IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 June 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
TIM FRAZER
PROFESSOR DAVID ULPH CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL PLC — Appellant

- and -

OFFICE OF COMMUNICATIONS — Respondent

- and -

WHISTL — Intervener

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HEARING – DAY 1

A P P E A R AN C E S

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

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

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

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Monday, 10 June 2019

(10.30 am)

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

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

MR BEARD: I will.

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

MR BEARD: I haven't fully checked.

THE CHAIRMAN: Not a monopoly of any kind.

MR BEARD: That's a healthy market share.

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

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

MR BEARD: Yes.

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

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

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

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

MR BEARD: Yes. In terms of logistics --

THE CHAIRMAN: Bundles.

MR BEARD: Bundles and positioning of people.

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

MR BEARD: I'm grateful.

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

obviously be subject to the usual rules of confidentiality.

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

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

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

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

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

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

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

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

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

Opening submissions by MR BEARD

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

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

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

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

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

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

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

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

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

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

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

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

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

What you see in that skeleton argument --

THE CHAIRMAN: I'm not with you yet.

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

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

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

THE CHAIRMAN: Right, I'm with you.

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

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

THE CHAIRMAN: This is the decision?

MR BEARD: It's the decision.

Now, if we look at that paragraph:

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

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

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

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

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

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

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

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

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

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

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

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

Ie when the CCNs were issued.

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

Then we go on to 7.4:

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

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

If we go on to 7.7, subsection C considers the

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

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

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

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

We'll come back to all of those points.

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

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

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

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

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

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

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

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

Then it talks about:

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

Then:

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

Then 1.17:

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

Then with we go over the page to 1.20:

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

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

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

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

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

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

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

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

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

"Abusive price discrimination does not occur when

the pricing has not applied."

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

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

We certainly rely on that too.

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

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

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

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

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

Then it says:

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

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

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

Then it goes on to say:

"This much is common ground."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

vitamin sales, and in particular rebates on vitamin sales.

THE CHAIRMAN: I remember it well.

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

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

So no elimination of the competitor to reinforce its position.

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

Then 1.12:

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

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

1.13:

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

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

Then at 1.14:

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

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

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

Because that was what was at issue here.

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: It's just an example.

MR BEARD: Yes, of course it is.

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

MR BEARD: Yes.

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

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

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

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

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

THE CHAIRMAN: Keep going with Irish Sugar then.

MR BEARD: I shall:

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

Obviously the predecessor numbering for 102(c):

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

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

It's at 116:

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

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

prices to potential customers of ASI.

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

If you turn over the page at 120:

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

Then it quotes the note.

So the conclusion at 124 is:

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

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

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

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

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

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

158:

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

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

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

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

the operation.

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

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

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

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

So this is a case concerning Article 82. One can

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

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

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

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

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

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

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

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

Again, no issues with that.

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

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

175:

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

176:

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

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

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

And then what we see in 177:

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

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

Which is where the alleged margin squeeze arose.

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

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

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

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

MR BEARD: Yes. This is the second strand.

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

MR BEARD: For these purposes we're not.

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

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

THE CHAIRMAN: It might amount to something else.

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

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

really just asking the question in a broad --

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

THE CHAIRMAN: In this economic sector?

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

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

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

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

MR BEARD: Yes, but that is --

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

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

THE CHAIRMAN: Is it an entirely new species?

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

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

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

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

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

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

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

which a contract will be changed.

THE CHAIRMAN: It is a formal step, though.

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

THE CHAIRMAN: It's not a vague memorandum.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Please carry on.

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

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

PROFESSOR ULPH: I understand that.

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

built in to the contractual scheme.

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

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

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

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

to come back to it.

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Mm-hm.

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

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

Then at 355:

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

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

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

356:

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

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

357:

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

So that's actual representations:

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

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

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

359 talks about the intent point again:

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

So we're picking that up point up again.

Then 360:

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

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

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

That's why in 361 it says:

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

And:

"... whether or not those representations were

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

362:

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

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

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

But if we look at 369, it says:

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

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

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

But the court then says no, that is wrong.

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

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

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

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

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

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

MR BEARD: No, it doesn't.

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

MR BEARD: Yes.

THE CHAIRMAN: Right?

MR BEARD: Yes.

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

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

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

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

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

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

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

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

THE CHAIRMAN: Is that a good moment to stop?

MR BEARD: Yes.

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

(11.47 am)

(A short break)

(11.56 am)

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

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

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

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

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

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

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

MR BEARD: I'm not trying to --

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

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

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

THE CHAIRMAN: To its logical conclusion.

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

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

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

So 22:

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

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

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

The simple answer is yes.

If one goes down to 25:

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

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

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

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

MR BEARD: This is true.

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

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

that say that in terms.

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

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

MR FRAZER: I understand, thank you.

MR BEARD: So 27:

"It is only the behaviour of the undertaking in

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

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

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

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

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

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

So it's talking about a rebate scheme here.

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

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

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

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

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

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

It's then that they say:

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

Again, we accept that. We recognise that.

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

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

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

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

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

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

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

Then at 1.16:

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

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

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

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

MR BEARD: Yes, because --

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

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

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

2.41, "NCCN 500":

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

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

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

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

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

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

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

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

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

What we say is that in relation to any finding of

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

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

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

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

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

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

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

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

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

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

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

This is citing AstraZeneca. But just look at that:

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

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

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

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

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

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

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

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

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

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

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

Then (g):

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

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

But (h) is key:

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Before lunch?

MR BEARD: Yes.

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

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

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

But then we do look at the particular circumstances

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

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

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

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

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

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

But you'll see in paragraph 4:

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

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

Then it goes on:

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

In paragraph 5.

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

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

Then 6:

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

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

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

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

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

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

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

Then 6:

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

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

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

MR BEARD: I believe so.

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: RM7 --

MR BEARD: B at tab 84.

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

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

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

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

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

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

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

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

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

Now they seek to pray in aid the restriction they

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

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

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

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

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

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

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

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

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

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

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

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

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

As I say, we recognise that rational operators will

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

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

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

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

Second, at 206:

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

approach] to conduct ..."

Assessing hypothetical conduct, and third:

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

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

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

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

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

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

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

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

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

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

MR BEARD: Yes.

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

MR BEARD: No.

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

be the effects.

MR BEARD: Yes.

THE CHAIRMAN: You're not really disputing that?

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

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

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

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

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

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

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

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

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

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

MR BEARD: Yes.

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

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

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

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

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

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

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

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

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

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

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

When we're here looking at --

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

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

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

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

MR BEARD: Well --

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

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

THE CHAIRMAN: Until what?

MR BEARD: Until Ofcom has reached a final decision.

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

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

other contractual terms.

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

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

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

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

minutes ago about that mechanism.

MR BEARD: Yes.

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

MR BEARD: Yes.

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

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

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

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

a competition infringement. They couldn't find that.

MR FRAZER: And what could they do under --

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

MR BEARD: Sorry, yes, I was focusing on a price-based. Yes, I apologise. That is quite right, in relation to the price-based finding. In relation to the announcements, plainly they can, yes, because we're not denying that a CCN being issued is a form of conduct. What we're saying is it's not pricing conduct.

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

MR FRAZER: Thank you.

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

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

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

Thank you.

(12.55 pm)

(The short adjournment)

(1.55 pm)

THE CHAIRMAN: Mr Beard.

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

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

THE CHAIRMAN: The Whistl bundle?

MR BEARD: Yes, it's the statement of intention bundle. I've got it as WH1, I'm sorry.

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

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

THE CHAIRMAN: So not the Whistl bundle?

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

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

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

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

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

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

So a finding in the investigation could change rights:

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

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

consideration, so that could include the reasoning:

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

Which is referred to above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROFESSOR ULPH: Thank you.

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

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

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

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

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

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

look at comparability.

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

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

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

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

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

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

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

this.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: But the analogy point.

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

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

MR BEARD: Yes.

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

MR BEARD: Yes.

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

MR BEARD: Yes, that's true.

THE CHAIRMAN: Anything else?

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

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

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

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

MR BEARD: I think they may have done. That may be true. The extent to which they've fed that into how you do your proper legal analysis of discrimination I think is a separate and additional question. We say they haven't got it right.

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: I understand that, but --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"... would provide considerably greater planning and

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

That's the four zones.

"... or indeed PP3 ..."

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

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

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

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

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

level."

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

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

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

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

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

And those requirements would include forecasting.

2:

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

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

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

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

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

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

What is being said here by Oxera from an economic

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

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

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

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

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

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

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

But nonetheless, what is being said here is a view

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

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

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

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

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

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

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

THE CHAIRMAN: Direct delivery means competition?

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

THE CHAIRMAN: Which you've already got.

MR BEARD: Yes, very extensively.

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

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

And in (a):

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

There are other changes there, zonal price plans and

long-term forecasts.

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

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

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

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

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

MR BEARD: Yes.

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

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

THE CHAIRMAN: You don't understand it?

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

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

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

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

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

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

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

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

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

MR BEARD: That's what -- that's how it's characterised. Throughout the documentation it's --

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

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

THE CHAIRMAN: That's probably a characterisation rather

than exactly what happened, or what's going to happen.

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

THE CHAIRMAN: Please continue.

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

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

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

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

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

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

that Ofcom would take in any event.

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

MR BEARD: No, there isn't.

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: Is that the end of the documents?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR BEARD: Yes, they are.

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

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

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

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

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

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

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

THE CHAIRMAN: Okay.

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

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

MR BEARD: I'm sure indeed we will.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIRMAN: How are you doing with ground 2?

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

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

You can come back with renewed vigour.

(3.08 pm)

(A short break)

(3.18 pm)

THE CHAIRMAN: Right. I hope we didn't come back too soon. On we go.

MR FRAZER: Mr Beard, just before we lose the point, part of the context of the price differentials that you've been talking about was the change in the zonal tilt which was also specified in the documents to which you referred us.

MR BEARD: Yes.

MR FRAZER: Will you be addressing us on that or are we going to wait for that later on, or is it not relevant?

MR BEARD: I'll be addressing on you the zonal tilt and the extent to which in particular that is relevant to how the analysis should be carried out and how causation analysis should be carried out, certainly.

In relation to issues concerning discrimination, the allegation that's put against us is the price differential is to be treated as discriminatory in and of itself, and really I'm trying to meet the case dealing with that on its own.

If we're dealing with a case that one looks at all of the CCNs in the round, then obviously the approach

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

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

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

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

THE CHAIRMAN: Which bundle?

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

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

terms that are used.

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

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

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

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

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

As we indicate in 4.24:

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

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

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

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

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

THE CHAIRMAN: To what extent was the possibility of

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

MR BEARD: By whom?

THE CHAIRMAN: Within Royal Mail. The contemporary documents.

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

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

MR BEARD: Certainly.

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

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

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

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

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

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

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

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

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

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

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

Specifically, clause 3.1 says:

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

But then it goes on to explain:

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

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

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

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

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

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

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

THE CHAIRMAN: The future is not the point?

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

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

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

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

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

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

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

THE CHAIRMAN: So that actually then terminates the eligibility?

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

THE CHAIRMAN: At some cost.

MR BEARD: At some cost?

THE CHAIRMAN: At some increased cost.

MR BEARD: Well, some increased cost in the sense that there would be surcharges, yes. We'll come back to this in relation to profitability.

THE CHAIRMAN: I dare say we will, yes.

MR BEARD: But nonetheless, the fact that you have to pay surcharges in relation to it doesn't mean that it's irrational for you to roll out as a rational operator and use NPP1 for those purposes. Indeed, that's the analysis that Mr Harman has carried out.

THE CHAIRMAN: So you're saying that when Ofcom say in

practice it would have been unavailable, you're saying that's wrong. It would have been available in practice --

MR BEARD: It is just wrong.

THE CHAIRMAN: -- even if it was not particularly attractive.

MR BEARD: Well, we are saying it is rationally attractive for someone.

THE CHAIRMAN: Not attractive; less unattractive.

MR BEARD: Less unattractive we can see. But less unattractive an abuse does not make, is our position.

THE CHAIRMAN: I might hold you to that.

MR BEARD: Certainly. That is what we'll come on to in relation to profitability. A reduction in profitability doesn't mean that there's any competitive disadvantage. But here the point is that if it is rational for you to roll out because you will make profits, you will make your returns, over the scheme of your business plan, then you keep going. The fact that you have to pay some more, there isn't any competition law objection to that.

THE CHAIRMAN: As you say, we shall get into that.

MR BEARD: But for the purposes of this, we do say rational operator continues to roll -- can continue to roll out using NPP1. Yes, arbitrage would be used, and no, it's not good enough to say we don't like arbitrage in

circumstances where, as can be seen from all of the history of attempts to change the access contracts, there is very intense scrutiny of any potential change and very close involvement of Ofcom in any potential change. So one can't assume that somehow these arbitrage opportunities are being stymied.

More particularly that's not the decision here. That is not the decision. You can't just say, well, they will probably try and stop you arbitraging. If you're going to say that you couldn't roll out across your business plan because arbitrage would not be available, that is a point that had to be made out, and it's not made out here.

So if I may, I'm just going to go back to one paragraph in the decision, just to finish off on discrimination issues, and that's just paragraph 7.106.

So 7.106, I just go to that because it's the assessment in relation to Royal Mail's cost justification, just to finish off on discrimination:

"We don't consider that the price differential introduced by Royal Mail can be justified by reference to any potential cost savings. First, the cost savings on which Royal Mail's cost justification relies would only in practice result from declines in volumes associated with end-to-end competition."

Now, I haven't gone into that in detail. It is certainly right that our cost assessments focused on savings that could be made where end-to-end competition rolled out, but it isn't actually true that savings would only be made in relation to end-to-end competition.

You can think of an example. For instance, a bank that is active in a particular part of the country decides it's going to move to emails rather than real mail would potentially result in a very significant drop in traffic which was predictable. Local authorities putting their communications online in particular areas could result in significant drops. So it's not right to say that the only cost savings would result in declines in volumes associated with end-to-end competition, but as I say, costs -- costings done did focus on direct delivery operator changes.

The second point, in (b):

"As explained in 7.47 to 7.64 above, NPP1 customers would be very unlikely to undertake their own end-to-end delivery activities in competition with Royal Mail given the adverse contractual consequences this would entail. It follows that the volume change forecasts that Royal Mail required only NPP1 customers to provide would not in fact have enabled Royal Mail to realise these

cost savings of the kind described above."

That again is wrong because even if you're focusing on direct delivery operators, for the reasons I have already articulated, they could rationally roll out and therefore cost savings could be made.

"Third, and in any event, there is no reason to suppose that APP2 customers could not have provided valuable forecasts in relation to anticipated volume reductions, in particular SSCs."

Well, this is unevidenced. There is no basis for this. Indeed, it is counter-intuitive that the APP2 customers would be able to do this in circumstances where they didn't have to provide SSC-specific and spread delivery.

Obviously shortly before they actually drop the mail through the inward mail sorting centre, they will know which SSCs mail is going to, but they don't -- the whole essence of APP2 is they don't have to commit.

In relation to Whistl, we recognise that the forecasts might be available, but as I say, Ms Whalley deals with the consideration of APP2 customers in that regard And Ofcom do not have a proper answer to that.

"Fourth, Royal Mail's failure to seek forecast information from APP2 customers is particularly stark, given its calculations of the cost savings that it

considered could be achieved by obtaining such information were in fact based on the roll-out plans of an APP2 customer, Whistl, in the Manchester area."

Well, this doesn't take anyone any further.

We recognised that what we were doing when we were doing some of the costing assessments was using what costs we thought we could have saved if we'd known that Whistl was about to roll out direct delivery in Manchester two years ahead rather than six weeks ahead or even shorter, as it turned out to be the case in Manchester. But that doesn't tell you anything about whether or not it was appropriate to seek forecast information from APP2 customers, but more importantly than that, it doesn't tell you that placing that forecasting requirement on NPP1 customers, which does give rise to cost savings, is inappropriate.

So the short point that is made at the end that somehow we're penalising operators is not made out, and that is in the context of the broader points I have made in relation to comparability, justification, and indeed errors about the scope of roll-out that was available to direct delivery competitors in relation to these matters.

So that is the outline on ground 2. I was going to move on now to ground 3, unless -- I'm sorry.

THE CHAIRMAN: No, I think you can go on.

MR BEARD: So essentially I'm going to cover six topics in relation to ground 3. The first will be the role of the AEC test and how the decision deals with AEC.

The second will be why the profitability test is the wrong test, the profitability metric that is used by Ofcom is wrong as a test.

The third is why factually Ofcom have erred in the application of that assessment.

The fourth point I'll pick up is why the suggestion that market development support of quantum analysis is both misconceived and wrong, and I will also pick up causation issues.

Finally, although it doesn't fit perfectly neatly in, I'll also pick up some of the points regarding intent and strategy that Ofcom relies upon in relation to its findings on competitive disadvantage.

So I'll start with the AEC issues or some of them.

Now, I'm obviously conscious that there's going to be a more wide-ranging economic discussion in relation to AEC and you have reports from, in particular, Mr Dryden for Royal Mail in relation to these matters.

I want to focus on some of the legal issues in particular in relation to these matters so I'm going to be going back to some of the law. Obviously, in making

these submissions I proceed on the basis that there is otherwise unlawful discrimination, contrary on our submissions on grounds 1 and 2, and what we are here assessing is whether or not there is competitive disadvantage being created by reason of the alleged unlawful price discrimination.

So the question we're asking ourselves is: is the discriminatory conduct by a dominant entity which has or is likely adversely to affect competition?

Now, it's quite interesting to see just how the decision proceeds in dealing with these issues in section 7, because the decision itself, if one picks it up in section D, after the discrimination section -- in section 7D at page 216, after the discrimination section, the first part that's then dealt with is strategy at D. Then we only come on to likely distortive effects of the price differential at 7.138 on page 223.

Now, as a preliminary observation, this is just the wrong way round in terms of focusing on what the problem is here. And it's not just a matter of the order in which you consider these matters.

What clearly happened here was Ofcom convinced itself and distracted itself from the key question about competitive disadvantage by deciding this was all some

kind of grand nefarious strategy. Royal Mail wanted to stymie competition, Whistl had stopped operating and that was enough here.

Whether or not it's a distraction or otherwise, the relegation of the effects of the analysis until after the supposed strategy findings is nonetheless instructive.

As I say, I'll come back to the strategy section in a bit, but looking at 7.138 onwards, which is the core focus of ground 3, what we see critically at 7.182 is the disowning of the use of as efficient competitor analysis in a consideration of the actual or likely effects of the discriminatory conduct.

In particular, at 7.184, we see three reasons being given. 7.184:

"In summary, we explain that on the particular facts of this case, Ofcom wasn't required as a matter of law to undertake an AEC EEO test, nor was it relevant to the conduct of issue. EEO tests and other price/cost tests have been found to be relevant by the CJEU in situations where dominant undertaking has engaged in a low pricing practice, such as selective prices, predatory prices or some types of margin squeeze."

Now, I'll come on to explain why that's wrong but I have already touched on the issue. The idea that one

designates some sort of conduct as low pricing practice and says no, you don't look at EEO tests here in relation to pricing. That's just the wrong approach and we will see that in the case law.

Then (b):

"A price/cost test of any design wouldn't assist in assessing the likely effects of a particular type of price discrimination in issue here. The price discrimination didn't involve lowering any prices that provided benefits to consumers."

That is very much the same point as made in (a).

"The concern to be assessed is whether, by penalising entry in the manner described earlier in subsection (e), Royal Mail made entry into the bulk mail delivery market significantly more difficult, thereby reducing incentives to enter, making entry less likely to occur."

So if you use strident language of talking about penalising entry, then suddenly this lowering prices becomes significant and you don't have to worry about EEO assessments at all. We say that's based on a fundamental misconception and is wrong.

Then (c):

"A comparison of the impact of the price differential on an EEO's costs fails to reflect economic

reality in the circumstances of the case."

Well, there are two broad points that I'm going to pick out when we're going through the law.

First of all, it is clear that AEC tests are highly relevant to the assessment of pricing practices, including this sort of pricing practice. Indeed, trying to relabel it as not low pricing and therefore outside the ambit of consideration of the AEC is misconceived. But the second and critically important point is that in this case what Ofcom is essentially saying is AEC analysis is irrelevant because Royal Mail came forward with material setting out an AEC analysis, and these points are saying it doesn't matter, we can ignore it.

Now, there is one paragraph that they put forward in the alternative which we will spend time on, 7.200, where they say without prejudice to that reasoning, we think the material put forward is wrong, and we will deal with that certainly, but that's it. And that is a fundamental failing in Ofcom's approach in relation to the analysis of effects here.

You don't have to reach a conclusion that AEC analysis is the beginning and end consideration of effects. You don't even have to reach a conclusion as to what specific weight should be given to AEC analysis in the circumstances. But as we will see in the law, it

is highly relevant, highly important, and something that has unjustifiably not been properly dealt with by Ofcom.

If we keep going through the sections here, we see:

"Summary of Royal Mail's case that it's necessary to assess foreclosure by reference to a price/cost test."

Well, we do say it was necessary when we put forward price/cost test information properly to consider and assess those matters, and we do say that what the price/cost test, the AEC test, does is it does provide a relevant degree of legal certainty in relation to the way in which you distinguish between foreclosure and anti-competitive foreclosure, and that is something that we will come on to identify in the case law.

More than that, what we see is that just above paragraph 7.191, Ofcom has gone so far as to say:

"A price/cost test is not necessary or appropriate to the facts of this case."

As I say, what they do in particular in 7.192, in referring back to their legal framework section, section 5, is make mistakes as to the way in which the case law sets out the importance of these considerations. I'm going to go through that next.

But just turning on, they say, 7.193, that there are lots of other considerations. Well, there may be other considerations. It may be that an EEO test is not

determinative of whether there's anti-competitive foreclosure but it is certainly highly relevant.

The second point that they make in objection 2, the use of an AEC test that's neither necessary nor appropriate, 7.196:

"As we have outlined above, the price differential is not a case of pure primary line or first degree discrimination."

It's labelling. That doesn't determine whether or not an AEC test is relevant.

Then if we go to the third point they raise, 7.199:

"As we have explained in detail in subsection 7(b) above, the relevant market in this case was characterised by high barriers to entry."

I'll come on to explain why it is that that isn't an answer either. The fact that given Royal Mail was, as they put it, overwhelmingly dominant and benefited from significant economies in scale and scope and was an unavoidable trading partner with control over an indispensable input is no answer to ignoring an AEC test.

Then, as I say over the page, we get these remarkably brief observations at 7.200 on all the material that has been provided by Royal Mail on why its approach is not economic reality.

The first of those, 7.200(a):

"The EEO test advanced by Royal Mail is based on Royal Mail's [underlined] cost."

Of course it is. That's how you do an AEC test. That's what the case law says you do. It's no objection.

Then (b):

"The sensitivity analysis conducted by Royal Mail's advisers assumes a roll-out profile based on Royal Mail's estimates of the likely operating costs of a new entrant."

The sensitivity analysis was an alternative that tried to move away from Royal Mail's costs and looked at other estimates.

It says:

"However, each of the scenarios examined by Royal Mail's advisers is still based on Royal Mail's downstream costs."

Again, it's no criticism.

Then (c):

"Other relevant factors aren't considered. Royal Mail's assessment of the notional as efficient entrant also fails to capture a number of other factors which are relevant to an access operator's as to whether to enter."

(i):

"A potential entrant and its investors would take into account risk as well as expected profitability."

Yes, it certainly would. It's part of an AEC test.

"Price differential reduced the upside potential for higher profits from entering into bulk mail delivery and increased the downside in the event that entry proved unsuccessful."

Yes, true. The AEC test covers that.

(c)(ii):

"As discussed in section 6, Royal Mail had a number of advantages unrelated to cost, such as reputation, experience and VAT status. These would make it more difficult to attract customers even if an entrant could match retail prices."

Again, that is what AEC tests do. They deal with those issues.

So I'll come back in some more detail on these points, but the actual consideration of the material that's put forward in two substantial reports from Mr Dryden and Mr Harman is abject in 7.200. So it all depends on saying it was completely inappropriate to do an AEC test. And that is just wrong.

We can see how it was that Ofcom got this so wrong by going back to the SO. If we could pick up RM8,

tab 2. So this is again the second of the SOs, 2 October 2015.

Under the heading "Legal Framework" on internal page numbering 98, internal 93, you see "Legal Framework" begins at 7.10 and there's some discussion of various cases, a number of which we've already touched on.

Where I actually want to pick it up is 7.22:

"The recent Intel judgment concerning the application of 102 in the context of rebate systems sheds more light on the issue of what's required to demonstrate that conduct is anti-competitive."

So here is Ofcom saying Intel tells us how we should consider Article 102 in the context of this case:

"In that judgment the general court identified a third category of rebate systems consisting in the grant of a financial incentive that is not directly linked to a condition of exclusive or quasi exclusive supply from dominant undertakings but which has, by its mechanism of application, fidelity-building effects. In examining such cases and consistent with the case law cited above, the general court held it is necessary to consider all the circumstances, particularly the criterion and rules governing the grant of financial incentives and to investigate whether improving an advantage not based on any economic service justifying

it, the financial incentive tends to remove or restrict a buyer's freedom to choose its sources of supply, to bar competitors from access to the market or to strengthen dominant position.

"Royal Mail has submitted that an effects analysis should be conducted by reference to the costs of an as efficient competitor and that the relevant test is the price/cost test using average variable cost or long run incremental cost data. On the basis of its application of such test, Royal Mail argues this there is a no foreclosure effects in this case.

"The general court has, however, confirmed in Intel it is not always necessary to (i) establish that the conduct will lead to the exit of equally efficient competitors from the market, (ii) to carry out a price/cost test to establish the potential for anti-competitive effects or (iii) to establish that an operator is or would be forced to charge negative prices as a result of the conduct in question.

"In relation to Post Danmark, the general court in Intel confirmed that the obligation in that case to carry out a price/cost analysis on an equally efficient operator basis was attributable to the fact that it was impossible to assess whether a particular level of price was abusive without comparing it to prices and costs."

I should say that's -- yes.

Then in relation to 7.26:

"Most recently, the opinion of Advocate General Kokott in Post Danmark II."

Yes, sorry, 7.25 is reference to Post Danmark I.

"Most recently, the opinion of Advocate General Kokott's in Post Danmark II elaborated on the issue further, explaining EU law doesn't support the inference of an absolute requirement always to carry out an as efficient competitor test for the purposes of assessing price based exclusionary conduct from the point of view of competition law."

7.27:

"These precedents make it clear it is not necessary to carry out a price/cost test to establish an infringement finding. The case law indicates the nature of the evidence required to establish an infringement depends on the nature of the conduct under consideration. Particularly in the case of price-based exclusionary conduct, it is relevant to consider whether it's possible to determine the price is abusive, other than by comparing it to other prices."

So that is their primary consideration of the position.

If we then go on, we pick it up, page 107 internal

numbering, "The relevance of applying a price/cost test". What you see in 7.70 onwards is consideration of whether or not there's any relevance to a price/cost test here.

Picking it up just at 7.71:

"We have explained above that as a matter of law it is not necessary in all cases to carry out a price/cost test. Case law indicates that the nature of the evidence required may depends on the nature of the conduct. For reasons explained below, we do not consider an assessment of Royal Mail's conduct in this case should be undertaken by reference to a price/cost test of the sort put forward by Royal Mail."

We don't think you should.

Then 7.74, I'm just moving through it:

"The case law is clear that it is not always the case that an EEO must be entirely foreclosed from the market in order for conduct to be found abusive. Whilst a positive finding that an equally efficient operator would be excluded from the market may be sufficient to establish the anti-competitive effects of abusive conduct, the absence of such finding does not establish that the conduct in question produces no anti-competitive effects. The absence of such finding is less likely to be relevant where concerns relate to

the level of one price relative to another price, rather than the absolute level of price."

It's just worth noting in that paragraph all of the footnotes are to the Intel judgment that was referred to earlier. It's worth just picking those up. If we go to the authorities bundle, 8, tab 98, we have got the epic work which is the general court judgment in Intel.

THE CHAIRMAN: Have we finished with the statement of objections?

MR BEARD: Yes, on the basis that I'm going to go to those paragraph references now.

So the paragraph references in particular cited in 7.74 were 88, 150 and 152 of Intel.

So if we just turn those up, 88 is on page 12 of 223. It's obviously discussing this in the context more generally of --

THE CHAIRMAN: I think I'm not with you. Which tab is it in?

MR BEARD: It's tab 98, I'm sorry, sir. Tab 98 in authorities bundle 8.

THE CHAIRMAN: The general court?

MR BEARD: This is the general court. Because this is what was being relied on in the SO.

What we see at 88 in that context, in the context of what's being considered here, whether or not exclusive

rebates by their very nature are capable of foreclosing competitors:

"It should be observed that a foreclosure effect occurs not only where access to the market is made impossible but also where that access is made more difficult. See Michelin II. A financial incentive granted by an undertaking in a dominant position in order to induce a customer not to obtain in respect of part of its requirements concerned by the exclusivity condition supplied from its competitors is, by its very nature, capable of making access to the market more difficult for those competitors."

So "by its very nature".

If we move on to the next reference that is relied on in that paragraph in the SO, paragraph 150.

Just picking it up at 149:

"It should be borne in mind foreclosure effect occurs not only where the access to the market is made impossible for competitors, it is sufficient that access be made more difficult."

150:

"It must be stated that an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility it's been made more difficult. It is true

that a negative result means that it is economically impossible for an as efficient competitor to secure contestable share. In order to offer a customer compensation for the loss of exclusivity rebate, that competitor would be forced to sell its products at a price which would not even allow it to cover its costs. However, a positive result means only that an as efficient competitor is able to cover its costs. In the case of the AEC test carried out in the contested decision proposed by the applicant, only the average avoidable costs, that doesn't mean there's no foreclosure effect. The mechanism of exclusivity rebates as described in paragraph 93 above is still capable of making access to the market more difficult for competitors even if that access is not economically impossible."

Then 152, which was the third of the references:

"That conclusion is not undermined by TeliaSonera, Deutsche Telekom or Post Danmark. The applicant submits that it follows from those judgments that the key criterion is whether a competitor as efficient as the dominant undertaking could continue to compete with the dominant undertaking. However, it should be borne in mind that those cases concerned margin squeeze practices or low price practices."

That's discrimination in Post Danmark:

"The obligation resulting from those judgments to carry out price and cost analyses is attributable to the fact that it is possible to assess whether a price is abusive without comparing it with other prices and costs. A price cannot be unlawful in itself. However, in the case of an exclusivity rebate, it is the condition of exclusive or quasi exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive."

So these are the paragraphs relied upon, and of course what we know is that when we turn on to the next chapter in the story in relation to Intel, actually that approach was rejected.

We need to go to authorities bundle 9 at tab 106.

Now, it's a terse judgment, Intel. We can pick it up just above 108, page 15 of 21, tab 106.

MR FRAZER: Sorry, which paragraph?

MR BEARD: I was just going to pick it up above 108, page 15 of 21.

So the first ground of appeal is alleging that the general court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances. In particular, what is said by the appellant there is that it failed to carry out and

consider an as efficient competitor analysis that had been put to the Commission, the Commission in its decision had considered, and the general court said did not need to be considered.

The findings of the court in relation to this ground begin at 129:

"In the first place, by the first two parts of its first ground of appeal, Intel, supported by ACT, argues in essence that the general court accepted that the practices at issue could be considered an abuse of dominant position within the meaning of 102 without examining all the circumstances of the present case and without assessing the likelihood of that conduct restricting competition."

Then:

"In the second place, by the third part of its first ground of appeal, Intel criticised the general court's analysis, carried out for the sake of completeness ... concerning the capacity of the rebates and payments granted to [various computer manufacturers] ..."

This was concerning supply of computer chips:

"... to restrict circumstances in the circumstances of the case."

132:

"It submits, in particular, that, since the

Commission applied [the AEC] test, the general court should have examined Intel's line of argument alleging that the application of that test was badly flawed and that, it had been correctly applied, it would have led to the conclusion contrary to that which the Commission reached, namely that the rebates at issue were not capable of restricting competition.

"In that respect, it must be borne in mind that it is in no way the purpose of Article 102 to prevent an undertaking from acquiring, on its own merits, the dominant position in the market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market."

Noting Post Danmark 1:

"Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

"However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition ...

"That is why Article 102 prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate ...

"In that regard, the court has already held that an undertaking which is in a dominant position in the market and ties its purchasers -- even if it does so at their request -- by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within ... Article 102."

This is all from Hoffmann-La Roche. This is paragraph 89. "However", this is 138:

"... that case law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing alleged foreclosure effects."

It's worth emphasising there that these are the alleged anti-competitive foreclosure effects. 139, the

parenthesis was there was a correction after the judgment was initially given, hence the parenthetical comment:

"In that case the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of market covered by the challenged practice ..."

So what's the scale of dominance? What's the share of market coverage?:

"... as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.

Then 140:

"The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in 102 may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable

effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking."

Then it goes on to talk about the fact that in this case there was consideration of the AEC analysis by the Commission, and at 143:

"It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment ...

"In those circumstances, the general court was required to examine all of Intel's arguments concerning that test."

In consequence, the judgment is quashed and remitted to the general court.

Now, the headline point is that the SO relied on law that's wrong.

The second key point is that Intel in the ECJ is doing in essence two things. It's saying labelling practices is not the way that you assess whether or not they have anti-competitive effects. They have to look at all the relevant circumstances.

Secondly, when you're doing that, the as efficient competitor benchmark is highly relevant because you see

all the way through this decision, and in particular at 133 and 139, that what has to be assessed is whether or not the arrangements in question would adversely affect competitors that are as efficient as the dominant undertaking. Competition law is not there to protect less efficient competitors.

The third point to draw from Intel is that where an undertaking submits during the administrative procedure material based on supporting evidence saying that the conduct is not capable of restricting competition, and by "capable of restricting composition" what is being talked about here is does it have likely restrictive effects, you must proper analyse that. That's 138.

The reality is Ofcom have just gone wrong here. They have tried to triangulate so that they don't have to engage with the AEC analysis and that is precisely what the ECJ was saying do not do. Don't start saying: this is a high pricing practice, not a low pricing practice. This is not like a margin squeeze, it's like something else. It's saying: don't use labels of that sort. They're not helpful. It is saying that AEC is important. So sidelining it, as Ofcom has sought to do, was wrong.

But most critically, perhaps, for the purposes of this appeal, it is absolutely clear that you properly

have to engage with an AEC analysis when it's been put forward to you and 7.200 just doesn't do that.

So it may be understandable why Ofcom has gone wrong here. It may be that it relied on the general court in the SO and it didn't want to have to engage further in relation to the AEC analysis that had been put forward because it had already followed that line. But it needed to and it hasn't done so and it doesn't have a justification for doing so in these circumstances.

As I say, this isn't a case where we have to stand here going: it's the AEC, it's absolutely determinative. What we're saying is you needed properly to analyse what had been put forward.

It's not, for instance, adequate as is suggested in some of the Ofcom submissions, to say, well, you know, this is a case involving intention.

Now, we dispute Ofcom's analysis of intention, but if intention mattered, and intention meant you did in a sense AEC, Intel would never have been decided in this way because in Intel what was found was that there was a global strategy that had been concealed in order to foreclose AMD. So that analysis would not stand up at all.

The reality is Ofcom have tried to pick on other cases and tried to sideline Intel and sideline the

thrust of Intel, not just the specifics of it. When the general court, they thought, helped them, they said it was terribly instructive in the SO. When the ECJ doesn't, it's all to be distinguished.

THE CHAIRMAN: Are you going to deal with Ofcom's point on Post Danmark II?

MR BEARD: Yes, I'm going to deal with Post Danmark I and Post Danmark II and MEO. I'm sorry.

THE CHAIRMAN: Don't apologise.

MR BEARD: I think I'll deal with Post Danmark I first, if I may. I'm not going to go through the Attorney General's opinion in Intel. It's broadly in the same direction but it actually just doesn't go as far as the ECJ does, in effect. It's brief, as a virtue, Intel.

THE CHAIRMAN: You can take we've read it.

MR BEARD: If we can go back to bundle 7 -- no, bundle 8, I'm sorry, tab 93 for Post Danmark I.

One thing that is just worth mentioning -- I'll come back to it when I deal with Post Danmark II itself -- no reference to Post Danmark II in the court's judgment. There are references to Post Danmark II in the AG's, and it's understood that because Post Danmark II came out just before the hearing in relation to the Intel case, that actually those were matters that were specifically canvassed. So the focus on Post Danmark I is therefore

instructive in Intel.

THE CHAIRMAN: Bundle 8?

MR BEARD: Bundle 8, tab 93, sir.

So this is Post Danmark I. This is selective pricing, price discrimination.

If we pick it up just at paragraph 22, perhaps 21, I think one of the members of the Supreme Court referred to the European tradition of tralitition jurisprudence, which I think was a polite way of it being highly repetitive.

Paragraph 21 again is one that we've seen before in broad terms, referring to Michelin, Compagnie Maritime Belge and TeliaSonera. Then at 22:

"Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."

So you can see why that was particularly cited by the ECJ Grand Chamber in Intel. It's worth bearing in mind this is also a Grand Chamber case, Post Danmark I.

If we then go to 25:

"... Article 82 prohibits a dominant undertaking

from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as itself and strengthening its dominant position by using methods other than those are are part of competition on the merits. Accordingly, in that light, not all competition may be regarded as legitimate."

26:

"In order to determine whether a dominant undertaking has abused its dominant position by its pricing, it is necessary to consider all the circumstances and to examine whether those practices tend to remove or restrict the buyer's freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions ... thereby placing them at a competitive disadvantage."

There's reference back to Deutsche. Then 30:

"Moreover, contrary to the line of argument forward by the Danish Government, which has submitted observations in these proceedings in support of the Konkurrenceradet's position in the main proceedings, the fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as 'price discrimination',

that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse."

So what we've got here is the same sort of considerations, indeed considerations that are later approved in Intel, but specifically being engaged with in the context of price discrimination.

Then we've got discussion of what was going on in relation to that case, and a consideration in particular at 36 and 38 about whether or not costs were being covered and therefore whether or not this could have anti-competitive effect in the context of the consideration of as efficient competitors. So 38:

"Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term."

So AEC considerations in relation to price

discrimination. I highlight it merely because (a) it is the strand of authority that is approved and developed in Intel focusing on as efficient competitors; (b) it is to do with price discrimination.

THE CHAIRMAN: It's to do with postal services.

MR BEARD: It is also to do with postal services, but I'm also careful not to obsess just about the particular facts of the matter that we're dealing with today. It is about the overall legal framework that we're looking as well.

So two other authorities, I was going to go to MEO and Post Danmark II. I will also deal with very briefly Deutsche Telekom.

But in relation to Post Danmark II -- I'm just conscious of the time. I'll go to it perhaps first thing tomorrow, if I may, but just as a headline, in relation to Post Danmark II, obviously we're dealing with the same entities in Post Danmark I. What we see from Intel is that where AEC material has been put forward, it cannot be ignored.

What we actually see in Post Danmark II is an emphasis on AEC, not some other test, not reasonably efficient competitors or less efficient competitors.

What Ofcom relies on Post Danmark II for is a suggestion that there's an exception to the use of an

AEC test where somehow it is impossible that an AEC could emerge.

Now, we say that two things in relation to that. Even if it is an exception, it must be necessarily very narrowly construed.

Secondly, it is in fact in the context of a case where the statutory and monopoly applied generally across the whole state and meant that only a portion of delivery was ever open for competition. So the circumstances were markedly different.

Secondly, it is critical that the decision in this case doesn't make any finding that an AEC is impossible. I'll come back to that, but there is nothing there. There are various comments about the market structure, but there is not a finding that it is impossible.

In circumstances where you would be dealing with an exception, that would critically be required for proper analysis of impossibility, but I think it is important to bear in mind that we don't accept that that exception is good law. Intel is very careful not to endorse or refer to Post Danmark II at all whilst it does specifically refer to and endorse Post Danmark I.

What it's saying is that this is a test you're applying to see whether or not efficient competitors are being kept out by the pricing. It had that case very

well in mind. As I say, the Attorney General refers to it. But in circumstances where you're dealing with precisely the same organisation, what Intel says is Post Danmark I approach of focusing on as efficient competitors is the appropriate approach, and they weren't including any qualifications to that.

So we say that even dealing with Post Danmark II at its highest, it doesn't assist Ofcom but, as I've said, the key thing is not just looking at the particulars of Intel, but the broad thrust of what Intel is requiring is much more important in this regard.

I'm conscious of the time. I've got a couple more cases on this topic and then I'll move on.

THE CHAIRMAN: We will resume with those tomorrow at 10.30.

Thank you everybody.

(4.30 pm)

(The hearing adjourned until Tuesday, 11 June 2019 at 10.30 am)

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