMES: Yes.

3 PROFESSOR ULPH: It's nothing to do with the behaviour of
4 the dominant undertaking.

5 MR HOLMES: No, I agree that that's the interpretation
6 that's intended.

7 THE CHAIRMAN: How are you doing for time?

8 MR HOLMES: I'm overrunning, but I'm now on the home
9 straight.

10 THE CHAIRMAN: You've got three more grounds to go.

11 MR HOLMES: I shall be very brief on that, I can take those
12 very crisply.

13 THE CHAIRMAN: We discussed at some length in Mr Beard's
14 submissions the question, which I'm sure you are coming
15 onto, which is whether that statement of the law in
16 Post Danmark II has arrived.

17 MR HOLMES: Yes.

18 THE CHAIRMAN: Intel.

19 MR HOLMES: May I take you, then, to the Intel judgment.

20 THE CHAIRMAN: It's the crucible of the dispute in this
21 case.

22 MR HOLMES: I agree that that may be the crucible.

23 THE CHAIRMAN: I'm conscious of the shorthand writers. We
24 probably have to pause at 11.30. How does that fit
25 your --

1 MR HOLMES: I shall not be finished within ten minutes, sir.

2 THE CHAIRMAN: We'll stop at 11.30. But can you carry on
3 now.

4 MR HOLMES: I'm grateful.

5 Tab 106, the Intel judgment. We can leap straight
6 to the important findings, as the tribunal knows the
7 context, at page 16. Picking it up at paragraph 137.

8 You can see there that the court -- I should perhaps
9 first deal with paragraphs 133, 134 and 136 to which
10 Mr Beard took you.

11 These are simply the formulation that we've seen now
12 in the Advocate General's opinion, and in
13 Post Danmark I. You have my submission that they do not
14 imply an as-efficient-competitor test is necessary. The
15 fact that Article 102 does not protect and ensure the
16 presence of a less efficient competitor does not mean
17 that there will not be cases where competition may be
18 restricted even by the exclusion of a less efficient
19 competitor. That's not how we read those paragraphs.

20 Then at 137, you have the case law that was relied
21 upon by the general court to say that where you have
22 exclusivity discounts by a dominant firm, you have an
23 abuse.

24 It is that proposition, the proposition that one
25 does not need to look further than the fact of

1 exclusivity, which is subject to clarification at
2 paragraph 138.

3 "In circumstances where there is evidence submitted
4 in the administrative procedure that the conduct was not
5 capable of restricting competition, and in particular of
6 producing the alleged foreclosure effects, in those
7 circumstances, the competition authority needs to
8 consider it."

9 That's what paragraph 139 indicates.

10 "In that case, the Commission is not only required
11 to analyse the extent of the undertaking's dominant
12 position on the relevant market, the share of the market
13 covered by the challenge practice, as well as the
14 conditions and arrangements for granting the rebates in
15 question, their duration and their amount. It is also
16 required to assess the possible existence of a strategy
17 aiming to exclude competitors at least as efficient as
18 the dominant undertaking from the market."

19 We don't read the final words of that paragraph as
20 meaning that in all cases where there is a challenge
21 made at the administrative stage to the finding of
22 foreclosure, there must always be an
23 as-efficient-competitor test undertaken. It depends
24 what material is brought forward by the party under
25 investigation, and what that material shows.

1 We do accept that where an AEC test is brought
2 forward, it's necessary to consider that AEC test and to
3 see what light it sheds on the case. But we say that in
4 this case Ofcom did that by considering the evidence
5 that was provided.

6 Then at paragraph 140 there's a reference to the
7 need also to consider objective justification, and at
8 141:

9 "If in a decision finding of rebate scheme abusive,
10 the Commission carries out such an analysis, the general
11 court must examine all of the applicant's arguments
12 seeking to call into question the validity of the
13 commission's findings concerning the foreclosure
14 capability of the rebate concerned."

15 Where there is an analysis by the Commission of the
16 position of an as-efficient-competitor, you can't duck
17 considering that where it's put in issue on a subsequent
18 appeal. The general court, by not considering and
19 ruling upon the AEC test, the Commission's own AEC test,
20 had committed an error.

21 But we don't read this judgment as implying that
22 there must always be an AEC test.

23 THE CHAIRMAN: Mr Beard said quite strongly, as I'm sure you
24 heard, that where the undertaking has put forward an AEC
25 test, then the administrative authority has an

1 obligation to consider it.

2 MR HOLMES: Yes.

3 THE CHAIRMAN: So that's an extrapolation from this.

4 MR HOLMES: We don't disagree at all, but it is necessary to

5 consider the material put forward, including the AEC

6 test.

7 THE CHAIRMAN: Your position is that Ofcom did consider it?

8 MR HOLMES: Yes.

9 THE CHAIRMAN: And decided it wasn't helpful in the

10 circumstances and was not obliged to do its own AEC

11 test. That's your position.

12 MR HOLMES: It is my position.

13 THE CHAIRMAN: That's very clear.

14 MR HOLMES: That's very good.

15 I think, then, we can move on really, because you

16 have seen the Intel judgment. You have my submission on

17 what --

18 THE CHAIRMAN: This is all hanging in the ether, as it were.

19 Is there any further aid to interpretation that might

20 tell us in our limited wisdom whether Intel has

21 overruled Post Danmark II on this point?

22 MR HOLMES: Well, it's certainly a relevant matter.

23 THE CHAIRMAN: This is a subject which is discussed from

24 time to time in fora that we probably shouldn't take

25 account of.

1 MR HOLMES: Well, ultimately the tribunal needs to consider
2 the case law as it is upon the page. We say that the
3 Intel judgment, a terse judgment, as Mr Beard noted,
4 must be understood in its context, and in the light of
5 the Advocate General's opinion, and the immediately
6 preceding case law, including a case decided by a
7 chamber in which the Judge-Rapporteur was the same
8 Judge-Rapporteur as was acting in Intel.

9 THE CHAIRMAN: I think he's written an article about this
10 approach, hasn't he, which --

11 MR HOLMES: Not a revolution, yes. Well, you're obviously
12 aware of that, sir.

13 THE CHAIRMAN: We are aware of quite a lot. I'm just making
14 sure that you're all aware of it, too.

15 MR HOLMES: I'm grateful for that.

16 THE CHAIRMAN: What about any subsequent ECJ case?

17 MR HOLMES: So --

18 THE CHAIRMAN: There are a couple in the authorities bundle.
19 Should we consider those, too?

20 MR HOLMES: There are, sir. Given the time, I think what
21 I propose to do, rather than try to do that on the
22 hoof --

23 THE CHAIRMAN: You can take that we will read them.

24 MR HOLMES: Of course. I'm grateful, sir. We will, of
25 course, address this in our written closings which will

1 then be the subject of oral closing.

2 On the remaining grounds, I think I can really be
3 very brief indeed.

4 On ground 4, objective justification, you have the
5 key points already from our consideration of the Hooper
6 report.

7 This is obviously an exception to be construed
8 narrowly, as you pointed out, sir. There is a statutory
9 scheme here. The regulator is responsible for looking
10 at this. Nothing Ofcom said encouraged Royal Mail to
11 think that it had licence to restrict competition in
12 order to protect the universal service, and in those
13 circumstances, we say that it is neither necessary nor
14 proportionate for an undertaking to take matters into
15 its own hands and engage in otherwise restrictive
16 conduct.

17 We must, of course, assume for the purposes of the
18 objective justification defence that you're with me on
19 the finding of a restrictive effect.

20 THE CHAIRMAN: You may very well say that.

21 MR HOLMES: Ground 5, the procedural error. There are again
22 four brief points to make in this connection.

23 First, we say that this was a minor modification
24 which was not substantive. Although particular figures
25 were expunged, the clear conclusion drawn from that

1 material was set out and was visible in the second
2 statement of objections, namely the fact that the price
3 differential accounted for a material proportion of the
4 profits that Whistl would make.

5 The second point to note is that this is not a case
6 like the European cases in which no one has access to
7 the material. In this case, there was a confidentiality
8 ring in place. The original SO went to external and
9 internal advisers and to economists. They could
10 understand the context of the points raised in the
11 second SO in the light of what they'd already seen --

12 MR BEARD: I'm so sorry. If it's being said --

13 THE CHAIRMAN: I'm going to put my own point.

14 I think what you're going to say is what Mr Beard
15 was saying was that it limited their ability to take
16 instructions. That's what's being argued.

17 MR HOLMES: That's understood.

18 MR BEARD: It was a broader point, I'm sorry. Is it being
19 said by Ofcom now that in circumstances where the
20 material was withdrawn from the SO, that the experts who
21 had seen it were supposed to bear that in mind when they
22 were reading the new SO that was issued? If that is
23 Ofcom's case, there are matters that would need to be
24 put forward in further submission because that is not
25 the case that has been put so far.

1 MR HOLMES: We can certainly have further submission about
2 this. There's of course closing submission to consider
3 it.

4 But as a matter of obvious practicality, you've got
5 an sow that was issued. You've got underlying figures
6 indicated. You've got the material conclusions still
7 visible in the second SO. The advisers go off, they
8 consider it. They make copious submissions in relation
9 to exactly this point. The central conclusion that they
10 put forward, and which they're still putting forward, is
11 that the metrics considered by Ofcom are misconceived
12 and irrelevant.

13 THE CHAIRMAN: The test is rather broader. It is a question
14 of whether their ability to defend themselves against
15 a large final and adverse decision has been weakened.

16 MR HOLMES: Let's cut straight to the quick.

17 THE CHAIRMAN: That's the case we have to consider.

18 MR HOLMES: I think their ability to defend themselves is
19 informed by the fact that they had a substantial
20 battalion of advisers within the confidentiality ring
21 that were able to inspect the materials on the file and
22 to understand in context the conclusions that are
23 contained in the second statement of objections.

24 The really clinching point, in our submission, is
25 that even accepting the slight chance test that Mr Beard

1 showed you, what argument were they prevented from
2 putting? The business has now seen all of this material
3 and here we are on appeal. If there was some point --
4 let's face it, it's a comprehensive appeal. Every point
5 that can be taken has been taken. If there was some
6 powerful point that emerged from the redacted material,
7 the material that was removed and which is now contained
8 in the decision, it would be before us. It would be
9 before the tribunal.

10 THE CHAIRMAN: Yes. We've always been told to be careful.
11 Procedural errors being cured.

12 MR HOLMES: That is true, but the specific context of the
13 tribunal's jurisdiction does need to be considered in
14 the light of the intentions with which it was
15 established. And you, sir, will be familiar with
16 a passage in the Napp judgment which was set out in the
17 skeleton argument of Mr Turner. We might take it from
18 there.

19 If you could turn up the Whistl skeleton to
20 paragraph 55.

21 You see there that his submission is that:

22 "Even if there has been some procedural defect in
23 the administrative proceedings below, the tribunal would
24 seek to cure it using its other procedures and to reach
25 a definitive ruling. In this regard, in the seminal

1 case of Napp, the President of the tribunal cited the
2 statement made in Parliament by the minister during the
3 passage of the competition law. It is our intention
4 that the tribunal should be primarily concerned with the
5 correctness or otherwise of the conclusions contained in
6 the appeal decision, and not with how the decision was
7 reached or the reasoning expressed in it. That will
8 apply unless defects in how the decision was reached or
9 the reason makes it impractical for the tribunal fairly
10 to determine the correctness or otherwise of the
11 conclusions or of any directions contained in the
12 decision. Wherever possible, we want the tribunal to
13 decide a case on the facts before it. Even where there
14 has been a procedural error, and to avoid remitting the
15 case to the Director General. We intend to reflect that
16 policy in the tribunal rules. This is an important
17 aspect of our policy and I shall explain the rationale
18 behind our approach. The bill provides for a full
19 appeal on the merits of the case which is an essential
20 part of ensuring the fairness and transparency of the
21 new regime. It enables undertakings to appeal the
22 substance of the decision, including in those cases
23 where it is believed that a failure on the part of the
24 Director General to follow proper procedures has led him
25 to reach an incorrect conclusion. The fact that the

1 tribunal will be reconsidering the decision on the
2 merits, will enable it to remedy the consequences of any
3 defects in the Director General's procedures."

4 We say in this regime it's highly relevant that the
5 material -- that there's no killer point that emerges
6 from these minor redactions of figures from the second
7 SO and which are revealed in the decision in
8 non-confidential form only because Whistl has left the
9 market and the material in its business plan is no
10 longer confidential.

11 THE CHAIRMAN: Yes, Mr Holmes.

12 That may have been the view of the minister
13 introducing the bill. Obviously we take that very
14 seriously, but the fact is we are 20 years on and
15 practice at the tribunal and the practice of authorities
16 has moved on, and we have to consider the situation as
17 it is now, and I think that applies generally.

18 I think at this point we might pause for five
19 minutes.

20 MR HOLMES: Of course. I'm grateful.

21 (11.32 am)

22 (A short break)

23 (11.42 am)

24 MR HOLMES: Sir, to pick up where we left off with just two
25 more points on the procedural issue, the first point is

1 I certainly did not mean by my submission to suggest
2 that in all the cases it will be possible for the
3 tribunal to find a way through and to arrive at
4 a conclusion in circumstances where there is a problem
5 with the decision which is under appeal. There will be
6 cases where substantial further work is needed or where
7 the issue which requires further investigation is of
8 a scale and complexity that it would be both unfeasible
9 and unfair to attempt to conduct that process at the
10 appellate stage rather than returning to the
11 administrative stage.

12 It's a matter of degree and we do say that where the
13 issue that is the subject of concern is a point of this
14 nature, particularly in circumstances where no answer
15 has been given, no argument brought forward to suggest
16 that the business were able to shed additional light as
17 a result of seeing the underlying figures and were
18 therefore prevented from running an argument at the
19 administrative stage, it wouldn't be appropriate to
20 strike a decision down on procedural grounds.

21 There's not a basis for concluding that there was
22 even a slight chance that things would have gone
23 differently at the administrative stage. Given the
24 scale of the issue, and given the minor nature, as we
25 submit, of the redactions, insofar as there were a new

1 argument which emerged as a result of the business
2 considering matters, the tribunal may well be able to
3 proceed to deal with it.

4 But given that we haven't for our part been able to
5 identify any such argument in the appeal, it's difficult
6 to see where the procedural argument goes.

7 We do also note that it would have been open to
8 Royal Mail to take this point at a early stage of
9 proceedings if they had thought that they were
10 substantially prejudiced, so that the administrative
11 procedure could be resumed simply and straightforwardly,
12 and that wasn't done as a matter of case management.

13 The only other point to make is just for the
14 avoidance of doubt, Royal Mail was certainly aware that
15 Ofcom continued to rely on Whistl's business plan
16 following the issuance of the second SO.

17 One can see that from correspondence at the time
18 which is set out in the Ofcom bundle 1 at tabs 19 and
19 20.

20 You see that this is a letter to the Director of
21 Investigations at Ofcom from Royal Mail's solicitors.

22 THE CHAIRMAN: This is the letters you attach to your
23 skeleton?

24 MR HOLMES: They were attached to the skeleton. Yes, they
25 were. So you've reviewed them already. The point then,

1 I needn't take you through it, it's simply the point in
2 the final paragraph on page 1:

3 "Royal Mail continues to believe that Ofcom's
4 refusal to provide complete access to the Whistl's
5 business plans is inappropriate. As explained in our
6 letter of 7 October 2015, it is clear from the revised
7 statement of objections issued by Royal Mail on
8 2 October 2015 that Ofcom is continuing to rely on the
9 business plan."

10 They are aware that Ofcom is continuing to rely on
11 the business plan, and you see that the footnote is to
12 the paragraphs of the -- you see a reference to the
13 relevant paragraphs of the revised SO at the foot of the
14 page:

15 "In this context, it is clear that in accordance
16 with the fundamental rights of defence provided under EU
17 law, information which is relied upon by a regulator
18 must be provided to the addressee in full and that ..."

19 Then there's quotation:

20 "Without prejudice to this general position, in
21 order to achieve a pragmatic solution as quickly as
22 possible. We have discussed Ofcom's suggested
23 methodology for testing the assumptions in the Whistl
24 business plan with Royal Mail's other external advisers
25 in an attempt to identify the workable solution. In

1 this regard we note that if Royal Mail's external
2 advisers are to be able efficiently to obtain
3 instructions from Royal Mail's business personnel as to
4 what they would consider to be reasonable objections or
5 assumptions as suggested by Ofcom, it is necessary to be
6 able to inform those business personnel of the
7 categories of projections or assumptions concerned."

8 As a result, there was then a series of suggestions
9 made about what could be provided to Royal Mail's
10 business personnel and you'll see from the following
11 tab:

12 "Whistl has consented to disclosure of much of the
13 information requested in your letter. This information
14 which may be disclosed to and discussed with
15 Royal Mail's business personnel or be conveyed to
16 Royal Mail via our secure file transfer system."

17 The scope of that disclosure was not the subject of
18 any challenge at the time. It could have been taken by
19 way of a further appeal to the procedural officer, and
20 if Royal Mail were unhappy with the determination of the
21 procedural officer, it had judicial remedies available
22 to it. We submit that there was no substantial
23 prejudice in this case.

24 The only final point then concerns penalty. This is
25 obviously a matter that the tribunal will need to

1 consider in the round when it's heard all of the
2 evidence and has seen the case in full.

3 The penalty is at large for the purposes of this
4 appeal.

5 Four brief points for now.

6 First of all, we submit that Ofcom faithfully
7 applied the penalty guidelines which are different from
8 those applicable at the EU level.

9 Secondly, while the fine is large in absolute terms,
10 it is, we say, proportionate in view of the scale, the
11 very substantial scale of the business and it was
12 substantially reduced for proportionality.

13 It also needs to be set in the context of
14 Royal Mail's estimation of the market share and revenues
15 that would be protected over the period of Whistl's
16 price plan, and you saw the slides where, absent the
17 particular option that was selected with the price
18 differential, very substantial sums of revenue were
19 expected to be lost, and if we're correct that the
20 conduct was an abuse of a dominant position, it's right
21 that a substantial penalty should be raised in order to
22 reflect the seriousness of the infringement and its
23 potential consequences.

24 Sir, those are my opening submissions. I'm grateful
25 for the tribunal's indulgence.

1 THE CHAIRMAN: Thank you, Mr Holmes.

2 Mr Turner.

3 Opening submissions by MR TURNER

4 MR TURNER: Sir, Mr Beard said in the course of his opening
5 for Royal Mail, and I quote:

6 "I'm careful not to obsess about the particular
7 facts of the matter that we're dealing with today."

8 I will, with your leave, take a different approach
9 and concentrate on the facts. You saw yesterday morning
10 that the Advocate General said in Intel, which is
11 Royal Mail's key case, context is essential,
12 paragraph 79. We'll deal in closings with the correct
13 understanding of Intel.

14 My hope is that what I say now will be complementary
15 to Ofcom's presentation and will be of assistance to you
16 when the witnesses are heard next week and when you come
17 to assess their evidence and perhaps need to ask them
18 some questions.

19 In view of the time, I will need to be quick.

20 One of Royal Mail's main points in the appeal, and
21 perhaps the main point rather than Intel, is the claim
22 that what it did didn't place Whistl at a competitive
23 disadvantage.

24 That's by and large the factual aspect of their
25 ground 3 in the appeal. What does it mean to put

1 a rival at a competitive disadvantage?

2 Mr Beard helpfully took you to a number of the
3 European cases which discuss it. One of those is called
4 TeliaSonera, from 2011. We don't need to go back there,
5 but that case indicated, paragraph 70, that a relevant
6 competitive disadvantage is something which involves
7 preventing or restricting a party's access to the market
8 or their growth or the growth of their activities on it.

9 That is a good working definition. It chimes with
10 the classic general statement of the test for an abuse
11 of dominance which we put in paragraph 2 of our
12 skeleton. The classic test, as you know, has two parts.
13 It asks first whether you have behaviour which isn't
14 competition on the merits. If you have, you then ask
15 yourself whether that behaviour hinders the maintenance
16 of the degree of competition still remaining in the
17 market, or the growth of that competition.

18 How that second part of the test applies in this
19 case is what I'm going to focus on. By reference to
20 some key documents, I propose to give you a short tour
21 of three broad areas.

22 Number 1, the competitive market situation as seen
23 from Whistl's viewpoint when it began its venture.

24 Number 2, I invite you to take a closer look at the
25 practical logistics for rolling out a significant

1 business in this industry; the mail delivery industry.

2 What are the challenges anyway facing an entrant?

3 Number 3, an understanding of the mechanisms by
4 which Royal Mail, announcing the higher prices to
5 customers who failed to replicate its nationwide pattern
6 of delivering mail, actually served to effect the
7 competitive process on the ground.

8 I'll begin with the issue of the market conditions
9 from Whistl's vantage point.

10 Our case is about bulk mail. The defining feature
11 of bulk mail is that it's commercial mail sent in bulk
12 by a business to many recipients. Sir, one of the Ofcom
13 documents puts it in those terms.

14 On the demand side, bulk mail delivery is vital as
15 a service required by lots of consumer-facing
16 businesses, and on the national stage these include the
17 banks, supermarkets and utility companies. It's not to
18 overlook the importance for regional and local
19 businesses, too. For all these businesses, the costs of
20 communicating with their customers may be a very
21 significant part of their own costs of doing business.

22 But bulk mail services are also required, I should
23 add, by the public sector authorities. Government
24 departments, local authorities sending out their council
25 tax bills and so forth.

1 Until Whistl's entry, Royal Mail remained
2 effectively a monopoly in a market that had been
3 liberalised. The context to Whistl's plan to enter was
4 that there were two market opportunities. Those were
5 a history of relentlessly rising prices from Royal Mail
6 for final mile delivery and the perceived ability to
7 provide a quality of service that genuinely bettered
8 Royal Mail's existing standards.

9 If I may invite you to turn up Whistl's investment
10 memorandum of May 2013. You'll find that in C4A at
11 tab 10.

12 They called it Project Luke, you will see from the
13 cover page.

14 If you could go in it, please, to tab 10, to
15 page 10, you have a slide entitled "Executive Summary"
16 the financial opportunity of E2E. If you look on the
17 right-hand side, you will see the first bullet, second
18 sentence:

19 "Concurrently, Royal Mail's wholesale pricing final
20 mile delivery downstream services has increased from an
21 average of 14p per item to 19.7p since 2011."

22 That's an increase of roughly 40% over the period.
23 Then the second and third bullets point out that Whistl
24 could provide the delivery service to customers at
25 a lower cost than Royal Mail.

1 If you drop down to the penultimate bullet, which
2 begins "Based on this pricing", you'll see that
3 TNT/Whistl have modelled that some 43 SSCs would deliver
4 sufficiently profitable returns once mature having
5 regard to the mailing volumes and projected costs. 43.

6 There's a couple of points to note straightaway.
7 The first point is with reference to this charge of
8 cherry-picking, these target areas were not all the high
9 density urban areas which it was most profitable for the
10 Royal Mail to serve. You see the language used in that
11 penultimate bullet. They were mostly suburban, London
12 and the urban delivery areas.

13 As you will see, as the Chairman noted in argument
14 earlier, London was in fact the highest delivery cost
15 area of all for Royal Mail to serve in the country. It
16 wasn't among the cheapest areas of the country for
17 Royal Mail, as someone coming to this fresh might
18 expect.

19 The second point: although Royal Mail has emphasised
20 in written and oral submissions that the outer limit of
21 Whistl's roll-out ambitions was 33 SSCs, which equates
22 to 42% of national coverage, you see from the
23 penultimate bullet that this was a conservative
24 approach. Potentially, the roll-out might have extended
25 further, based on their modelling, delivering 68%

1 coverage. If you go to page 53 on this issue in the
2 same document, you have a slide which is entitled "E2E
3 roll-out plan" with a helpful picture.

4 Please look at the final bullet on the right. This
5 makes clear that there was a prospect of extending the
6 roll-out at a later date, depending on the success of
7 the plan. You see the language used in the last bullet
8 on the right.

9 The relevance of this is that one of Royal Mail's
10 bolder arguments is that its behaviour wouldn't have
11 impeded a profitable roll-out of up to 31 SSCs, I think
12 is their figure, on the NPP1 plan and so Royal Mail says
13 essentially its behaviour wasn't capable of curbing
14 Whistl's commercial objectives, blocking competition, as
15 the aspirations extended to only a little over 31 SSCs
16 in any case.

17 Now, we don't agree with the premise of their
18 argument. Royal Mail's behaviour had an instant
19 paralysing impact on the progress of the roll-out, which
20 is key to your assessment. It wasn't something that
21 would only bite in the far distant future.

22 But even if there was anything in that premise, the
23 conclusion of the argument is also false because
24 Whistl's business plan is envisaging an ultimate
25 roll-out to 33 SSCs as explicitly conservative and not

1 as its outer limit.

2 I turn from that to the question of service levels
3 in the country for mail delivery.

4 Please go to slide 11 in this same presentation.
5 Key strengths of TNT Post which became Whistl, on
6 page 11.

7 The fourth heading on the right is in bold:

8 "Latest Technology

9 "Significant benefits compared to Royal Mail's
10 legacy infrastructure will be achieved by introducing
11 technology such as sequencing and mapping software which
12 lowers costs. The introduction of software such as FA
13 CTS and track and trace by hand-helds has led to more
14 operational control. The technology is embedded in the
15 operational design and planning which gives
16 a competitive advantage compared to Royal Mail."

17 The new technology would mean giving to customers
18 a superior type of service to the service which they got
19 from Royal Mail. Standard feature of the service
20 envisaged was that all the mail was going to be tracked
21 with GPS technology to the recipient's door, allowing
22 proof of delivery, and you will understand that for
23 organisations like Thames Water, sending out their bills
24 for payment, this has got very obvious advantages.

25 PROFESSOR ULPH: Can I just ask a question of clarification.

1 Was this new technology technology that TNT had used
2 elsewhere?

3 MR TURNER: Yes, it was. I was going to mention that. It
4 was technology which they had themselves used in their
5 roll-outs or the parent had used elsewhere in Europe,
6 and particularly in Italy. They'd already done it.

7 PROFESSOR ULPH: Thank you.

8 THE CHAIRMAN: Particularly important in Italy, I would have
9 thought, track the arrival of post.

10 MR TURNER: Yes, sir.

11 In PwC's commercial due diligence investment report
12 for the investor LDC, which was October 2013, that was
13 prepared in order to give advice to LDC, they
14 specifically highlighted in the report those benefits to
15 customers. It's worth just turning that up, too. It's
16 in the same file at tab 32. If you go in it to page 49.

17 They've done some work here as part their own due
18 diligence for the investor. The title says:

19 "Customers identified cost savings and mail
20 trackings, the main reason for switching to TNT Post's
21 end-to-end service".

22 The main reasons.

23 "Furthermore, there appears to be widespread support
24 for an alternative to Royal Mail for end to end."

25 Then, if you look on the right-hand side, you'll see

1 some of the key advantages referred to and quotations
2 from customers to whom they had spoken. If you look at
3 number 3 at the bottom page:

4 "Increased accountability due to the mail tracking
5 system is also a key reason to switch. We were
6 attracted by full tracking. There had been a few
7 complaints of issues with the Royal Mail service, mail
8 not being delivered, and we wanted the ability to
9 understand where the problem was."

10 Then:

11 "The key attraction for us of TNT Post E2E was the
12 tracking capability, particularly for our catalogues, as
13 we can receive confirmation of receipt."

14 Now, we can put that away for a moment, but this
15 file is the one that I'm going to be sticking with.

16 These facts about Whistl's lower prices and
17 a differentiated and better type of service are
18 important to the overall assessment that this tribunal
19 has to perform because it shows that when Royal Mail
20 eliminated Whistl, it wasn't merely snuffing out
21 a duplicate, inefficient, second mailing company.

22 Purchasers across the nation in bulk delivery have
23 been deprived of something of real value as
24 a consequence of the exit of Whistl.

25 On this, finally, I should underscore something

1 briefly that Mr Holmes mentioned yesterday as the
2 general context for considering the solidity of Whistl
3 and its plans, and this chimes with what Professor Ulph
4 has just put to me.

5 It is relevant that Whistl was at the time the
6 wholly owned subsidiary of PostNL. It was a heavyweight
7 postal organisation. PostNL had already successfully
8 rolled out E2E networks in the Netherlands, where it had
9 responsibility for the universal service, and in
10 Germany, in Italy, and as I was saying, this technology
11 was based on their Italian experience in particular.

12 The entire entry plan and the practices they were
13 going to adopt was based on valuable European
14 experience, and in this regard, if you have the
15 investment memorandum still to hand at tab 10, go in it
16 to page 39. I perhaps don't need to read it, but this
17 is the slide which explains the international experience
18 and the successful trial enabling a quick roll-out.
19 There's a pictorial depiction of the use of the GPS
20 technology on the left, and on the right, I direct your
21 attention to the top bullet:

22 "International experience has led to an innovative
23 product."

24 If you cast your eye over it, you will see that they
25 explain those advantages.

1 The real practical advantages.

2 Now, standing back, you must be clear that when
3 Royal Mail's consultants carry out their
4 as-efficient-competitor analysis, they're not relying on
5 underlying like for like efficiency advantages which
6 Royal Mail had over Whistl in the service bulk mail
7 delivery. There is no sense in which Royal Mail was
8 providing a service to customers at lower prices or
9 higher quality to the customer than Whistl was already
10 providing on a tiny scale and would have provided across
11 the nation but for the conduct.

12 Moreover, you've seen from Mr Holmes' analysis that
13 Royal Mail itself, when it was strategising, identified
14 direct delivery competition as one of the - in its words
15 - true market constraints on its own ability to continue
16 increasing escalating its own prices at will. To see
17 that again, I think that was at tab 33, the presentation
18 of 1 November 2013, if you want to go there quickly, at
19 page 8.

20 The Sue Whalley presentation, tab 33 in the same
21 bundle. If you turn in that to page 8, I pause because
22 I think the entire page is marked as confidential. It
23 might not be.

24 THE CHAIRMAN: Yes, and in mine, too.

25 MR TURNER: That may --

1 THE CHAIRMAN: Are we allowed to say it's a page?

2 MR BEARD: I think these are confidentiality markings that
3 were relevant particularly at the time of the
4 administrative procedure.

5 As we've made clear, insofar as it comes to the
6 issue for the tribunal's judgment, we recognise that
7 there will be material that is presently marked
8 confidential the tribunal may want to refer to. I'm not
9 referring to this one particularly.

10 What we haven't done is done a wholesale review of
11 confidentiality.

12 THE CHAIRMAN: Can Mr Turner --

13 MR TURNER: Can I refer to the things on this page, please?

14 MR BEARD: I'm just trying to take instructions. I'm sorry.

15 If Mr Turner has particular documents he wants us to
16 check, we're very happy to do that. We've indicated
17 that.

18 MR TURNER: I'll proceed anyway.

19 If you look to the right of challenging the legal
20 basis of competition law, you'll see from the first
21 bullet --

22 THE CHAIRMAN: I think I did mention this page.

23 MR TURNER: I think you also picked this point up. I'm
24 drawing attention to it --

25 THE CHAIRMAN: Without saying in any what it was.

1 MR TURNER: No.

2 MR BEARD: For the moment, other than referring to numbers,
3 yes, please proceed on the basis that this page is not
4 confidential.

5 THE CHAIRMAN: Mr Turner.

6 MR TURNER: I'm grateful.

7 So you will see they refer to their flexibility to
8 increase the end-to-end price of the main letter
9 products, and in the second bullet, as well as
10 e-substitution, direct delivery is identified as the
11 true market constraint for letters, not competition law
12 or regulation.

13 They recognise the power in the market of the
14 competing product exerting pressure on them to keep
15 their own prices under control.

16 It chimes with the point that was made by
17 Advocate General Kokott that you saw in Post Danmark II.

18 Now, the cost efficiency that Royal Mail's
19 economists are relying on for somewhat talismanic
20 quality in the as-efficient-competitor test is
21 essentially the result of assigning the vast majority of
22 Royal Mail's common costs of the bulk mail service onto
23 the universal service which was a different thing, and
24 this other services. That's how you reach a result that
25 these other entities, hypothetical competitor or Whistl

1 itself, is not as efficient as the Royal Mail. What
2 I have sought to do is to explain that on a like for
3 like basis, things look very different.

4 Now, there are two other points that fall to be made
5 from this document, the investment memorandum, before
6 you leave it entirely. The first can be seen on
7 page 44. It's in tab 10.

8 THE CHAIRMAN: Just before you go on, where do you put
9 frequency of delivery into the efficiency calculation?

10 MR TURNER: Frequency of delivery was itself an efficiency
11 for bulk mail because it meant that they could
12 accumulate the mail and deliver it --

13 THE CHAIRMAN: Does Whistl offer a service of
14 six-days-a-week delivery?

15 MR TURNER: No, it didn't. It offered three days week,
16 which was itself, we say, when you are looking at bulk
17 delivery, efficient. I will actually explain that
18 further as this trial progresses. Yes, as you mentioned
19 it, that was itself an efficient way of delivering bulk
20 mail.

21 THE CHAIRMAN: This is on the basis that the customer is the
22 producer of the mail, not the recipient of it.

23 MR TURNER: Both for the customer and the recipient for whom
24 receiving the mail matters, that was sufficient, and it
25 was an efficient way of discharging this service of bulk

1 mail delivery, yes.

2 THE CHAIRMAN: But it is relevant to the efficiency
3 calculation?

4 MR TURNER: It was itself -- yes, it was. It was an
5 efficiency.

6 What you will see, because it will be developed as
7 this trial progresses, is that it was an advantage that
8 they had. It was something they could do more
9 efficiently in this market, and the question is whether
10 in that connection what Royal Mail says, which is that
11 their obligation to deliver six days a week, the burden
12 of it, is something which counts on their side in an
13 as-efficient-competitor analysis.

14 The way that it does is because they say we had to
15 deliver six days a week because of the parallel
16 universal service obligation, and therefore it makes
17 sense for all of the costs of delivering on this side,
18 which are shared in common costs, to be attributed to
19 that other service.

20 THE CHAIRMAN: I understand that, but we could put the
21 six-days-a-week delivery service as an advantage, as
22 well as a burden.

23 MR TURNER: It would be -- well, that will be debatable. We
24 saw it as an advantage because, as you say, sir, the
25 customers saw it is an efficient and satisfactory way of

1 getting their mail to the recipients. That was what
2 they wanted.

3 PROFESSOR ULPH: I think there's two separate issues here.
4 One is: how do customers view six-days-a-week delivery
5 vis-a-vis three days a week? And I'm happy to take the
6 view that from the point of view of a customer getting
7 bulk mail, they're probably relatively indifferent as to
8 whether they get it on a Thursday or a Friday. If it's
9 a tax notice or something.

10 MR TURNER: You mean the consumers?

11 PROFESSOR ULPH: Consumers, they're broadly indifferent.

12 MR TURNER: They're probably happier.

13 THE CHAIRMAN: I was hoping somebody would mention consumer
14 finally in this case.

15 PROFESSOR ULPH: But from the point of view of delivery, the
16 costs of delivery, presumably there are some advantages
17 to doing it three days a week in the sense that if you
18 put the mail together in bigger bundles, and then
19 deliver it more efficiently.

20 MR TURNER: Yes, that's right. That is -- I'm grateful
21 because that is part of the efficiency advantage to
22 which I was referring.

23 PROFESSOR ULPH: On the other hand, given that Royal Mail is
24 already delivering six days a week for the non-bulk
25 mail, presumably it doesn't cost them any extra to

1 deliver six days a week with bulk mail.

2 MR TURNER: Yes. This comes down again to the application
3 of the as-efficient-competitor test, the fact that they
4 have taken those costs and partly for that reason
5 assigned them to the other service, and said that there
6 aren't extra costs, incremental costs, involved in this
7 as well.

8 Now, I was on page 44 and the first of the two other
9 points I wanted to make from this memorandum is
10 something you can see from the foot of the page on the
11 right. There you can see consideration of whether the
12 regulator was likely to need to step in and rescue the
13 universal service if Royal Mail found it was losing
14 money hand over fist used to fund that service.

15 If you cast an eye over that final paragraph on the
16 right, you will see that based on a report of
17 international experience of end-to-end competition, the
18 report had pointed out that incumbents were given strong
19 incentives to modernise in response to competition.

20 You'll see it extended to Post Office and delivery
21 networks, sorting technology, formats and price
22 structures, as well as operational and management
23 structures. So it gives some colour to how this had
24 been perceived in other contexts to stimulate
25 efficiency.

1 Therefore, this adds some weight to the point that
2 Mr Holmes had foreshadowed, that far from simply
3 undermining the universal service, the discipline of
4 competition in this industry, there was reason to
5 believe could help to improve it. That gives some flesh
6 to the remarks about that that you saw in the Hooper
7 report yesterday.

8 The second point to be made concerns the critical
9 question of funding for this new venture. Staying on
10 page 44, you will see from the top of the page that
11 significant investment was required. This is the
12 second -- first row, high fixed cost of entry. You will
13 see the second column:

14 "Significant investment required, establishment of
15 depots, machinery, trained staff, vehicles, onward
16 delivery centres required to perform the end-to-end
17 function."

18 If you go forward now to page 75, we're still in the
19 same document, there's a graph and it shows the
20 projected cash funding requirement at that time and it
21 peaked or, rather, the orange line reaches the lowest
22 point at December 2014 at around £52 million.

23 That's what they thought would ultimately need to be
24 put in.

25 This funding would not come, could not come, only

1 from the parent company PostNL. They needed an external
2 funder.

3 If you please go back to page 13, this is a slide
4 headed "Executive summary of the transaction and
5 investment opportunity". On the right hand side it
6 says: "Partnership with PostNL."

7 You will see from the second and third bullets that
8 there was a problem with trying to get the funding
9 exclusively from the parent company. Internal funding
10 wasn't available for the project, they had to get an
11 external investor.

12 Now, that is all I'm going to say on the first of
13 the three areas I wanted to cover, which is the market
14 context and setting the scene. I'm now going to move to
15 the second area which concerns the practical and
16 logistical challenges of actually expanding, entering
17 and expanding in the mail delivery market.

18 It's very important for you to take a closer look at
19 the way in which either Whistl or any rival operator
20 would have to have taken to build up a rival delivery
21 service.

22 The launchpad for rolling out an end-to-end business
23 was to win customers for the so-called upstream
24 activity; collecting and sorting the mail. On the back
25 of that, they provided a retail service.

1 That activity, the collection and sorting of mail,
2 provided the seedbed of customers, the access customers.
3 If you had them for that, they're then available to be
4 converted from the Royal Mail final delivery service to
5 this new Whistl final delivery service in those
6 localities where Whistl had rolled out.

7 In many cases, Whistl contracted with the access
8 customer, as I say, for what was actually
9 a comprehensive retail service: we will deliver your
10 mail. You contract with us. But in providing that
11 retail service, in transacting with Thames Water or
12 E.ON, Whistl was of course entirely reliant on
13 Royal Mail for the final delivery, except in those few
14 localities where it had rolled out its own network of
15 posties. Royal Mail was a gigantic subcontractor.

16 Whistl, typically, therefore, made arrangements when
17 it contracted on a retail basis to pass through to its
18 customers the in fact escalating Royal Mail costs of
19 that final delivery leg. Put bluntly, if the price of
20 Royal Mail's service to Whistl went up, the increased
21 price would fall to be paid ultimately by Whistl's
22 retail customer.

23 If I can give you an illustration of this, you
24 should have a small bundle marked "Overflow bundle".

25 MR BEARD: I'm sorry, before we go further in relation to

1 this overflow bundle, I don't know which documents
2 Mr Turner is going to refer to. There are two documents
3 in here that were included in the case file documents, 6
4 and 8. I've got no objection to those being relied
5 upon.

6 We're not clear why it is that further documents
7 should now be being introduced by Mr Turner or Whistl at
8 this stage.

9 THE CHAIRMAN: I haven't even found the bundle yet.

10 MR BEARD: I thought I would put down a marker.

11 MR TURNER: Shall we look at the documents? You'll see that
12 there's absolutely nothing inculpatory.

13 These are explanatory documents. This is the
14 judicial stage of the case. You're concerned with the
15 proper adjudication of the matters raised in the grounds
16 of appeal and you need to understand what you are
17 dealing with.

18 THE CHAIRMAN: Just to keep pace with all the documents that
19 are being referred to. Any reasonable means from any
20 party is acceptable.

21 MR TURNER: Now, if you go in this little file to tab 2,
22 you'll have something, conditions of contract. I'm
23 simply going to illustrate the way that this actually
24 worked.

25 It's headed "Conditions of Contract". This as

1 contract with in fact E.ON. If you turn on two pages
2 past the index, you will see a page headed "Terms and
3 conditions services" and a date, 11 August 2011.

4 This is before the first end-to-end operation of
5 Whistl, the first little excursion which took place in
6 West London in April 2012. You'll see, if you look at
7 recitals, E.ON UK wishes to enter into a framework
8 agreement, and the provision of postal services.

9 Now, if you go to the back of the tab, and just turn
10 to the third page from the end, if it's double-side
11 printing, as I hope you have, you'll have on the
12 right-hand side, schedule 3, specification; and on the
13 left-hand side, something which says payment process.

14 Now, schedule 3 specified the postal services which
15 were subject to the agreement and essentially Royal Mail
16 was the subcontractor in this arrangement. We don't
17 need to go to it, we can look at clause 43, if we wanted
18 to.

19 The provision at the top of the left-hand page is
20 what I direct your attention to, if you still have that
21 open.

22 "In the event of an increase in Royal Mail prices,
23 the service provider shall have the right to increase
24 its prices by the same amount subject to giving the
25 company no less than 30 days' notice."

1 That's how the pass-through works.

2 E.ON belonged to the group of big customers which
3 had signed up for Whistl's postal service and showed an
4 interest in supporting Whistl's roll-out of a final leg
5 delivery service, too. There was very substantial
6 customer appetite for an alternative to Royal Mail. We
7 saw that mentioned a moment ago in the PwC document.

8 If you could please keep this overflow document to
9 hand, but go back to the C4A bundle, which is the other
10 main bundle I'll be working from, and you go in it to
11 tab 2, to around the same time as the E.ON contract,
12 August 2011, you have a presentation here. It's an
13 internal presentation on the prospective development of
14 a service within Whistl.

15 If you go within that to the final page, page 42.

16 PROFESSOR ULPH: Which tab are we at?

17 MR TURNER: 2, second tab.

18 That page is headed "Appendix: Initial client
19 engagement". You'll see on the left, the list of the
20 major existing customers from Barclays at the top down
21 and the annual volume of business that they were doing
22 with Whistl, then called TNT.

23 You'll see Barclays, you will see further down,
24 about eight or nine down, E.ON. That's one of the
25 customers, who they wanted to speak to, to try on

1 attract to the new delivery service.

2 That's the list of customers. If we can put that
3 away for a moment and go back to the overflow bundle --

4 PROFESSOR ULPH: Can I just ask a question of clarification.

5 MR TURNER: Yes.

6 PROFESSOR ULPH: Were these all existing customers of
7 Whistl?

8 MR TURNER: I believe that they were, yes.

9 PROFESSOR ULPH: Okay.

10 MR TURNER: Yes, that's right, they were. 2011, these are
11 the so-called access customers. They have the retail
12 agreements with them and the sort of mechanisms that
13 I have showed you.

14 Then they had to try and convince them to turn to
15 the end-to-end delivery service, too. If you go back to
16 tab 3 of this overflow bundle, you now have a variation
17 agreement, sort of extension of the agreement with E.ON
18 which used to be Powergen. It's dated 12 March 2012.
19 If you look at the introduction, it's concerned with the
20 extension of service provision to introduce final mile
21 mail delivery services. That's under the heading
22 "Introduction", using its own delivery network from time
23 to time to be provided under this agreement.

24 If you turn over the page, the second page, box 1,
25 these are the boxes under the heading "Service

1 description of specific terms". If you look at the
2 first box, service, delivery times are not guaranteed.
3 The last two paragraphs on the right:

4 "E2E delivery service shall be performed in such
5 geographical areas as determined and amended by TNT Post
6 from time to time. The customer agrees to allow TNT
7 access to all the customer's mail volumes from its
8 existing agreement for the purpose of E2E delivery
9 service and the customer further agrees that TNT will
10 choose the routing of the customer's mailing and the
11 subcontractors and agents it uses."

12 That was therefore the permission to use this
13 service to be granted to Whistl.

14 On the third page, just to note, box 11, towards the
15 bottom is called indicia:

16 "The customer shall comply with the indicia
17 requirements set out in the E2E delivery service annex
18 at the customer guide."

19 This is for your note because customers needed to
20 mark the letters as Whistl letters, not Royal Mail
21 letters. That, therefore, needed to be a print job that
22 had to be carried out, and that's because Royal Mail
23 didn't permit mail to be marked "delivered by
24 Royal Mail" unless it actually was.

25 The final page is the price. If we just look at the

1 last page.

2 THE CHAIRMAN: It's the customer that puts "Whistl" on the
3 letter?

4 MR TURNER: Well, yes, where the customer has its own
5 printing house, it would need to arrange for the
6 printing house, and I'll develop this, to put "Whistl"
7 on the letter.

8 THE CHAIRMAN: We should really declare an interest. We all
9 receive bulk mail and we've been studying closely where
10 they might have come from.

11 MR TURNER: But you do not receive bulk mail which now
12 benefits from the Whistl final delivery service.

13 THE CHAIRMAN: You are dealing with history.

14 MR TURNER: If one goes to the last page, E2E delivery
15 service prices, a very short point, third line:

16 "E2E discount. The applicable Royal Mail access
17 price multiplied by the discount set out in the table
18 below."

19 The way in which you get customers, you have to
20 tempt them to agree to your service, win them over, and
21 you offer them a discount on the Royal Mail access
22 price.

23 Now, this is one type of major customer.

24 PROFESSOR ULPH: Just before we move on, could I just go
25 back and clarify this printing issue?

1 MR TURNER: Yes, I'm going to cover that again in a moment,
2 but if you wish to raise it --

3 PROFESSOR ULPH: Carry on.

4 MR TURNER: I won't forget it.

5 THE CHAIRMAN: Nor will Professor Ulph.

6 MR TURNER: Now, customers of this kind made arrangements,
7 as I say, for the overall retail delivery of their mail,
8 and their focus, customers like E.ON, is on what's my
9 bottom line price for the retail service. It's not hard
10 to envisage how a jump in the price caused by one part
11 of the overall service becoming more expensive would
12 make Whistl's trading position more difficult in the
13 context of the retail level what you will have seen was
14 a fiercely competitive, low margin business.

15 I'm shortly going to turn to look at the way in
16 which what happened did affect competitive dynamics in
17 the marketplace and show you some illustrations.

18 Before doing so, a second category of customer was
19 called the CDA customer. You've heard those referred
20 to. They typically are only buying the upstream
21 services from Whistl. As a wholesale service in a way.
22 The customer then made their own arrangement with
23 Royal Mail for the downstream final delivery part. Two
24 contracts.

25 That structure had a particular consequence for this

1 case. Once the Royal Mail price differential comes in,
2 that sort of customer is going to have a new incentive,
3 a sharp one, to deal on the terms of the cheaper plan,
4 the NPP1 plan, if it can do so. Because if one of these
5 customers, banks or charities, wants to place some of
6 its final mile delivery business with the new entrant
7 instead of Royal Mail, that customer then risks failing
8 to meet its own geographic mix requirements on the NPP1
9 plan. It is exposed to surcharges in its own right, or
10 even at a certain point being displaced onto the more
11 expensive, the dearer zonal price plan.

12 Those are two major categories of customer for you
13 to be aware of.

14 After recruiting the upstream and the retail
15 customers, the second critical step in developing your
16 business, if you're someone like Whistl, is to convert
17 these customers. You've seen the result of that in the
18 case of the E.ON case because I took to you the contract
19 after that had happened.

20 In the case of the smaller, regional people, it was
21 often, but not always, the case that the contractual
22 arrangements allowed Whistl automatically to provide
23 their own final mile delivery service if they chose.
24 But for these bigger customers it needed a sales pitch
25 to convince the customers to sign up to use Whistl's

1 service for the final delivery leg in the locations
2 where Whistl had rolled out.

3 How would you do that? Well, those customers would
4 need to be convinced that Whistl's new service, first,
5 was reliable, durable, it was not going to default.

6 Second, they would also have to be convinced that it
7 was worthwhile financially for them to incur what was
8 risky from their point of view, because their mail has
9 got to be delivered to their customers, and which would
10 involve some extra cost in switching a part of their
11 mail requirement away from Royal Mail. This is where
12 I'm going to come back to it.

13 For many of the big customers, what this meant was
14 that Whistl first had to show them that they had
15 achieved or that they were absolutely going to achieve
16 a minimum coverage across the whole country, the whole
17 of the United Kingdom, for the new network, over which
18 a per item discounted cost for the final leg would add
19 up to a significant sum.

20 If enough areas of the country had been covered,
21 that would add up eventually to a big enough cash saving
22 to tempt the big customers to sign up to Whistl's
23 service. You will see in the moment that the figure of
24 25% of national coverage was one of the rule of thumb
25 targets.

1 Now, to make these points good, within file C4A,
2 can I invite you to go to a document we've just looked
3 at briefly, tab 32. It's the PwC due diligence report
4 again. You find that at, as I say, tab 32.

5 They're advising the funders on the market and the
6 sense of this investment. Go in it to slide 56, please.
7 See what they're telling the funder. Slide 56:

8 "Geographical roll-out [at the top] is a key driver
9 of end-to-end conversion, with customers responding
10 positively to improved coverage. Roll-out assumes
11 a catchment of about 7.8 million households by 2017
12 supporting the conversion assumptions."

13 Then, if you look at the figure, and the timeline is
14 from left to right, you'll see that they were hoping to
15 climb up in terms of converting customers in the areas
16 where they'd rolled out 57% in Q1/2014 on the left up to
17 88% in Q4/2017.

18 For the business plan to work, to succeed, the
19 conversion rate of customers was critical. If you have
20 open the facing page, page 57, and you look that, I'm
21 afraid in my copy I've got red boxes round some of this.
22 That may mean that this is confidential. No, I can
23 refer to this. I'm grateful.

24 You'll see, if you are looking at page 57, the top
25 entry is Barclays on the left, and you will see on the

1 right-hand side -- I'll come back to this again -- that
2 one of the things you had to do, if you were going to
3 use the new Whistl service, involved in that case
4 overlabelling.

5 "Overlabelling has been raised as an issue on direct
6 mail. TNT Post to consider the costs of solutions,
7 investment to support the mailing houses."

8 I will develop this, but there was an additional
9 cost which the customer would be concerned about if they
10 were going to be switching over.

11 You'll see here in relation to Barclays that they
12 had different sorts of bulk mail, and there was a phased
13 plan for converting them from Q1/2014, 45%, get them up
14 by the end of that year to 60%.

15 If you turn over the page to 58, the heading says:

16 "At the point of 25% national coverage TNT Post is
17 able to offer a sufficient discount to make it
18 financially attractive and material for customers to
19 convert to the new service."

20 I won't go into it in the interests of time, but the
21 simple maths supporting that is on the right-hand side
22 of the page, where they say if you give them a discount,
23 it's got to be spread over the volume, and this is what
24 matters to the customers.

25 This is what we're dealing with in terms of the

1 logistics and how this all works.

2 There were at least three other significant
3 challenges facing Whistl in the drive to roll out
4 a competing network. The first one is the one that
5 I said I would come back to a moment ago, which is
6 entrusting final delivery to Whistl, in particular
7 localities, could mean the customer incurring
8 significant extra costs unless Whistl absorbs that cost.

9 The issue, sir, is illustrated by the example of the
10 mailing print house Brightsource. Brightsource was
11 a company supportive, very supportive of the plan to
12 develop an alternative, but it was acutely aware in its
13 position of the direct cost implications.

14 For this you need to turn up, I'm afraid, the second
15 bundle, C4B for a moment. We'll come back to C4A. C4B
16 at tab 75.

17 This is one of these mailing houses that produces
18 the letters. You will see it's a single page, the
19 single page is headed "Operations Department Update",
20 and the date of it at the bottom is 18 December 2013.

21 If you look, there's a section in it entitled "TNT
22 end to end". Sir, shall I hang on?

23 THE CHAIRMAN: I'm just having fun here. Yes.

24 MR TURNER: It's tab 75, Brightsource's operations
25 department update. And the heading:

1 "TNT End to End

2 "TNT have been for some time trying to persuade us
3 to use their end to end service. While we support the
4 idea of an alternative to Royal Mail, the operational
5 realities mean it would cost us more to produce each
6 mailing as we would have to get each envelope printed
7 with a different indicia to avoid having each end to end
8 pack overstickered.

9 "TNT intimated they would be willing to pay the
10 difference, but when they realised how much this would
11 cost, around £270 per different outer, 200,000 a year,
12 they weren't so willing to do it for all our clients,
13 but have suggested that would be willing to do it for
14 our top five or six clients as a trial."

15 Sir, does that deal with the point?

16 PROFESSOR ULPH: I just want to be clarified, that for
17 a company like Brightsource, would they already be
18 printing indicia saying delivered by Royal Mail?

19 MR TURNER: Yes.

20 PROFESSOR ULPH: The cost that's involved is in putting on
21 a different type of printing?

22 MR TURNER: Yes. Because they're still using Royal Mail,
23 these customers, across the nation as a whole, but in
24 some localities they've got to adjust the print run to
25 take into account that in those particular areas, those

1 spots, it will now be --

2 PROFESSOR ULPH: Why were you involved if having to do two
3 lots of printing, then, for some mail that goes and gets
4 delivered by Royal Mail, they print it with a Royal Mail
5 indicia, and for other mail that's delivered by TNT,
6 they have to put on a TNT. So that's the additional
7 cost?

8 MR TURNER: Yes.

9 PROFESSOR ULPH: That's helpful.

10 MR TURNER: Let me check that's right. I'll come back to
11 that after the break in case I have said anything that's
12 wrong.

13 The first point is that. The second is this.
14 You've heard that Royal Mail had a major competitive
15 advantage in competing for the customers who couldn't
16 reclaim VAT on the mailing costs, and those were notably
17 banks and charities.

18 Because of its unique position as the designated
19 universal service provider, Royal Mail alone didn't have
20 to charge VAT. To compete successfully for the custom
21 of these people, Whistl had to undertake to underwrite
22 the cost and they called that VAT compensation.

23 If we can put away C4B for a moment and go back to
24 C4A, to that due diligence report at tab 32, and go in
25 it to page 59.

1 Now, this deals with the concept VAT equalisation
2 enables TNT Post end to end offering to become
3 competitive without a discount. There they were hoping
4 still with the court case impending to overcome that
5 hurdle, but otherwise they would need to discount the
6 price. If you look on the right-hand side, that column
7 at number 3, it says:

8 "For mail delivered TNT Post end to end this would
9 be subject to VAT on both elements. TNT Post offsets
10 this by discounting the price effectively removing VAT.
11 This enables TNT Post to be in line with CDA or slight
12 variation on the agency customers."

13 Now, Royal Mail was fully conscious that Whistl
14 needed to dig deep financially to succeed in winning
15 over this important group of customers.

16 Indeed, in the lead-up to its decision to introduce
17 this contested price differential, Royal Mail looked at
18 the market and in a paper they said they hadn't believed
19 that Whistl would be able to capture this business from
20 the banks for this reason, because of the VAT problem.

21 We can look at one key document on that, which is
22 actually relied on in the decision, 4.113, and you'll
23 find it at -- I have to ask you to open up again C4B at
24 tab 62. It's the chief executive's update to the
25 Royal Mail board, tab 62 in B. She gave that update on

1 11 December 2013.

2 If you look in that -- again, I am not sure --
3 I won't read out the shaded figures. Paragraph 6 at the
4 bottom:

5 "Based on the survey data, we believe that TNT could
6 achieve a large market share in areas in which it is
7 operating fairly easily. This could be achieved by
8 banks and large customers who currently use the TNT
9 upstream service ..."

10 Some of them are named:

11 " ... switching to the TNT direct delivery network.
12 Through the Ipsos Mori survey, we have observed that
13 [significant amount] of [that customer]'s mail is
14 already going through the TNT direct delivery network
15 where it operates. This suggests TNT is able to offer
16 a low price to certain customers to gain business.
17 Previously we believed that TNT would not be able to
18 capture traffic from banks due to the VAT exemption for
19 access services but not end to end services."

20 Then over the page, while we are there at 7:

21 "The survey further revealed that TNT is already
22 delivering mail for some small access operators. TNT
23 could also grow its direct delivery market share by
24 winning traffic from additional banks and operators."

25 Two are referred to:

1 "This will derive additional economies of scale,
2 making more areas of the country profitable for them to
3 operate a direct delivery network. We also believe
4 smaller TNT customers have no choice or visibility over
5 whether their mail is delivered by Royal Mail or TNT."

6 Royal Mail saw right into the heart of Whistl's
7 difficult financial situation. It appreciated the
8 daunting investment that Whistl had to make to win over
9 customers in this category to its own delivery service
10 by Royal Mail. It hadn't believed it to be something
11 they would be able to do.

12 Royal Mail also saw with clear eyes that if Whistl's
13 roll-out was to go further, it would achieve economies
14 of scale and they would become stronger. Paragraph 7.

15 This takes me onto the third challenge facing the
16 Whistl roll-out.

17 PROFESSOR ULPH: Can I just ask you one question about that.

18 MR TURNER: Yes.

19 PROFESSOR ULPH: In this paragraph, where it talks about

20 Whistl grow its direct delivery market from winning
21 traffic from additional banks and operators.

22 MR TURNER: I'm sorry?

23 PROFESSOR ULPH: We're talking in that paragraph about if it

24 grows direct delivery market share by winning traffic
25 from additional banks and operators.

1 MR TURNER: Yes.

2 PROFESSOR ULPH: Are these banks and operators that you were
3 already serving or Whistl was already serving and this
4 is a conversion, or are these banks and operators that
5 other access operators might be serving and you're
6 winning them from them?

7 MR TURNER: Sir, I will confirm that over lunch, by my
8 understand is that at least some of them will be access
9 customers who we were already serving.

10 Yes, we'll come back to that after lunch.

11 PROFESSOR ULPH: Thank you.

12 MR TURNER: As I say, this then takes me, their comment
13 about the economies of scale, to the third challenge
14 facing the Whistl roll-out, and this is very important
15 indeed. It was a race against time.

16 All the documents show how important it was to avoid
17 delay in the physical roll-out across the country, to
18 cabin and confine the period in which Whistl was in the
19 investment phase was bleeding freely, suffering ongoing
20 losses.

21 As Mr Holmes emphasised yesterday, and I won't
22 repeat it, this was against the backdrop of falling mail
23 volumes overall in the country. The longer the period
24 of delay, the longer the uncertainty about how quickly
25 or even whether Whistl would grow to scale, in view of

1 Royal Mail's behaviour. The longer all that went on,
2 the more perilous funding became. In this connection,
3 if you have open still that PwC report back in the A
4 bundle, tab 32, you can look, please, at slide 47. This
5 is what the investors are being advised.

6 You have a slide there. I'll just wait for the
7 tribunal to get it open. Tab 32, slide 47. It should
8 be headed:

9 "TNT Post's E2E volumes are predominantly driven by
10 the speed of their physical roll-out and their ability
11 to convert the customers".

12 You have that.

13 Now, turn to the right-hand column, points 3 and 4
14 at the bottom:

15 "TNT Post [3] end to end delivered volumes depended
16 on the physical roll-out being in place within the
17 timescale of the business plan. A delay of a roll-out
18 capability reduces the ability to deliver the planned
19 volume of items end to end. The availability of finance
20 is critical in facilitating scheduled physical roll-out.
21 Investor funding, deal timing. TNT Post's potential E2E
22 volumes are driven by current assumed conversion rates
23 within the model and new revenue streams. Failure to
24 hit these conversion rates reduces the volume of items
25 available to be delivered by TNT Post."

1 Then in bold:

2 "Conversion rate is key."

3 The corrosive power of delay, something which caused
4 delay to the roll-out plan, was a major theme throughout
5 the PwC report.

6 If you go forward in the same document to page 61,
7 you have a heading beginning:

8 "Converted CDA revenues are forecast to increase
9 from 1.7 to £59.7 million on the back of the roll-out".

10 PROFESSOR ULPH: Sorry, which page are we at?

11 MR TURNER: It's 61. It's headed:

12 "Converted CDA revenues are forecast to increase on
13 the back of this roll-out".

14 If you look, please, at the right-hand side, the
15 penultimate bullet, I just draw attention to that:

16 "Delayed end to end roll-out would reduce TNT Post's
17 ability to offset the VAT pricing discount."

18 In other words, they are having to juggle all these
19 factors. They need to get this conversion done. They
20 need to roll out and get the coverage. And it all has
21 to be done within the time forecast in the business
22 plan. They need to do that to get the numbers right.

23 If you turn over the page to page 62, here a point
24 is made that delay in the roll-out was a threat also to
25 another aspect of the plan which was called local sort,

1 you can see from the top left, and this was a specific
2 delivery service for customers who were sending mail
3 within their locality.

4 On slide 62, if you look at the right-hand side, the
5 third bullet, second indent, just above "Key drivers",
6 it says:

7 "Clearly a key determinant of the achievability of
8 the local sort plan is the operational roll-out of E2E
9 as this is a significant driver of customer sign-up."

10 You need the coverage, then you get the customers.
11 If you look at the facing page, which should be
12 slide 63, on the right-hand side at the bottom, under
13 the heading "Key risks":

14 "Delayed roll-out is a key threat to the success of
15 the local sort plan."

16 Sir, I have now covered -- and I'm looking at the
17 clock as I go -- the two first topics.

18 The last topic is, in a sense, the most important,
19 and that will occupy the remainder of my time. That is
20 the ways in which, against what you've now heard from
21 me, Royal Mail's behaviour did affect the competitive
22 process given these mechanisms.

23 I shall deal with that after the short adjournment.
24 You indicated yesterday you would be prepared to start
25 again at 1.45. I don't know if that remains the case.

1 THE CHAIRMAN: If you please. Thank you.

2 (1.00 pm)

3 (The short adjournment)

4 (1.44 pm)

5 MR TURNER: Before the break, two matters came up that

6 I said I would check.

7 The first of those was about the indicia that you
8 put on the mail when you're doing the final leg
9 delivery.

10 What I said was right. Essentially, when it's
11 Whistl doing the final delivery leg, then there has to
12 be the Whistl indicia put on the letter. It involved an
13 extra cost. There are two ways of meeting that. Either
14 Whistl would do it. It had the machinery itself to
15 arrange that. Or the customer, depending on the type of
16 customer, could arrange to do it.

17 Separate question is who pays for this, the extra
18 cost.

19 Secondly, there were two ways in which this
20 happened. Either printing the fresh envelopes or, as
21 you saw from one of the documents that I went to,
22 overlabelling, something that Barclays was worrying
23 about with its direct mail.

24 That is the issue with E2E indicia.

25 It's important to point out, because it arose

1 earlier as well from a question, there's a separate
2 issue in relation to using the ZPP3 plan, pay-as-you-go
3 for sending mail to different zones, one of four zones.
4 There, there was a separate requirement to mark the
5 envelope with the zone that you were sending it to.

6 That's not something that arose under either the
7 NPP1 plan or the APP2 national plan. It was only about
8 ZPP3, but it's an important additional dimension. If
9 I can show you two documents on that, if you have C4B,
10 and go in it to tab 90, you'll have there a Whistl slide
11 deck. This is one where they were considering impact of
12 the Royal Mail price plan proposal, 14 January 2014.

13 If you go in that to the fifth slide, that one is
14 entitled "Zonal Pricing". You'll see from the third
15 bullet, to qualify for zonal pricing, the mail items
16 needed to be marked with an indicia indicating which
17 zone they were destined for, A, B, C or D.

18 That's actually developed -- and I'll give you one
19 other reference quickly -- at C4C, the C bundle, if you
20 open that and go to tab 139. You won't have looked
21 probably at any of these yet ahead of the witnesses
22 coming into the box, but this is one of the strategising
23 slide decks prepared by Whistl in the aftermath of the
24 price differential notification.

25 This one is 23 February 2015, and if you go in that

1 one to page 22 you will have a slide which is marked
2 "Zonal Indicator", I hope.

3 The top of the page says:

4 "Royal Mail Requirements

5 Zonal indicator to appear in the address window or
6 on the envelope to the right of the address. The word
7 zonal to appear on the customer final bag labels for
8 each zonal mailing."

9 Then there's a picture showing how this was to be
10 done.

11 I should stress that this therefore is not an
12 inherent part of the end-to-end indicia, where you have
13 to put on your indicia for the final delivery leg, but
14 if you were to use this plan, for example in what
15 they've been calling arbitrage, where you post some of
16 the mail using this, then again, either the customer or
17 the provider is going to have to meet this additional
18 complication too. It's a slightly separate issue.

19 I hope that answers your question on the first
20 point.

21 PROFESSOR ULPH: That's very helpful.

22 MR TURNER: The second point, sir, that you raised was to
23 ask me something about the document I took you to from
24 Royal Mail, the chief executive's update, in the B file
25 at tab 62. It appears that there I might not have

1 stated the position correctly.

2 This was the chief executive's update to the board
3 and the date is 11 December 2013. In it, I took you to
4 paragraphs 6 and 7.

5 In paragraph 6, this is Royal Mail's perspective,
6 describing the Whistl service and the threat, they
7 referred, in the second sentence of 6, to:

8 "Banks and large customers who currently use the TNT
9 upstream service."

10 Then they named five of them. Who would then be
11 converted to or switch to the TNT direct delivery
12 network.

13 Over the page, this prompted your question, sir,
14 there was a reference to TNT growing its direct delivery
15 market share by winning traffic from additional banks
16 and operators. I think you asked me whether those were
17 already served by Whistl at the upstream level. The
18 answer is no, those ones weren't.

19 PROFESSOR ULPH: Okay.

20 MR TURNER: This would have been part of the plan that if
21 you increase the coverage, you can use the end-to-end
22 service and the discount there to entice these people to
23 use you instead of Royal Mail.

24 They weren't currently operators at that point.

25 PROFESSOR ULPH: Just to be really clear, you are saying

1 that these would be the customers you would win from
2 Royal Mail or from other access operators?

3 MR TURNER: Yes, that's right.

4 PROFESSOR ULPH: Okay.

5 THE CHAIRMAN: It's Royal Mail's view of what you might do?

6 MR TURNER: That's right. This is their perception at the
7 time, quite right.

8 PROFESSOR ULPH: Just to amplify, was it part of the Whistl
9 strategy to try to win customers from other Royal Mail
10 or other access operators?

11 MR TURNER: Yes. This is the point that you raised
12 yesterday, and yes, I'm definitely going to deal with
13 that in a moment, too.

14 PROFESSOR ULPH: Thank you.

15 MR TURNER: But the answer, in short, is they thought about
16 it but because of the competitive situation, which I'm
17 going to unpick a little bit further now, they didn't do
18 it.

19 PROFESSOR ULPH: Okay.

20 MR TURNER: The big one, their arch rival, is called UK
21 Mail, so there might have been a question there whether
22 they should provide the direct delivery services for UK
23 Mail. It's a real question. Ultimately, they didn't,
24 and I'll show you the dynamics.

25 PROFESSOR ULPH: If the quality of service of Whistl was so

1 much higher?

2 MR TURNER: Sorry?

3 PROFESSOR ULPH: If the quality of service offered by Whistl
4 would was so much higher, then that would be an issue.

5 MR TURNER: It could in principle be attractive, yes, even
6 though that party is a competitor of Whistl's at the
7 upstream level, to be a customer of them at the
8 downstream level. But I'll show you in a moment how
9 that was thought about.

10 The third topic is this. The ways in which
11 Royal Mail's behaviour affected the competitive process.

12 I need to begin with a basic reminder of the way
13 that the behaviour had an impact.

14 As a matter of pure mechanics, the price
15 differential didn't just have an impact when operators
16 who were on the NPP1 plan moved on to the APP2 plan,
17 which was more expensive.

18 Take Whistl. Whistl was starting on the APP2 plan,
19 and the introduction of this price differential, as you
20 will see again more clearly in a moment, was going to
21 have an effect of pushing it onto the other plan so as
22 not to be a disadvantage.

23 That's the first effect, pushing it from the plan
24 where it is able to operate in the way that it had
25 predicted for its roll-out onto this plan where it had

1 to meet all of the conditions of the geographic mix.

2 Then, once it's on that cheaper plan, if it chose to
3 roll out beyond a small number of localities, it would
4 incur heavy surcharges progressively, particularly
5 following the refinements which were made in these CCNs
6 to the tolerances applicable before these surcharges
7 bit.

8 To summarise, coming on to NPP1 and then incurring
9 the surcharges, those were themselves the consequence of
10 what Royal Mail did, and that is how Royal Mail itself
11 and Whistl viewed the problem.

12 Now, sir, as you were saying to me a moment ago, you
13 did raise, in the course of, I think, Mr Holmes'
14 submissions yesterday, this question about the market
15 dynamics and whether Whistl would come in and offer its
16 downstream services to another access operator to, say,
17 UK Mail.

18 It is an extremely important question, and the
19 answer, I hope, will help illuminate the way that this
20 industry was working.

21 As I say, the answer is essentially no. I'll take
22 the example of UK Mail. They were rivals at the access
23 operator level. At the retail level of business.

24 Whistl's nascent delivery service was a tool for
25 competing against UK Mail at the level where they went

1 head to head. To show that, it's helpful to go back
2 again to the PwC report which is in C4A at tab 32. If
3 you could open that up again, please, C4A, tab 32 and go
4 in it to page 41.

5 This is how PwC are describing the situation. I'll
6 take it in stages.

7 At the top:

8 "UK Mail uses its parcels and mail network to offer
9 a low margin DSA service ..."

10 That's the access, the upstream service:

11 " ... enabling it to win contracts on price. TNT
12 Post's end-to-end roll-out will remove significant
13 downstream costs from its operations, giving it a price
14 advantage."

15 You see that they're saying the other organisation
16 has got an advantage because it's got economies of scope
17 with another business, the parcels network, giving it an
18 advantage. The idea is that TNT Post's roll-out will
19 give it a compensating advantage to be able to fight
20 better at that upstream level.

21 Looking down at the next point, left-hand column,
22 under the heading "Price Sensitive":

23 "The DSA purchase decision is primarily driven by
24 price, with service, quality and value added extras
25 generally taking secondary importance."

1 You will see just above that that the DSA market is
2 highly competitive and low margin. This is where Whistl
3 and UK Mail are going head to head.

4 Then in the second bullet, first indent, a number of
5 large users of DSA services are now using e-auctions as
6 part of the tender process, referred to the HMRC.

7 Just look to the right, right-hand side in bold:

8 "UK Mail was able to win DSA contracts on price by
9 using its higher margin parcels and courier businesses
10 to subsidise the less profitable DSA business."

11 There they are using their separate business to get
12 the advantage, and underneath the table:

13 "Market commentary suggests that UK Mail has been
14 winning DSA contracts on price. UK Mail is able to do
15 this as its DSA business is effectively subsidised by
16 the more profitable parcels and courier business. These
17 are able to use DSA infrastructure and operations. UK
18 Mail is therefore able to continue to win contracts at
19 low margin with the DSA infrastructure supporting its
20 more profitable operations. We expect this pricing
21 strategy to continue."

22 Then at the bottom of the page, on the left,
23 "Outlook and TNT Post positioning," looking between the
24 two red boxes:

25 "The E2E roll-out provides TNT Post (Whistl) with

1 the opportunity to cut out Royal Mail downstream costs
2 and therefore compete with and potentially undercut UK
3 Mail on price."

4 It's very interesting what one gathers from it is
5 that the competitive process, which occurs between the
6 operators at the retail level, was very much affected by
7 the wholesale cost of the downstream delivery leg, and,
8 crucially, Whistl, you see from this, is hoping to
9 compete for the customers on the basis that its
10 downstream delivery service is lean and efficient and
11 lower cost than the delivery service which UK Mail can
12 offer. So you see there the interplay between the two
13 levels and the importance of being able to offer
14 a downstream service at a lean cost.

15 By the conduct which was sanctioned in this case,
16 Royal Mail was engineering a situation where this could
17 not happen, and it knew it.

18 Please remember what Royal Mail said in the slide
19 presentation at tab 25, which we'll go back to briefly,
20 if I may, to complete this point. Mr Holmes took you to
21 this, it's entitled "Proposed actions on access
22 contracts to protect the USO".

23 In it, on page 25, you can now return with fresh
24 eyes to the sentences that Mr Holmes read to you
25 yesterday at the foot of the page. There they were

1 looking at the effect of what they were planning on
2 TNT/Whistl. Likelihood of complaint, high as they would
3 need to switch to the PPl plan to continue to compete
4 with Royal Mail. UK Mail, I'm sorry. But that would
5 then dent their direct delivery ambitions. Would they
6 switch plans? Probably yes in the short term as they
7 wouldn't incur any surcharges on PPl.

8 That explains why they were right to have approached
9 it in that way. We say the anti-competitive effect, as
10 well as the intent, was plain.

11 If we can stay for a moment with this presentation
12 bit Royal Mail, I want to get two more things out of it
13 before we leave it.

14 The first is to underline to you this important
15 point. The price differential wasn't simply about
16 higher prices charged by Royal Mail on the one hand to
17 Whistl on the other at the wholesale level which harm
18 Whistl's trading position at the retail level. It's not
19 as simple as that because there's another huge dimension
20 to this case. You are dealing with a marketwide
21 measure. This is not a measure that just raises
22 Whistl's costs directly. It works its mischief by
23 making the NPP1 plan, the cheaper plan, sticky for many
24 market participants, Whistl's customers and potential
25 customers.

1 Notably you have the CDA customers, the ones who
2 directly are making their own contractual arrangements
3 for the final delivery leg, and they're going to come up
4 sharp if suddenly, by using Whistl for any amount of
5 their work, their costs are going to go up. But the
6 stickiness problem isn't just restricted to them and the
7 impact of this behaviour on them, because you have now
8 also seen that in the case of big customers like E.ON,
9 there had to be an express choice made when you've
10 already got them as the retail customer to persuade them
11 to switch over to Whistl's new emerging service.

12 Because these are marketwide effects, in order for
13 Whistl to preserve its existing business relationships
14 with the customers, or to hope to capture new customers
15 for the ongoing roll-out, Whistl would now need to give
16 them, because of the impact on them, additional
17 reassurances, additional financial guarantees, over what
18 it had previously been doing. It would need to dig
19 deeper into its own pockets, or a funder, to finance the
20 losses ahead for the roll-out.

21 You have open in front of you, then, this
22 presentation at tab 25. This is a presentation in
23 which, to back up what I'm saying, Royal Mail goes
24 through the different customers and says, now, what is
25 the impact going to be on them and their incentives?

1 It's not just us against Whistl. How will these other
2 players in the market behave if we introduce this new
3 measure?

4 If you go to page 13, you'll see the start of an
5 annex titled: "Detailed customer analysis." Then the
6 following tabs, they run through some of the big
7 customers one by one, and say, well, if we do this, how
8 are their incentives going to be affected by this?

9 A lot of this remains, for the time being, in green
10 so that I can't refer to it, but if you go to page 17,
11 you can read who the customer is. You have got a large
12 bank there. If you look at the top row under the bold,
13 PP1, six failed SSCs to five, in other words in England
14 and Wales they were going to tighten the tolerance so
15 that you now only needed to fail five before you started
16 to incur surcharges, rather than the previous position
17 of six. The comment for that particular customer is
18 that they were currently failing five. They were at the
19 limit already. At the limit --

20 THE CHAIRMAN: That's a comment you cannot refer to. I know
21 this is rather ludicrous, but that's a comment you can't
22 refer to because it's in green.

23 MR TURNER: I'm not relating it to a particular --

24 THE CHAIRMAN: No. This is getting a bit silly, isn't it?

25 MR BEARD: Well, as I say, I don't have any difficulty.

1 Mr Turner is very sensibly anonymised who he's talking
2 about here, and in those circumstances I'm not sure that
3 there is a great difficulty.

4 If there are any figures that are such that they
5 might specifically identify, then I think we shouldn't
6 read those out. Each of these documents, where there
7 have been references where there's green on them, those
8 behind me will go away and do a double-check on them.

9 THE CHAIRMAN: You can carry on, I think.

10 MR TURNER: I'm grateful.

11 The comment is that in looking at what impact, what
12 they do is going to have, you have here a large customer
13 who is right at the limit before the surcharges would
14 bite, and provided that they stay at that limit, and
15 some of their business doesn't go elsewhere, they will
16 remain compliant with the cheapest plan.

17 Go forward a page to page 18, another large bank.
18 The same point applies.

19 Go back to page 16. Here you have a particular
20 customer, I don't know whether I can refer to who that
21 is, but we will be returning to that particular
22 customer.

23 At this juncture, can I please just ask you to note
24 on page 16 the name of that particular person and at the
25 top, current contract, that that one was operating both

1 under PP1, the cheaper plan, and posting some of its
2 mail on the zonal plan, ZPP3.

3 PROFESSOR ULPH: Could I just ask another question of
4 clarification.

5 For each of these customers, the bottom line in the
6 list of possible actions is a one-plan only rule. Is
7 that referring to the idea of eliminating arbitrage?

8 MR TURNER: Yes, it was. Yes, it was, so that you would be
9 only be able to do it through the one plan.

10 PROFESSOR ULPH: Thank you.

11 MR TURNER: That's, at any rate, how we understand this.

12 Royal Mail will say if that's not the case.

13 If we turn back in it to page 4 in this same
14 document, this is a page again Mr Holmes took you to.
15 I want to make another point on the right-hand column,
16 the fourth bullet. It's under a heading "Objective
17 Justification" and you will see it says:

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

20 What this is saying is that you have people who are
21 purely regional operators, but they can all sign up to
22 a national consolidator to access the cheaper NPP1 price
23 plan, and then they are also, as it were, locked into
24 this. This is why I refer to this as a marketwide
25 effect. You shouldn't think of it only as a bilateral

1 measure between Royal Mail and Whistl. It's a form of
2 fly paper. It is the stickiness that will hold
3 everybody on NPP1 that is part of the competitive
4 intrusion from this measure.

5 THE CHAIRMAN: But not kill them, hopefully.

6 MR TURNER: Not while they remain stuck, no.

7 THE CHAIRMAN: That's what fly paper does.

8 MR TURNER: Now, the other thing that I want to get out of
9 this document is that it sheds light on Royal Mail's
10 view about the correct interpretation of its own measure
11 as well as the impact it was going to have, because
12 Royal Mail considered that it was only if direct
13 delivery operations like Whistl's remained small scale,
14 which means five or less SSCs under the new arrangement,
15 that they would be compatible with the new plan.

16 If you have slide 4 still in front of you we were
17 looking at it a moment ago, the third bullet on the
18 right-hand side says in the last sentence:

19 "A small scale DD ..."

20 Which means direct delivery operation:

21 " ... five or less SSCs could be supported on PP1
22 and any wider roll-out would be sure to trigger Ofcom
23 intervention in any case."

24 Now, a separate point from the one Mr Holmes made is
25 that what was envisaged here by Royal Mail, when they

1 were thinking about the impact of their measure, was
2 that you would be on this if you were five or less SSCs
3 as a roll-out. That supports the point that
4 Royal Mail's current protestations in these proceedings
5 that a rival could, in fact, have rolled out as far as
6 31 SSCs under this price differential plan are
7 unconvincing.

8 The contemporaneous documents show you the reality.
9 It also supports Whistl's understanding at the time and
10 the finding which was made about it in the decision --
11 to give you the reference, 7.53(c) -- that the
12 eligibility requirements for this cheap plan could not
13 be met in a situation where Whistl applies to join this
14 plan while also declaring an intention to roll out
15 a competing delivery network beyond five SSCs.

16 THE CHAIRMAN: What sort of Ofcom intervention does this
17 paper mean when it says "bound to trigger"?

18 MR TURNER: Well, as with Mr Holmes, we understand that to
19 mean that if Ofcom begins an investigation on the
20 competition complaint --

21 THE CHAIRMAN: Unless it means they would come until to help
22 rescue the --

23 MR HOLMES: That's my understanding, sir. It's not
24 a competition complaint. It's an intervention for the
25 USO. That's my understanding.

1 MR TURNER: That may be. It may be that Royal Mail will
2 clarify that.

3 Now, Whistl was in the position, you'll recall,
4 having rolled out to five or what became four SSCs at
5 the material time, and is faced with the question, what
6 can we do?

7 They need to present to Royal Mail under the new
8 arrangements two-year forecasts of their mailing
9 intentions for every SSC. That's part of the new
10 structure. Just to give the reference, you will see it
11 in CCN 3 at paragraph 2.1. You have a copy in the B
12 bundle at tab 85.

13 But part of what you needed to do was to present
14 a forecast for two years, and you ask yourself, how
15 could Whistl at that point possibly have done that,
16 including producing a roll-out plan, while also
17 demonstrating to Royal Mail, to their reasonable
18 satisfaction, that they had a reasonable likelihood of
19 meeting the national spread benchmark? They were not
20 compatible.

21 That's how we saw it. That's generally how the
22 market saw it, and Royal Mail's position in these
23 proceedings that Whistl could have stayed on this plan,
24 joined it and stayed on it, even to roll out the 13 SSCs
25 without arbitrage, just rings hollow.

1 In the decision, Ofcom also found that Royal Mail
2 retained considerable subjective discretion, both on who
3 it might agree was actually eligible to join the plan,
4 and secondly, whether or not they would need to pay
5 surcharges. Even if there was a very significant
6 failure of the plan benchmarks. In the decision that's
7 footnote 857.

8 Ofcom's finding on that, too, is revealed by this
9 document. If you look at slide 12, the heading to this
10 one identifies the perceived problem and the objective
11 that Royal Mail was setting itself.

12 "An access operator on NPP2 would currently be able
13 to roll out a direct delivery network on a scale that
14 jeopardise the economics of the USO while still paying
15 the average uniform national access price."

16 Their aim was to curb the roll-out of a direct
17 delivery network on such a significant scale.

18 If you look at the first column on this page, the
19 last bullet:

20 "A reasonable endeavour allows room to not surcharge
21 a customer who fails the tolerances due to legitimate
22 but unusually variable volumes."

23 And competing was not, one would imagine,
24 a legitimate basis for forgiving a party, and therefore
25 waiving surcharges.

1 I would now like to turn to what actually did
2 transpire in the marketplace.

3 Analytically, there are three distinct strands of
4 competitive impacts to be disentangled. First, there's
5 the immediate impact of this price differential
6 notification on Whistl's market behaviour itself. How
7 did Whistl respond to this? How was its market
8 behaviour influenced? There's an immediate competitive
9 impact.

10 Second, there's the impact which this notification
11 produces on the customers, including -- I'll show you
12 Citipost and others, and on potential customers. This
13 is the marketwide measure point, because it deters them
14 from placing any significant amount of their business
15 with Whistl's emerging service unless they can be given
16 financial guarantees and assurances to make them
17 satisfied that this is going to stand up in the service
18 it's rolling out.

19 I have examined each of those two or referred to how
20 they work. These two impacts, the one on Whistl and the
21 one on the customers, are linked, because the impact on
22 customers feeds back to aggravate the impact on Whistl
23 and to disrupt Whistl's capacity to implement a roll-out
24 which is time critical.

25 Those two impacts feed on each other, and there is

1 a third to consider as well. This is the adverse impact
2 produced by Royal Mail's conduct on the willingness of
3 the prospective funder, LDC, to keep going and finance
4 the roll-out.

5 Now, Royal Mail's notification to the market in this
6 regard had a dual aspect. The first aspect is that what
7 it did was identify a particular level at which there
8 was going to be a price differential between services to
9 the customers, the ones who undertook to replicate
10 Royal Mail's National Geographic mix, and the services
11 for customers who did not.

12 Royal Mail in its appeal is focusing on that aspect
13 of what it did alone, as if it were the whole of the
14 matter, but in the real world there was a second aspect
15 to what they did, too, in their notification.

16 Their notification set a principle that Royal Mail
17 was going to operate a price differential to its
18 customers along those lines. Royal Mail's behaviour was
19 a signal to the market of how Royal Mail intended to
20 take commercial steps to protect the USO, and protecting
21 the USO is the flip side in this market of saying to
22 clip the wings of direct delivery competition.

23 If we go back again in bundle A, C4A, tab 35, the
24 options for protecting the USO, go in that to page 9,
25 this is the nature and effect of the measure that they

1 took.

2 The slide is headed: "Evaluation of proposed
3 solution for April 2014". First bullet:

4 "Our proposal is to combine a series of actions each
5 of which has a rational commercial and business
6 justification. Taken together, the combined package of
7 actions will address most of the immediate problems with
8 access contracts and send a clear signal to the market
9 that we will compete effectively to protect the USO."

10 I say that when you are assessing Royal Mail's case
11 and their legal submissions, you must have at the
12 forefront of your mind that there are these two aspects
13 to it. There was a particular price and then there was
14 the effect and content of what they say at a more
15 general principled level. They are telling the
16 market: this is what we will do.

17 All three of these different but interlinked impacts
18 on competition in the marketplace are readily apparent
19 from the documents to which I now turn again. The
20 notification of the price differentials in January 2014
21 first was the culmination of behaviour which had started
22 already with Royal Mail signalling to the market the
23 previous month it was going to take this step.

24 I'm going to come back to this later, but the
25 decision itself, in various paragraphs we have referred

1 to in paragraph 58 of our skeleton, treated the
2 pre-January signalling as part of the same overall
3 conduct which culminated in what was done on 10 January.

4 In that regard, the first port of call is the leak
5 by Royal Mail of its intentions which happened at the
6 end of November 2013 to UK Mail, Whistl's main rival in
7 the retail business.

8 If you go back to the A file, C4A, and go to tab 45,
9 a document Mr Holmes has already shown you, he's read
10 this, so I don't need to look at it in much detail
11 again, but if you have that, tab 45, it's an email sent
12 by a Whistl executive to Royal Mail, and they're
13 pointing out their customers are being approached now by
14 one of their key competitors, saying that there will be
15 an differential price come April 2014 in the contract
16 rates.

17 Market intelligence had already, therefore,
18 necessarily been leaked, and was being used by the main
19 competitor. That was then shortly followed by the
20 formal email notification from Royal Mail to the market
21 as a whole, which is at tab 47, hurriedly rushed out,
22 6 December.

23 Then at tab 49, which I don't think you've seen, is
24 the reaction contained in the email from the Whistl
25 chief executive, Mr Wells, to PostNL, the parent

1 company, the next day, 7 December 2013.

2 He says halfway down the page:

3 "Here is the summary of the call Saturday morning
4 that was had with the Ofcom senior official. I spoke
5 Friday evening to Stuart McIntosh Board Director. They
6 are taking Royal Mail attempts to differentiate price,
7 the access contract, very seriously."

8 He says three lines up from the end:

9 "While the attempt to derail end to end is
10 predictable, the timing is awful."

11 Then we need to go, please, into the C4B file
12 chronologically ordered. Tab 54.

13 This is an internal email exchange on 9 December in
14 the parent company, PostNL. The tribunal is interested
15 in competitive impacts. You'll see from this,
16 9 December:

17 "We've relooked at the figures and tried to delay
18 some of the sign-offs to 15 January."

19 Then they're listed.

20 "This will delay our commitment."

21 Because the parent is also putting in money to the
22 15 January. The point is that commitments are already
23 being scaled back. So you have an effect on E2E
24 competition, the progress of the roll-out instantly.
25 You have tangible defensive behaviour attributable

1 solely to the price differential. At this point, this
2 is the only matter that is known about.

3 Then, if you turn to the next tab, 55, you have
4 Whistl's presentation to Ofcom, so in they go, on 9
5 December, and this is relied on in the decision, for
6 example 4.147.

7 If you go in this to page 10, Royal Mail price
8 differential. The second tab says:

9 "Rumour -- now announcement -- is having immediate
10 market impact (BBC and 3 Mobile tenders) ..."

11 I think that's 3 Mobile company:

12 "Need to underwrite differential in upstream
13 prices."

14 The point I made. They need to try and combat this
15 by underwriting the difference.

16 Then the fifth bullet town, the penultimate one:

17 "Large CDA customers on National (RBS, LTSB, HMRC)
18 or old contract (Barclays) need further compensation to
19 convert to TNT Post delivery."

20 You see from that, again, the market impacts already
21 biting.

22 Now, if we can please go to the Whistl bundle, put
23 this away for the moment, and look in this at tab 9.

24 I think that's right. Whistl put in its statement
25 of intervention, its pleadings, and behind it there were

1 lots of exhibits. You should have a whole series of
2 tabs. Tab 9 should show page 400.

3 THE CHAIRMAN: The problem is mechanical, not intellectual.

4 Yes.

5 MR TURNER: Towards the bottom of this page, again the names
6 are redacted, but you have an email written by someone
7 who you'll see is at UK Mail, the company, to somebody
8 who is a customer, you can see further up the page, and
9 it says after the greeting:

10 "I wanted to share with you an update UK Mail have
11 received from Royal Mail wholesale."

12 They have been told:

13 "Regarding changes to the access contracts this
14 April next year [2014]. Currently the two contract
15 options both on the same access charges. However, going
16 forward from April 2014, Royal Mail wholesale confirms
17 there will be a price differential introduced between
18 the two in favour of price plan 1.

19 To confirm, UK Mail trade against price plan 1
20 whereas TNT trade against price plan 2. This means we
21 will see a difference in the access costs between the
22 two carriers from April onwards. At this stage, we
23 don't know what the pricing differential will be.
24 However, expect to gain knowledge over the next couple
25 of weeks."

1 Then:

2 "In addition, Royal Mail wholesale have also issued
3 a communication recently advising that they will be
4 taking action to close the loop which currently allows
5 zonal arbitrage. I know that by working in this manner
6 TNT have gained a competitive advantage. Therefore, the
7 removal of this will definitely put us in a more
8 competitive position."

9 A couple of things to say about this. The first is
10 that, to add to what Mr Holmes said about the intention
11 of Royal Mail to close down arbitrage as a possibility,
12 or the two-plan approach, that was clearly market news.

13 Secondly, you'll have seen, or you will see, it's
14 part of our case, we weren't, in fact, doing arbitrage
15 or whatever this competitor was saying, and that will be
16 something that we will come to.

17 My main purpose now is to show you, though, what
18 already was happening before 10 January 2014.

19 Now, if you keep this bundle with you for a moment,
20 I'm going to go back to the overflow bundle. I would
21 like you to go forward to see what happened when the
22 specific price notification itself came on
23 10 January 2014 so that you can see some customer
24 reactions to that notification in the immediately
25 following days.

1 If you go in this to tab 6, you have a letter that
2 was attached to Whistl's complaint to Ofcom originally.
3 For some reason, unfortunately it hadn't found its way
4 into the bundle apart from this, but it was there right
5 at the outset.

6 This is a letter written on 22 January 2014. So
7 that's just over a week after the notification of the
8 new arrangements.

9 Despite the markings which you may have on your
10 copy, I'm told it's only the name of the individual
11 signing it which is to be treated as confidential.

12 This is from a customer which acted as a form of
13 intermediary called Citipost. Citipost had its own NPPI
14 plan with the Royal Mail, and they write this:

15 "It is with regret that I have to inform you that
16 Citipost are no longer in a position to use the
17 end-to-end service due to the changes with our
18 Royal Mail wholesale access letters contract.

19 The impact of the changes, should we continue to use
20 the end-to-end service, puts Citipost at risk of failing
21 to achieve our forecast as we need to show details on
22 an SSC specific basis and therefore could be subject to
23 a surcharge and have our national price plan 1 contract
24 terminated.

25 Due to the change in Royal Mail ..."

1 The next paragraph is about zonal pricing:

2 "Due to the change in the wholesale tariff of
3 London, we would also require a reduction on the
4 end-to-end charges of at least 25% against APP2 for
5 those SSC areas."

6 Finally, to wrap up:

7 "As you will appreciate, whilst we have been willing
8 to use the E2E as an option, the changes to the RMW
9 contract could expose Citipost to additional charges and
10 termination of our contract.

11 If you wish to discuss further or require any
12 clarification, please contact me."

13 Citipost are concerned if they continue using the
14 Whistl service, they'll pay a heavy price on their own
15 mail agreement with the Royal Mail.

16 That, in itself, was already a competitive impact
17 from Royal Mail's behaviour on 10 January.

18 It had been, as you have seen, foreseen by
19 Royal Mail itself. This sort of thing places obvious
20 pressure on Whistl and the funders. It shows very well
21 how the stakes are raised for a new entrant in direct
22 delivery.

23 Now, in fact, the suspension of the CCNs, which
24 followed Ofcom commencing the investigation, which was,
25 I think, 21 February, led to Citipost continuing with

1 Whistl on a wait and see basis. But, as you know,
2 Royal Mail did not withdraw the price differential. It
3 wanted to maintain it. The situation disrupted all
4 Whistl's business dealings with its customers and
5 potential customers in the manner which has been spoken
6 to, and will be spoken to in court, by our witnesses,
7 Mr Wells and Mr Polglass, at what was a critical
8 juncture of the business development.

9 For your note, this is most extensively described in
10 Mr Polglass' statement at paragraphs 28 to 32. I won't
11 go there now.

12 Now, in parallel with that, the news of the price
13 differentials also led to Whistl coming under renewed
14 competitive attack from the competitor, UK Mail. So
15 you've already seen how they came in with the document
16 I showed you from December the previous year. But UK
17 Mail then renewed its attack and it began aggressively
18 approaching Whistl's customers using price differential
19 as a tool.

20 If you have still the Whistl bundle near, please go
21 in it to tab 11.

22 In that, after the formal page, you should have
23 page 429. Now, you will see that this is an email,
24 again from UK Mail, and it's 20 January 2014.
25 Therefore, just over a week after the notifications by

1 Royal Mail. Who it was sent to has been anonymised, but
2 it was sent to a company which was using, as I'll show
3 you in a moment, an intermediary called PhD for its
4 mailing requirements. PhD was one of Whistl's
5 customers.

6 UK Mail tells the customer that:

7 "Because Whistl is operating on the APP2 price plan,
8 this is now going to mean higher costs being paid by the
9 customer."

10 You can read that for yourself, but to cut to the
11 quick, at the foot of the page they say:

12 "Based on your annual volume of approximately
13 8 million packs, by using UK Mail, instead of TNT Post,
14 you will save just under £20,000 a year on the access
15 costs alone. I have attached a quick comparison for you
16 to demonstrate this."

17 That matter was escalated by the recipient to Whistl
18 as you see from the top of that page. There's an email
19 at the top, "Care to explain this urgently, please."

20 The follow-up to it is in the overflow bundle at
21 tab 7. I'm told that the only thing that is
22 confidential in here again is the names, which helps.
23 But if you turn in to the last page, it begins at the
24 foot of the previous page with an email beginning:

25 "Dear [X]

1 As I believe you've already discussed, you have some
2 concerns about the price you may pay going forward."

3 You then see a reassurance:

4 "Please be reassured that TNT Post won't
5 disadvantage their customers."

6 If you go over the page:

7 "We will do what is right for our customers."

8 Then travelling through the email string going up,
9 the customer says no, I need more than a reassurance,
10 and they want clarity, and the clarity is given, if you
11 look at the first page, eventually, 5 February 2014:

12 "I appreciate the need for clarity on this and
13 confirm the following."

14 Then there are two companies concerned, the
15 intermediary and then the ultimate customer:

16 " ... will not be commercially disadvantaged as a
17 result of the proposed changes, which means that if
18 price plan 1 is the most competitive access tariff
19 available at the time of price increase, this will be
20 the tariff you and they will be on."

21 They have to give the price assurance.

22 Whistl needed to fight the fire by providing the
23 formal reassurance that it would take the financial hit
24 and the customer would receive the lowest Royal Mail
25 price.

1 Then, finally, to complete the examples, if you go
2 back to the Whistl bundle, the exhibits from the
3 statement of intervention. Go in it to tab 12, you have
4 an email dated 23 January 2014, almost two weeks after
5 the notification. This is from a company called
6 Laithwaites Wines, and the email is addressed to Whistl.
7 It's following an approach to them by a rival mail
8 operator who may or may not have been UK Mail again.

9 It says:

10 "Further to our conversation, I'm writing to express
11 my concern about the new pricing structure from
12 Royal Mail for access agreements. It doesn't seem
13 justifiable to me that there should be two price points
14 for providing what is effectively the same service for
15 their DSA clients."

16 Writes the customer:

17 "I believe the competition is essential to the
18 postal market in the UK in the face of increasing
19 competition from other media, which is why we have
20 always supported TNT in their bid to provide a true end
21 to end alternative.

22 We also believe the current service we experience
23 from TNT is superior to other suppliers in the market
24 for downstream access products. I have been already
25 been approached by a DSA operator who is on the

1 alternative price plan to yourselves offering
2 preferential rates to those supposedly received from
3 yourselves when the new prices come into play in
4 April 2014. As previously mentioned, we are keen to
5 support TNT and their ambitions to open up the market to
6 true competition and I don't feel it's right that we
7 should have to switch supplier to obtain the best DSA
8 rates available.

9 I look forward to discussing with you further."

10 Here again, you have a small customer, very clearly
11 expressing the customer's perspective --

12 THE CHAIRMAN: It's not competition, but they didn't want to
13 switch.

14 MR TURNER: Well, they appreciate the competition and they
15 don't want to see the competition snuffed out. They
16 don't want to see the fly on the fly paper die.

17 THE CHAIRMAN: They want TNT to reduce its price.

18 MR TURNER: They wanted TNT to reduce its price as a result
19 of this new measure, that's absolutely right.

20 Then if we go on, if you've got the overflow again,
21 and go to tab 8, this is a slightly more complete
22 version of what was already in the statement of
23 intervention bundle.

24 We're now a little way beyond the January 2014
25 impact. We're 18 February 2014. So we're a month after

1 the price notifications, but still a couple of days
2 before Ofcom's suspension, which was 21 February.

3 This shows, again, UK Mail still waging its
4 competitive campaign by deploying Royal Mail's
5 notification of the price differential. We'll see at
6 the foot of the page UK Mail writing to this customer,
7 which is a customer called Joe Brown's, a clothing
8 outfit, and it's a similar letter to the one you've seen
9 before. They want to discuss the new access pricing
10 structure recently announced by Royal Mail wholesale.
11 Referring to the different price plans, and on this
12 occasion quantifying the impact if they stay with TNT,
13 which they think is going to be necessary because of
14 TNT's profile and what it intends to do, as being
15 a difference of just over £27,000 on the costs for that
16 customer alone, and there's an analysis at the back.

17 Again, this needs the specific customer reassurance
18 from Whistl. We do not see this ourselves as meeting
19 competition. We see this as repairing the consequences
20 of an anti-competitive measure.

21 To summarise, therefore, all of what I have shown
22 you is intended to illustrate the disruption in the
23 marketplace which did take place as a direct foreseen
24 consequence of the notification of the price
25 differential.

1 What Royal Mail did impeded Whistl's ability to
2 progress the roll-out in line with its business plan and
3 in line with the PwC due diligence report. They
4 achieved nothing like the conversion rates that had been
5 foreseen.

6 The final area on the facts that I then wish to
7 cover briefly was the impact of this, too, on the
8 investor, on LDC.

9 Mr Holmes took you yesterday to the internal
10 Royal Mail document on 9 January 2014, the day before
11 they made the announcement, which is at C4B, tab 84. He
12 referred to that again today as a key document for the
13 Ofcom case. That's the internal document in which, on
14 the second page --

15 PROFESSOR ULPH: Which tab are we at?

16 MR TURNER: I'm sorry, tab 84. It was the day before they
17 did it, 9 January. Page 2, towards the bottom, they
18 say:

19 "We think TNT's claims about the harm they will
20 suffer are exaggerated, but it's possible that they may
21 find it difficult to attract new customers given the
22 market uncertainty that may be created by their
23 complaint."

24 Pausing there, their complaint about our actions:

25 "It is also possible that TNT's financing may be

1 conditional on there being no regulatory or competition
2 law dispute ongoing."

3 Now, Royal Mail was aware, as you've seen from
4 several documents, of Whistl's need for financing when
5 it took its action and here Royal Mail was accurate in
6 its assessment of the impact which the notification and
7 the competition investigation which it inevitably
8 triggered was apt to have in stymieing the investment.

9 If you have the C4B bundle still in front of you, go
10 in it to tab 100. Again, the names are redacted, but
11 I can tell you who the companies concerned are.

12 On the bottom half of this page is an email from the
13 parent, PostNL, to the investors. You will see in it:

14 "As agreed last Friday we would send you the final
15 version of the two scenarios for your review."

16 Then there's a scenario 4 and a scenario 5 which
17 refer to roll-outs in certain local locations. They're
18 Harrow and Liverpool which did go ahead, and then one in
19 Edinburgh which was at that point put back.

20 They're talking, then, about the fact that they have
21 already taken action to suspend their roll-out plan in
22 certain localities and put things back.

23 In the event, Edinburgh, which is mentioned here,
24 was not rolled out even in the fourth quarter of 2014 as
25 per the third bullet. The timing of the roll-out, as

1 you see from the end of the second indent, was meant to
2 follow a hoped for positive decision by Ofcom in
3 August 2014 which didn't come. The extensive nature of
4 the disruption to what had been a carefully planned
5 roll-out sequence was extensive.

6 If you keep this document open for a moment, I would
7 invite you, if you would, to go to the decision because
8 at the internal numbering of the decision, at page 111,
9 you have a very handy description in a table of the
10 immediate roll-out sequence that they'd hoped to follow,
11 called the base case, and the delay in certain areas
12 which then occurred because of their suspensions.

13 You will see there Oldham, Bolton and Stockton, the
14 first of those, minus six meant that they were going to
15 bring that forward. You will see from the paragraph
16 underneath this table actually that was then postponed,
17 too. Then you will see Edinburgh put back 12 months,
18 East London put back 12 months, Birmingham put back nine
19 months and so forth. So there was a domino effect on
20 the roll-out.

21 Then, if we return to that email and see what is
22 happening there, this is a conversation between the
23 parent and the investors, and the parent is referring to
24 these changes that they're making, and they ask, under
25 the various indents towards the foot of that page:

1 "We very much appreciate your feedback on these two
2 scenarios and whether you're willing to complete
3 immediately following Ofcom's ruling expected at
4 mid-August. Under the same conditions as had been
5 agreed in the agreement signed December 13, 2013, if we
6 proceed with either scenarios 4 or 5."

7 Pausing there, this is a reference to the share
8 purchase agreement, the investment agreement, which, as
9 at, as they say, December 2013, the investors had signed
10 and they were poised to complete on. That's why this
11 timing was, as Mr Wells said in the email I showed you,
12 awful.

13 If you turn to the internal email of the investors,
14 which is at the top of the page, which followed that
15 exchange, they refer there to a MAC clause which they
16 wanted to look at, material adverse change. This will
17 be dealt with again probably in more detail with the
18 witnesses, but the point is that although the investors
19 had already signed a deal, in the immediate aftermath of
20 the pre-announcement by Royal Mail of the price
21 differential, and although they were poised to complete,
22 they did take pains to include a get-out clause at that
23 time, this material adverse change clause.

24 They did that precisely because, and only because,
25 of the prospect of the price differential which was all

1 that was known about in December. It's a clause
2 intended to allow the investors to pull out if the
3 threat of this adverse condition hadn't been lifted by
4 a longstop date.

5 I have only got a few more documents.

6 If you go forward to tab 101, the investors are
7 writing now on 7 February 2014. At the foot of the
8 page, they say after the thank you paragraph:

9 "Our strong preference is for scenario of 5(b) of
10 your two presented scenarios which is the closer case to
11 what we envisaged from the original model. We concur we
12 should keep the deal the same as what was agreed in the
13 share purchase agreement. This would mean completing
14 post the Ofcom ruling once we have clear visibility on
15 the ruling implications."

16 This mattered to them.

17 "We would also like to understand the timing of
18 impact of any Royal Mail appeal. Perhaps [X] is best
19 placed to address this situation."

20 This shows you the importance in the investors' mind
21 of the impact of delay on their investment.

22 Then, if you go forward to 107, you have an internal
23 paper from the investors, LDC, although the date is not
24 written on it, it is 22 March, if you want to note it,
25 2014.

1 They say in the first part:

2 "TNT Update Paper

3 We exchanged on TNT on 13 December 2013 subject to
4 a number of conditions. The two key clauses, material
5 adverse changes, needed to be satisfied were regulatory
6 approval. Complete."

7 That's the merger being allowed:

8 "And Royal Mail group pricing resolution not
9 complete. Royal Mail pricing. One of the key risks
10 identified in the final investment report was
11 Royal Mail's competitive reaction and strategic response
12 to TNT's plans. We concluded there were limited options
13 at their disposal of conventional means of competition
14 and effectively Royal Mail and TNT would fight a cold
15 war over their positioning in the market.

16 Our agreement included a MAC clause that required
17 Royal Mail annual price rises not to have material and
18 adverse effect on the outlook for the new company
19 business plan. Royal Mail announced a price rise of
20 about 3% on 10 January 2014, effective 1 April, in line
21 expectations."

22 Then this:

23 "However, they also announced a gerrymandering of
24 the pricing methodology which, to summarise the
25 complicated proposal, would render the end of E2E

1 competition in the UK by TNT. If accepted, this would
2 result in TNT, or any other new entrant, being on a
3 price plan where the differential means they could not
4 be profitable competing with RMG."

5 So you see them focusing on the differential as the
6 matter influencing them.

7 Now, ultimately, the investors, as we know,
8 withdrew, and the deal collapsed.

9 The final document is this. Mr Beard took you to
10 the letter at the end of his address, written by LDC to
11 Ofcom to explain what had happened. That was in the C
12 bundle, C4C, if you pick that up again, at tab 153.
13 Right at the back.

14 Now, Mr Beard suggested that the concern of the
15 investors was at this point that reason for finally
16 withdrawing was only with the zonal tilt, and he says
17 the zonal tilt is not the subject matter of this appeal,
18 although I must stress Whistl considers that this, too,
19 was unlawful, whatever Ofcom chose to focus on for its
20 decision.

21 But the part of the letter which he did not read is
22 also important. If you go in it to the second page, and
23 you see therefore page 2 of the internal numbering,
24 request 2 at the top, they were asked:

25 "In addition, if not fully articulated by the

1 documents, please explain the reasons where LDC
2 supported the inclusion of the material adverse event
3 clause in the agreement."

4 They give a timeline as their response.

5 "9 December Royal Mail notified TNT and its other
6 access customers that it intends to publish its prices
7 on 7 January. They stated they intend to introduce
8 a price differential between the contract used by, among
9 others, TNT under which postal services would be more
10 highly priced than those provided to customers on
11 national price plan 1. If permitted, the price changes
12 would come into effect in April."

13 They then narrate the history, and at the
14 penultimate bullet says:

15 "On 11 December 2013 TNT management's lawyers
16 finalised TNT management's disclosure for the agreement
17 investment the following specific disclosure was
18 included which summarises the position."

19 Then there's a long block of italic text, but about
20 six lines down:

21 "TNT Post is not eligible to sign a national price
22 plan 1 SSC contract due to its own delivery activities."

23 Essentially, therefore, it was the differential that
24 was drawn to the attention of the investors properly as
25 the problem. The reference to eligibility is, for the

1 reasons that I have explained, that they thought, and
2 I think reasonably, I submit reasonably thought, that
3 they wouldn't be eligible to join this plan and say that
4 they could satisfy the benchmarks if they at the same
5 time submitted forecasts showing an intention to
6 undertake a roll-out.

7 Then you turn to the summary at the foot of that
8 page:

9 "LDC therefore supported the inclusion of the clause
10 in the agreement because LDC believed, on the basis of
11 the information provided to it by both TNT and PostNL,
12 that the proposed price changes notified to TNT could
13 have an adverse impact on the viability of TNT's
14 roll-out plans. Consequently, have an adverse impact on
15 the value of the investment."

16 Then if you look at the facing page, a timeline is
17 provided in answer to the question, can you explain the
18 reasons why LDC considered that the MAC clause was
19 engaged in the period leading up to 13 June 2014.

20 If you drop down about eight bullets or so,
21 30 January 2014, they say this:

22 "Clearance from the EU commission received. At this
23 point in time, the deal could have completed if the
24 terms of the May-clause had not been triggered."

25 Essentially, yes, the price differential had an

1 impact, it did cause, contribute to this investment not
2 proceeding.

3 With that, sir, I conclude that the tribunal will
4 have seen that there is a basic difference in approach
5 to this case between the main parties, royal Mail and
6 Ofcom, to the assessment of a breach of competition law.

7 In particular, Royal Mail says the heart of this
8 matter, the heart of it is that an AEC test,
9 as-efficient-competitor test, needed to form in the
10 circumstances of this problem the basis of the
11 assessment. Either it's decisive or, says Mr Beard, it
12 was a highly relevant consideration which Ofcom should
13 have grappled with beyond what it did; although how has
14 not been explained.

15 Ofcom says this doesn't grapple with the nature of
16 the problem in this case. They draw attention to the
17 market context and all the circumstances, as I have
18 sought to follow, and they say nor does the law require
19 it. And we agree. Ofcom and we invite you to be guided
20 primarily by the facts.

21 There is one point I heard Mr Holmes this morning
22 that I will support him on, but clarify my understanding
23 of, and it's this. Like Ofcom, we emphasise that the
24 introduction of the CCNs was plainly the relevant
25 conduct found to be abusive in the decision, and it is

1 idle to seek to provide a label to what was done and
2 then say that, having provided a label, either
3 Article 102(c) or price discrimination, you then have to
4 go down some narrow path other than the general
5 assessment of abuse of dominance.

6 If you would open the decision, please, I'll simply
7 take to you a short number of paragraphs illustrative of
8 the way we see the position.

9 The first is 7.138, internal page 223. A very
10 simple statement at 7.138, the first paragraph in that
11 section, Ofcom say:

12 "In this part we explain based on assessment of all
13 the circumstances of this case our conclusion that the
14 introduction of the price differential in the CCNs
15 issued by Royal Mail in January 2014 was reasonably
16 likely to distort competition."

17 Pause there. It's a very clear succinct description
18 of what the conduct is which they are examining in the
19 decision. There's no need to look for ambiguity in the
20 word "introduction". We can see exactly what's meant
21 there. It's what they did at that time.

22 That's the conduct. It's also clear, as I've
23 mentioned, that the decision treated this as the
24 culmination of and not detached from the
25 pre-announcement signalling by Royal Mail to the market.

1 I have given some references in paragraph 58 of our
2 skeleton, but as you have the decision open in front of
3 you, I'll just show you some of these.

4 7.203 on page 241, as set out in sections 3 and 4:

5 "As a result of Ofcom opening its investigation, the
6 implementation of the price differential was suspended
7 on 21 February."

8 Some six weeks after it was introduced and then the
9 brackets:

10 "(Its introduction had also been signalled to the
11 market in December 2013)". It then refers back to those
12 paragraphs.

13 Then if you go to page 250, the same observation,
14 you have paragraph 7.232, the foot of the page. You
15 will see there, picking it up at the sentence four lines
16 down:

17 "It is difficult to isolate the impact of each of
18 the differing price changes in the CCNs. However, the
19 evidence contained in contemporaneous internal documents
20 shows that: (a) when the introduction of the price
21 differential was signalled in December 2013, its
22 anticipated impact led to the inclusion of the May
23 condition; (b) the actual introduction of the price
24 differential in January 2014 on top of the other price
25 changes was a material factor in the CCNs was a material

1 factor in LDC's decision to invoke the May condition.
2 See paragraphs referred to above."

3 Finally, shortly, on 7.236, 7.236, beginning at the
4 second sentence:

5 "We consider that the evidence contained in the
6 contemporaneous internal documents shows that the
7 financial implications of the price differential which
8 would come on top of the other prices changes in the
9 CCNs was a material factor in the decision to reduce and
10 then suspend further roll-out.

11 After Royal Mail's announcement on 6 December 2013
12 of its decision in principle to introduce a price
13 differential, Whistl recognised the risk posed by
14 a price differential."

15 Then the quotation:

16 "As set out above, even before the price
17 differential was introduced, Whistl developed plans to
18 postpone further property investments in its end-to-end
19 operations and delayed three of the seven proposed
20 expansion areas for 2014."

21 We say that the sensible reading of this is that
22 they're not detaching it, they're seeing it as the
23 culmination of the behaviour, and the culmination was on
24 10 January.

25 The final point is turning from what is the conduct

1 to the very simple question of what are the effects that
2 the decision focuses on.

3 Here I go to an exchange between, sir, the chairman
4 and Mr Beard.

5 We see this as perfectly simple, too. If you go to
6 7.166, for example, in subsection (f) below they say:

7 "We explain our finding that the introduction of the
8 price differential ..."

9 We have the conduct:

10 " ... was a material contributing factor."

11 It contributed, was a contributory cause of:

12 "(a) The disruption of LDC's agreed investment in
13 Whistl in January; and (b) the reduction or suspension
14 of parts of Whistl's planned further roll-out of the
15 end-to-end delivery operations."

16 It's as simple as that.

17 The chairman drew Mr Beard's attention to, I think,
18 7.256, which really makes the same point. This is
19 a succinct statement of the same thing. There, about
20 four lines down, it said:

21 "The delay to and suspension of Whistl's roll-out to
22 which the introduction of the price differential
23 materially contributed, was likely to have been ..."

24 And the point that the chairman made was, well,
25 there they are saying that that was the material

1 contributing cause.

2 It's not complicated. It should not be complicated.
3 That is the bare bones of this.

4 The real distinction, we say, for analysing
5 infringement is between some internal measure within the
6 dominant organisation, such as the note that was passed
7 by the sales director in the Irish Sugar case, purely
8 internal, it's not a market measure, on the one hand,
9 that cannot be relevant conduct, and a market facing
10 measure, some external behaviour.

11 There's no need, we think, to search for some point
12 when the market facing measure has crystallised into
13 some legal measure. But in any event, it makes no
14 difference to the conclusion, even if you do take that
15 approach. Here the conduct is clear and the effect
16 relied on is clear.

17 That's as far as I'm going to take it, I think, in
18 terms of legal submissions in any detail.

19 I'll conclude by saying this. That if you do focus
20 on the facts of this case, and all the circumstances,
21 there is no real doubt about what happened. Royal Mail
22 took action which had the aim and the effect of impeding
23 the roll-out of Whistl's delivery network to make more
24 difficult what it called direct delivery competition on
25 any significant scale.

1 That was their aim because they took the view that
2 this was an appropriate way, a justifiable way, for them
3 to avoid what they term revenue dilution, which would
4 otherwise be the consequence of a fall in the volume of
5 their mail delivery business.

6 Revenue dilution wasn't a problem because Royal Mail
7 executives wished to make high profits in bulk mail.
8 There's no issue about personal gain. They were
9 concerned that the income stream from delivering bulk
10 mail was required to help Royal Mail cross-subsidise the
11 universal service.

12 Royal Mail didn't want to take its chances with the
13 risks of competition on the merits, and in his expert
14 report for this case Mr David Parker of Frontier
15 Economics, whom you will hear, has referred to the
16 well-known saying from 1935 from Professor John Hicks:

17 "The best of all monopoly profits is the quiet
18 life."

19 Royal Mail resisted Ofcom's suggestions that one
20 consequence of exposing it to competitive pressure is
21 that Royal Mail would be driven to make efficiencies
22 which would not otherwise come about. They took
23 a different approach. That was a breach of the law and
24 it was a breach which has cost this nation dearly by
25 preventing a new and vibrant service from becoming

1 established in mail delivery.

2 Sir, I have finished somewhat earlier than I feared
3 that I might, but I hope that will be helpful for anyone
4 hoping to catch --

5 THE CHAIRMAN: It's not a requirement.

6 MR TURNER: Rather than add further to that, sir, those are
7 our opening submissions.

8 THE CHAIRMAN: Thank you.

9 Discussion re timetable

10 Now, where are we then?

11 MR HOLMES: Well, sir, I think we're on track so far. We've
12 managed to complete opening submissions within the
13 period planned.

14 I should say that, for our part, we've taken
15 seriously the request by the tribunal to try to compact
16 matters and to try to proceed as efficiently as possible
17 with the timetable.

18 With that in mind, we have been considering the next
19 stage of the proceedings, which is to say the factual
20 cross-examination of witnesses, and we are due to begin
21 with the Royal Mail witnesses next week.

22 Having considered overlapping material in
23 Ms Whalley's and Mr Simpson's statements, we now feel
24 that we can dispense with the need for oral examination
25 of Mr Simpson. So his attendance will not be required

1 at the trial.

2 I understand that Mr Turner equally has no need to
3 cross-examine him, and that equally the Whistl factual
4 witnesses can be made available on Wednesday to allow us
5 to utilise any spare capacity in the timetable which
6 results.

7 It may be possible to complete proceedings during
8 the course of next week.

9 THE CHAIRMAN: We may save a day.

10 MR HOLMES: We may save half a day to a day, sir.

11 THE CHAIRMAN: Does that affect the expert evidence dates?

12 MR HOLMES: Well, sir, we're obviously in the tribunal's
13 hands. It may be helpful for us all to have a little
14 extra time in which to prepare for the expert evidence,
15 but ultimately it's a matter for the tribunal how it
16 takes the timetable if there are any savings.

17 THE CHAIRMAN: I'm just trying to avoid the whole thing
18 being so long drawn out that we forget at the end where
19 we were at the beginning.

20 MR HOLMES: That's well understood, sir.

21 THE CHAIRMAN: Others have commented, can I say, about the
22 length of oral hearings. We're very concerned that they
23 should be as short and as punchy as possible. So that
24 is the pressure on us.

25 I'm not sure that's consistent with having whole

1 days off in the middle. Having said that, I regret that
2 we're not sitting tomorrow. It's entirely due to my
3 convenience.

4 MR HOLMES: That's well understood.

5 THE CHAIRMAN: I think I would like a little time to
6 reflect. I take your point. That's very helpful.
7 Obviously the (inaudible) will consider and if they can
8 be in touch.

9 Mr Beard, have you got anything?

10 MR BEARD: No, I was going to say, it's helpful to know this
11 now. We can obviously communicate that to Mr Simpson
12 and we note the point that Whistl factual witnesses
13 could be available on Wednesday.

14 I think we'll need to just look at the timetable
15 more generally in relation to experts and where matters
16 are going to go.

17 THE CHAIRMAN: We're talking about one day's saving at most.

18 MR BEARD: I think Mr Simpson, with respect, I don't think
19 it was ever anticipated he was going to take very long,
20 even if Mr Holmes was going to ask him many questions.

21 THE CHAIRMAN: Not your key witness?

22 MR BEARD: Well, he is, but the fact he is unchallenged,
23 I can make a halfway submission.

24 THE CHAIRMAN: So maybe half a day. Anything we can gain is
25 welcome.

1 MR TURNER: The only comment I would make is in the
2 reflection, to some extent, more haste, less speed.
3 This is an efficiently managed case.

4 THE CHAIRMAN: You can't accuse of haste, Mr Turner.

5 MR TURNER: Well, if one compresses it too far, then the
6 quality diminishes as well as the human cost going up,
7 and this is already at a pace which is fair. Whatever
8 those in other quarters may say, shaving a day or two
9 off to achieve that, won't, I think --

10 THE CHAIRMAN: I'm conscious that we've already set the
11 timetable, so we're not going to gain all that much by
12 trying radically alter it in the middle.

13 MR BEARD: If it means we essentially just stick to the
14 timetable and we might finish early on Wednesday next
15 week, then so be it. Then we start on Thursday with
16 Mr Polglass. I'll liaise with the other counsel about
17 that.

18 THE CHAIRMAN: Okay. That's helpful.

19 In that case, we meet on Monday morning at 10.30
20 with Ms Whalley; is that right?

21 MR BEARD: That's right. The order was Ms Whalley,
22 Mr Simpson, Dr Jenkins, but in the circumstances it
23 will, Ms Whalley, Dr Jenkins.

24 THE CHAIRMAN: Very good. Thank you very much.

25 (3.15 pm)

(The hearing adjourned until Monday, 17 June 2017 at
10.30 am)

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