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

Case No. 1299/1/3/18

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

18 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 6**

## APPEARANCES

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

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

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

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Tuesday, 18 June 2019

(10.28 am)

MS SUSAN WHALLEY (continued)

Cross-examination by MR HOLMES (continued)

THE CHAIRMAN: Mr Holmes, good morning.

MR HOLMES: Good morning.

THE CHAIRMAN: Please carry on.

MR HOLMES: Good morning, welcome back.

Ms Whalley, when we broke yesterday we were in the course of discussing the contemporaneous documents, and I'll resume with them in a moment, but first can I ask you one clarificatory question arising out of the evidence you gave yesterday.

You said yesterday that you tried to find a way to protect the universal service at the same time as not doing anything that would inhibit the progress of another player in the market, because you knew you couldn't do that. You used that formulation or a similar one twice.

When you say that you knew you couldn't do that, do you mean that you knew you were not permitted to engage in conduct to inhibit the progress of another player in the market for the purposes of competition law or that you lacked the practical means of achieving such an outcome?

1 A. (Pause). Royal Mail was very conscious of its  
2 obligations, its legal and competition law obligations,  
3 and understood that it could not do anything which would  
4 foreclose competition in the market.

5 Q. So your evidence is that you knew at the time that it  
6 would be contrary to competition law to inhibit the  
7 progress of another player in the market; is that right?

8 A. We, the company, considered that it should not and could  
9 not do anything which would prevent an efficient  
10 competitor from competing in the market.

11 Q. As regards the practical means available to Royal Mail  
12 to inhibit a direct delivery entrant's progress in the  
13 market, would you accept that Royal Mail had a powerful  
14 tool available to it, namely the ability to manipulate  
15 the terms on which the entrant purchased access, which  
16 was an essential input to its business?

17 A. (Pause). No, that is not how we considered it at the  
18 time, and in fact at the time Royal Mail considered that  
19 it actually had relatively few degrees of freedom and  
20 actions that it could take in order to protect the  
21 universal service in a declining market, and with  
22 considerably increased competition.

23 Q. The question wasn't about how you saw it at the time,  
24 Ms Whalley. The question was about Royal Mail's  
25 ability. Based on your knowledge of the market, would

1           you agree that Royal Mail had the ability to inhibit  
2           a direct delivery entrant's progress in the market by  
3           changing the terms on which the entrant purchased access  
4           which was an essential input to its business?

5           A. (Pause). No, Royal Mail considered that it had some  
6           flexibility to look at zonal prices, and indeed that was  
7           part of the guidance from Ofcom that that was an element  
8           of commercial freedom that Royal Mail should assess in  
9           considering its commercial responses to the changing  
10          market conditions.

11          Q. Well, I'm asking you, based on your knowledge of the  
12          market, whether you agree that by charging a higher  
13          price to the entrant, Royal Mail could raise the  
14          entrant's costs across all of the access services which  
15          the entrant still needed to buy in from Royal Mail,  
16          thereby deterring its direct delivery roll-out? Do you  
17          accept, just based on your understanding of the market,  
18          that that was a possibility?

19          A. (Pause). Royal Mail considered that making adjustments  
20          to the zonal costs and prices for access would, could  
21          have an impact on the prices that players were paying in  
22          the market. But at all times Royal Mail took into  
23          account very carefully its obligations to make sure that  
24          any adjustments to prices were fully cost-reflective,  
25          and that was important in order to try and make sure

1           that the impact of cherry-picking delivery  
2           competition -- in that context, Royal Mail was still  
3           able to provide the universal service in a sustainable  
4           way.

5       Q.   Let's leave aside zonal prices, Ms Whalley, because  
6           Ofcom's decisions on this case don't raise the question  
7           of the lawfulness of the zonal tilt adjustment, do they?  
8           Think about the price differential for a moment, if you  
9           would, and consider whether the ability to adjust prices  
10          between the plans gave Royal Mail a powerful tool to  
11          discourage a direct delivery entrant by raising its  
12          costs of purchasing the essential input of access across  
13          all of the mail that it would still need to route via  
14          Royal Mail's delivery network. That is a powerful tool,  
15          isn't it, based on your understanding of the market?

16       A.   I wouldn't describe it as a powerful tool. No.

17       Q.   Okay, very good. Well, let's look at the documents. We  
18          had got yesterday as far as the pricing strategy board  
19          paper of 23 July 2013. Can we now move on to August of  
20          2013, and consider a document which is in bundle C4A at  
21          tab 17.

22                This is another slide deck prepared for the pricing  
23                strategy board on 21 August 2013, and I should probably  
24                have asked you this before: you sit on the pricing  
25                strategy board; is that correct?

- 1 A. Yes.
- 2 Q. The title of the slide deck is "Letters pricing  
3 strategy: Business objectives and initial view of  
4 pricing options". So this document should shed light on  
5 Royal Mail's true business objectives in bringing  
6 forward pricing options; would you agree? Judging from  
7 the title.
- 8 A. Yes.
- 9 Q. Turning on to page 1, there are some key questions  
10 identified for the meeting. The first question relates  
11 to wholesale pricing. That means access pricing,  
12 doesn't it?
- 13 A. Yes.
- 14 Q. The question that is posed is: "how should the business  
15 focus its attention on Wholesale pricing options to  
16 protect the USO and increasing rate card prices as part  
17 of the annual Tariff?"
- 18 So the business objective of the wholesale pricing  
19 options, which we will come to in a moment, was  
20 therefore in part to protect Royal Mail's increasing  
21 rate card prices; is that correct?
- 22 A. (Pause). The prime focus of the options was protecting  
23 the USO.
- 24 Q. But --
- 25 A. There was an annual tariff process where typically

1 Royal Mail would increase prices as part of that tariff  
2 process.

3 Q. But you were looking to protect increasing prices; is  
4 that a right reading of that question?

5 A. (Pause). I think the right way to interpret that is  
6 that the company was looking at pricing options to  
7 protect the universal service, and pricing including  
8 rate card prices was one element of that.

9 Q. So in the language of the letter strategy document we  
10 looked at yesterday, Royal Mail was looking at how it  
11 could capture the value of letters; do you agree?

12 A. Yes.

13 Q. Okay. Turning on to slide 6, three options or  
14 propositions are identified to protect the universal  
15 service. Can we work through these in reverse order,  
16 beginning at the bottom. So the third proposition is:

17 "Other ideas like increasing the price differential  
18 between geographical zones and reducing advertising  
19 prices by up to 20%."

20 Now, these are the two responses that were  
21 identified as competition law compliant in the Oxera  
22 paper submitted to Ofcom in October 2012, modelled as  
23 a commercial response, aren't they?

24 A. They were discussed by Oxera, yes.

25 Q. But more than that, they were modelled by Oxera as the

1 commercial responses in order to determine whether they  
2 would allow you to protect the 5% EBIT margin to which  
3 you felt you were entitled; that's correct, isn't it?

4 A. They were part of the Oxera modelling, yes.

5 Q. So on the one hand changing the zonal tilt to reduce  
6 prices in urban areas and cutting retail and access  
7 prices for a type of product where demand is judged most  
8 likely to switch to a direct delivery entrant; that's  
9 right, isn't it?

10 A. Sorry, could you say that again?

11 Q. So the two proposals there, the two ideas there, are on  
12 the one hand changing the zonal tilt so that prices are  
13 lower in urban areas, and cutting retail and access  
14 prices for the type of product, advertising mail, where  
15 demand is judged most likely to switch to a direct  
16 delivery entrant; that's right, isn't it?

17 A. Yes, those were the two options there.

18 Q. Yes. The second column considers whether there is any  
19 value to be had from these options. Pausing there, is  
20 that a reference to the value that can be captured from  
21 letters or some other measure of value?

22 A. (Pause). My recollection, this was the value from  
23 letters.

24 Q. You see that the conclusion is that: "These options",  
25 the two we've just been discussing, "will continue to be

1 available but they are unlikely to drive value to the  
2 same extent as the above options".

3 That's because, as we know from the October 2012  
4 Oxera modelling results, this combination doesn't  
5 provide sufficient protection to Royal Mail's letter  
6 volumes to meet your 5% operating profit target; that's  
7 right, isn't it?

8 A. Yes, we considered at the time that these options were  
9 not sufficient to protect the universal service to be  
10 financially sustainable, in particular because reducing  
11 prices, for example advertising, took revenue straight  
12 out of the top line of the business, which was already  
13 under a £200 to £250 million threat from e-substitution.

14 Q. So cutting prices in response to competition reduced  
15 revenues and profits, and for that reason it wasn't  
16 pursued?

17 A. Yes, that's correct.

18 Q. The second proposition is a minimum volume pricing  
19 commitment in each geographical area; do you see that?

20 "Access operators pay for a minimum volume for each  
21 geographical area ... regardless of whether they give  
22 Royal Mail this volume to deliver."

23 Do you see that?

24 A. Mm.

25 Q. So access customers would pay something in each SSC,

1           whether or not they used Royal Mail or a direct delivery  
2           competitor. Can you speculate on how that would affect  
3           a direct delivery entrant's plans to roll out?

4           A. What I can say is that this was an option that was  
5           considered at the time. However, based on further  
6           consideration and advice, this was an option that we did  
7           not think was a feasible option to pursue.

8           Q. But in effect it would achieve the same thing as the  
9           price differential, wouldn't it? It would raise the  
10          costs of an access operator that rolled out services in  
11          competition with Royal Mail, because that access  
12          operator would have to pay for volumes that it wasn't in  
13          fact using in the SSCs where it rolled out.

14          A. (Pause). Sir, I'm not sure what the question is,  
15          please.

16          Q. The question is that this option would deter direct  
17          delivery roll-out by raising the costs of an access  
18          operator that opened its own direct delivery operations  
19          in particular areas, because in those areas there would  
20          still be a requirement to purchase volumes from  
21          Royal Mail at a particular level; do you agree?

22          A. Yes, and so we considered that that construct was not  
23          an option to take forward.

24          Q. Yes. Then the first proposition:

25                 "Create a price/financial incentive for committing

1 to a national distribution of mail to all postcodes".

2 That is the price differential, is it not,

3 Ms Whalley?

4 A. Yes.

5 Q. And this would also raise a direct delivery entrant's  
6 costs, rendering them less competitive than their access  
7 only competitors and deterring them from entering.

8 (Pause). Do you agree?

9 A. (Pause). At the time, the company recognised that any  
10 step that it took to try and protect the universal  
11 service could potentially have an impact on the costs of  
12 another player in the market, because in a declining  
13 market there simply -- if you are taking a step to try  
14 and protect the activities of one business, in this case  
15 the universal service, which was a legal obligation, the  
16 company recognised that there could be an impact on  
17 other players in the market.

18 The question that we debated long and hard, with  
19 significant work and significant advice, was whether any  
20 action that we took, that Royal Mail took, whether that  
21 action would have an exclusionary impact on another  
22 player in the market, and we were all the time focused  
23 on trying to find a solution and a response which could  
24 protect the universal service but which would not stop  
25 a direct delivery player or any other player in the

1 market from competing.

2 Q. But the impact on a direct delivery entrant isn't some  
3 collateral effect of the proposition which is described  
4 here. You can see from the language used that the  
5 intention is to create an incentive for operators to  
6 commit to a national distribution of mail; that's to say  
7 purchasing mail delivery volumes from Royal Mail across  
8 the country. It's a financial incentive to buy from  
9 Royal Mail, and therefore a deterrent to self-supply or  
10 to purchase from a direct delivery entrant. (Pause).  
11 Would you agree with that?

12 A. (Pause). There was significant -- there were benefits  
13 to Royal Mail from having a national fall-to-earth of  
14 access volumes, remembering that by this time access  
15 volumes were approaching 60% of the market. So in order  
16 to plan the business, there were benefits to having  
17 a national fall-to-earth, and the company believed that  
18 companies, other players who chose not to give  
19 a national fall-to-earth were benefitting from  
20 additional flexibility in the way that they used access  
21 services. But there was a benefit from a national  
22 fall-to-earth.

23 Q. Turning to the second column, the value to be had from  
24 the first proposition and the second is said to depend  
25 on whether they can be cost justified:

1           (Proposition needs to be justified to ensure  
2 regulatory cooperation)."

3           So these propositions, including the price  
4 differential, were being considered before Royal Mail  
5 knew whether there was a cost justification that could  
6 be offered in relation to them; do you agree?

7       A. I would not agree with that, for the following reason:  
8 back during 2012, Royal Mail had discussed the benefits  
9 of volume certainty and the potential for a lower price  
10 based on that volume certainty. So this was not a new  
11 concept. As I said, access volumes by this time were  
12 well over 50% of the market, and in order to plan and be  
13 as efficient as possible, understanding where the  
14 volumes were falling in the operation was extremely  
15 valuable to plan that operation.

16           So this was not a new concept. The challenge was to  
17 align on a methodology and a modelling that was robust  
18 in terms of an objective justification, and that  
19 modelling was very complex and took time to do. So  
20 I don't accept that the company had come up with this  
21 idea, as was indicated here.

22       Q. So if the business was genuinely motivated by cost  
23 considerations, would one really see on this slide the  
24 language that "the proposition needs to be objectively  
25 justified to ensure regulatory cooperation"? Doesn't

1           that suggest that the cost justification is being  
2           pursued to deal with the regulatory consequences of  
3           an action which has another underlying business purpose?

4           A. (Pause). I'm sorry, that's not how I read this or how  
5           it was intended at the time. The company knew that any  
6           step that it took to try and protect the universal  
7           service in an increasingly competitive market would come  
8           under scrutiny, and therefore was so conscious that any  
9           proposal that was put forward had to be robust and fully  
10          scrutinised, and it's in that context that this was  
11          written.

12          Q. I see. The final column, "Prioritisation for  
13          April 2014", greenlights the price differential for the  
14          January CCNs, doesn't it?

15          A. Yes. We thought that was an option that we could  
16          consider for April 2014.

17          Q. And you say that Oxera are looking at this, so Oxera,  
18          then, returning to the stage. If we could put aside C4A  
19          for a moment and go to OF1, Ofcom defence bundle 1.

20                    It's the Oxera proposal of August 22, 2013.

21          MR BEARD: It just happens that's not one of the bundles the  
22          witness has, so we're just sorting out a copy of the  
23          document.

24          THE CHAIRMAN: Right.

25                    Make sure the witness has time to consider it.

1 MR HOLMES: Of course, yes.

2 THE CHAIRMAN: Which tab in the bundle is it?

3 MR HOLMES: It's tab 5, it's an Oxera proposal that was  
4 provided to Royal Mail on August 22, 2013.

5 Have you seen this document before, Ms Whalley?

6 A. This document was not in my witness statement or  
7 referred to in my witness statement, so I have not --

8 Q. But do you recall it from the time, when you were  
9 commissioning Oxera to do this --

10 A. To be honest, I don't recall this specific document.  
11 There were very many documents at the time.

12 Q. It's really just for expository purposes for what we are  
13 going to come to next. You will see that Royal Mail is  
14 considering a number of options to restructure the  
15 existing access contracts in order to respond to the  
16 threat of direct delivery competition. You see that on  
17 page 1?

18 A. Mm.

19 Q. That was your understanding of the work that Royal Mail  
20 was indeed undertaking at the time.

21 A. (Pause).

22 Q. Ms Whalley, I will give you time to consider this  
23 document if you need to, but the questions I'm asking  
24 you are really quite basic and they don't derive from  
25 the contents of the document. So by all means take time

1 to review it, can I just try putting the questions to  
2 you and see if you feel able to deal with them. They  
3 are really referring to quite short passages from the  
4 document; would that be satisfactory?

5 A. Okay.

6 Q. Thank you. So the first question I put on page 1, do  
7 you see under "Background and introduction":

8 "Royal Mail is considering a number of options to  
9 restructure the existing access contracts in order to  
10 respond to the threat of direct delivery competition."

11 I think we can agree that that is a fair description  
12 of what Royal Mail was considering at the time, can't  
13 we?

14 A. Yes.

15 Q. Then turning to page 2, there are a list of options  
16 which Royal Mail has commissioned Oxera to consider as  
17 part of its work. Do you see that option A is:

18 "Introduce a price discount on NPPI (SSC), without  
19 a volume commitment."

20 That is the price differential; is that correct?

21 A. It was the thinking on the price differential at the  
22 time, yes.

23 Q. Yes. I would like also just to draw your attention to  
24 point E. Another option that was being considered at  
25 the time was:

1           "Targeted discounts in just the SSCs where [direct  
2           delivery] is emerging."

3           That's correct, isn't it?

4           A. That's what's written here, yes.

5           Q. But do you recall that that option was also under  
6           consideration by Royal Mail at the time?

7           A. That was an option that Royal Mail had on the table at  
8           this time. However, it was an option that was, from  
9           recollection, relatively quickly taken off the table --

10          Q. Yes.

11          A. -- in terms of options that the company and the board  
12          decided to progress.

13          Q. Yes. That's all we need from that document.

14                 A workshop took place between Royal Mail and Oxera  
15                 on 27 August 2013; that's right, isn't it?

16          A. I believe so, yes.

17          Q. You attended that meeting, didn't you, Ms Whalley?

18          A. I would have done, yes.

19          Q. Well, you say in your witness statement --

20          A. Yes, I did.

21          Q. -- at paragraph 185 that you did. You don't exhibit any  
22          contemporaneous note or minutes of the workshop. Were  
23          any notes or minutes made or any presentations given at  
24          that workshop? (Pause). Would you like to look at the  
25          paragraph of your witness statement? It's 185.

1 (Pause)

2 Would you like me to repeat the question?

3 A. I -- to be honest, I can't recall whether there was  
4 a document at this meeting. What I can say is that at  
5 this time the company was thinking about a number of  
6 different options, and subsequent work was then done on  
7 these options.

8 Q. Well, no notes or minutes or presentations have been  
9 disclosed to Ofcom at any stage of this process in  
10 relation to that meeting, so all we can go on is the  
11 output from Oxera which was produced after the meeting  
12 and the light that sheds on Royal Mail's intentions.

13 So can we now look at that, and I would like to go  
14 to some documents in the cross-examination bundle,  
15 please. If you could turn to tab 1, you can see that  
16 this is an email from an Oxera person, who I understand  
17 I can refer to, Mr Flórez Duncan, sent to various  
18 Royal Mail employees on 3 September 2013.

19 Do you recall working with Mr Flórez Duncan during  
20 the relevant period in the run-up to the CCNs,  
21 Ms Whalley?

22 A. I recall that Mr Duncan was part of the Oxera team.

23 Q. This, you can see from the date, is a week after the  
24 pricing workshop we discussed. We can see that Oxera  
25 had committed to providing initial thoughts on two of

1 the options under consideration. You see there  
2 option A, the price differential, and option E, the  
3 targeted discount option in areas where direct delivery  
4 was emerging.

5 Do you recall those options from the paper you  
6 looked at a moment ago?

7 A. Yes.

8 Q. The first draft of the note on option E is at tab 2.  
9 Now, I appreciate that this option was not progressed,  
10 Ms Whalley. The reason why I would like to discuss it  
11 with you is to see what light it sheds on the purposes  
12 underlying the options that were under consideration.

13 Now, I will take you to particular passages. If you  
14 need longer to familiarise with the document, that's  
15 understood. But let me first show you particular  
16 passages and ask you to comment on them.

17 You see from the first paragraph, the description of  
18 the option again, "Targeted access price discounts and  
19 selected SSCs where direct delivery entry is emerging".

20 Turning forward to page 3, there is another feature  
21 of the option which is also described in the first  
22 complete bullet at the top of the page:

23 "Furthermore, it is understood that Royal Mail may  
24 be considering introducing these discounts on a time  
25 limited basis, for example to respond to the threat of

1 direct delivery, then once the threat has been averted  
2 prices will be raised back to previous levels."

3 Do you recall that feature of the proposal that  
4 Royal Mail was considering at that point?

5 A. (Pause). What I remember about this option, sir, is  
6 that at the time the company was brainstorming and  
7 thinking through a number of different options. This  
8 option E was put on the table and discussed but, as  
9 I have, I think, said, this option was considered not to  
10 be a viable option and therefore taken off the table.

11 Q. You didn't answer my question, Ms Whalley. My question  
12 was: do you recall that at the time the thinking was  
13 possibly to introduce the discounts on a time limited  
14 basis and to re-introduce them after the threat from  
15 direct delivery had been averted?

16 A. I don't remember all of the discussions around the  
17 different options that were --

18 Q. That is again not an answer to my question, Ms Whalley.  
19 My question was a specific question about your  
20 recollection of this particular feature. I'm not asking  
21 whether you recall all of the discussions around this  
22 option. I'm asking you if you recall this particular  
23 feature?

24 A. (Pause). If it --

25 Q. This is a question of recollection, Ms Whalley --

1 A. I'm just --

2 Q. -- it's not a question of reflection.

3 A. No, but I -- at the time there were many different  
4 options that were being discussed and that were on the  
5 table --

6 Q. That is again avoiding my question, Ms Whalley, but we  
7 can move on if you are not prepared to answer it.

8 What do you think might be meant by "the risk of the  
9 threat of direct delivery being averted" in that  
10 passage? What would constitute averting the risk of the  
11 threat of direct delivery in a particular SSC?

12 A. This paper was not written by me or by anyone at  
13 Royal Mail.

14 Q. And you are not prepared to speculate?

15 MR BEARD: Sorry, I think it's not appropriate to ask  
16 a witness to speculate, and I don't think that's  
17 a proper question.

18 MR HOLMES: Very well, I'm happy to move on, sir.

19 THE CHAIRMAN: I think we will draw --

20 MR HOLMES: Your own conclusion.

21 THE CHAIRMAN: -- whatever conclusions are appropriate.

22 MR HOLMES: Yes.

23 If you would look at the middle of page 2, you can  
24 see that despite a high level positive view from Oxera,  
25 they also highlighted certain competition or regulatory

1 risks, and they say at the first bullet:

2 "The way in which the selected SSC areas are chosen  
3 can have a material impact on the riskiness of the  
4 practice from a competition law perspective. The  
5 highest risk approach in this regard would be to select  
6 SSCs based solely on public announcements or known  
7 roll-out plans by TNT and/or only in response to actual  
8 entry by direct delivery competitors. If this were the  
9 case, it could lead to the portrayal of the entire  
10 pricing scheme as part of a plan to eliminate  
11 a potential rival from the downstream delivery market."

12 But at the next bullet they say that:

13 "The ideal scenario would be to target price  
14 reductions on SSCs which are known or could be argued to  
15 have lower than average costs, thereby introducing  
16 a cost base justification which would make the scheme  
17 even more defensible in the event of an investigation.  
18 Absent concrete evidence from a fully cost based  
19 justification, in order to minimise the risk identified  
20 above, the selection of SSCs could be based on objective  
21 criteria which could be hypothesised to have an impact  
22 on cost eg, number of delivery points, volume of mail,  
23 stem lengths between delivery points, and delivery  
24 offices). It would be expected that the SSCs that are  
25 most at risk to competition would be captured by such

1 objective criteria, although it is recognised that such  
2 mapping will not be perfect."

3 So the cost justification that is being proposed by  
4 Oxera in relation to this proposal was an ex post  
5 justification which was thought to be likely still to  
6 capture the SSCs that are most at risk of competition.  
7 Do you see that?

8 A. (Pause). As I said before, this was an option that the  
9 company did not progress --

10 Q. Again, that wasn't the question. In this case, do you  
11 accept that the cost justification that is being  
12 suggested here is not the real commercial rationale,  
13 which is in fact to target the SSCs most at risk of  
14 competition? In this case, not the option that was  
15 pursued, but in this case, the cost justification was  
16 an ex post justification.

17 A. (Pause). As I said, this was not an option that we  
18 progressed at the time.

19 Q. Well, that is not an answer to my question. Over the  
20 page, you see that there are initial thoughts on  
21 commercial considerations to assist in the design and  
22 modelling of option E, and you will see that the  
23 incentives and financial impact on a DD operator are  
24 modelled to see whether they might lead to a "no entry"  
25 scenario or an "entry" scenario by the direct delivery

1 operator.

2 And moreover, you will see that under the "no entry"  
3 scenario:

4 "Under the discounting regime for areas where TNT  
5 would consider entry, a lower access price offers a low  
6 risk alternative to setting up own operations. Hence  
7 TNT could recognise that there are commercial and  
8 operational benefits to remaining with Royal Mail while  
9 no further action on TNT's own behalf is required."

10 Then in the paragraph beginning "Furthermore" you  
11 see:

12 "If the discounts are also offered in the areas  
13 where TNT already has DD presence, it is possible that  
14 these assets could be scaled down/withdrawn to take full  
15 advantage of the lower access price. Whether this  
16 represents a credible and profitable strategy for TNT  
17 would crucially depend on the level of the discount."

18 Do you see that?

19 A. I see that.

20 Q. Why do you think Oxera is considering, for the benefit  
21 of Royal Mail, the incentives and financial impact on  
22 a DD operator and whether the DD operator would proceed  
23 with entry or would pursue a "no entry" scenario?

24 A. One of the lenses that the company was looking at all of  
25 these options at the time was the extent to which any

1           action that was taken by the company would have  
2           an impact to prevent a direct delivery player from  
3           progressing in the market.

4       Q.   And why was that?

5       A.   Maybe this is a question -- I mean, this is Oxera  
6           advice.

7       Q.   It is.

8       A.   This is not a Royal Mail document.

9       Q.   But I'm using it to ask, really, about your underlying  
10           intentions.

11      MR BEARD:  Just to be clear, the question was "Why do you  
12           think Oxera is considering?"  Dr Jenkins is going to be  
13           available for questioning about what Oxera was thinking.

14      MR HOLMES:  Well, we can certainly raise this with  
15           Dr Jenkins.

16      THE CHAIRMAN:  I have a feeling, Mr Holmes, this is not  
17           really progressing very far.

18      MR HOLMES:  Well, there is one more point to put in relation  
19           to this document, sir, which is an important one because  
20           it does relate directly to Royal Mail's objectives.

21      THE CHAIRMAN:  But I don't think you are going to get  
22           Ms Whalley's opinion on what Oxera were advising.

23      MR HOLMES:  I am happy to let that question lie.

24      THE CHAIRMAN:  It might be a good idea to ask Oxera in due  
25           course.

1 MR HOLMES: Indeed.

2 If we could turn to page 4, "Financial impact on  
3 Royal Mail". The first sentence states:

4 "From Royal Mail's perspective, a selective,  
5 SSC-level discount could be a relatively expensive way  
6 to deter entry ..."

7 Then it explains why.

8 Then in the following paragraph:

9 "The exact value of the discount could be set  
10 between 0% and the level required to ensure that prices  
11 still cover long run average incremental costs ... so as  
12 to satisfy two main objectives."

13 First bullet:

14 "Maximising the probability of TNT not rolling out  
15 or even scaling back its current DD operations, and  
16 minimising the commercial impacts to Royal Mail suffered  
17 across the discounted and non-discounted regions."

18 So I put it to you, Ms Whalley, that the intention  
19 underlying this proposal from Royal Mail was to maximise  
20 the probability of TNT not rolling out or even scaling  
21 back its current DD operations and to deter entry.

22 A. I disagree with that.

23 Q. So you think Oxera simply misunderstood your commercial  
24 intentions?

25 A. As I said, this is an Oxera document. Royal Mail did

1 not write this document. Royal Mail was very clear all  
2 the way through this that it needed to try and take some  
3 action to protect the universal service but any action  
4 that it took should not prevent another player in the  
5 market, who was efficient, from being able to progress  
6 its activities. That was the thinking in the company  
7 and the focus of the discussions at the time.

8 Q. So would you expect, then, Royal Mail personnel, when  
9 they received this document, to correct Oxera's  
10 misapprehension about the intentions that were being  
11 perceived?

12 A. (Pause). At the time there were many documents, there  
13 were many discussions, and this document -- this option  
14 was ... as I've said before, it was relatively quickly  
15 considered not to be a viable option.

16 Q. I see. Well, let's see how Royal Mail did respond to  
17 the email, to this note when it landed. The response is  
18 at tab 3 of the cross-examination bundle, or one of the  
19 responses. If you could turn to the second page in the  
20 chain, you see that this is an email -- you see at the  
21 bottom of page 1, in fact -- from a Royal Mail employee,  
22 I'll call her Ms X, sent at 18.04. Do you see that? In  
23 the second paragraph, Ms X notes that:

24 "From a legal perspective, the Oxera notes would not  
25 be legally privileged."

1           Now, the implication of that is that the notes would  
2           be disclosable, isn't it, Ms Whalley?

3           A. Sorry, which part of the document are you referring to?

4           Q. Do you see there is an email beginning "Hi Felipe", an  
5           email to Mr Flórez Duncan?

6           A. Is this tab 3?

7           Q. It's tab 3. Do you see an email chain at tab 3 of your  
8           cross-examination bundle, and do you see there is a --  
9           at the foot of page 1, you begin an email there -- do  
10          you see?

11          A. Mm.

12          Q. -- from Ms X to Felipe Flórez Duncan, responding to him  
13          having received the note. I was drawing your attention  
14          to the second paragraph of that email:

15                 "From a legal perspective, as the Oxera notes would  
16                 not be legally privileged", and then she continues to  
17                 make some points.

18                 So first of all "would not be legally privileged",  
19                 do you agree that the implication of that is that the  
20                 notes would be disclosable?

21          A. I believe so.

22          Q. Yes. Because they are not legally privileged, and  
23          therefore disclosable, Oxera is asked to amend the note  
24          in two ways:

25                 "Please soften the wording throughout to make it

1 clear that we're trying to ensure that DD operators pay  
2 an appropriate price for accessing the network and also  
3 achieve pricing which is compliant with competition  
4 law."

5 Then on the time limit point, then -- the second  
6 bullet:

7 "I understand (from [redacted]) that we have not  
8 definitely decided to make option E's pricing 'time  
9 limited' so please amend any reference accordingly."

10 Then thirdly:

11 "On the time limited pricing point, please remove  
12 the reference to 'responding to the threat of DD and  
13 then putting prices back up'."

14 Now, these requests aren't made on the basis that  
15 Oxera has misunderstood Royal Mail's objective, were  
16 they?

17 A. I've not seen this email exchange, I was not copied in  
18 to this email exchange --

19 Q. Well, you are the only Royal Mail witness that I can ask  
20 these questions to.

21 A. -- and I'm not, therefore, aware of all of the  
22 discussions that took place at the team level between  
23 Oxera and Royal Mail.

24 Q. Well, let me put it like this: were you aware that  
25 documents were being amended with a view to the risk of

1           their disclosability in subsequent competition  
2           proceedings?

3           A.   (Pause).  I was not aware of this email exchange --

4           Q.   That wasn't the question I asked you.

5           A.   -- that's all I can say.

6           Q.   That was not the question I asked you, Ms Whalley.  Were  
7           you aware of documents being amended because of their  
8           disclosability in subsequent competition proceedings?

9           A.   (Pause).  What I remember was that there were, as the  
10          thinking progressed, there were a number of documents  
11          that were being discussed and, as advice was received,  
12          the thinking in the documents was updated.

13          Q.   That again is not an answer to the question I asked.

14          A.   I do remember that, but I don't -- I don't -- I haven't  
15          seen this email, I don't have any knowledge of documents  
16          being updated.

17          Q.   Yes.  I understand.

18                 The first email in the chain shows Mr Duncan's  
19          response.  So by then he has spoken to another  
20          Royal Mail employee, let's call her Y.  Do you see that  
21          from the first line, Ms Y?  And that he intends to  
22          circulate an updated note in the light of their  
23          telephone discussion.  He acknowledges that the time  
24          limited point could cause problems and suggests deleting  
25          it, and he then suggests that he will "reflect on the

1 first point about softening language" but expresses  
2 "concern that Oxera has sought to provide an independent  
3 and objective view on whether the pricing option as  
4 presented to us can pose competition law problems from  
5 an economics perspective."

6 So Oxera's position is: we're trying to advise you  
7 on the implications of the proposal you have provided to  
8 us, and the request to "soften the advice because it's  
9 disclosable" risks watering down its substance; do you  
10 see that?

11 A. Yes.

12 Q. Then an updated version of the note is provided at  
13 tab 5, and you will see that, at the top of page 3, the  
14 reference to "time limited discounts that apply only  
15 until direct delivery threat was averted" has now been  
16 deleted, and the text under "The financial impact on  
17 Royal Mail" at the bottom of page 3 has changed such  
18 that the first set of bullets expand on the way that the  
19 proposed discount would impact on revenue, but the  
20 comments about the cost of deterring entry and the  
21 objective of maximising the probability of Whistl not  
22 rolling out or even scaling back its roll-out are still  
23 in the note.

24 So it appears from this that, after speaking with  
25 Royal Mail about the note, Oxera's understanding was

1 still that the intention was to deter Whistl from  
2 entering the market.

3 A. (Pause). Sorry, which bit in the note are you referring  
4 to?

5 Q. If you look at the top of page 3, the reference to  
6 "recoupment", to "raising prices after the risk of the  
7 threat of direct delivery has been averted" has gone  
8 from this document now.

9 Equally, at the bottom of the page, under "Financial  
10 impact on Royal Mail", you have an expanded discussion  
11 of the impact on revenue, but there is still a reference  
12 made to this being a relatively expensive way to deter  
13 entry. Over the page, you still see a reference to  
14 maximising the probability of TNT not rolling out or  
15 even scaling back its current DD operations.

16 So the conversation that has been had with Ms Y has  
17 not led Mr Flórez Duncan to believe that the intentions  
18 stated here are inaccurate or require to be amended; do  
19 you see that?

20 A. Mm.

21 Q. So I put it to you again: this was the intention that  
22 Royal Mail was pursuing by means of this option,  
23 maximising the probability of TNT not rolling out or  
24 even scaling back its current DD operations; that was  
25 what Royal Mail wanted to achieve commercially,

1 otherwise it would have been corrected.

2 A. One of the reasons why this option was rejected was  
3 because the company considered that it would have  
4 an impact potentially on Whistl, TNT, that could not be  
5 supported.

6 Q. Was that the intention of the proposal when first  
7 formulated?

8 A. As I said, there were a number of different options that  
9 were being considered --

10 Q. This is not an answer to my question.

11 A. I understand it's not an answer to your question.

12 Q. Is the answer that you don't know what the intention  
13 that Royal Mail was pursuing by this option was?

14 A. There were a number of different options, and one of the  
15 questions that we asked Oxera and we asked Oxera for  
16 advice on for each of the options was what would be the  
17 impact, and maybe this is, you know, this is an Oxera  
18 document, it's not a Royal Mail document, and we asked  
19 Oxera to give advice on the different options and the  
20 potential impact of the different options.

21 Q. At tab 6, Royal Mail again seeks to amend the document,  
22 and you see that from the email at the foot of the page  
23 from Ms X. She states:

24 "Hi Felipe, on the basis this paper won't be  
25 privileged, please remove, or I can do so, the following

1 text in the 'Objectives' section: 'Maximising the  
2 probability of TNT not rolling out or even scaling back  
3 its current DD operations'. We can talk about it  
4 tomorrow, but it should not be included in any document  
5 which can be disclosed in the event of  
6 an investigation."

7 Do you see that?

8 A. I do. Again, this is not an email that I have seen,  
9 I was not copied in to this email.

10 Q. So you weren't aware that Royal Mail was trying to  
11 clothe particular aspects of the fact position with  
12 privilege?

13 A. I was not aware of this email exchange, no.

14 Q. I see.

15 A. I can't comment on it.

16 Q. Very good. Just to complete the story, you see at tab 7  
17 the amended note that was then prepared by  
18 Mr Flórez Duncan, and at page 4 it removes the  
19 problematic passage in order to produce a disclosable  
20 document that did not reflect that intention.

21 Can we turn now to the price differential. That had  
22 the same goal as this option A that was canvassed  
23 alongside it in September, namely to deter entry by  
24 Whistl, didn't it, Ms Whalley?

25 A. So which option are we now back on?

- 1 Q. We are now on price differential.
- 2 A. The price differential.
- 3 Q. The price differential also had the intention to deter  
4 entry by Whistl?
- 5 THE CHAIRMAN: The same as option E, not the same as  
6 option A.
- 7 MR HOLMES: Yes. Exactly, sir, I'm grateful.
- 8 A. (Pause). Sorry, could you repeat the question?
- 9 Q. The question, of course. Of course.
- 10 The price differential had the goal of deterring  
11 entry, didn't it, Ms Whalley?
- 12 A. (Pause). I disagree with that statement. The focus --  
13 as I think I said, Royal Mail recognised that anything,  
14 any steps that were taken under the commercial freedom  
15 could have an impact on the costs for another player.  
16 We recognised that, but we also recognised that the  
17 market was becoming more competitive, there was another  
18 player with plans to expand, and there were -- any steps  
19 that we took had to be consistent with our legal and  
20 regulatory obligations. So --
- 21 Q. So the answer is no?
- 22 A. -- I don't accept that we were trying to --
- 23 Q. Deter entry.
- 24 A. -- deter entry.
- 25 Q. By Whistl?

1 A. I don't accept that.

2 Q. No, good, well, we can now turn to see what the  
3 documents say.

4 At tab 9, you will see an email exchange, Royal Mail  
5 writing to Mr Flórez Duncan and another Oxera person at  
6 the bottom of page 1, and explaining that they're  
7 "preparing a presentation for senior Royal Mail Group  
8 colleagues on the access pricing proposals on which you  
9 had advised."

10 Then:

11 "The first slide in the attached [PowerPoint] is  
12 intended to go into the main (ultimately non-privileged)  
13 part of the presentation and the remaining three will  
14 form part of a privileged annex that will contain  
15 a legal assessment and the supporting economic advice."

16 There is also a reference to:

17 "... a scanned copy of [in inverted quotes] 'Slide  
18 8' which explains the scenarios being considered, but  
19 please note the impact numbers will change once [another  
20 person at Royal Mail] has done some more work on them."

21 So two things sent across.

22 First of all, the slide deck in question being  
23 broken into a non-privileged and a privileged annex, or  
24 an ultimately non-privileged part, was it a common  
25 practice at Royal Mail to produce slide presentations

1           that consisted of a part that was intended to be  
2           ultimately non-privileged, in your experience?

3           A. To be honest, I really can't remember.

4           Q. You can't remember if --

5           A. I can't remember that.

6           Q. -- Royal Mail --

7           A. I can't remember.

8           Q. -- prepared some slides with a view to them being  
9           ultimately non-privileged? Very well.

10           If we turn on to tab 10, you find the slide  
11           presentation in question. You see the first page,  
12           although it's said to be mainly -- to go into the main  
13           ultimately non-privileged part has nonetheless been  
14           heavily redacted for privilege.

15           Just looking at the heading, "Ofcom expects  
16           Royal Mail to use commercial levers to protect the USO  
17           but we must be mindful of the regulatory conditions and  
18           competition law". That's a sentiment that you would be  
19           very happy to see disclosed in any regulatory and  
20           competition law proceedings, isn't it, Ms Whalley?

21           A. Yes, that's how I remember it at the time.

22           Q. Yes.

23           THE CHAIRMAN: Are we reaching a suitable point to pause?

24           MR HOLMES: Yes, let's pause now, sir, and we can continue  
25           after the break.

1 THE CHAIRMAN: Ten minutes.

2 (11.42 am)

3 (A short break)

4 (11.52 am)

5 MR HOLMES: Ms Whalley, we were considering the slide  
6 presentation at tab 10 of the cross-examination bundle.  
7 Could you turn now to page 2, which is part of the  
8 presentation that was intended to be clothed in legal  
9 privilege. You will see parts have indeed been redacted  
10 for privilege, but the economic assessment remains  
11 visible in the third column. Do you see that?

12 A. Mm.

13 Q. Action 2, in the list of individual actions, is "up to  
14 0.3 pence price diff between NPP1 and NPP2". That is  
15 the price differential, isn't it?

16 A. Yes.

17 Q. NPP2 was the name at the time for APP2; is that right?

18 A. Yes.

19 Q. And the economic assessment which is quoted, although  
20 it's still provisional, is:

21 "Justification based primarily on value dependent on  
22 surcharges which are within Royal Mail control. Ofcom  
23 may not view this as sufficient objective justification.  
24 The impact on the upstream market may be significant."

25 So the objective justification at this point had

1 shifted towards value to customers and away from costs;  
2 is that right?

3 A. My recollection at the time was that the discussions  
4 were on both a value justification and a cost  
5 justification, where the value justification was the  
6 value to customers on APP2 from the increased  
7 flexibility that they had under the APP2 contract to  
8 give to Royal Mail for onward posting a less specific  
9 profile of mail, because under APP2 they were able to  
10 provide mail categorised in four zones, which gave  
11 additional flexibility to those customers compared with  
12 the NPP1 customers who had to provide the profile on the  
13 83 SSCs.

14 So at the time, and this I think was back in  
15 September, early October, the discussion as I remember  
16 was on both considering the value justification as well  
17 as the cost justification which was the benefit to  
18 Royal Mail from the advance forecast information to  
19 enable better planning of the operation. So both  
20 elements were in discussion.

21 Q. In the case of Whistl, by far the largest APP2 customer,  
22 representing the lion's share of all APP2 volumes, what  
23 is the increased flexibility that Whistl will enjoy?

24 A. (Pause). So for any customer on APP2, Whistl included,  
25 there was greater flexibility to meet the criteria for

1 mail in the four zones which gave those customers  
2 greater flexibility around the posting profile of their  
3 mail.

4 Q. So it was the flexibility of not having to observe  
5 a national profile and therefore of being able to  
6 compete with Royal Mail without incurring prohibitive  
7 surcharges; that's the case, isn't it?

8 A. That was one of the characteristics of APP2, yes.

9 Q. Now, although you say both were in play, we saw that the  
10 early slides, presentations yesterday, referred to  
11 a cost justification, didn't they? They said that it  
12 was difficult. Do you recall that?

13 A. Yes.

14 Q. Now the justification is based primarily on value; do  
15 you see that?

16 A. (Pause). That is what is written in this document but,  
17 as I just said, my recollection at the time -- and  
18 I haven't seen this, this is not in my witness bundle,  
19 I have the document that was presented in  
20 October 2013 -- but my recollection was that the  
21 discussion was focused on both the value differential as  
22 well as the cost -- sorry, the value justification and  
23 the cost justification.

24 Q. But you just --

25 A. And there was ongoing work on the cost justification.

1 Q. And ultimately, in the paper to the disclosure board in  
2 January, I think it was 6 January, it was the  
3 differential, the amount of the differential was  
4 justified by reference to the cost calculations, wasn't  
5 it? Do you recall that?

6 A. Yes, in the disclosure committee papers there was  
7 justification for the cost differential, and then in the  
8 subsequent paper there was also a discussion on the  
9 value differential, the value justification.

10 Q. They were both referred to there.

11 A. Yes.

12 Q. But the valuation was done by reference to cost; that's  
13 right, isn't it? That was the ... solely based on ...  
14 perhaps we should go to it.

15 A. The most quantified view was based on the cost.

16 Q. If you could just take C4B/79. So it's bundle C4B.  
17 Sorry for all the files, Ms Whalley. This case has  
18 killed a lot of trees.

19 A. There are a lot of trees, indeed.

20 Q. Do you see tab 79 in C4B?

21 The point I was making is simply what one sees at  
22 2.10:

23 "The justification of the price differential is  
24 solely based on the calculations of the cost  
25 differential between the two scenarios, not the value to

1 customers of the additional flexibility."

2 That was where you ultimately pinned your colours;  
3 is that right?

4 A. (Pause). Yes.

5 Q. And --

6 A. Because it was on the cost justification that was most  
7 quantifiable.

8 Q. Doesn't this equivocation between different  
9 justifications which one sees running through the  
10 documents and also which surfaced during the course of  
11 your evidence yesterday confirm that these are ex post  
12 considerations, they are advanced in order to get  
13 regulatory compliance and not because they are the true  
14 reason for Royal Mail's actions?

15 A. (Pause). That's not how I would characterise it. As  
16 I think I've said, we were extremely conscious that any  
17 proposal that was put forward under commercial freedom  
18 would come under significant regulatory scrutiny, and  
19 that therefore any proposal needed to have sound  
20 justification for those proposals. So -- and in the  
21 case of the cost justification, what I remember at the  
22 time, this was a very serious and important factor for  
23 Royal Mail, if volumes were going to come out of the  
24 business at the rate of 15% to 20% market share loss at  
25 the local level, having the advanced information of that

1 volume loss was critical to enable the company to plan  
2 for those volume declines at the local level. So it was  
3 not a theoretical construct; it was a critical factor in  
4 Royal Mail in the face of declining volumes to at least  
5 be able to plan the operation to take out cost as best  
6 it could when those volume declines inevitably took  
7 place.

8 Q. The problem with the cost justification, Ms Whalley,  
9 I want to put to you, is the one that you set out in  
10 an email at tab 12 of the cross-examination bundle.  
11 This is a long and involved email chain in relation to  
12 cost justification. You see on page 3 there is an email  
13 from Mr Flórez Duncan in which he says -- he refers to  
14 "some documents circulated by a Royal Mail employee  
15 which are notes of meetings with ops". What are ops?

16 A. Operations.

17 Q. It's a department of Royal Mail; is that right? Or  
18 a division of Royal Mail?

19 A. It's the teams within Royal Mail that run and manage the  
20 network, everything from mail centres to delivery  
21 offices. That's operations.

22 Q. He continues:

23 "Please find below our views and comments on how  
24 this can be used to provide a robust cost justification  
25 for a price differential between NPP1 and NPP2/PP3.

1            "In summary, we consider that there is a lot of  
2 useful information contained in these documents which  
3 point directionally towards there being a cost  
4 justification for why NPP1 is less costly and more  
5 valuable for Royal Mail than NPP2 or PP3. All of this  
6 will be helpful in order to prepare an argument that  
7 a price differential is objectively justified.

8            "However, we also consider that in order to be able  
9 to provide a robust justification to a competition law  
10 standard, further work and evidence would be required.  
11 There are two aspects that we would highlight in this  
12 regard. Below we explain these two points and provide  
13 some ideas on how to overcome them.

14           "1) The 'value' for Royal Mail resides in getting  
15 advance knowledge of volume profiles, but these profiles  
16 do not necessarily have to be in accordance with NPP1  
17 [that's the national profile]. A common theme across  
18 both documents coming out of the detailed discussions  
19 with Ops, is that Royal Mail derives considerably more  
20 value from the receipt of timely information on the  
21 volume profile of access customers (whatever this  
22 profile is), [ie whether national or zonal], rather than  
23 from any intrinsic benefit from an Ops perspective that  
24 a national profile by SSC ... has over other profiles  
25 that are possible under NPP2/PP3. In other words, if

1 Royal Mail customers on NPP2 or PP3 were able to commit  
2 to post mail according to pre-specified profile of mail  
3 and shared this information with Royal Mail one to  
4 two years in advance, the value for Royal Mail from a  
5 planning perspective would be very large. For a very  
6 large customer, such as TNT, the value of this  
7 information could be the same, if not greater, than the  
8 value coming from the implicit commitment made by most  
9 customers on NPP1."

10 Then looking at your response to his email, you  
11 raise a couple of questions. Do you see that email at  
12 the foot of page 2?

13 A. Mm.

14 Q. "Given the value of potential cost justification seemed  
15 to be from the certainty of the volume and profile,  
16 could it be argued that if that info could be provided  
17 under PP2 and 3 that would also qualify for a discount,  
18 ie there is a base price for a plan and then a discount  
19 if the customer can provide a forward view of volume."

20 Do you see that?

21 A. Mm.

22 Q. That's the problem with the cost justification, isn't  
23 it, Ms Whalley?

24 A. (Pause). Perhaps I could take a minute to explain the  
25 level at which planning information and volume

1 information is helpful to Royal Mail. If there is  
2 information -- and then I will answer your question.

3 Q. Yes, of course. Yes.

4 A. If there is information at a zonal level, urban  
5 for example, urban can include Leeds, Manchester,  
6 Liverpool, other urban areas. Information at that level  
7 is not helpful to plan an operation which is local. At  
8 an SSC level, of which there are 83, each SSC is on  
9 average between 15 and 20 delivery offices, which are  
10 operational in a local area. And the availability of  
11 that information at a local level could practically be  
12 used by the delivery office managers and the local  
13 managers to make structural changes to the delivery  
14 routes, the level of resource at the local level in  
15 order to be able to manage the volume declines and try  
16 and ensure that the resources in the operation were as  
17 closely aligned as possible to the volumes and the  
18 workload, which was important for efficiency.

19 The issue with APP2 -- and we had many, many,  
20 I recall many, many discussions around this point -- the  
21 issue with APP2 is that customers and, whilst  
22 I recognise that TNT/Whistl was the major customer under  
23 APP2, it was not the only customer under APP2. And  
24 those customers did not plan their business using SSCs;  
25 they planned it on the basis of 11,000 postcode areas

1           which then came into the zones, and therefore we  
2           considered at the time that it was not practical for  
3           APP2 customers to provide that level of forecast at the  
4           SSC level.

5           The company, in all those discussions, did actually  
6           think that if these proposals went to a complaint and  
7           Ofcom reviewed that complaint and made a decision around  
8           that complaint, the company at the time and part of the  
9           discussion was wondering whether actually Ofcom might  
10          ask Royal Mail to take the APP2 contracts and  
11          restructure them based on SSCs rather than zones.

12          In the meantime, in our consideration, the  
13          consideration at the time, Royal Mail was aware that  
14          TNT/Whistl would probably have that information. We  
15          questioned whether Whistl might want to provide that  
16          information, but we considered it was possible for  
17          Whistl to move from APP2 to NPP1 and to be in a position  
18          to provide that information.

19          So that was the discussion that I recall at the time  
20          around the forecasting and volumes and the cost  
21          justification for the price differential.

22          Q. Well, can we see what Mr Felipe Flórez Duncan says at  
23          the top of page 4, because I think it directly addresses  
24          the answer you have just given. Do you see the fifth  
25          line from the top? He says:

1            "What is less helpful is that the justification  
2            provided means that customers who are on NPP1 but are  
3            not able to meet the criteria and tolerances of this  
4            price plan, should still be able to receive a discount  
5            if they are able and willing to tell Royal Mail with  
6            sufficient advance notice and a sufficiently high level  
7            of precision (eg, which SSCs, when) that they are  
8            unlikely to meet the criteria of PPI but are willing to  
9            commit to another profile."

10           So I think that although it's slightly involved,  
11           what Mr Duncan is saying is that you could offer the  
12           option to Whistl to provide this information which, on  
13           your case, would unlock cost savings and benefits in  
14           exchange for more favourable pricing; but instead you  
15           chose to tie the price differential exclusively to  
16           a national profile which Whistl could only remain upon,  
17           given the criteria and tolerances, without incurring  
18           prohibitive surcharges, if it did not pursue its direct  
19           delivery roll-out ambitions.

20           So, first of all, doesn't that cast doubt on the  
21           veracity of your objective justification based on costs?  
22           If you were really interested in cost savings, surely it  
23           would have been in your interest to do as  
24           Mr Flórez Duncan is here suggesting to you?

25           A.    What I can say about that, from the internal discussions

1 at the time, Royal Mail did not have bespoke access  
2 contracts. There were a significant number of access  
3 players in the market. The simplest structure from  
4 Royal Mail's point of view would have been to have had  
5 one access contract. However, Royal Mail recognised  
6 that different customers had different needs, different  
7 posting needs. In some cases they had their own  
8 customers. And the evolution of the access contracts  
9 had been to establish a small number, three, access  
10 contracts which could meet the needs of different access  
11 customers. It simply was not practical to have had  
12 bespoke contracts for --

13 Q. You wouldn't have needed bespoke contracts though, would  
14 you Ms Whalley?

15 A. With all -- well, if I may say, had -- Whistl/TNT was on  
16 an APP2 contract, and part of the discussion at the time  
17 was if there was, in effect, a bespoke contract for  
18 Whistl, who might be able to provide the volume  
19 information but was not on an NPP1 contract, then there  
20 would have been an impact on other players on APP2.

21 As I said before, we did consider that it was  
22 possible that Ofcom, if there were a complaint, would  
23 look at whether Royal Mail should develop APP2 as  
24 a contract with volume forecasting. We did consider  
25 that.

1 Q. But you wouldn't need a bespoke contract, you just have  
2 a condition under APP2 which allows parties to supply  
3 this valuable forecast information, if they are able to  
4 do so, in exchange for the favourable pricing. No other  
5 APP2 customer would be adversely affected, and there is  
6 no need to have a bespoke contract just for Whistl.

7 That's what Mr Flórez Duncan is suggesting.

8 A. So at the time we considered that, on APP2, as I said,  
9 no other customer would be able to provide that level  
10 and reliability of information --

11 Q. When you say no other customer, you mean other than  
12 Whistl?

13 A. Other than potentially Whistl.

14 Q. Yes, I see.

15 A. And we considered that Whistl could move to NPP1 and  
16 gain --

17 Q. Well, we will see what you thought would happen on NPP1  
18 if it moved.

19 Can we turn now to tab 11, please, Ms Whalley.

20 So this is a hard copy slide which was attached to  
21 the email I showed you earlier, attaching also the slide  
22 deck with the ultimately non-privileged first page.

23 You will see it appears to form part of some other  
24 separate slide deck. As well as being in scanned form  
25 it's got a different Royal Mail logo on it from the

1 slide deck at slide 10, it is in a different font and  
2 has a different footer.

3 Now, we haven't seen the wider slide deck from which  
4 it's drawn. Can you shed any light?

5 A. So the wider slide deck -- I have never seen this  
6 version of this slide. The wider slide deck from which  
7 this page was drawn is a document, I believe it's at  
8 tab 69 of my witness statement --

9 Q. But that is prepared some time after -- this was  
10 attached to an email of 10 October 2013.

11 A. But what I'm saying is I have not seen this --

12 Q. I see. So you cannot shed any light on --

13 A. -- so I cannot shed any light.

14 Q. I see. You will see someone has --

15 A. What I can shed light on is the --

16 Q. I am going to take you to that slide, Ms Whalley. I'm  
17 conscious of the time, so if we could -- when we come to  
18 that slide, you can make any points you want to about  
19 it.

20 THE CHAIRMAN: The difference, Mr Holmes, is that this slide  
21 at tab 12 has writing on it.

22 MR HOLMES: Yes.

23 THE CHAIRMAN: Is that the point? Yes.

24 MR HOLMES: Well, certainly one of the points is that it has  
25 handwritten comments on it, and I was going to ask

1 Ms Whalley if she recognised the handwriting.

2 A. I have no idea. I'm sorry.

3 Q. That's good.

4 The manuscript amendments have added that the slide  
5 is privileged. Do you think this was to try to prevent  
6 its subsequent disclosure?

7 A. I don't know. I really don't know where this slide came  
8 from.

9 Q. Okay.

10 A. All I can talk about is the final version of this slide.  
11 I don't know where this came from.

12 Q. Well, let's then perhaps take it from your final  
13 version, if you feel more comfortable speaking to that  
14 one. So it is in C4A at tab 35, but you may have it --  
15 I think it's in a number of places in the bundles, but  
16 that's where I have been working from it.

17 I think it's the same, it's the October -- yes.  
18 Just to confirm, does your document have at the front of  
19 it "Options for protecting the USO: draft discussion  
20 document, October 2013"? Very good.

21 So if you could turn to the slide, which is  
22 slide 10, on the slide two of the options are marked in  
23 red, three in yellow, and one in green.

24 Now, the green column is in substance the option  
25 closest to the one ultimately implemented by Royal Mail;

- 1           that's correct, isn't it?
- 2       A.   Yes.
- 3       Q.   And green signifies that it was, in Royal Mail's view,  
4           the best approach; is that correct?
- 5       A.   Yes, we considered it was the best approach to try and  
6           protect the universal service, yes.
- 7       Q.   And the left column shows that in assessing whether the  
8           option was best, Royal Mail looked at three factors: the  
9           likely outcome for the direct delivery operator; the  
10          market share loss; and the Royal Mail revenue loss.  
11       That's right, isn't it?
- 12      A.   Yes.
- 13      Q.   The green column achieves the end state scope of Whistl  
14          switching to PP1 and staying there; do you see that?
- 15      A.   Yes, but what's important on the green column, if I may  
16          explain, is the date 2014.  So when the company was  
17          doing the modelling, and it was modelling, under this  
18          option what we thought might happen -- and it was  
19          a view -- was that TNT/Whistl would switch to PP1, and  
20          the numbers here are based on, as you can see it says  
21          "by 2014", so that was an assumption of what might  
22          happen in 2014; whereas, for the other scenarios, it is  
23          more of an end state by 2017.
- 24      Q.   So --
- 25      A.   So there is a reason for that.

1 Q. But, Ms Whalley, forgive me, the switching to PP1 and  
2 staying there is linked to the market share loss and the  
3 revenue loss which is then shown. Do you see that?  
4 1.4% and 40 million; yes?

5 A. That was the modelled estimate for 2014.

6 Q. Well, not only for 2014.

7 A. No, however, if I may, please, look at slide 10 --

8 Q. Yes.

9 A. -- in conjunction with slide 11 --

10 Q. Yes, I'm going to take you to slide 11.

11 A. -- the reason for that is there were many moving parts,  
12 and at the time Royal Mail considered that there were  
13 a number of different options that Whistl might have,  
14 and as you can see from the three graphs that are on  
15 page 11 -- and these were just three possible  
16 outcomes -- so there was an option, if there was no  
17 change, that was the top graph --

18 Q. But that's not an option, is it, in relation to  
19 scenario 2? That's no action. What's being modelled  
20 there is scenario 0 in the above slide, isn't it?

21 A. That's correct.

22 Q. So the two options for Whist that you have modelled --

23 A. So the two options --

24 Q. -- are the two at the bottom of the page, aren't they,  
25 Ms Whalley?

- 1 A. Yes, and --
- 2 Q. The one that shows a steady state of 1.4% and 40 million  
3 of revenue loss over the period of the plan is the  
4 middle of the graphs, isn't it, Ms Whalley?
- 5 A. Yes, but the 1.4% is reached by 2014, that was the  
6 reference in the green chart, or the green column in the  
7 chart on slide 10.
- 8 Q. So tell me, which do you think Royal Mail hoped and  
9 expected to happen out of these two charts, the middle  
10 chart and the bottom chart?
- 11 A. We actually didn't know.
- 12 Q. No, you may not have known what would happen; which did  
13 you hope and expect would happen?
- 14 A. Royal Mail thought it was possible and feasible that  
15 actually scenario 3 might happen.
- 16 Q. You are deliberately evading my question, Ms Whalley, if  
17 I may say so. Can we turn to slide 9.
- 18 A. Would you like to pose your --
- 19 Q. What did you hope and expect of those two scenarios to  
20 happen? Look at the second bullet on page 9:
- 21 "Introducing a small price incentive, less than  
22 1.5%, for customers committing to a national profile of  
23 mail is likely to be attractive to almost all customers  
24 and will not exclude direct delivery competition. The  
25 market share in delivery we might expect to lose within

1 the permitted tolerances of price plan 1 is 1.4%  
2 representing 30 to 40 million of revenue."

3 That was your expectation.

4 A. When we were discussing this at the time, I don't think  
5 it's right to characterise it as our expectation.  
6 You're right to say the modelled number is that, but we  
7 were not aware at the time of the nature of Whistl's  
8 business plan, its investment, how it would -- at the  
9 time this was done, how it would consider, and we  
10 thought there was an option, as set out on the bottom of  
11 slide 11, that actually TNT would take the opportunity  
12 to accelerate the roll-out. We recognised there would  
13 be a cost to Whistl of doing that, but we did consider  
14 that that was a possibility.

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

24 So Royal Mail would have preferred to go for the "do  
25 nothing" scenario shown in the top of the three charts.

1 It certainly wouldn't have proceeded with scenario 2 if  
2 it had really thought that there was a prospect of the  
3 bottom chart coming to pass. Its behaviour is only  
4 rational on the assumption that what it expected, as  
5 indicated in the second bullet on page 9, is that you  
6 end up at a steady state from the get-go of about six  
7 SSCs and a market share of about 1.2%, 1.4% for Whistl,  
8 scarcely larger than the one it had already achieved.

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

16 Q. You had to take a punt.

17 A. -- there would be a cost to that.

18 Q. And the cost would have been no profit for two or  
19 three years; is that right? That's your bottom  
20 scenario, that Whistl would be able to engage external  
21 investment in a risky proposition that was non-profit  
22 making for two to three years while it built economies  
23 of scale; is that correct?

24 A. That potentially would have been one of the  
25 implications. We did recognise that, in rolling out on

1 NPP1, for example, there would have potentially,  
2 depending on the volumes, been surcharges that Whistl  
3 would have incurred. But, had Whistl been able, through  
4 its roll-out, to build up significant volumes, and on  
5 the basis of what we were seeing at the time in  
6 Manchester, for example, that seemed to be the case,  
7 then it was possible that the volumes and the benefit of  
8 the significant and additional volumes would outweigh  
9 the costs of any surcharges that Whistl would be  
10 incurring.

11 Q. I'm tempted to say that there is a rich irony in  
12 Royal Mail suggesting that Whistl could forego  
13 a reasonable rate of return, two to three years, in  
14 circumstances where your justification for your conduct  
15 was to achieve an EBIT of above 5%, and in circumstances  
16 where your public documents indicate that you thought  
17 a 10% to 14% EBIT was more appropriate given the risk  
18 value of the company to investors.

19 But laying that point to one side, you have the  
20 foregoing of a reasonable rate of return for two to  
21 three years. You also have a greatly accelerated  
22 roll-out by TNT, generating operations at a rate that  
23 would cover 40%, in excess of 40% of all premises by  
24 quarter 2 of 2016.

25 So you are also expecting that Whistl, on this

1 scenario, would be able to greatly accelerate its  
2 roll-out, aren't you? That that would be a feasible  
3 proposition.

4 A. At the time we were obviously not aware of the  
5 discussions that Whistl was having with potential  
6 investors, but we did consider whether Whistl might take  
7 advantage to try and accelerate its coverage of 42% of  
8 delivery points.

9 Q. If you could turn to slide 7, I want to consider what  
10 you hoped and expected was the outcome with you, in the  
11 light of the bullets shown, in the yellow column,  
12 "Launch package of initiatives without reducing average  
13 prices".

14 Do you see that the option, the description is:

15 "Price recognition for a national profile."

16 That's the price differential, isn't it?

17 A. Yes.

18 Q. And "Revised zonal prices", that's the zonal tilt,  
19 isn't it?

20 A. Yes.

21 Q. You then set out:

22 "What do we have to believe? No revenue dilution  
23 because average prices will increase at or above plan.  
24 DD operators will move to PP1 to avoid surcharges. DD  
25 will not expand to point of damaging commercial return."

1           Now, all of those propositions are consistent with  
2           your hope and expectation being that Whistl will stop at  
3           1.4% and Royal Mail's revenue loss will be confined to  
4           40 million, the green scenario 2 in the traffic light  
5           chart, are they not, Ms Whalley?

6           A. (Pause). From the point of view of the universal  
7           service, that would have been the best outcome.  
8           However, as I said, we considered that Whistl had  
9           options and could progress with its roll-out beyond the  
10          six SSCs under these proposals.

11          Q. Taking the pain of the raised costs under APP2 and  
12          foregoing profits for several years as a result of your  
13          action in introducing the price differential; that's  
14          right, isn't it, Ms Whalley?

15          A. (Pause). There was going to be -- sorry, could you just  
16          rephrase the question again for me, just repeat the  
17          question?

18          Q. So Whistl would take the pain of the raised costs under  
19          APP2 and forego profits for several years as a result of  
20          your action in introducing the price differential;  
21          that's what you are suggesting was Whistl's option?

22          A. (Pause). Yes, we recognised that, in progressing under  
23          NPP1, Whistl in the short term might incur some  
24          additional costs. However, it was possible that, with  
25          the roll-out, with significant market share, recognising

1           that Whistl had 50% of access volumes which were volumes  
2           with customers that it could potentially switch to  
3           delivery, we considered that there was a feasible option  
4           for Whistl, as an efficient entrant into the market, to  
5           be able to progress and build up its volumes in a direct  
6           delivery operation.

7           Q. If you considered that the bottom chart, despite its  
8           adverse impact on Royal Mail, was the likely outcome of  
9           your proposed scenario 2, why do the scenarios shown in  
10          slide 10 only show the outcome of the middle chart? Or  
11          are you suggesting that the scenario 2 isn't confined to  
12          the middle chart?

13          A. (Pause). In the bottom chart, had Whistl rolled out in  
14          this way, then the revenue loss to Royal Mail would have  
15          been material because Whistl would have reached 42% of  
16          delivery points. I can't say exactly which one of  
17          scenarios 0, 1, 3, 4 and 5 it would relate to, but this  
18          scenario would be, I think, consistent with some of the  
19          other scenarios here.

20          Q. So, I'm sorry, we agreed earlier that the bottom two  
21          charts on page 11 were both modelling scenario 2. One  
22          is with an assumption of no profit; yes? I put a point  
23          to you earlier that it would be irrational to adopt  
24          scenario 2 if you really thought the outcome would be  
25          the bottom chart, because it's worse for you than the

1 "do nothing" chart at the top. But the second point is  
2 that scenario 2 shown in 10 is undoubtedly the middle  
3 chart here, and one can see that because if you look at  
4 the bottom of the page, all of these assume no major  
5 investment is available to the entrant and that the  
6 entrant needs 10% profits in any expansion; yes? So  
7 that's the assumption of 10% profitability of each year  
8 of the roll-out.

9 The bottom chart is what happens under scenario 2 on  
10 the assumption that Whistl foregoes that profitability.  
11 So what's shown in chart 10, I put it to you, isn't the  
12 bottom -- sorry, what's shown in scenario 2 on slide 10  
13 is the outcome of the middle of the charts on page 11,  
14 not the bottom of the charts on page 11. Do you see  
15 that, and do you agree?

16 A. (Pause). That's not how we considered these charts. So  
17 in the green column, the 1.4%, 40 million, is the impact  
18 in 2014. At that point, remembering that we didn't know  
19 Whistl's plan, we didn't know the level of investment  
20 that Whistl was seeking, we didn't know Whistl's  
21 margins, we didn't know anything about the investment  
22 scenario for Whistl, and what we considered was that  
23 there would be options -- as I've talked about -- for  
24 Whistl to progress and, as I said, we did recognise that  
25 there would be a cost, either in a surcharge or in the

1 higher price due to the differential, for a period of  
2 time which might impact the Whistl business until it had  
3 built up significant volumes, at which point those  
4 significant volumes and the money earned on those would  
5 outweigh any costs. We did think that was a feasible  
6 option.

7 Q. Ms Whalley, I'm going to put it to you that scenario 2  
8 in slide 10 shows the market share loss and the revenue  
9 loss based on the middle chart on page 11, and I'm going  
10 to explain in three stages why that's the case, and you  
11 can tell me if you disagree.

12 On page 10, do you see at the bottom in the third  
13 line under the table it is stated that -- the assumption  
14 is that the entrant needs 10% profits in any expansion;  
15 do you see that? Yes?

16 A. (Pause). Yes, I see that.

17 Q. The second point is that, if you look at the charts on  
18 page 11, the middle chart assumes profits, expansion  
19 through profit; yes? Do you see that --

20 A. Yes.

21 Q. -- from the heading? And the bottom chart assumes no  
22 profit. I can take you, if you like, to the underlying  
23 working notes if you disagree with me, but these charts  
24 show the output of spreadsheets that are calculated on  
25 those two bases, the middle one with profits, the bottom

1           one without profits.

2           So it follows, therefore, that the scenario 2 in  
3           slide 10 is recording the results, despite that  
4           reference to "by 2014", of the middle chart. Do you see  
5           that, and do you accept it, or shall we go to the  
6           working notes?

7           A. I have not seen the working notes.

8           Q. Okay.

9           A. I'm not familiar with those working notes. The middle  
10          chart on page 11 --

11          Q. Yes.

12          A. -- would, I think, be consistent with the green  
13          column --

14          Q. Yes.

15          A. -- if Whistl had decided not to continue with the  
16          roll-out.

17          Q. Very good, so we have got --

18          A. However, the bottom chart reflects the green column, had  
19          Whistl decided with investment and recognising there was  
20          a cost to progress at pace with the roll-out.

21          Q. But I have just put to you why that clearly isn't the  
22          case, Ms Whalley. The scenario 2 isn't intended to  
23          cover both of those charts, the position as at 2014,  
24          because you can see from the assumptions at the  
25          bottom -- do you see the bottom line? -- that the

1           assumptions for all of the modelling shown in slide 10  
2           is that the entrant needs 10% profits in any expansion.  
3           So that 1.4% and 40 million is the end state --  
4       A.   But what I'm then saying --  
5       Q.   -- under the middle chart.  
6       A.   -- is that in slide 11 that bottom slide was a scenario  
7           that Royal Mail considered was a possible scenario --  
8       Q.   Yes, I understand that.  
9       A.   -- for Whistl to roll out without --  
10      Q.   Without profit.  
11      A.   It would imply that there was a lower profit than 10%  
12           potentially.  
13      Q.   No, it's zero profit, I can show you, perhaps if we turn  
14           forward to the working notes.  
15      A.   I haven't seen the working notes.  
16      Q.   I'm simply making good the point, Ms Whalley.  
17      THE CHAIRMAN:  Mr Holmes, I don't want to interrupt your  
18           flow.  Isn't the date of "by 2014" relevant, in that --  
19           on the third chart on page 11, "by 2014", there is still  
20           relatively little direct delivery expansion?  Is that --  
21           all the witness maybe is saying, is that by 2014 revenue  
22           loss has not been very great?  
23      MR HOLMES:  Yes, but I had understood her to be saying that  
24           scenario 2 in this slide --  
25      THE CHAIRMAN:  No, I understand that.  I am just wondering

1           whether the source of what appears to be  
2           a misunderstanding is that date which is influencing  
3           whether the green column is consistent with chart 13 or  
4           not. On its face it is strictly consistent, but not  
5           maybe in the way that you are suggesting.

6           MR HOLMES: I'm grateful.

7                        So to be clear, Ms Whalley, you are only assuming  
8           that scenario 2 could cover either of those because of  
9           the insertion there of the date "by 2014"?

10          A. Yes.

11          Q. But equally it's clear from the slide that in fact,  
12          because what is being included in slide 10 is a scenario  
13          with 10% profits, that it is the middle chart which is  
14          being shown, in which the overall loss, on exactly the  
15          same metric as the other scenarios, is 40 million and  
16          the overall market share loss, not just in 2014 but  
17          looking forward, is limited to 1.4%, and that's why that  
18          scenario was selected.

19          A. But that's under the assumption that there's no major  
20          investment --

21          Q. Yes.

22          A. -- and the entrant would need 10% profits.

23          Q. Yes, exactly, correct.

24          A. That's --

25          Q. Why would you include that scenario in slide 10 if you

1           didn't regard it as the one that you expected and wanted  
2           to result?

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

12       THE CHAIRMAN:  I think the witness accepts that the third  
13          chart on page 11 would require considerable investment  
14          and foregoing of profit.

15       MR HOLMES:  Yes.  I am grateful.

16       THE CHAIRMAN:  That may be sufficient for you.

17       MR HOLMES:  Yes, it would, sir.  I think we can move on.

18          There is only one more question, sir, so --

19       THE CHAIRMAN:  You are not going to take us to spreadsheets  
20          before lunch, Mr Holmes?

21       MR HOLMES:  I see that that would be an unwise course, sir,  
22          so I shan't attempt that.

23          All I shall ask is this: on your understanding, do  
24          any of these charts model a situation in which Whistl  
25          made substantial use of arbitrage?

1 A. (Pause). I don't think I know the answer to that  
2 question.

3 Q. Okay, then we shall leave it there. Just on arbitrage,  
4 Royal Mail's approach was that arbitrage was a problem  
5 and it was taking and continues to take steps to address  
6 it; that's correct, isn't it?

7 A. Royal Mail didn't like arbitrage because it was worth  
8 8 million in revenue. However, it was used by players  
9 in the market.

10 MR HOLMES: I am grateful.

11 I have no further questions, sir, so that concludes  
12 my cross-examination of this witness.

13 THE CHAIRMAN: Just before you stop, that 8 million figure,  
14 that's not a confidential figure, is it?

15 MR HOLMES: It's in Ms Whalley's statement, and I don't  
16 believe --

17 A. I think, to be precise, it's 7.8.

18 THE CHAIRMAN: Thank you.

19 So you have no further questions?

20 MR HOLMES: That's correct, sir.

21 THE CHAIRMAN: So after lunch it will be Mr Turner?

22 MR TURNER: Yes. There is a fair amount to get through, but  
23 we hope to conclude by the end of the day.

24 THE CHAIRMAN: We are ready and waiting. We will return at  
25 2 o'clock.

1 MR BEARD: I should just say, if Mr Turner is unable to  
2 complete this afternoon, Ms Whalley will not be  
3 available, unfortunately, tomorrow.

4 THE CHAIRMAN: I think you did say that yesterday, or  
5 somebody said it yesterday; that's a strong incentive,  
6 to both parties, may I say, to conclude today with this  
7 witness.

8 MR TURNER: Absolutely. If it cannot be done today, then we  
9 will ask permission to interpose Ms Whalley later in the  
10 week.

11 THE CHAIRMAN: We shall cross that bridge when we come to  
12 it, if we come to it.

13 MR TURNER: Yes.

14 THE CHAIRMAN: Thank you very much. 2 o'clock.

15 (1.01 pm)

16 (The short adjournment)

17 (1.59 pm)

18 Cross-examination by MR TURNER

19 THE CHAIRMAN: Mr Turner, good afternoon.

20 MR TURNER: Good afternoon, sir.

21 May it please the tribunal, to speed the plough we  
22 have prepared a cross-examination bundle, you should  
23 have copies of this.

24 This very largely does not contain new documents,  
25 but what it is is putting all of the things that I'm

1 going to ask about into one place to avoid the waste of  
2 time when you are searching for the files. I have tried  
3 to make it quicker.

4 THE CHAIRMAN: Very considerate, thank you.

5 MR TURNER: Ms Whalley, do you have a copy of that file?

6 A. I do.

7 MR TURNER: If the members of the tribunal do too, I shall  
8 begin.

9 Ms Whalley, I would like to begin by focusing on one  
10 of the major themes of your evidence, and if you have  
11 your witness statement there in one place or another,  
12 you find it in paragraph 136, if you could go there,  
13 please. Do you have that? If you cast your eye over  
14 what you say there, essentially your point is that  
15 Whistl's entire business model for direct delivery was  
16 based on cherry-picking business from Royal Mail from  
17 the start, when it started rolling out the direct  
18 delivery network in specific areas; is that right?  
19 That's what you say.

20 A. (Pause). Yes.

21 Q. Thank you.

22 Now, in the new bundle that you have been given, if  
23 you turn to the second tab, there is a document that we  
24 have seen before. This is the presentation which  
25 Royal Mail gave to Ofcom on 10 December 2013, and the

- 1 title is "April 2014 access pricing". Do you have that?
- 2 A. Yes.
- 3 Q. You remember that you attended this on behalf of  
4 Royal Mail?
- 5 A. I was at the meeting, yes.
- 6 Q. You said yesterday twice in the course of the day, "We  
7 welcomed competition, the company welcomed competition,  
8 but thought it needed to be on a fair basis". Do you  
9 remember that?
- 10 A. Yes.
- 11 Q. If we go to page 10 in this presentation, which you  
12 attended, we have the "Conclusions" page. If you look  
13 at the second bullet, your slide says:
- 14 "We believe direct delivery has the ability to limit  
15 customer choice and damage the viability of the USO as  
16 this form of competition is not on a level playing  
17 field."
- 18 This form of competition. So I gather from this,  
19 Ms Whalley, that Royal Mail saw direct delivery  
20 competition, in general, as being inherently an unfair  
21 form of competition because of the absence of a level  
22 playing field; is that right? (Pause). Rather than  
23 parsing the words, it's your reaction that I'm  
24 interested in.
- 25 A. (Pause).

1 Q. Shall I repeat that?

2 A. If you could repeat it for me, please, yes.

3 Q. The proposition with which I'm asking you to agree is  
4 that Royal Mail saw direct delivery competition, in  
5 general, as an unfair form of competition, and that was  
6 because of the absence of a level playing field.

7 A. (Pause). So Royal Mail saw direct delivery competition  
8 as a potential risk to the universal service because  
9 a direct delivery entrant had the ability to determine  
10 which areas of the country it delivered in, how many  
11 days of the week it delivered, and what type of mail it  
12 delivered, and that was a potential risk to the  
13 universal service because of the risk that a direct  
14 delivery entrant could start delivering significant  
15 amounts of mail in dense urban areas, leaving Royal Mail  
16 needing to deliver in higher-cost parts of the country,  
17 and this could have an impact on the inherent  
18 cross-subsidies in a sustainable universal service.

19 Q. Now -- very good, we'll come to those individual points  
20 in just a moment, Ms Whalley. I would like to focus,  
21 though, on a concept that you have here, and which you  
22 mentioned numerous times yesterday too, of the level  
23 playing field.

24 I am suggesting to you your concern, the one that  
25 you put to Ofcom, was the absence of a level playing

1 field. We will go into the reasons in a moment. Can  
2 you agree with that proposition? (Pause). It is, after  
3 all, what you said numerous times yesterday.

4 A. So what -- one of the concerns that Royal Mail had was  
5 that direct delivery competition could have an impact on  
6 the sustainability of the universal service in line with  
7 the graveyard spiral that was highlighted by Mr Hooper  
8 in his report. And one of the reasons that Royal Mail  
9 was concerned was that the rate of growth of access  
10 volumes in the UK, as a result of some of the issues  
11 that we spoke about yesterday, was significantly greater  
12 than in any other country, and the level of bulk mail  
13 volumes which were with upstream players had the  
14 potential to increase the volumes that would be  
15 attainable for a direct delivery player at a level which  
16 could have an impact to drive the graveyard spiral. So  
17 that was one of the concerns that Royal Mail had.

18 Q. Ms Whalley, I don't mean to hurry you unduly, but is the  
19 answer to my question yes or no? Have you forgotten the  
20 question?

21 A. Please repeat the question.

22 Q. Were you concerned, essentially, about direct delivery  
23 competition as an unfair form of competition because of  
24 the absence of a level playing field? Is the answer yes  
25 or no?

1 A. Yes, we were concerned that ... we were concerned that  
2 direct delivery could have a very significant impact on  
3 the universal service, given the market landscape and  
4 the regulatory landscape that existed.

5 Q. Would you agree that a level playing field, the words  
6 that you have used numerous times, means level for all  
7 the parties and not just the incumbent? It's not in the  
8 document, it's a point I'm putting to you directly.

9 A. When -- the term "level playing field", when we talked  
10 about that, when Royal Mail talked about that, it was in  
11 the context that the market and the regulatory framework  
12 should give different players in the market the ability  
13 to compete fairly.

14 Q. On a level basis?

15 A. Fairly.

16 Q. Do you mean by that on a level basis, fairly?

17 A. Fairly is what I mean. Fairly. That it was fair.

18 Q. Well, let's look at how you describe the problem in your  
19 own words. So if you still have paragraph 136 in front  
20 of you, this is how you have unpacked it in writing. If  
21 we look six lines down at your text, you say this:

22 "Direct delivery is based on an entrant's ability to  
23 price at a level below Royal Mail, regardless of how  
24 efficient Royal Mail becomes, because of the inherently  
25 higher costs attached to delivering the universal

1 service, which the entrant does not face, rather than  
2 due to the entrant's own underlying efficiency  
3 advantages."

4 Is that really the gist of your point? That was the  
5 nub of the unfairness that you are drawing attention to  
6 now?

7 A. (Pause). So, yes, we considered that there were cost  
8 advantages for a direct delivery player because a direct  
9 delivery player did not face the obligations of  
10 providing the universal service that Royal Mail did.

11 Q. And that was the source of the unfairness; is that your  
12 point?

13 A. (Pause). I wouldn't say that that was the sole point of  
14 consideration when I referred to a fair playing field,  
15 no.

16 Q. Because you have another consideration in mind that you  
17 are going to tell us? (Pause). Ms Whalley, shall we  
18 leave it that you can't think of one at the moment?

19 A. Yes, if we can come back to that.

20 Q. Let's stick with what you had said here and the sentence  
21 we have just read together. Now, with your eye on the  
22 page, would you agree with this: let's take the logic in  
23 your sentence and see where it leads us; would you agree  
24 that by the same reasoning it would equally be unfair on  
25 the new entrant if it was Royal Mail competing against

1           it in bulk mail delivery by relying on inherently lower  
2           costs, which Royal Mail enjoys as a result of delivering  
3           the universal service, which the entrant does not enjoy?  
4           That's the logical corollary of what you say there,  
5           isn't it? Sauce for the goose is sauce for the gander.

6           A. In theory, yes, but I don't believe that was the case.

7           Q. You thought there were no unique advantages attaching to  
8           Royal Mail as its position -- from its position as the  
9           designated universal service provider. Can I put to  
10          you, for example, the exemption from charging VAT to  
11          customers for direct delivery, which only Royal Mail  
12          enjoyed, was such a unique advantage, wasn't it?

13          A. (Pause). Access was indeed exempt from VAT. However,  
14          there are significant costs and obligations that are  
15          present for a universe service provider where the  
16          universal service provider is required to deliver in all  
17          parts of the country and, in the case of the UK, six  
18          days a week --

19          Q. We can agree that --

20          A. -- with a unionised workforce.

21          Q. So we can agree, Ms Whalley, that there are advantages  
22          as well as disadvantages for Royal Mail from its  
23          position as the designated universal service provider;  
24          is that right?

25          A. Potentially, yes.

1 Q. Your essential point is that a like for like comparison  
2 is needed so that you have overall a level playing field  
3 between Royal Mail and an entrant?

4 A. (Pause). I come back to the point I made before that we  
5 believed that the playing field needed to be fair.

6 Q. And did you, on that basis, argue that the VAT exemption  
7 you enjoyed should be removed? Or did you rather  
8 vigorously defend the preservation of that exemption?

9 A. We did. As part of the mandated access regime, we  
10 defended it.

11 Q. Now, a few moments ago you were outlining the different  
12 ways in which a new entrant in bulk delivery engages in  
13 cherry-picking, and you have covered that in your  
14 statement too. That's a couple of paragraphs back on  
15 page 41, if you want to go there, at paragraph 134. Do  
16 you have that?

17 A. Yes.

18 Q. So I'm looking at the foot of page 41, and four lines up  
19 from the bottom there is a sentence which begins  
20 "Rather"; have you got that?

21 A. Yes.

22 Q. "Rather, the entrant's strategy would be to cherry-pick  
23 the most profitable parts of the market ..."

24 Pausing there, you mean the most profitable parts  
25 for whom? Do you mean for Royal Mail?

- 1 A. And potentially for the entrant.
- 2 Q. Do you mean for Royal Mail as well as the entrant? Who  
3 do you have in mind?
- 4 A. (Pause). I can't remember exactly when I wrote this,  
5 but I believe I was referring to urban areas.
- 6 Q. That's the first of the points that we are about to come  
7 to, but before we get there, the basic proposition is  
8 the entrant will be cherry-picking the most profitable  
9 parts of the market in various ways. My proposition is  
10 that you would have included in the idea of for whom  
11 that is the most profitable Royal Mail itself. That  
12 must be the concern from cherry-picking, mustn't it? It  
13 shouldn't be difficult.
- 14 A. One of the concerns that Royal Mail had was losing  
15 volumes from dense parts of the market and being -- then  
16 having a disproportionate amount of volume in higher  
17 cost to serve areas.
- 18 Q. So we can agree that when you said "the most profitable  
19 parts of the market", you did mean, least among others,  
20 to Royal Mail?
- 21 A. Yes.
- 22 Q. You then, in the following subparagraphs, do unpack  
23 that. So let's look at those in turn. (a) is focusing  
24 on the low cost to serve areas, with the high population  
25 density, notably the dense urban areas. (b) was

1 providing the slower service, that's the three days  
2 a week economy service as opposed to the six days a week  
3 that Royal Mail has to provide. (c) was focusing on  
4 business mail, usually -- mostly machine sequenced into  
5 the order it will be delivered.

6 So you have given three dimension for cherry-picking  
7 by the new entrant: one, the areas of coverage; two, the  
8 delivery frequency, that's the three-day a week economy  
9 service point; and, three, the type of mail. That's  
10 right?

11 A. Yes.

12 Q. Now, your account here does not mention that you made  
13 exactly the same points to the regulator Ofcom in 2014,  
14 nor that the regulator gave clear reasons why what you  
15 said was wrong on each of those points, does it?

16 (Pause). So my proposition is that the witness  
17 statement does not refer to the fact that you had made  
18 exactly these points to Ofcom by way of submission.

19 A. I believe in my witness statement I did refer to the  
20 fact that we had had a dialogue with the regulator about  
21 our concerns on direct delivery and the impact of direct  
22 delivery and potential cherry-picking on the universal  
23 service.

24 Q. And you did. But, Ms Whalley, even a careful reader  
25 looking at what you say here might be forgiven for

1 thinking that Ofcom had agreed with you about the  
2 supposed inherent dangers of cherry-picking; isn't that  
3 right?

4 A. I'm sorry, I'm not following your logic on that point.

5 Q. Let's go forward -- have a look, if it helps, at page 62  
6 of your statement, and look at paragraph 202. Do you  
7 have that?

8 A. Yes.

9 Q. That begins by saying, you say:

10 "The CCNs as a whole sought to address ..."

11 Then you set out certain matters, (a), (b) and (c).  
12 If we look at (b) and drop halfway down, you first refer  
13 to Mr Hooper, and then you say:

14 "Ofcom itself recognised in the APR [which stands  
15 for access pricing review] consultation that a rival  
16 direct delivery operator's ability to cherry-pick entry  
17 could have a negative impact on Royal Mail, if,  
18 for example, it were effectively subsidising entry by  
19 an inefficient operator", and there is a footnote.

20 So I say again, one receives the impression, does  
21 one not, Ms Whalley, from this that Ofcom to some extent  
22 was recognising the predicament that Royal Mail was in  
23 at the material time and its vulnerability to the types  
24 of cherry-picking that you outlined, those three kinds  
25 of cherry-picking? Yes? (Pause). That's how the

- 1 reader would understand your statement.
- 2 A. So what I would say on that is that, in a number of  
3 documents, I believe Ofcom had made a reference to  
4 a recognition that direct delivery could have an impact  
5 on the sustainability of the universal service, and  
6 I believe in one document Ofcom did say that actually  
7 direct delivery could have an even bigger impact than  
8 the access regime had had. However, I come back to what  
9 I said yesterday, which is: despite Ofcom highlighting  
10 that concern, its guidance in March 2013 was that  
11 Royal Mail should use its commercial freedoms to address  
12 the risks of that direct delivery competition and its  
13 potential impact on the universal service.
- 14 Q. So, Ms Whalley, stay with 202(b). We see there you're  
15 referring to Ofcom itself giving this recognition. Do  
16 you see that? And there you do footnote a reference to  
17 a document to support what you say Ofcom recognised. Do  
18 you see that? Do you see that you are quoting --
- 19 A. Mm.
- 20 Q. -- from paragraph 7.44 of this access pricing review  
21 paper? You see that you are doing that?
- 22 A. Yes.
- 23 Q. Did you choose that document yourself to quote from?
- 24 A. Could I have the document, please?
- 25 Q. You will find it in the cross-examination bundle, in the

1           third tab. (Pause). So that's the document you were  
2           relying on. Are you familiar with the document that you  
3           were relying on?

4           A. I don't believe it's the third -- that's the monitoring  
5           update.

6           Q. This is in fact the document. If you go in it to  
7           page 82 --

8           A. I haven't got it. I don't have that document.

9           Q. You may be in the wrong bundle, Ms Whalley. I'm sorry  
10          for the confusion. The new bundle.

11          A. This one? Sorry. There are too many trees.

12          Q. I understand that entirely. So it's that new bundle,  
13          it's the third tab. Sorry for that. If you look at the  
14          first page, there is the document that you are  
15          footnoting, and this is the document you are relying on  
16          for that proposition, which is part of your statement.

17                 The question was whether you chose that document  
18          yourself to quote from.

19          A. Yes.

20          Q. You did.

21                 Now, if we start at page 74, we have Ofcom's  
22          provisional conclusions. Can I pause just to check that  
23          you still remember this document that you quoted from?

24          A. This document was at the end of 2014, after the CCNs.

25          Q. Yes, it's the one that you quote.

- 1 A. We did not have this document at the time of the CCNs.
- 2 Q. No, this is the document, however, that you are relying  
3 on yourself.
- 4 A. Mm.
- 5 Q. Yes? Do you remember it?
- 6 A. Yes.
- 7 Q. Now, if we look at paragraph 7.2, just so that we can  
8 orientate ourselves, what's going on, if I've understood  
9 it correctly -- and please say if I haven't -- is that  
10 Ofcom had identified a group of concerns, and those were  
11 concerns about the prospects of Royal Mail behaving  
12 unfairly to disadvantage new entrants in bulk mail  
13 delivery, wasn't it? It's what this was about.
- 14 A. (Pause). Yes.
- 15 Q. To speed it along, if we look at the first bullet at  
16 7.2:
- 17 "Royal Mail has the flexibility to structure its  
18 access charges so as to set relatively high charges (by  
19 comparison with its own costs) in areas where entry is  
20 unlikely while setting relatively low charges in areas  
21 open to competition. In doing so it can deter  
22 beneficial entry in bulk mail delivery."
- 23 So essentially the concern was of targeting without  
24 proper cost-reflective pricing; that's right, isn't it?
- 25 A. (Pause). Yes, that was a concern that Ofcom expressed.

1 Q. Yes, and to meet that concern they had certain proposals  
2 to counter the problem of Royal Mail's undue discretion  
3 in setting the access charges which could have  
4 anticompetitive effects.

5 If we look at the next page, 75, you see a summary  
6 of those proposals there at the top in four bullets. Do  
7 you see that?

8 You will recall those proposals.

9 A. (Pause). Yes.

10 Q. The first of them, the first bullet, is a proposal to  
11 introduce a rule essentially requiring cost-reflective  
12 pricing by you so that for every service the ratio of  
13 the zonal charges would equal the ratio of the zonal  
14 costs; so that was one of the proposals, wasn't it?

15 A. That was one of Ofcom's proposals at the time.

16 Q. We then have the heading in the middle of the page --  
17 this is just so that we can explain the paragraphs that  
18 you have quoted, in a few moments:

19 "Our concern about zonal charges."

20 Perhaps you can read 7.9 and 7.10 briefly to  
21 yourself.

22 (Pause)

23 So to summarise, am I right, Ms Whalley, that to  
24 meet the concern of possible anticompetitive behaviour  
25 that Ofcom perceived, at this point they had a proposal

1           that you should set cost-reflective pricing in the way  
2           they outlined? So, for example, if you wanted to set  
3           rural and suburban zone charges well above your fully  
4           allocated costs, then you also had to do so in the  
5           London and urban zones, the ones where you faced the  
6           threat of entry. That was the proposal, was it not?

7           A. So, sir, if I may say, that was the proposal from Ofcom  
8           in this document. One of the concerns that Royal Mail  
9           had, and I think this was a very legitimate concern,  
10          Royal Mail had asked Ofcom for guidance on "fair and  
11          reasonable", so when Ofcom published its new regulatory  
12          framework it did indeed say -- and I think repeated, and  
13          I refer to it in my witness statement -- that it  
14          recognised that it needed to provide guidance on "fair  
15          and reasonable" for the access framework. That guidance  
16          was not forthcoming at the time that it had set out in  
17          March 2013 that it expected Royal Mail to use its  
18          commercial freedom to come up with commercial actions to  
19          mitigate the risk of direct delivery on the universal  
20          service, and indeed I believe that as late as 2014 Ofcom  
21          recognised that it had not provided guidance on "fair  
22          and reasonable" to the market.

23                 So when Royal Mail was putting together, as best as  
24                 it possibly could, the commercial responses to the  
25                 threat of direct delivery to protect the universal

1 service, it did not have the benefit of Ofcom's guidance  
2 on "fair and reasonable".

3 Q. Now --

4 A. This information here came late in 2014 and was not  
5 available, as I think would have been helpful, in a more  
6 timely fashion.

7 Q. Yes --

8 A. So that's what I wanted to say about that.

9 Q. Thank you, Ms Whalley.

10 Now, it is -- this is the document which you are  
11 quoting for your proposition in your witness statement.  
12 Let's go to that now, on page 82. You will recall that  
13 in your witness statement a small part of this is quoted  
14 as support for the notion that Ofcom recognised the  
15 inevitable problems, risks of cherry-picking.

16 Would you read 7.44, from which you quote, and 7.45  
17 together on page 82 at the top, and particularly 7.45.

18 (Pause)

19 Have you had a chance to read that?

20 A. (Pause). Yes.

21 Q. So we can see, can't we, Ms Whalley, that Ofcom was not  
22 agreeing with Royal Mail's perspective that there was  
23 some inherent problem with competition in bulk delivery  
24 for so long as Royal Mail was under the universal  
25 service obligation? I suggest that the position, as we

1 can see here, is rather that Ofcom were saying that if  
2 Royal Mail's access charges in the areas where  
3 an entrant didn't enter were based on Royal Mail's costs  
4 of delivery, not a uniform charge, there would be no  
5 artificial cost advantage for an entrant. That was  
6 Ofcom's point, wasn't it?

7 A. (Pause). Could you just reiterate your explanation of  
8 that for me?

9 Q. Reading 7.45 in particular, Ofcom is saying that if your  
10 access charges in the areas where an entrant doesn't  
11 enter are based on your costs of delivery there, you  
12 have that freedom, there is no artificial cost advantage  
13 for the entrant; that's right, isn't it? (Pause). It's  
14 what Ofcom says here.

15 A. Yes, that's what Ofcom says.

16 Q. And Royal Mail already had the power to do that, didn't  
17 it, to charge different prices in different areas, and  
18 the only question being considered here was whether  
19 Royal Mail should be made subject to a duty? (Pause).  
20 You would agree with that?

21 A. (Pause). What do you mean by "duty"? It doesn't refer  
22 to a duty.

23 Q. No, Ofcom was considering imposing a requirement, its  
24 proposals involved among other things imposing  
25 a requirement, and we looked at that a moment ago. My

1 point is that Royal Mail already had the power to do  
2 this, didn't it, to impose different prices in different  
3 areas? I think you can agree with that.

4 A. Yes. There were opportunities using zonal prices, yes.

5 Q. And Ofcom also pointed out here that even if you have  
6 a less efficient operator who is prepared to accept  
7 a lower mark-up than Royal Mail, and it can offer  
8 a better price to the customer, that's a source of  
9 genuine competitive advantage which has the potential to  
10 offer benefits to consumers? We see, don't we, that  
11 that was Ofcom's perspective?

12 A. Yes.

13 Q. Is that right?

14 A. Yes.

15 Q. It's not one that we find in your statement, in your  
16 account of cherry-picking and your dialogue with Ofcom,  
17 is it? (Pause). Ms Whalley, is the answer yes or no?

18 A. The focus of my statement, though, was on the events in  
19 2013. This guidance and proposal from Ofcom was  
20 a document late in 2014.

21 Q. With respect, Ms Whalley, that's not right. Look at  
22 paragraph 7 of your statement on page 3. The vast  
23 majority of everything in it, right up until the last  
24 letter, 7(h), is all about the industry context and  
25 history, isn't it?

1 A. In terms of context, yes.

2 Q. And, moreover, you quote yourself from this document for  
3 that point, don't you, in paragraph 202?

4 A. (Pause). Yes.

5 Q. Let's move on.

6 The last sentence of 7.45 refers to paragraphs A5.91  
7 to A5.108, and you find those in the next tab of the  
8 bundle in front of you, tab 4. If you go in that to  
9 page 24, I think the starting point is a paragraph  
10 there, A5.97. Do you see that, near the top of page 24?

11 A. Yes.

12 Q. You will see the Royal Mail argument being summarised  
13 that the combination of the universal service  
14 obligations and this regulatory requirement created the  
15 scope for cherry-picking arbitrage by an entrant across  
16 three dimensions, coverage, delivery frequency and type  
17 of mail; yes?

18 A. Yes.

19 Q. So we come back to the point, Ms Whalley, that these are  
20 exactly the same three points that you have made again  
21 to this tribunal in your witness statement; yes?

22 A. Yes.

23 Q. And we see in the following paragraphs that Ofcom  
24 rejects each of them in turn, don't we? Turn the page.

25 (Pause)



1 to accept a mark-up which is lower, is engaging in  
2 standard competitive behaviour, aren't they? Those are  
3 the features of ordinary competition.

4 A. Mm.

5 Q. The nub of your concern -- I'm sorry, when you say "Mm"  
6 you have to say "Yes" for the transcript.

7 A. Yes. Yes.

8 Q. The nub of your concern is what you alluded to yesterday  
9 in conversation with Mr Holmes, and that's the fear of  
10 losing volumes through a process of competition. Isn't  
11 your key concern that because of the high proportion of  
12 fixed costs in your delivery network, your average cost  
13 of delivering universal service mail goes up when the  
14 volumes go down, a point that you made yesterday?  
15 That's the real concern, isn't it?

16 A. (Pause). Yes, there was a concern that if volumes  
17 reduce, the unit costs go up.

18 Q. So this is not about cherry-picking; this is about  
19 resistance to the competitive process in this area  
20 because of the fixed cost business that you have; isn't  
21 that right?

22 A. (Pause). Yes, there is a concern that the universal  
23 service was threatened. If significant volumes are lost  
24 then the unit cost goes up and the unit cost is higher  
25 in certain parts of the country where it is higher cost

1 to deliver. So cherry-picking is a part of that.

2 Q. Well, we won't go back into the detail of the argument,  
3 given the time, but can I put to you that even if  
4 an entrant was able to enter the market on a fully  
5 national basis, that would present the same problem for  
6 you of the prospective loss in volumes, which could  
7 threaten the USO, couldn't it?

8 A. Yes, a loss of volumes would threaten the USO.

9 Q. Now, we won't deal with the other points, we will come  
10 back to those later with the experts, but I'll turn now  
11 to the issue of the market constraints that Royal Mail  
12 was under, and I may as well begin, before we leave this  
13 document, by looking at paragraph A5.109, if you still  
14 have it open in front of you. Do you have that?

15 A. Yes.

16 Q. If you could perhaps read that to yourself.

17 (Pause)

18 Here, perhaps in a nutshell, Ms Whalley, would you  
19 agree that we see Ofcom's position on how competition  
20 would affect Royal Mail in this area? That's their  
21 position, isn't it? (Pause). Strong constraint on  
22 prices, expanding the market and creating incentives for  
23 you to realise efficiencies, putting downward pressure  
24 on industry costs and encouraging you to pass those  
25 benefits to consumers.

- 1 A. That's what Ofcom has written.
- 2 Q. Well, more than that. You would agree that was  
3 generally their position?
- 4 A. Mm.
- 5 Q. Yes. Now, in your evidence yesterday you said this:  
6 "... direct delivery competition ... was something  
7 that we needed to take account of in how we planned the  
8 business."
- 9 I think we can be more specific than that,  
10 Ms Whalley. You would presumably accept, wouldn't you,  
11 that direct delivery competition from Whistl and the  
12 threat of a significant roll-out acted as a constraint  
13 on your price setting for downstream delivery at the  
14 time before Whistl's service came to an end? It had  
15 that effect, didn't it? It forced you to moderate your  
16 price increases.
- 17 A. (Pause). There were many factors that Royal Mail took  
18 into account when making judgements on price.
- 19 Q. Did this particular factor affect your price setting,  
20 the threat of direct delivery? Did it exert a market  
21 constraint or not? (Pause). Ms Whalley, you must  
22 remember whether it did play a factor in your thinking.
- 23 A. As I said, there were a number of factors when we  
24 considered price changes. Given the rate of  
25 e-substitution in the market, we also looked at,

1           for example, elasticities. So it was not the only  
2           factor that we took into account.

3       Q. Now, I'm not saying it was the only factor, but I think  
4           you are implicitly agreeing it was a factor; do we agree  
5           on that?

6       A. We had to take into account the competitive environment.

7       Q. So let's turn on in that same cross-examination bundle  
8           to tab 6, it's another document we have seen, it's the  
9           letters strategy paper from June 2013, when Whistl is in  
10          the market.

11                If we turn to page 4, you have the executive  
12                summary. You see the second row down marked "Context"  
13                on the left in red type, and you see five bullets.

14                Look at the penultimate bullet. There are four risk  
15                drivers which could materially impact on letters  
16                revenue, and those are set out.

17                Then if we go to the next row, marked "Theme 1" in  
18                red on the left-hand side, we read the first bullet:

19                        "To deliver the planned revenue we will increase  
20                        prices broadly in line with RPI. Small, smooth  
21                        increases aimed to avoid customers being prompted to  
22                        switch from mail and avoiding increasing the risk of  
23                        direct delivery."

24                Now, leaving aside the risk of e-substitution, one  
25                of the factors mentioned here, Ms Whalley, is clearly

1           avoiding the risk of direct delivery, isn't it? So we  
2           can see here how competition in bulk mail was operating  
3           as a market constraint on your power over pricing.

4           A. Yes.

5           Q. As well as price, another dimension of competition is  
6           that it typically increases customer choice compared to  
7           a monopoly service. Can I suggest to you that Whistl,  
8           then TNT, was offering the choice of an advanced form of  
9           delivery service which Royal Mail was not offering, but  
10          for which there was widespread support among customers;  
11          do you agree? (Pause). That Whistl was offering  
12          a standard service which was an advanced form of  
13          delivery service to customers?

14          A. No, I have no evidence of that.

15          Q. Really?

16          A. What I can say on that was that the satisfaction for  
17          postal services was at a very high level, over 85%.

18          Q. Did you have no knowledge of the form of service that  
19          Whistl was offering to customers?

20          A. What I had no knowledge of was any research or evidence  
21          which indicated whether that service was valuable to  
22          customers. I didn't have any evidence of that.

23          Q. But is it implicit in your answer that you did know and  
24          do know now that Whistl offered customers tracking to  
25          the door as part of its standard offering? This is

- 1 a factual matter.
- 2 A. Yeah, I was aware that that's what Whistl was seeking to  
3 provide. As I said, I had no evidence whether that was  
4 a service that customers valued.
- 5 Q. Well, given your knowledge of the mail business, might  
6 you be able to give the tribunal now, in your own words,  
7 any reasons why customers might value such a service, or  
8 can't you think of any?
- 9 MR BEARD: Is that a factual question or again speculation?
- 10 MR TURNER: It's not speculation, it's asking about the  
11 witness's knowledge of the mail business and she will  
12 answer. (Pause). Can you see anything of value to  
13 customers, your former customers, in the provision of  
14 this form of service?
- 15 A. I could comment on parcels. I believe it's speculation  
16 to comment on letters, because I never did any research  
17 into this for letters.
- 18 Q. Were you aware of it being even considered within  
19 Royal Mail at the time?
- 20 A. (Pause). Royal Mail was not, to my best knowledge,  
21 considering scanning letters at the doorstep.
- 22 Q. Let's approach this from one final direction. If you go  
23 to tab 8 in the new bundle, you have an extract from  
24 a Whistl document, a commercial due diligence report  
25 that was prepared by PwC for the prospective investor.

1           May I ask, have you ever seen this document before?

2           A. No.

3           Q. Turn to the second page that you have there, you have  
4           a slide 49.

5                     If you run your eye over the title, and the  
6           customers' comments summarised on the right-hand side,  
7           would you agree from your business perspective that  
8           these are plausible comments?

9           MR BEARD: Is the question whether or not these comments  
10           were actually made by customers to PwC or whether or not  
11           this type of comment is the sort of thing that customers  
12           might make? It is very difficult --

13          MR TURNER: It is the latter, Mr Beard.

14          MR BEARD: It is a bit difficult when it's a document that  
15           is not --

16          THE CHAIRMAN: Mr Beard, we are having difficulty enough,  
17           I would be grateful if the questioning continued, and  
18           indeed the answer.

19          A. I have not seen this before.

20          THE CHAIRMAN: That's not what you are being asked,  
21           Ms Whalley.

22          A. And I cannot comment and speculate on these findings.  
23           This is not research that Royal Mail did. So I'm unable  
24           to ... to get, to be drawn into a discussion on this  
25           research.

1 THE CHAIRMAN: Could I just say that as far as I'm  
2 concerned, I don't speak for my colleagues obviously,  
3 the impression I'm getting from the evidence you are  
4 giving on this point is that Royal Mail looked at its  
5 own quality and specification of service and didn't  
6 consider anybody else's; is that a fair conclusion?  
7 A. Royal Mail undertook research among its own customers on  
8 satisfaction levels with the service that was being  
9 provided --  
10 THE CHAIRMAN: By Royal Mail?  
11 A. By Royal Mail. We did do --  
12 THE CHAIRMAN: Yes, that is what I was assuming.  
13 A. Yes, that is what --  
14 THE CHAIRMAN: So my conclusion is, subject to whatever else  
15 is said, a reasonable one; is that right?  
16 A. The focus of the Royal Mail research, I think it is fair  
17 to say, was on satisfaction levels with --  
18 THE CHAIRMAN: Royal Mail services.  
19 A. -- Royal Mail services.  
20 THE CHAIRMAN: Okay, I'm content with that conclusion.  
21 I don't know whether Mr Turner is, but I am.  
22 MR TURNER: I am obliged, and we will move on.  
23 Turn to another area, Ms Whalley. Turn to  
24 paragraph 134 of your statement. So this is what we  
25 started off by looking at, you will recall. Do you have

1           it in front of you?

2           A. Yes.

3           Q. We looked at the sentence just above letter (a) at the  
4           bottom where your evidence was that the entrant's  
5           strategy would be to cherry-pick the most profitable  
6           parts of the market.

7           If we turn the page to 136, four lines down, your  
8           evidence continued:

9           "\"This 'cherry-picking' is exactly what Whistl did  
10          when it started [that should say \"rolling out\"] its  
11          direct delivery network in specific areas.\"

12          Were you aware, when you signed your statement, that  
13          Whistl's roll-out had begun in areas of London?

14          A. Yes.

15          Q. And you knew also, I think, that Royal Mail's delivery  
16          costs in London, where there is a high density of  
17          addresses, were higher than in all the other zones,  
18          including in rural zones, didn't you?

19          A. I believe on a fully allocated cost, not on a LRIC cost.

20          Q. We will look at that in a moment. If I put those two  
21          points together, that Whistl began the roll-out in  
22          London and that the costs in London for you were in  
23          fact, let's say, high, can you accept that your witness  
24          statement is rather misleading by suggesting that Whistl  
25          was cherry-picking by taking the most profitable

1 business areas from you, because those were not, so far  
2 as Royal Mail was concerned, the most profitable  
3 business? Is that right?

4 A. I am afraid I cannot remember the profit margin of all  
5 of the different zones.

6 Q. But you felt qualified enough to say what you did in  
7 your written evidence, that this was the form of  
8 cherry-picking which was exactly what Whistl did when it  
9 started rolling out its network. So at the time you  
10 signed this statement, you did feel qualified to make  
11 that point.

12 A. But I would also like to point out that Whistl was not  
13 only rolling out in London, it was other urban areas  
14 with dense populations that were profitable. It was not  
15 only London.

16 Q. We may come to that, but they began the roll-out in  
17 London, didn't they, and the point that I have made  
18 therefore surely applies concerning the misleading  
19 nature of this part of your evidence?

20 A. (Pause). As I said, I cannot remember all of the  
21 details relative to the LRIC versus FAC, and maybe  
22 that's a point that may get discussed with the experts,  
23 but there were differences in the different zones on the  
24 costs and therefore the profitability.

25 Q. I think you said a moment ago that you think the costs

1           may have been higher for you on a fully allocated cost  
2           basis in London than elsewhere, but not on a long run  
3           incremental cost or other basis; was that what you were  
4           saying?

5           A. That is my recollection, but, as I said, I don't have  
6           the precise numbers in my head.

7           Q. Shall I give them to you? If you turn to tab 10 in this  
8           document overleaf, we have one of your papers,  
9           Royal Mail's, marked "Zonal cost calculations".

10          A. Where ...?

11          Q. It's the same bundle, the new one, and you need to go to  
12          tab 10 and look at it in landscape. Do you see it's  
13          dated 25 March 2014? Would you, at the time, have seen  
14          this before?

15          A. (Pause). To be honest, I can't remember.

16          Q. Well, shall we go in it to the last page, page 5 -- it  
17          contains updated results -- and have a look together and  
18          what it says.

19                 So here we see on the left-hand side a blue column  
20                 marked "Floor" and on the right-hand side a yellow  
21                 column, a row at the top marked "Ceiling", and then  
22                 "Price" wedged in the middle in green.

23                 For "Floor" we have an acronym on the left, DLRAIC.  
24                 Are you familiar with what that stands for?

25          A. The LRAIC was the long run average incremental cost.

- 1 Q. And for "Ceiling" on the right we have another acronym,  
2 DSAC. Do you know what that stands for?
- 3 A. I believe it's a standalone cost.
- 4 Q. If we run our eye across this table, we see London as  
5 the last but one row at the bottom, and I think we see  
6 that on all measures of cost, both these measures of  
7 cost, London is higher than any other zone, isn't it?
- 8 A. Yes.
- 9 Q. In summary, when Whistl started doing its own deliveries  
10 in London, Whistl didn't cherry-pick the areas that were  
11 cheapest for Royal Mail to serve, let alone leave you  
12 with no option but to charge unprofitable average prices  
13 elsewhere in the country, did they? (Pause).  
14 Ms Whalley, it's a yes or no.
- 15 A. I apologise, there is a level of detail in these  
16 documents, which are not attached to my witness  
17 statement, which are going to a level of detail that  
18 I don't have in my head.
- 19 Q. That I understand, Ms Whalley, but we are testing the  
20 point that you have made in your witness evidence in  
21 paragraphs 134 and 136, and in response to what you said  
22 there, do you recall, about Whistl engaging in  
23 cherry-picking when it started rolling out its network  
24 in specific areas? I'm putting to you that it didn't  
25 cherry-pick the areas that were cheapest for Royal Mail

1 to serve, and it didn't leave Royal Mail with no choice  
2 but to charge unprofitable average prices elsewhere in  
3 the country? Can we agree on that?

4 A. (Pause). My recollection at the time was that the price  
5 for London was high and one of the changes that we made,  
6 Royal Mail made in the zonal pricing was to reduce the  
7 price in London so that Royal Mail was better able to  
8 compete in London with a new entrant into the market.  
9 That is one of my recollections.

10 Q. Yes. We will come to that in a moment. While we have  
11 this page open in front of us, will you agree I'm  
12 interpreting this correctly when I look at the London  
13 row and I see that the average price there is very  
14 close, [redacted], to the floor prices, floor costs?

15 I'm now told that this is a confidential document,  
16 I'm reminded. So without mentioning the figures, can we  
17 agree that the average price which is quoted for London,  
18 without mentioning it, is close to the floor costs on  
19 the left rather than the ceiling costs on the right?

20 Whereas, if we look at suburban or rural, we see it  
21 done in a different way, that the price there is very  
22 close to the ceiling and far away from the floor; do you  
23 see that?

24 A. I can see that, and again I apologise, I have not --  
25 this is the first time I have seen this document, and

1 I believe that these prices here may have reflected ...  
2 proposals that would make London a more competitive part  
3 of the market for Royal Mail. But, as -- I have not  
4 seen this document before.

5 Q. Well, let's press on. In your evidence yesterday you  
6 were asked by Mr Holmes why zonal prices didn't protect  
7 you against cherry-picking. Do you remember him asking  
8 you that?

9 A. Yes.

10 Q. I'll summarise your answer, but for the transcript it's  
11 Day 5, page 68. You said that before the CCNs the zonal  
12 prices were not cost-reflective, and it was an element  
13 of the CCNs to adjust zonal prices to be more  
14 cost-reflective, to ensure operators using parts of the  
15 zonal contract were paying a more cost-reflective price.  
16 Do you remember giving that answer?

17 A. Yes.

18 Q. So let's consider how you were setting your zonal  
19 prices, given Royal Mail's relative costs in the four  
20 types of zone. If we go on to tab 12, have you seen  
21 this before, this letter? It's Royal Mail's letter to  
22 customers dated 28 February 2011, giving the access  
23 prices that they would pay for the forthcoming year,  
24 2011/2012. Do you see that?

25 A. I do, and again I have not -- I cannot remember seeing

1           this document. This document was not part of my witness  
2           statement.

3       Q. Now, that doesn't matter.

4       A. I was not running the access and wholesale business at  
5           this time.

6       THE CHAIRMAN: Shall we see what Mr Turner wants to make of  
7           it before you --

8       A. Yes.

9       THE CHAIRMAN: -- distance yourself from it?

10      A. Yes, of course, sir.

11      MR TURNER: Shall we see how it bears on the evidence that  
12           you gave yesterday.

13                 Now, we see from the second paragraph, which begins  
14                 "As we previously stated, we thought carefully about  
15                 these price increases", that what the letter was doing  
16                 was notifying price increases to your customers.

17                 Can I ask you whether you know this is something  
18                 that Royal Mail consistently did more or less every year  
19                 since 2010?

20      A. Yes.

21      Q. The table at the bottom shows the percentage variances  
22           for the different zones from the average national price,  
23           which is the middle column. Yes?

24      A. Mm.

25      Q. So that's from the national price, which is charged

- 1           under both NPP1 at the time and APP2; is that right?
- 2       A.   Yes.
- 3       Q.   So if I understand it correctly, it means that if we're
- 4           looking -- let's take letters at the top, that letter
- 5           prices in the urban zones are 10.9% lower than the
- 6           national average; yes?  Is that right?
- 7       A.   Yes.
- 8       Q.   And suburban 0.3% higher, and rural 11% above the
- 9           national average?
- 10      A.   Mm.
- 11      Q.   And London, for London we have 9.9% higher than the
- 12           average.  Have I understood it correctly?
- 13      A.   Yes.
- 14      Q.   Above the table, you will see a sentence beginning
- 15           "Secondly":
- 16           "... the zonal pricing variances to the national
- 17           prices have been updated slightly to become even more
- 18           cost-reflective."
- 19           Can you confirm, please, your understanding of what
- 20           is meant by "cost-reflective" there in the letter?
- 21      A.   I believe it means reflective of the costs of
- 22           Royal Mail.
- 23      Q.   Let's turn on to the next tab.
- 24      A.   At a fully allocated cost level.
- 25      Q.   Thank you.

1           Let's turn on, tab 13. So we here have a letter  
2           which is now dated January 2012, and this is giving the  
3           new access prices for the forthcoming year again. There  
4           is a third paragraph marked "Summary of changes". Do  
5           you see that?

6           A. Mm.

7           Q. It's right to say, isn't it, that you were increasing  
8           your prices again; yes?

9           A. Yes.

10          Q. Turn over the page to page 2, we have again another  
11          table at the bottom, I think this is the corresponding  
12          exercise to the one we have just carried out, isn't it?

13          A. It looks like it.

14          Q. And again you say, just above the table, that the zonal  
15          prices have been updated to become even more  
16          cost-reflective; yes?

17          A. Yes.

18          Q. That would mean cost-reflective in the same sense that  
19          you have just explained to the tribunal; yes?

20          A. Yes.

21          Q. So let's turn forward to tab 14. We now have a letter  
22          concerning the year immediately before the CCNs with  
23          which the case is concerned. If we look at "Summary of  
24          changes", am I right that this is again notifying  
25          customers of more price rises; yes?

1 A. Yes.

2 Q. If we turn over the page, we have the 2013/14 variances,  
3 and we have the same pattern; yes?

4 A. Yes.

5 Q. So would you agree that it was wrong yesterday for you  
6 to say that the pre-2014 prices were not  
7 cost-reflective?

8 A. (Pause). My recollection was that these prices were set  
9 on fully allocated costs and not LRIC costs. I may have  
10 got that wrong, but that was my recollection, and there  
11 is a difference between the LRIC cost and the fully  
12 allocated cost.

13 Q. Is it your evidence, therefore, that if you had adopted  
14 a different cost base consistently for all of the  
15 different zones, that would have led to a different  
16 pattern?

17 A. (Pause). I don't know.

18 Q. Well, let's go forward to the next tab, 15.

19 THE CHAIRMAN: Mr Turner, I am sorry to interrupt, but we  
20 are approaching interval time, if not exceeding it.

21 MR TURNER: Sir, you are right. This is the last letter in  
22 this sequence, so I can either leave it for the moment  
23 or finish this.

24 THE CHAIRMAN: It rather relates to how we are doing for  
25 time.

1 MR TURNER: There is a lot to go through. I am trying to be  
2 as quick as I can.

3 THE CHAIRMAN: Yes.

4 MR TURNER: I am going to be taking up the full amount of  
5 time that the tribunal will give me the indulgence to  
6 have.

7 THE CHAIRMAN: Right, which is until 4.30.

8 MR TURNER: Yes.

9 THE CHAIRMAN: Mr Beard is going to re-examine. How long  
10 does Mr Beard think he wants?

11 MR BEARD: Not very long. I have only got a couple of  
12 questions at the moment. I just wonder -- I mean, if  
13 Mr Turner thinks he will not be done in the next hour,  
14 maybe it's useful just for him to think about that so  
15 Ms Whalley can know whether or not she is coming back on  
16 Thursday.

17 THE CHAIRMAN: Are you about to come to some devastating  
18 point or what?

19 MR TURNER: I have been making devastating points.

20 THE CHAIRMAN: You may very well say that, Mr Turner, I  
21 couldn't possibly comment.

22 MR TURNER: You will be the judge of that.

23 Sir, yes, I will do what I can. There is  
24 a realistic prospect, depending on how we go, that  
25 I might finish and then Ms Whalley will be done.

1 THE CHAIRMAN: I have to say, we have conferred on that, we  
2 are most uncomfortable at the thought of Ms Whalley  
3 being obliged to be in purdah for any lengthy period.  
4 We think that is unfair on her.

5 MR BEARD: We are too, it's simply that Mr Turner indicated  
6 that he might need more time and tomorrow is not  
7 available and therefore we just simply are trying to be  
8 cooperative.

9 THE CHAIRMAN: Yes. I repeat what I said, we are not very  
10 happy about a long period of purdah, so if we can get  
11 this finished today that would be good all round. I am  
12 conscious I am taking up time now. It might be better  
13 if you finish your point and then we will break for  
14 five minutes.

15 MR TURNER: I am obliged, sir.

16 THE CHAIRMAN: Thank you.

17 MR TURNER: Ms Whalley, if you will go to tab 15, please.

18 So here we have the zonal variances which were announced  
19 in the CCNs in 2014; yes?

20 A. Yes.

21 Q. If we turn to the third page, we have the customary  
22 table, and looking at the top right-hand side for  
23 letters, London is now no longer 9.9% above the national  
24 average price, it drops to 25% below the national  
25 average price; yes?

- 1 A. Yes.
- 2 Q. That pricing was a fundamental departure from the  
3 position historically for London, wasn't it?
- 4 A. Yes.
- 5 Q. There hadn't been any significant reduction in your  
6 costs of delivery between January 2013 and January 2014,  
7 had there?
- 8 A. Royal Mail was taking costs out of its network all the  
9 time. However, I believe that the difference here was  
10 moving to a LRIC basis for the costing as part of  
11 proposals to use commercial freedom in order to be able  
12 to ensure that Royal Mail could compete. I believe that  
13 that was the biggest difference here.
- 14 Q. To be clear, you are talking about a LRIC basis for  
15 London alone, not for the other zones? (Pause). Yes?
- 16 A. My recollection was that Royal Mail made these pricing  
17 proposals with reference to LRIC which --
- 18 Q. For London?
- 19 A. -- it was entitled to do.
- 20 Q. For London?
- 21 A. Yes.
- 22 Q. Alone?
- 23 A. I can't remember whether it was for London alone, but  
24 I can -- I believe it was for London.
- 25 Q. Last point, Ms Whalley, and then we will break.

1           If you could go into your statement at  
2           paragraph 199, which you should find on page 61, you  
3           will recall that it was part of your written evidence  
4           for this tribunal to discuss these price changes and the  
5           reasons for them, wasn't it?

6           A. Yes.

7           Q. You will see that you say in the middle of the paragraph  
8           that the CCNs include modifications which had the impact  
9           of reducing prices for the urban and London zones and  
10          increasing suburban and zonal prices. The next  
11          sentence --

12          A. Yes.

13          Q. -- then explains:

14                 "This was to ensure prices took account of the  
15                 relevant costs to Royal Mail of delivering mail in these  
16                 areas."

17                 Now, emphasising the phrase "the relevant costs to  
18                 Royal Mail", on reflection, can we agree that that is  
19                 not a fair and accurate statement?

20          A. I don't understand why not, if the basis was LRIC.

21          Q. Because here, Ms Whalley, I would suggest to you that  
22          the phrase "prices taking account of costs to  
23          Royal Mail" means something altogether different from  
24          cost oriented prices for each of the zones. What it  
25          means is that you were treating pared-down estimates of

1 Royal Mail's costs in London, the incremental costs, as  
2 a floor for prices in London and you were actually  
3 setting prices in London uniquely low to target the  
4 small-scale new entry from Whistl; that's right? It was  
5 to meet the competition in the local areas where the new  
6 entrant was coming in.

7 A. So my recollection at the time was, as part of  
8 a commercial response to protect the universal service,  
9 Royal Mail looked at its zonal pricing and set proposals  
10 for zonal prices in order to ensure that Royal Mail  
11 could compete in London.

12 Q. Now, lastly, Ms Whalley, in view of that, if you could  
13 just turn back to tab 3 for a moment, we looked earlier  
14 at paragraphs 7.9 and 7.10 on that page, what you say in  
15 the final sentence of your witness statement in  
16 paragraph 199 was this:

17 "Ofcom has not objected to these charges (sic)."

18 Yes? Do you see that?

19 THE CHAIRMAN: "Changes".

20 A. Yes.

21 MR TURNER: I'm sorry, "changes".

22 Ms Whalley, that may be technically correct in  
23 relation to this current infringement decision, but it's  
24 rather economical with the truth, isn't it? Because the  
25 zonal price rejigging was a measure in the CCNs which

1           you were combining with the price differential between  
2           the two national plans with a single aim, which was to  
3           counter Whistl's roll-out of a competing delivery  
4           service; would you agree?

5           A. I would not agree with that, and we talked about that  
6           before, and if I go to this last point here on 199, when  
7           this was written it was in the context of the CCNs and,  
8           if you recall, one of the concerns that Royal Mail had  
9           at the time was indeed that Ofcom, at that time, had not  
10          provided any guidance to Royal Mail or the market on  
11          what it meant by "fair and reasonable terms of access".  
12          This guidance was not available at the time.

13          Q. I understand that, Ms Whalley, but just to be absolutely  
14          clear, my question to you was about the basis for your  
15          pricing, and what I put to you was that this pricing, as  
16          you adopted it in London, had the same single aim as the  
17          price differential and it was to combat Whistl's further  
18          roll-out of a competing delivery service; is that right?

19          A. The way I would characterise it, and Royal Mail  
20          discussed it at the time, was to use Royal Mail's  
21          commercial freedom in order to try and be able to  
22          compete on a fair basis with a new delivery entrant in  
23          order to help protect the universal service. That's how  
24          I would characterise it.

25          MR TURNER: Thank you.

1 Sir, shall we leave it there?

2 THE CHAIRMAN: Yes. Five minutes.

3 (3.36 pm)

4 (A short break)

5 (3.41 pm)

6 THE CHAIRMAN: Crack on.

7 MR TURNER: Ms Whalley, I want to turn now to a new topic,  
8 and the topic is the issue of eligibility for the  
9 national price plans, and the conditions under which  
10 a customer would be able to move over from one to the  
11 other.

12 In the new bundle, if you turn to tab 15 --

13 A. Is this the same bundle as I had before?

14 Q. Yes. It's the recent one. You should have at tab 15  
15 a document 10 January 2014, it's the notice of the CCNs.  
16 Do you have that?

17 A. Yes.

18 Q. You see in it, on the first page, paragraph 2.1,  
19 something you will be familiar with, that there are  
20 two-year forecasting requirements for the NPP1 plan  
21 being introduced. Do you see that, 2.1(a) and (b)?  
22 Customers had to provide a two-year notification, and so  
23 forth.

24 A. (Pause). Yes.

25 Q. So with that in mind, if we then go to tab 18, we have

1 the access letters contract pro forma. In it, you go to  
2 page 39, which has the NPP1 plan terms. Tell me when  
3 you have that. It's headed "Schedule 3. Price plan.  
4 Option A". Do you have that?

5 A. Yes.

6 Q. The paragraph on eligibility is 2.1, under the bold  
7 heading, "Eligibility to opt for a National Price Plan",  
8 and you will see it says:

9 "You may only opt for [NPP1] (SSCs) if you are able  
10 to prove to our reasonable satisfaction that you have  
11 a reasonable likelihood of meeting the National Spread  
12 Benchmark and the Urban Density Benchmark."

13 Would you agree with me that the natural way to  
14 understand that is that Royal Mail would need to be  
15 satisfied that the customer's forecast mail intentions  
16 that it had to submit would fit with the plan's  
17 requirements? (Pause). The phrase "reasonable  
18 likelihood of meeting" gives us the clue.

19 A. Yes, although I recall that there were opportunities to  
20 be on this price plan and to have profiles that were  
21 divergent and to still be on the price plan, albeit that  
22 there were surcharges that would have been in place. So  
23 that's my caveat.

24 Q. We're dealing here with the conditions of eligibility  
25 for joining it in the first place, and we have agreed

1           that the natural way for a business to understand what's  
2           written is that it's forward looking; that's right?

3           A. Yes.

4           Q. I would suggest it fits with the way that Royal Mail  
5           actually behaved in practice, and suggest that  
6           Royal Mail examined the forward looking plans of  
7           a business to see not only if they were currently  
8           compliant with the benchmarks, but whether they would  
9           continue to meet the benchmarks; isn't that right? It's  
10          the way it was done?

11          A. What I remember is that the requirement for the forecast  
12          and the volume information was a new requirement --

13          Q. Yes, it was.

14          A. -- under the CCNs.

15          Q. Let's look together at how Royal Mail was considering  
16          how it would work. If you go to tab 20, please, you  
17          should have a heading "Notes from meetings and  
18          conference calls with operations on planning and  
19          forecasting and insight into changes in customer  
20          behaviour". Do you have that?

21          A. I do see the document here, but again this document was  
22          not part of my witness bundle, so this is a new  
23          document.

24          Q. I'm not worried about that, but it's the point that  
25          comes out of it that we're interested in your evidence

1 on.

2 If you could turn to the second page, please, you  
3 will have a little bullet at the top on the left-hand  
4 side. Do you see that?

5 A. On page 2?

6 Q. Yes, at the very top, after two lines which are  
7 a run-over from the previous page, there is a bullet?

8 A. Yes.

9 Q. What it says is that:

10 "When [a confidential well known high street firm]  
11 wanted to set up their own account on NPP1 for their  
12 [blank] business, the requirements of the plan required  
13 them to discuss with us their profile and volumes to  
14 assess whether they would be able to conform to the  
15 requirements of NPP1. Our analysis of their data and  
16 discussions with their senior managers regarding plans  
17 for their business led [it should say "led us to  
18 conclude"] that they would not be able to conform to  
19 NPP1 and they were therefore not allowed to take up  
20 NPP1."

21 So, Ms Whalley, this supports the idea that  
22 Royal Mail's practice, how it was liaising with  
23 customers about the new requirements, matched what one  
24 would naturally understand the words on the page to  
25 mean, doesn't it?

1 A. Yes. I'm not aware myself of the specifics of this  
2 customer --

3 Q. No.

4 A. -- however, so I cannot comment on the reasons why, in  
5 this case, that may not have been appropriate.

6 Q. No, but we see the approach.

7 Now, under the new terms for NPP1 which were being  
8 introduced, a customer wouldn't qualify if it failed to  
9 meet the national spread benchmark in five SSCs in  
10 England and Wales, down from six previously; is that  
11 right?

12 A. Yes.

13 Q. Would you agree that a customer such as Whistl/TNT which  
14 was carrying out its own deliveries in four SSCs prior  
15 to the CCNs in London and Manchester and had concrete  
16 plans to roll out the others within the coming year,  
17 would not be able to prove to Royal Mail it was  
18 reasonably likely that they would pass the benchmark?  
19 In fact, Ms Whalley, was it not obvious that they would  
20 fail the benchmark in 2014 and almost straightaway?

21 A. My understanding at the time was that the access team  
22 who managed contracts with customers believed that it  
23 was feasible for TNT/Whistl to move from APP2 to NPP1,  
24 and indeed in my witness statement I do have a meeting  
25 note from a meeting which I did not attend but

1 a colleague did attend, which I believe, from memory,  
2 was on 17 December in 2013, where there was a discussion  
3 on the potential for Whistl to move to NPP1.

4 Q. We will come to that, Ms Whalley, in a moment, so please  
5 be patient.

6 You would agree with me that based on the available  
7 criteria published and based on what we can see of  
8 Royal Mail's own practice, that I'm right to say that  
9 Whistl might expect that it would not be able to meet  
10 the terms of the NPP1 plan? It must follow, mustn't it?

11 A. As I said, I don't know in this particular case why this  
12 customer was not able to do that, and how that related  
13 to the profile of TNT/Whistl at the time. That's not  
14 information that I had.

15 Q. We don't need information, Ms Whalley, all we need to  
16 observe is that the decision was being made, as one  
17 would expect, on the basis of the plans that they  
18 submitted, and that Whistl's plans were to have  
19 a roll-out, which would mean that they would be in  
20 breach. So I ask you again: can we agree that if Whistl  
21 was, according to its plans that it would need to  
22 submit, going to be in breach of the benchmark, it  
23 wouldn't be able to prove it had a reasonable likelihood  
24 of meeting it and be eligible for the plan? Wouldn't  
25 that be the natural inference?

- 1       A. My understanding is -- and I believe that this is  
2       a legal, I think it was addressed in the reply as  
3       a legal point around reasonable endeavours.
- 4       Q. Now, I'm not going to get into the legality of it with  
5       you, Ms Whalley, at all. I am asking you for your  
6       business understanding, given the nature of the contract  
7       terms that you were putting out and the way that your  
8       operations team were dealing with this. So let's leave  
9       the legality to one side.
- 10      A. My understanding at the time was that it was feasible  
11      for Whistl to move to an NPP1 plan and to continue  
12      roll-out, recognising -- and I do recognise this -- that  
13      depending on the volumes and the locations, there may  
14      have been surcharges that were applicable.
- 15      Q. Is the basis for your understanding what you were saying  
16      a moment ago, your reference to this meeting that took  
17      place between Royal Mail senior executives and Whistl  
18      executives? Is that what you take as the basis for your  
19      understanding?
- 20      A. I remember that at the time there were a number of  
21      discussions that were held on this point. That's what  
22      I can say.
- 23      Q. And what was your reference to that meeting intended to  
24      signify? Was it relevant to this point?
- 25      A. Sorry, relevant to which point?

1 Q. To the question of eligibility of TNT/Whistl to join the  
2 NPP1 plan, the point that we are discussing.

3 A. So the reason that I made a reference to the meeting is  
4 that my understanding is that at that meeting there was  
5 a discussion around the potential for Whistl to move to  
6 NPP1, and indeed I believe that colleagues at that  
7 meeting indicated a willingness to have a discussion  
8 with Whistl about how to do that.

9 Q. Well, it is covered in your witness evidence, as you  
10 say, so let's look at that. It's on page 66 of your  
11 statement at paragraph 219, at the foot of the page. So  
12 there we have your evidence on this point.

13 I'm not sure Ms Whalley has the document.

14 A. No, I do have the document.

15 Q. Now, Ms Whalley, none of the Royal Mail executives who  
16 were at the meeting have been called as witnesses of  
17 fact, unfortunately. But you say, in the third line of  
18 219:

19 "I was briefed after the meeting and have reviewed  
20 Whistl's notes of the meeting, which are exhibited."

21 Yes?

22 A. Yes. Do we have that, the meeting notes?

23 Q. I'm coming to that in a moment. May I ask you, before  
24 we go there, who briefed you, please?

25 A. (Pause). I presume that it was -- which of these names

1           are confidential?

2           MR BEARD: The first of the names there is not confidential.

3           The other two I think remain confidential.

4           A. So I presume that it was the first name here.

5           MR TURNER: And are you aware of any other note which was

6           taken of this meeting on the Royal Mail side?

7           A. (Pause). I don't (inaudible).

8           Q. There isn't one in the bundle. I am asking if you can

9           remember any other note of this meeting which was

10          prepared on the Royal Mail side?

11          A. I don't remember.

12          Q. This note, which you do exhibit, the Whistl note,

13          presumably contains nothing which is at odds with the

14          briefing you received or else you would have said so in

15          your witness statement. Would that be right? (Pause).

16          I can tell you you don't refer to anything.

17          A. I don't refer to any other note, that's correct.

18          Q. Well, the minutes that you exhibit in your evidence are

19          at tab 21 in this same bundle. Can we look at those,

20          please. If we turn to the second page and look at the

21          top, three lines down, I think I can refer to these

22          names because the Whistl names are not confidential, and

23          we have been told by Mr Beard that the first Royal Mail

24          name is also now not confidential.

25          So you see the third row down:

1           "NW, Mr Wells, asked if RM had considered the impact  
2           on TNT post. SA said they considered the revenue from  
3           each customer and the price plans, they would look at  
4           the impact on each customer and assess where some  
5           customers have a possible mitigating effect."

6           Do you see that?

7           A. Mm.

8           Q. On reflection, would you agree that this was somewhat  
9           economical with the truth on Mr Agar's part, assuming  
10          this note is complete? That is not a full answer to the  
11          question that was put to him by Mr Wells?

12          A. I can't comment on that, I wasn't at the meeting, and so  
13          these are not my meeting notes.

14          Q. No, but we can agree that the price differential and the  
15          zonal tilts had been designed with the impact on Whistl  
16          and its roll-out at least in mind; wasn't that the case,  
17          from everything that we have gone through so far?

18          A. As I said, I was not at the meeting, so I am therefore  
19          not able to comment on the accuracy of what is in -- is  
20          in these notes at that point.

21          Q. I'm not asking you about that; I'm saying that if the  
22          note was complete, that was a rather misleading answer  
23          to be given to Mr Wells' question.

24          A. And what I'm saying is I don't know whether that's  
25          what -- exactly what was said, because I was not at the

1 meeting, so I can't comment on that.

2 Q. Now look at the foot of page 2, the last but one entry:

3 "NW said this would impact both the downstream  
4 access and end-to-end activities of TNT Post. The net  
5 result would be it could well scupper the set-up of an  
6 alternative E2E network. NW asked if RM was aware of  
7 the impact on TNT Post's business."

8 Then this:

9 "SA said the prices would be cost-reflective and  
10 that TNT Post has options to mitigate the effect. SA  
11 said that TNT Post currently satisfied the conditions of  
12 NPP1."

13 So, Ms Whalley, can we agree that this says only  
14 that at TNT's current level of roll-out, TNT satisfies  
15 the conditions of the plan?

16 A. That is what is said here. Again, I was not at the  
17 meeting so I don't know whether -- I don't know exactly  
18 what was said at the meeting, but that is what is said  
19 here.

20 Q. And your briefing after the meeting, by the individual  
21 concerned, doesn't lead you to take a different view?

22 A. As I said earlier today, based on the discussions that  
23 Royal Mail had at the time, the view was that Whistl  
24 could move to NPP1 and continue, albeit recognising  
25 there would be some surcharges depending on precise

1 volumes and locations.

2 Q. Can we agree --

3 A. That's my view.

4 Q. Understood, but you need to focus on my question, which  
5 is about what is said here. This says nothing about  
6 what would happen if TNT were to submit a two-year  
7 forecast which showed an aggressive roll-out plan to  
8 further SSCs, does it? In other words, Ms Whalley, it  
9 may be the case that if TNT stops its roll-out, that it  
10 can join the plan; it has that option. But if it  
11 continues its roll-out, that is incompatible with the  
12 terms of eligibility for the plan, isn't it?

13 A. (Pause). I go back to what I said before, which is that  
14 Royal Mail considered that there was -- there were  
15 options for Whistl to continue its roll-out on NPP1 to  
16 additional SSCs, albeit with surcharges.

17 Q. Now, Ms Whalley, I can't take that much further, but  
18 there is some confusion in the papers about the  
19 circumstances in which a customer who was on the NPP1  
20 plan, assume that you get on to it, is then liable to be  
21 switched over to another zonal plan for non-compliance;  
22 are you aware of that debate in this case?

23 A. My understanding, and I think it goes back to what  
24 I mentioned before on reasonable endeavours, which  
25 I don't feel, as I'm not a lawyer, qualified to talk

1 about, but which may come out in further discussion, but  
2 my recollection was that a player could only be asked to  
3 move to a different plan if there was more than 15%  
4 volumes that didn't comply, and my understanding was  
5 that Royal Mail didn't think that would be the case in  
6 this instance.

7 Q. Now, Ms Whalley, I'm not asking you in any way about the  
8 correct legal interpretation of these documents. What  
9 I am asking you about is the business understanding of  
10 these documents, how they were operated, how they were  
11 received and the information about how they would be  
12 operated that was communicated by Royal Mail to Whistl.

13 Now, can we turn, please, to tab 17 in the  
14 cross-examination bundle. This is a document which  
15 we've already seen, the proposed actions on the access  
16 contracts to protect the USO. In it, please, can you  
17 turn in the customer analysis section to page 22. Do  
18 you have that?

19 A. Mm.

20 Q. So here, it's in green, so we have to be careful about  
21 who it is. You see the customer identified at the top,  
22 and we can see from the first row under "Change":

23 "PP1: 6 failed SSCs [going down] to 5."

24 That this customer was failing to meet the plan  
25 benchmark in a fair number of SSCs in England and Wales;

1           yes?

2           A.   Mm.

3           Q.   We see at the bottom:

4                    "Would they switch plans?"

5                    The comment that:

6                    " ... they are compliant enough with [the] cheapest  
7           plan."

8                    Yes?

9                    So presumably in Royal Mail someone does take the  
10           approach that this customer's failures can be forgiven  
11           on the basis that Royal Mail will accept them making  
12           reasonable endeavours to comply with the plan; yes? To  
13           comply with its terms.

14           A.   That would be my understanding.

15           Q.   Yes.  Now let's look back at the Royal Mail presentation  
16           which was given to Ofcom, which we started with, at  
17           tab 2, in December.  Turn in it to page 9.  So in time  
18           this is a later document, but on page 9 you have a slide  
19           talking about the impact on different customers in the  
20           market and referring to their options to switch.

21                    If you look at the bottom, and I'm not sure if this  
22           is confidential so I shan't read it out, the bottom  
23           customer on the left and the impact on the right, you  
24           see what is said there about the impact?

25           A.   Yes.

1 Q. My question, Ms Whalley, is: would this business  
2 document not suggest that Royal Mail was taking the  
3 position that a failure by a customer -- I won't mention  
4 this named customer -- to meet the requirement would  
5 allow Royal Mail to switch them compulsorily and that  
6 this formed part of the presentation you attended with  
7 Ofcom? (Pause). It's the word "therefore" will be  
8 switched.

9 A. What I don't know and I can't comment on is whether, in  
10 the case of this particular customer, there was  
11 a change. I am unable to comment on that. These  
12 documents are from different times. I'm unable to  
13 comment on that. I don't know.

14 Q. No, I'm not asking you to comment on that specific. I'm  
15 asking you to comment on the approach. If you simply  
16 focus on that box with impacts, it's the "therefore"  
17 will be switched to another price plan which is  
18 important, and I'm asking you whether that captures  
19 correctly the approach that Royal Mail was then taking  
20 commercially to how these plans would interact?

21 A. My recollection at the time is that the access team were  
22 having discussions with customers on their business and  
23 the extent to which it fit with different plans. As  
24 I mentioned, I cannot comment on this particular  
25 customer and whether there was a reason for the

1 "therefore" in this instance. I can't comment on that.

2 I don't know.

3 Q. Fine. In view of the time, let's move on. If you can  
4 turn back to the note of the meeting, which was at  
5 tab 21 of this bundle, and look in it -- turn to page 4.  
6 Do you have that?

7 A. Yes.

8 Q. Fourth page. Third entry up, somebody whose name cannot  
9 be mentioned, we will call them Ms X, asked how a price  
10 differential would create a problem for end-to-end, and  
11 you will see the answer given by the Whistl attendee  
12 that:

13 "... 40% of volumes were from customers with their  
14 own contracts, CDA or agency, with RM and therefore had  
15 total visibility of the Royal Mail price and so a price  
16 differential would create a material difference from our  
17 competitors. If the [Royal Mail] price is included in  
18 our full price, the differential would result in  
19 a decrease of our profits."

20 Do you see that?

21 A. Yes.

22 Q. Were you surprised that Ms X did not know how a price  
23 differential would create a problem for end-to-end,  
24 given her active role in the discussions with the RM  
25 team to create these proposals?

1 A. (Pause). Again, I was not at the meeting, so I cannot  
2 comment in what context that she asked that question,  
3 and whether she was asking it in order to get a view.  
4 I can't comment on that, I wasn't at the meeting.

5 Q. No, but she would have had a fair idea, wouldn't she, of  
6 the impacts that she was asking about? Do you agree  
7 with that?

8 A. Quite probably.

9 Q. Royal Mail was being told here by Whistl that under this  
10 new price differential the CDA customers were going to  
11 find the Royal Mail price to them directly was going to  
12 be higher for deliveries wherever in the country Whistl  
13 wasn't delivering. Would you accept that that might  
14 well deter such customers from going on to place  
15 significant amounts of delivery business with Whistl?  
16 Would you at least accept that?

17 A. Potentially, yes.

18 Q. Can we turn back to tab 17, to the customer analysis  
19 that we were looking at before, and now go to page 25.  
20 Page 25, when you have it, is about Whistl, TNT as it  
21 was then called; do you see that?

22 A. Mm.

23 Q. We see what's said towards the foot of the page:

24 "Likelihood of complaint: high, as they would need  
25 to switch to PP1 to continue to compete with UK Mail,

1 but that would then dent their direct delivery  
2 ambitions."

3 So that was appreciated by Royal Mail too, prior to  
4 the meeting with Whistl, was it not?

5 A. I think, as I've said, it was recognised that if Whistl  
6 moved on to NPP1 and continued with its roll-out, there  
7 would be an impact on costs from surcharges.

8 Q. Well, it says here, Ms Whalley, "that would then dent  
9 their direct delivery ambitions". The natural meaning  
10 of that, surely, is that there was an understanding that  
11 it would have a competitive impact, wasn't it? (Pause).  
12 It must be, Ms Whalley, mustn't it?

13 A. Yes, as we discussed earlier there were options, and  
14 I refer back to the different blue charts that we talked  
15 about earlier today.

16 Q. Well, now can we go to slide 17, and I would like to  
17 suggest that Royal Mail also understood, at the time of  
18 that meeting, that the price differential would impact  
19 on other big customers. Here this one is confidential  
20 again, but we see at the top of slide 17 that it's  
21 a well known organisation. You see in relation to the  
22 row "six failed SSCs to five" its existing position.

23 It would be the case, wouldn't it, that this would  
24 make it more difficult for an organisation such as this  
25 to place more business with Whistl and suffer the higher

1 charges that would result? Isn't that the natural  
2 understanding to take from what we see?

3 A. (Pause). Can you just explain again the link between  
4 this customer and Whistl?

5 Q. If this customer is already failing the limit, five  
6 SSCs, then were it to fail more by placing additional  
7 business with Whistl, then it would become subject to  
8 charges and its costs would go up, which would be  
9 naturally likely to serve as a deterrent. My  
10 proposition is that this was something that Royal Mail  
11 understood in its customer analysis of the impact of the  
12 price differential.

13 A. (Pause). Our discussion at the time focused on, if  
14 Whistl were able and progressed with its roll-out, as we  
15 thought it could, then if there were a cheaper price,  
16 then there were opportunities for Whistl to convert  
17 significant amounts of volume into its network from its  
18 upstream customers. That's how we thought about it.

19 MR TURNER: Sir, in view of the time, I'll tell you where  
20 I am, I have perhaps one more question that I will put  
21 arising from the meeting note, and then one question on  
22 arbitrage, so there is a possibility we might sail  
23 a little bit beyond 4.30, but then if we come to a hard  
24 stop it may avoid the need for any further issue on  
25 cross-examination, if you will permit.

1 THE CHAIRMAN: I think we are willing to go with that,  
2 Mr Turner.

3 MR TURNER: I am obliged.

4 Please can we go back, Ms Whalley, to the meeting  
5 note at tab 21 --

6 A. Yes.

7 Q. -- and look at page 3, and you will see towards the foot  
8 of page 3, the third entry from the bottom:

9 "SA said that RM have not considered what impact the  
10 6 December 2013 decision will have on that investment  
11 [this is the planned investment in Whistl, so he said  
12 they hadn't considered it]. He said that they were only  
13 aware of the announcement by Herna ... [PostNL CEO] and  
14 they 'had an inkling' of an investor being lined up.  
15 They had indicated the potential price plan  
16 differential, page 84 of the Royal Mail IPO prospectus,  
17 and sent a letter in January 2013. He said he presumed  
18 these statements had led to ... CEO of [that company]  
19 making the statements he did about the level of  
20 differential. He added that RM would do nothing which  
21 does not meet its regulatory and legal obligations."

22 Now, in fact, Ms Whalley, I would suggest that  
23 Royal Mail's strategic thinking about what to do to  
24 combat the risk of direct delivery and protect the  
25 sustainability of the USO was informed by a clear

1 awareness on TNT -- that TNT's progress may depend on  
2 external investment; it may depend on that. It was  
3 a matter that you knew, was it not, and that you were  
4 working into your thinking?

5 A. So regarding Whistl's investment, we knew that Whistl  
6 was looking for investment.

7 Q. And that it --

8 A. We had no idea of who the investor might be, level of  
9 investment; the first time that that information was  
10 available was, I believe, on 13 December.

11 Q. Can we go back, Ms Whalley, to the document that  
12 Mr Holmes took you to just before lunch, which is at  
13 tab 19 on page 10. Just focusing on the final line of  
14 the slide on page 10:

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

18 Will you accept that Royal Mail's strategising about  
19 the best course of action for it to take and what would  
20 best combat the threat of direct delivery was informed  
21 by awareness that TNT's progress may depend on getting  
22 external investment?

23 A. (Pause). Yes, we were aware that TNT/Whistl was looking  
24 for external investment.

25 Q. And that, whether or not it got it, would affect the

- 1 progress of its roll-out plans?
- 2 A. (Pause). Yes, we presumed -- yes.
- 3 Q. Before this meeting, the meeting in December that we  
4 were talking about, Royal Mail had also signalled to the  
5 market that it was getting ready to do something in this  
6 area, including by introducing a price differential  
7 between the plans, wasn't it?
- 8 A. Royal Mail made a communication to the market, I believe  
9 it was -- I think it was on 6 December, and the reason  
10 for that was that there was speculation in the market,  
11 and as a responsible company the decision was that  
12 Royal Mail should communicate to customers its thinking  
13 in order to quell the speculation that was going on in  
14 the market, and that communication took place, as  
15 I said, I think, December 6.
- 16 Q. Shall we turn to tab 25 and finish this? Tab 25 in this  
17 same bundle has minutes of the meeting of the board of  
18 directors on 11 December.
- 19 A. Mm.
- 20 Q. You will see in attendance two names that I think I can  
21 mention in the second block down, Stephen Agar and  
22 Sue Whalley.
- 23 A. Mm.
- 24 Q. If we turn to page 3, at the top, letter (g):  
25 "(i) Stephen Agar explained the company would be

1           introducing a price differential reflecting a cost  
2           benefit to Royal Mail and increasing the zonal price  
3           differentials to better reflect competitive conditions  
4           between zones. He advised the board that the company  
5           had signalled to the market it was getting ready to do  
6           something in this area and TNT had immediately contacted  
7           Ofcom to complain."

8           If I can then look, in conjunction with that, at  
9           (iii) just below:

10           "The board discussed TNT, and Stephen Agar reported  
11           on their service in comparison to Royal Mail."

12           Pausing there, it looks like he at least was  
13           comparing the service.

14           "He further advised that he believed that TNT had  
15           now received financial backing for expanding end-to-end  
16           operations beyond the current zone."

17           So, Ms Whalley, I would suggest that, going back to  
18           the way Mr Agar put it in the meeting that took place on  
19           17 December, this was more than an inkling that he had,  
20           as he put it, in response to the question; this was part  
21           of a discussion on the steps which Royal Mail was  
22           putting in place to counter the threat of direct  
23           delivery. It was part of their core thinking in terms  
24           of the steps that they were going to take, wasn't it?

25           A. I think I've said already that, yes, Royal Mail was

1 concerned about the impact of the changing market  
2 conditions, not only direct delivery but also increasing  
3 e-substitution, on the USO to the order of £500 million  
4 a year, and Royal Mail, having had many discussions with  
5 Ofcom, appreciated and understood that Ofcom was not  
6 going to make any intervention until it had seen  
7 Royal Mail use its commercial freedoms. In that  
8 context, Royal Mail management and the board assessed  
9 different options that it could take using its  
10 commercial freedoms in order to try and protect the  
11 universal service. A £200 million impact would have  
12 wiped out the cash flow of the company at the time. The  
13 margin was 3.3%. But at all times, in assessing those  
14 different options, Royal Mail was very mindful of its  
15 legal and regulatory obligations and did a huge amount  
16 of work, sought advice, in order to try and make sure  
17 that any proposals it put into the market were on the  
18 right side of the line, because it was worried about the  
19 impact of the changing market environment on the  
20 universal service.

21 Q. Ms Whalley, I don't doubt for a moment that Royal Mail  
22 considered that it was under threat and stood to lose  
23 a lot. I asked you a specific question, whether its  
24 awareness of the possible impact of the signal to the  
25 market given by Royal Mail on Whistl's potential for

1           obtaining investment was part of your thinking about  
2           what may well happen in terms of Whistl's ability to  
3           continue a roll-out. So it was a specific question and  
4           if you could answer that, I should be grateful.

5       A. Yes.

6           No, Royal Mail, as I mentioned, responded to the  
7           market on 6 December because there was significant  
8           speculation in the market, and we thought it was  
9           appropriate to communicate to the market our thinking.

10          I had got no information around a potential investor  
11          until I believe it was communicated by Whistl on  
12          13 December, and up until that point any discussion at  
13          Royal Mail around the potential investor into Whistl was  
14          speculation. We did not know.

15       Q. Now, Ms Whalley, I'll leave that now. In view of the  
16       time, I'm going to go to one last point, which is on  
17       arbitrage, and your evidence about that.

18          Can we begin at tab 29. So this is Royal Mail's  
19          notice of appeal. So you have seen this before, you are  
20          acquainted with the company's arguments in this case;  
21          yes? (Pause). I'll take you to it in a moment,  
22          Ms Whalley, but you are generally aware of the contents  
23          of this document, and I take it that you have read the  
24          notice of appeal?

25       A. Yes.

1 Q. Now let's look at the top of page 376, letter (b), which  
2 belongs, as you see from the previous page, to 5.39.

3 That says:

4 "Whistl could have rolled out its end-to-end  
5 operations to the target of 31 SSCs indicated in its  
6 business plan by arbitraging between the NPP1 and ZPP3  
7 price plans without needing to switch to APP2."

8 So there is the proposition. Then if you go to  
9 5.42, you are relied on:

10 "As explained by Ms Whalley, notwithstanding  
11 Royal Mail's concerns over the practice, access  
12 operators including Whistl had been exploiting arbitrage  
13 opportunities between Royal Mail's different price plans  
14 for many years and still are doing so today, over four  
15 years after the announcement of the CCNs."

16 So you are relied on in the context of the point  
17 that access operators including Whistl had been  
18 exploiting arbitrage opportunities for many years. Is  
19 it actually your evidence to this tribunal that Whistl  
20 had been exploiting arbitrage opportunities for many  
21 years or at all? (Pause). Is that your evidence?

22 A. My understanding was that Whistl was, of the total of  
23 the 7.8 million that I believe was lost revenue for  
24 Royal Mail on arbitrage, that Whistl/TNT may have  
25 accounted for about 2 million of that. That is my

1 recollection.

2 Q. And where do you get that from, please?

3 A. It was in one of the documents, I can't remember which  
4 one.

5 Q. It's not a point in any part of your witness evidence,  
6 is it? Shall we turn to the paragraphs that are relied  
7 on in the notice of appeal in your evidence, which are  
8 on page 34 of your statement. Do you have that?

9 A. Yes.

10 Q. If you refresh your memory about what you said in those  
11 two paragraphs, and read that to yourself.

12 A. Sorry, which paragraphs are you looking at?

13 Q. These are the ones that are said by Royal Mail to be the  
14 basis for this proposition that you had supported this.  
15 105 and 106 on page 34.

16 (Pause)

17 We can look at 107 as well.

18 A. Yes.

19 Q. Now, nothing in your evidence, Ms Whalley, mentioned  
20 Whistl, did it?

21 A. No.

22 Q. In fact, I would suggest to you that Whistl had not been  
23 exploiting arbitrage possibilities. Were you shown at  
24 any point what the Whistl witness, Mr Polglass, had said  
25 about Whistl exploiting arbitrage before you came to

1           give evidence today?

2           A. I believe I did see Mr Polglass's statement, if you have  
3           that.

4           Q. Yes, it's in the same bundle, tab 30, and you need to go  
5           in it to the bottom right-hand side, number 493. So you  
6           have seen this before, but essentially his point is that  
7           the suggestion that they had been exploiting arbitrage  
8           for many years is simply not true. I'll put it to you  
9           that you do have no reason to disagree with what he  
10          says?

11          A. (Pause). My recollection was different from that, but  
12          I agree it's not in my evidence, in my witness  
13          statement.

14          Q. And you will be aware, I think, that shortly before the  
15          notification of these CCNs, Royal Mail had announced  
16          generally to its customers, in November 2013, that it  
17          was going to change the access contracts to mitigate the  
18          risk of arbitrage exposure; do you remember that?

19          A. I do remember that --

20          Q. Signalled to the market.

21          A. I do remember that. Arbitrage was a cost to the  
22          business. However, it was a practice that was used by  
23          a number of different customers, and as proved to be the  
24          case when we started discussing this, it proved to be  
25          extremely difficult, because of the way in which

1 different customers used it for their needs, to gain any  
2 consensus in the market on how this might change.

3 So although Royal Mail did not -- arbitrage was not  
4 helpful and beneficial for Royal Mail, at the same time  
5 Royal Mail saw that this was a very difficult practice  
6 to change because it had become embedded in a number of  
7 customers and their way of doing business.

8 Q. Now, Ms Whalley, coming to the end, if you go, please,  
9 to tab 32 in the bundle, there you have the letter we  
10 have just been discussing, 15 November 2013, in which  
11 Royal Mail did bring generally to customers' attention  
12 that it was seeking to take steps to avoid exposure to  
13 the risk of arbitrage; do you see that?

14 A. Mm.

15 Q. In those circumstances you would agree that it would be  
16 a rather rash business response to plan a roll-out that  
17 would involve significant arbitrage, would it not?

18 A. I think all players in the market who were using  
19 arbitrage were well aware that it was very difficult for  
20 Royal Mail to make changes because there was no solution  
21 on arbitrage that would be likely to be agreed by all  
22 players in the market. I think that was well understood  
23 at the time, actually.

24 Q. Was the answer to my question yes?

25 A. Sorry, can you repeat the question?

1 Q. Whether it would have been unsafe for a business, in  
2 view of Royal Mail's declared attitude, to plan for  
3 business based on the intention to engage in arbitrage?

4 A. No, I don't necessarily think so, for the reason that  
5 I just stated.

6 Q. Can you expand on that again, please?

7 A. Because, as I stated, arbitrage was used by a number of  
8 customers and there was a cost to Royal Mail of that  
9 arbitrage, and as we considered the options and as the  
10 business went on, as I understand it, to discuss the  
11 options with different customers, there was no option  
12 that was agreed by all customers, and therefore it has  
13 proven very difficult to change, and still exists.

14 Q. Yes, Ms Whalley, I'm not sure that was an answer to my  
15 question, but we'll leave it there and I'll show you one  
16 final document and then we're done.

17 Could you go, please, to tab 33. This is a letter  
18 from TNT Post, now Whistl, dated 26 November 2013, and  
19 it relates to arbitrage. If you turn over to page 3,  
20 there is a heading, "Preventing arbitrage":

21 "There are a number of other measures which ...  
22 could and should be adopted to minimise arbitrage  
23 without the need to alter tolerance [here] on NPP2 ..."

24 Were you aware that Whistl was in discussion with  
25 Royal Mail about the problem of arbitrage after its

1 announcement and that it recognised Royal Mail's wish  
2 and intention to drive it out?

3 A. I was not -- I was aware of the broad discussion in the  
4 market. I was not -- I have not seen this letter  
5 before, and I was not aware of any detailed discussion  
6 at the time at this level of detail. I was not.

7 MR TURNER: Sir, I have no further questions.

8 THE CHAIRMAN: Mr Beard, do you wish to re-examine?

9 MR BEARD: I do, but I'm going to be very brief.

10 THE CHAIRMAN: Please proceed to be very brief.

11 MR BEARD: It may be slightly out of order, but so that  
12 I pick up one or two --

13 THE CHAIRMAN: Out of order?

14 MR BEARD: Out of order of papers that have been -- I don't  
15 mean lawful, but it may be that as well; we will see.

16 Re-examination by MR BEARD

17 MR BEARD: Ms Whalley, if we could just go back to your  
18 witness statement, paragraph 106, second sentence, you  
19 refer to Royal Mail's modelling team analysing levels of  
20 arbitrage.

21 Can you just explain what Royal Mail's modelling  
22 team were and what they were doing here?

23 A. So Royal Mail's modelling team was a team of expert  
24 modellers who were looking at how different customers  
25 were using the different price plans in order to try and

1           reduce their overall costs by using zonal contracts in  
2           conjunction with another national contract. That's what  
3           they were doing.

4       Q. I see, and that was where you got the figure, was it,  
5           that then follows in the following sentence?

6       A. I believe so, yes.

7       Q. Do you know -- the exhibit is in the bundles, in the  
8           sense that there is a holding place for it in the  
9           bundles. Because it's a huge Excel spreadsheet, I think  
10          it is had electronically so I can't provide it to you,  
11          Ms Whalley, to look at.

12                Do you recall looking at that spreadsheet before  
13                preparing your witness statement?

14       A. I recall looking at it a while ago, a long -- yes,  
15           a while ago.

16       Q. Do you recall whether or not it descends into detail of  
17           particular customers?

18       A. I believe it did.

19       Q. So when you were being asked about where sources of  
20           numbers for, in particular, Whistl that you recalled  
21           were from, could it be that it was from that  
22           spreadsheet?

23       A. It could be that it was from that spreadsheet.

24       Q. I'm grateful.

25                You were taken variously but perhaps most recently

1 in the cross-examination bundle from Mr Turner, just so  
2 it's the most recent time you have been to it, to  
3 a document at tab 17, which is also in bundle C4A at  
4 tab 25, but just at 17, and you will recall that  
5 document. If we go to, for example, slide 17, page 17,  
6 this was one of the pages Mr Turner took you to, it  
7 concerned a particular customer, I'm not going to ask  
8 about that, on the left-hand side the column is headed  
9 "Change", and the first change that's indicated is PP1  
10 moving from six failed SSCs to five, and then there are  
11 three or four others, and then at the bottom there is  
12 a one plan only rule. Do you recall what that was as  
13 a possible change?

14 A. I believe that that was a change if a decision or  
15 a proposal were to be made at any time to move from  
16 three access plans to one plan.

17 Q. So that would be putting in place one plan, was it? And  
18 was that ever adopted?

19 A. No.

20 Q. Whilst we're in that bundle, could we go on to tab 19,  
21 so that's draft discussion document October 2013, which  
22 is at C4A/35 in addition.

23 A. Is this the October '13 --

24 Q. Yes, that's the one, exactly. The page I just wanted to  
25 ask you very briefly about, you have already been to,

1 page 7, helpfully highlighted in yellow.

2 You were asked questions about one of the bullet  
3 points in the yellow on the launch package of  
4 initiatives without reducing average prices.

5 You will see at the top left, "Strategic Option",  
6 then "Description", so that's the first bullet,  
7 "Introduce revised PP1 T&Cs and price recognition for  
8 a national profile", and then "Revise zonal prices".

9 Then under "What do we have to believe?", there are  
10 six bullet points. The first is:

11 "No revenue dilution because average prices will  
12 increase at or above plan."

13 Second is:

14 "DD operators will move to PP1 to avoid surcharges."

15 Third:

16 "DD will not expand to point of damaging commercial  
17 return."

18 Fourth is:

19 "Ofcom will intervene if/when there is tipping point  
20 on volumes and Royal Mail has done as much as it can."

21 Fifth is:

22 "Tipping point might become more likely if DD  
23 receives external investment."

24 Sixth is:

25 "Proposals defensible to Ofcom [and the] CAT".

1           Do you recall those last three points, and what do  
2           they mean?

3           A. Well, the last one I think is clear and it's what I have  
4           said before, that we were, Royal Mail was mindful of its  
5           legal and regulatory obligations and therefore any  
6           commercial response needed to be on the right side of  
7           the line and consistent with our obligations.

8           In terms of the other two points, Royal Mail was  
9           concerned that Ofcom was potentially underestimating the  
10          risk of direct delivery, in part because of the  
11          experience between 2006 and 2010 where access volumes  
12          had taken off exponentially faster than the regulator  
13          had predicted, and therefore here Royal Mail did  
14          consider whether there would be a point at which Ofcom  
15          would assess the situation and would actually conclude  
16          that an intervention was indeed required because  
17          otherwise the universal service was not sustainable, and  
18          Royal Mail's concern all along -- and that was one of  
19          the key points of our discussion with the regulator --  
20          was a risk that if it got to that point, then any  
21          intervention would simply be too late.

22          Q. One final question, completely separate topic, could you  
23          take up your witness statement, in the course of your  
24          evidence on a number of occasions you referred to the  
25          fact that there was an expectation that Ofcom would give

1 guidance on "fair and reasonable", and you had referred  
2 to it in your witness statement. Given the time, I am  
3 going to grossly lead the witness in relation to where  
4 that might be found in the witness statement.

5 THE CHAIRMAN: This is what you meant by out of order?

6 MR BEARD: Precisely. I am recognising that I am entirely  
7 out of order at this point.

8 It's on page 49. Could you just very briefly cast  
9 your eye over the first section of that part of your  
10 witness statement under heading H and the question is:  
11 was that the section of the witness statement to which  
12 you were referring in the course of your answers?

13 A. (Pause). Yes, indeed. Ofcom had said to Royal Mail  
14 that Royal Mail needed to use its commercial freedom to  
15 protect the USO in the face of changing market  
16 conditions, and although Ofcom had said and recognised  
17 that it needed to provide guidance on fair and  
18 reasonable for access, and actually I believe Ofcom had  
19 recognised that it was not only Royal Mail but other  
20 industry participants who were needing that guidance,  
21 that that guidance was not forthcoming and, indeed, in  
22 2014, at the end of 2014, Ofcom recognised that it had  
23 failed to provide that guidance on fair and reasonable.  
24 So that's what I was referring to.

25 MR BEARD: I'm going to leave it there, Mr Chairman, and



1           get through the Whistl witnesses in the timetable that  
2           exists, I think I am perfectly content for it to be  
3           indicated to them that we start on Thursday.

4       THE CHAIRMAN: You are the appellant, you must have your  
5           days in court.

6       MR BEARD: Yes, we will of course have plenty of those  
7           still.

8       MR HOLMES: We are also obviously content with that, sir.

9       THE CHAIRMAN: Right. Thank you, everybody. Thank you.

10       (5.05 pm)

11                       (The hearing adjourned until 10.30 am  
12                       on Wednesday, 19 June 2019)

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