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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1049/4/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18th February 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR PAUL STONEMAN
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

UNICHEM LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

supported by

PHOENIX HEALTHCARE DISTRIBUTION LIMITED

Intervener

Mr. Nicholas Green Q.C. and Miss Maya Lester (instructed by Allen & Overy LLP) appeared for the Applicant
Mr. Peter Roth QC and Mr Daniel Beard (instructed by the Treasury Solicitor) appeared for the Respondent
Miss Kelyn Bacon, Mr David Marks and Mr John Markham (instructed by CMS Cameron McKenna) appeared for the Intervener.

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HEARING: DAY TWO

1 MR. ROTH: Good morning, Sir, and the Tribunal. Despite the contraption behind me, I am not
2 going to start with maps.

3 THE PRESIDENT: Well I think that is a great pity, because the maps are now in total confusion and
4 we really need to be taken through them from the start to get a clearer idea of who had what
5 maps when, and what they show.

6 MR. ROTH: Sir, I was intending to do that in just a moment.

7 THE PRESIDENT: Right.

8 MR. ROTH: And to go through it step by step. I thought that would be helpful. I just wanted to
9 apologise for the muddle I got into on Monday, when it started to become clear to me, because
10 I was on my feet, that what I was told about the maps and what is said in the documents about
11 the maps to correspond to the maps and what is said in the documents about maps did not
12 correspond to the maps that I was showing you and had in front of me, and now it emerges, as
13 you have seen, that the wrong maps have been put in by both us and the Interveners, so I was
14 speaking to the wrong maps and that is why I certainly got confused and I am sure I became
15 very confusing.

16 THE PRESIDENT: Well we became very confused as well.

17 MR. ROTH: I fully understand that and I am sorry about that, and it is embarrassing for me too.
18 Just before turning to maps can I mention two other points and then take you through the
19 history step by step. One is a quite different point I skipped over on Monday, and that is going
20 to SLC and the important point prompted by the question from Professor Stoneman, and that is
21 the meaning of “substantial lessening of competition”, because I talked about the s.33 test in
22 terms of the making of a case there, but I did not say anything about what the end result which
23 the OFT, and indeed on a reference the Commission, would have to consider the risk of a
24 substantial lessening of competition and, in particular, the significance of the word
25 “substantial”. That is addressed in our skeleton at para.7, if the Tribunal has that, were we say
26 that it is not defined in the Enterprise Act. It is used in the merger legislation of several other
27 jurisdictions, and it was intended this concept and this application would be explained by the
28 Commission and the OFT in detail in their guidance.

29 THE PRESIDENT: Yes, we have read that.

30 MR. ROTH: And then the guidance is set out.

31 The other point to mention on that is there is in fact authority in the context of merger
32 review in the United Kingdom on the meaning of “substantial”. That is not referred to in our
33 skeleton argument, but may I hand it up. [Document handed to the Tribunal] I have given

1 copies to my friends. It is *R v. MMC ex parte, South Yorkshire Transport* [1993] 1 W.L.R.23, a
2 decision of the House of Lords. There it was on the meaning of “substantial” in the phrase
3 “substantial part of the United Kingdom”, as you will see on the first page just at the end of the
4 first long paragraph. It was a precondition for reference under what was s.64(3) of the old Act
5 – since so small an area, and here it was bus companies – comprised in the reference could not
6 constitute a substantial part of the United Kingdom. So that was the issue before their
7 Lordships as to what that meant, and in the speech of Lord Mustill, with which all their
8 Lordships agreed, at p.29 at the top, quoting the first stage as a matter of common language:

9 “... no recourse need be made to dictionaries to establish that ‘substantial’
10 accommodates a wide range of meanings. At one extreme there is not trifling, at the
11 other there is nearly complete, as where someone says he is in substantial agreement
12 with what has just been said. In between there exists many shades of meaning
13 drawing colour for their context, but the meaning of the word has been reflected in the
14 decided cases as is I believe made quite clear by the judgment of Mr. Justice Otton.”

15 THE PRESIDENT: Yes. What is the point you want to make on this, Mr. Roth?

16 MR. ROTH: The point I want to make is that the word “substantial” and “substantial lessening of
17 competition” involves a sense of proportion and it means “worthy of investigation”, and indeed
18 of prevention, and that one takes from that paragraph, and then at the top of p.31, about four or
19 five lines down.

20 “The epithet ‘substantial’ is there to ensure that the expensive laborious and time-
21 consuming mechanism in the merger reference is not If it is not
22 worthwhile.”

23 So it goes to the question, and this I think was Professor Stoneman’s point if I correctly
24 understood, whether the OFT effort is satisfied applying the case test, that there is not a single
25 customer in East Anglia who would suffer any detriment of competition or whether it could
26 take a somewhat broader view and say this is a matter of degree, and we would say it would be
27 quite absurd and unworkable even for the Competition Commission if it had to be satisfied of
28 the position for every single customer. This merger already, which affects ----

29 THE PRESIDENT: I do not think there is much dispute about that proposition, Mr. Roth.

30 MR. ROTH: I am very much obliged. So there is a matter of degree and an element of judgment
31 that is involved, and that was the point.

32 Secondly, before taking you to the chronology – a word about the Issues Letter,
33 because Mr. Green made great play of the fact that the Issues Letter was sent to the parties on

1 the 30th November and said that there was concern about whether there was sufficient
2 competitive constraint, constraint on the merged entity from UniChem and EAP in certain parts
3 of East Anglia, and said, you will remember the concern, that neither AAH nor UniChem can
4 provide an effective service there. Mr. Green read it to you and I will not repeat it. And then
5 nine days later the OFT decided not to refer the merger, and Mr. Green pointed out that little
6 that was new was said by the merging parties on this point in between, and he asked, “Well,
7 how could the OFT have possibly had this doubt which was voiced so clearly on the 30th
8 November, dispelled by the 9th December?” – you will remember the point, and it sounds a
9 very nice forensic point.

10 But, with respect, this completely misportrays the way the decision process works at
11 the OFT and the role of the Issues Letter.

12 THE PRESIDENT: Is this in evidence?

13 MR. ROTH: It is. It is explained in Mr. Priddis’ witness statement at paras.24 to 28. Could
14 I invite you, rather than I reading it aloud, to quickly read it. It is on pp.16 to 18 of
15 Mr. Priddis’ witness statement, the long witness statement.

16 THE PRESIDENT (After a pause): Yes. We have read that.

17 MR. ROTH: So you see from that, Sir, the procedure is that the case – and he explains right the way
18 through his statement – from the beginning is investigated by a case team. Each case has a case
19 team assigned to it and they conduct the investigation. They do not make the final decision.

20 The Issues Letter is prepared by them at the final step in their investigation and sets
21 out, as Mr. Priddis explains, all the forceful arguments in favour of a reference, because those
22 arguments have to be presented to the case review meeting, the CRM, which is chaired by a
23 more senior official – in this case it was Mr. Priddis in fact who chaired it as director of
24 Mergers Branch and where those issues are debated – and so before the CRM an Issues Letter
25 or issues paper, as it is here called, is given to the parties to give them the final opportunity to
26 make any further representations regarding the key issues on which the Decision will be taken.
27 It does not mean that the case team have not agreed with their earlier submissions, but it is done
28 so one can be quite sure they have the final word on all those points.

29 THE PRESIDENT: But if the case team had agreed with their previous submissions why would you
30 need to bother with sending an Issues Letter?

31 MR. ROTH: Because the decision-maker at the final meeting might say, “I am concerned about this
32 and I’m not sure that I accept what you’ve just told me”. You have also seen Mr. Priddis’
33 witness statement; it is not just the team, there is also a devil’s advocate at the final meeting

1 putting the contrary view to challenge what the case team say, and that is put in as a safeguard
2 precisely to guard against them coming to too early a view, so that all the ----

3 THE PRESIDENT: So these documents do not represent the OFT's view in your submission?

4 MR. ROTH: The Issues Letter does not, and it makes clear that it is simply a hypothesis, and it is
5 not to be assumed, para.24 of Mr. Priddis' statement, that the Issues Letter represents the
6 views, even preliminary views, of the OFT. It is what are identified as the key issues, and case
7 against the merger and the case for reference on all those key issues, but not the view that has
8 been concluded, it is not a conclusion of the OFT, that is what he explains and unless, with
9 respect, he is not telling the truth, that is how it works. You may think this is a foolish
10 procedure, you may think it is a prudent procedure, but this is the procedure that the OFT
11 adopts, and then comes the CRM where there can be a recommendation from the case team,
12 sometimes there is and sometimes there is not but here there was. There is the devil's
13 advocate who argues the contrary, no doubt on the basis of the Issues Letter and what he has
14 heard at the issues meeting, as he attends it. Then that results in a recommendation from the
15 case review meeting, which is further presented to in this case the Executive Director of the
16 OFT who takes the final decision after the presentation. So that is the process, and that is why
17 I say it is quite wrong to present the Issues Letter as a demonstration that those conducting the
18 investigation at the OFT were still in serious uncertainty about these points as at the end of
19 November.

20 THE PRESIDENT: But if they were not in serious uncertainty why go through the process?

21 MR. ROTH: Because those are the areas which were identified where competition issues could
22 arise, those are the areas therefore in which the decision maker at the decision stage has to be
23 satisfied. Those are the areas which will be debated at the final decision meeting, with a
24 recommendation from the case team, but still will be debated and the contrary case will be put.
25 Therefore a final opportunity is given to the merging parties, we have had a lot from you
26 already, is there anything more you want to say about any of these issues? That is how it is
27 done. As I say, you may think it is a prudent procedure to do a final safeguard, you may think
28 it is an over elaborate procedure, you may think it is an absurd procedure, but that is their
29 procedure, and that is why the issues letter should not be taken as saying you reach one view
30 quite clearly, strongly on 3rd November, and you did a 180 degree switch a week and two days
31 later, because that is not how the process works.

32 THE PRESIDENT: It is very difficult for us to go on anything except what is in the document, is it
33 not? It is very difficult to say that was not their view, or that is not necessarily their view, or it

1 may be a different view. If you send an Issues Letter according to the Guidance that suggests
2 that there are potentially material competition issues, or potentially complex issues that may
3 warrant a reference. The whole thing is only a hypothesis, for any one it maybe the case
4 hypothesis anyway.

5 MR. ROTH: It absolutely identifies that there are potential issues that may warrant a reference
6 because not every case has an Issues Letter, it is only in complex cases of course that that route
7 is embarked on. But it does not mean any more than that, and when you say, Sir, the
8 documents, well the documents include, with respect, what Mr. Priddis says in his witness
9 statement, it is a material document, speaking with all his experience as director of mergers'
10 branch, involved in this process, and having been a member of the Bar, and I ask you to accept
11 what he says is true.

12 THE PRESIDENT: I do not doubt what he says.

13 MR. ROTH: So that is the evidence before you.

14 THE PRESIDENT: Yes.

15 MR. ROTH: How the process works, because it could well be that the recommendation of the case
16 team, challenged by the devil's advocate at the issues meeting is challenged so forcefully that
17 the decision maker says "I have respect for you and the case team and all the hard work you
18 have done, but it is my judgment and I think this case should refer".

19 So I come to cartography, and perhaps even isochronology. Having spoken about the
20 final step in the process, what I want to show you carefully is the process which led to the
21 Decision, step by step. May I hand up a chronology, cross-referenced to the documents, which
22 Mr. Beard has prepared, which I hope you will find very helpful.

23 THE PRESIDENT: Yes, I think we seem to have that.

24 MR. ROTH: One starts with the AAH proposed merger the year before. UniChem was involved in
25 commenting on that. You see on 28th October UniChem put in a submission and could I ask
26 you to look at that which is in Mr. Priddis' exhibit bundle at tab 27.

27 THE PRESIDENT: Yes.

28 MR. ROTH: This is the letter of 28th October, comment on AAH's proposed acquisition, and they
29 enclose on behalf of UniChem a short paper setting out its concerns, and you may for your
30 notes possibly wish to make a note, that is in the Appellants' bundle at tab 6 – a short paper.

31 They say:

32 "For the reasons discussed in the closed bid UniChem believes the acquisition raises
33 serious issues".

1 Then the next paragraph also enclosed is UniChem's response to the OFT's questionnaire,
2 which we received and then if you go two pages on you have the reply to the questionnaire.
3 You see question 3:

4 "How far does your current customer base extend. As explained in annex 1 of the
5 briefing paper [the other paper] the vast majority of UniChem's customers lie within
6 90 minutes one way drive time of each of UniChem's warehouses. In East Anglia
7 very few customers lie beyond this range, 29 out of the 479 pharmacies and
8 dispensing doctors buy from UniChem's Letchworth warehouse, and 7 out of 75
9 hospitals. As such, UniChem considers its effective customer base to extend only as
10 far as the 90 minute drive time boundary illustrated below, which falls short of
11 Norwich, Kings Lynn, Gt. Yarmouth, Lowestoft, Felixstowe and the east of Ipswich
12 and Colchester."

13 THE PRESIDENT: Its effective customer base.

14 MR. ROTH: And that you see they have illustrated over the page, I hope you have a colour copy
15 where the isochrone is ...

16 "Do you foresee any problems in extending your customer base? Yes, see the
17 briefing paper, especially para. 4.4 and 5.6".

18 And then before turning to the briefing paper, you see there is discussion about prices and so
19 on, which I do not think I need go to. Question 14 (the final one): "Do you have any concerns
20 about this merger?"

21 THE PRESIDENT: Is it right to just point out that they do say in this document that they have got
22 customers beyond the 90 minutes driving time, but their argument is that the 90 minute drive
23 time is their effective customer range?

24 MR. ROTH: Yes, absolutely. Then the briefing paper, which I am afraid one has to go to the other
25 bundle at tab 6, the application bundle, and there you can see there are two paragraphs that
26 they highlight in the letter I have just read to you, that is to say para.4.4, the reality of the
27 existence of a separate market for supplying dispensing doctors, they are talking about here,
28 despite having devoted substantial efforts over recent years to growing its shares of the
29 dispensing doctors, UniChem has found it remarkably different to make inroads, including
30 East Anglia where EAP and AAH have entrenched positions based on a long history.
31 UniChem have set up a new business unit specifically to target dispensing doctors, it plainly
32 has the expertise and resources to be a competitor across the UK, but it has failed to penetrate
33 the market.

1 THE PRESIDENT: Yes.

2 MR. ROTH: That is 4.4. The other paragraph they refer to I think is 5.6 on p.6.

3 “Underlying the difficulty of penetrating the East Anglia region, even for an
4 experienced operator it is notable UniChem’s market share in that region is still
5 considerably lower than its share nationally, notwithstanding its attempts to expand in
6 the region since the OFT’s negative confidential guidance in respect of the EAP
7 acquisition in 2000. Such difficulties reflect the relatively high capital cost and poor
8 financial returns, UniChem faces in attempting to grow a largely rural market where
9 EAP and AAH are already very strong.”

10 Then if you could turn on, please to para.6.3:

11 “The MMC made clear in its 1996 report that it is concerned to preserve competition
12 in wholesaling pharmaceuticals especially in the light of legislative restraints on
13 competition in manufacture. The same concerns exist today.”

14 Pricing they talk about there and then the MMC and the final two sentences:

15 “The concerns of the MMC have particular relevance in a situation where a national
16 wholesaler attempts to purchase a regional wholesaler that is its closest competitor,
17 both in terms of geographic coverage and focus on the dispensing doctor market”

18 So there UniChem is saying that AAH is EAP’s closest competitor. If I could ask you to go
19 back to 4.9 in this document, which references the attachment attached at appendix 1 is an
20 isochrone analysis centred on each of the warehouses and the full-liners. That is the
21 introduction to appendix 1 which is at p.290. That is a report, it does not say who it is from,
22 but which includes an isochrone analysis, in fact two one for doctor and pharmacy, the other
23 for hospitals, if you remember hospitals was a big issue in that merger. I do not ask you to
24 look at it in detail, because you do not have the coloured version, and I will wait until we get to
25 the submission on the present merger, where again we get a similar isochrone analysis pretty
26 much the same. It is the same point being made here about the 90 minute drive time.

27 THE PRESIDENT: And would it be fair to say this analysis is broadly consistent with, in the sense
28 of being prepared on the same kind of assumptions as the subsequent analysis that you
29 produced?

30 MR. ROTH: So it appears to us, and some of the language, indeed, is almost as if it comes from the
31 word processed document, with things changed for the new merger. Then in the next few
32 weeks UniChem presented further material to the OFT, as you see from the chronology, they
33 wrote on 20th November and then on 24th November, and 24th November, if you could please

1 look at – one is back in Mr. Priddis exhibit bundle at tab 29. I am sorry I will have to jump a
2 bit between these two bundles, because I think there was an attempt not to duplicate everything
3 that was already with another witness elsewhere. Tab 29, a letter of 24th November 2003,
4 enclosing four copies of a note incorporating maps showing the location of UniChem’s
5 independent retail pharmacy and dispensing doctor customers in East Anglia. Then on the
6 next page I hope you have – and I hope in colour – a map. UniChem customer locations.
7 Figure 1 illustrates the location of independent pharmacy customers that UniChem serves from
8 its Letchworth and Croydon warehouses where independent pharmacies are defined as
9 excluded Boots the Chemist, managed chains and supermarkets. In total Letchworth delivers
10 468 independent pharmacies using a very conservative definition of East Anglia, the two
11 warehouses deliver to 91 and 55 independent pharmacies in the region respectively, giving a
12 total of 146 customers, they then give a wider definition.

13 “As shown in figure 1, 21 of Letchworth’s independent pharmacy customers in East
14 Anglia lie beyond its 90 minute direct drive isochrone, as defined in the briefing
15 paper. None of Croydon’s do. These 21 customers represent 14 per cent. UniChem’s
16 total independent pharmacy customer base in the region under the narrow definition.”

17 Then you can see where they are. You can see over the page a list of who they are.

18 “To demonstrate the reduced service quality that UniChem is able to offer its more
19 distant independent pharmacies afternoon delivery cut-off times are given in table 1.
20 The average afternoon cut-off time at Letchworth is 12.30 but those offered to these
21 more distant customers are significantly earlier. This impacts on the quality of service
22 these pharmacies are able to offer their patients”

23 And you will see it is between 11.10 and 11.30.

24 THE PRESIDENT: Yes.

25 MR. ROTH: So it is a little under an hour and half. They go on to say, those are pharmacies, we do
26 not have any success in dispensing doctors, there is only one in the region and he, in fact, is
27 way away from the area we are concerned with in this case, so no dispensing doctors. But you
28 see where the independent pharmacies are along the East coast, up to Kings Lynn and beyond
29 at the top.

30 THE PRESIDENT: Yes, we need to get familiar with some of these names now.

31 MR. ROTH: Yes, and I hope the map I am coming to in a moment will assist on that. Then on 3rd
32 December, you will see from the chronology, the decision was made to refer the AAH bid.

1 The decision stated, and that is the application bundle tab 7. paras.34 to 36 under assessment, it
2 says:

3 “Share data is not itself an accurate indicator of actual and potential competition.
4 34. In the supply of ethical dispensing it might be the case that in limited
5 circumstances short-liners will provide some constraint. The evidence suggests,
6 however, that the most likely source of competition is full-liners. These may,
7 however, be limited in their ability to provide effective competition given the
8 location...”

9 and so on.

10 “Third party comments tended to suggest this was a limited factor in certain parts of
11 East Anglia, but was still important. Further detailed investigation is required to
12 determine how effective such competition is likely to be in constraining the behaviour
13 of the merged parties.”

14 Then they talk about hospitals at 35, the duopoly:

15 “... lead to a reduction of potential suppliers – hospitals expressed particular concern
16 about this reduction in choice and the potential adverse impact upon services. In
17 these circumstances the OFT believes it is, or may be the case ...” etc. “... goods and
18 services, namely the supply of pharmaceuticals to retail pharmacies, dispensing
19 doctors and hospitals in the East Anglia region extending ...”

20 And so on, and those were the reasons, in summary, we are given. That was December 2003.

21 So one jumps on, Sir, now, to April 2004.

22 THE PRESIDENT: Yes. It is not suggested in the December 2003 Decision that Unichem might be
23 able to exercise a competitive constraint on the merger concerned there. No, wait a minute –
24 other full liners, yes. Sorry, yes.

25 MR. ROTH: Yes, they examine it and say they may be limited ----

26 THE PRESIDENT: Sorry, let me get it right – 34, other full liners, they may be limited in their
27 ability to provide effective competition in the location of their depots and the ability to serve
28 customers some distances from their depots – okay. And then third party comments tend to
29 suggest that and further investigation is required.

30 MR. ROTH: Yes. So that is December 2003.

31 We jump on in time because, as we know, that reference did not proceed, to April
32 2004, which was the Phoenix confidential guidance submission, and there then followed a
33 meeting and information requests, and on the 2nd June 2004, as you see from the chronology,

1 Phoenix respond to the information request from the OFT with a response that includes what
2 we call the “big maps”, just as a shorthand, which are at tab 15, and if I can go first to the
3 response that they made. This is in Mr. Priddis’s exhibit bundle at tab 2. You will see a
4 summary of the key points, and if you turn to p.3, question 4, and that is showing they were
5 asked to provide by the OFT a map showing the geographical spread of Phoenix and EAP
6 customers with confirmation of numbers.

7 “Phoenix and EAP have compiled separate lists of all their current pharmacy and
8 dispensing doctor accounts in the East Anglia region with a monthly turnover
9 threshold above £15k. Multiple pharmacies are not included as both companies are
10 excluded from bidding for this business.”

11 That is the change.

12 “A map is attached at annex B plotting the locations of these customers, denoted by
13 blue for Phoenix, green for EAP. It is interesting to note that in the far north and
14 south Phoenix’s presence is currently very limited as Phoenix has been unable to
15 generate enough business to make a van route viable. The parties have also cross-
16 checked the list of accounts dealing principally with Phoenix and/or EAP with a
17 complete list of pharmacy and dispensing doctors ... Potential customers identified
18 not dealing with Phoenix or EAP are as follows ...

19 The ‘others’ are pharmacy and doctors identified within the region who must be
20 dealing with wholesalers than Phoenix or EAP. Moss is supplied by Unichem”

21 I pause there because that deals with the first map, before going on to the second map,
22 and these are the maps that you will find at tab 15. That is what they call Annex B, at the
23 Tribunal’s tab 15.

24 THE PRESIDENT: This is Phoenix customers and Hawk customers?

25 MR. ROTH: This is Phoenix customers and EAP. I have put on the map on the board, Sir, where
26 the A14 goes, marked in orange, and the place names in my copy, and I suspect the Tribunal’s
27 copy, are not very legible on the map at all. That is Norwich up there. That is Cambridge,
28 where Phoenix has its depot. That is Great Yarmouth, and below Lowestoft, and then up at the
29 top that is Kings Lynn. So that was the first map, and the point being made is that Phoenix –
30 there are a lot of green dots, being EAP, but there is not a lot of Phoenix up at the top. They
31 were obviously looking at what will be the effect for counter factials there.

1 Then the second map, which is referred to in the next paragraph, and again it is of
2 course the same map with different dots on it, and I have highlighted the A14 on it. I will read
3 the explanation:

4 “The parties have also plotted the location of each of these customers ...”

5 That is customers not supplied by Phoenix or EAP on a map of the region. So this is all other
6 pharmacies or dispensing doctors which they can identify who are not on the map because they
7 are not supplied by Phoenix or EAP. You will see the green dots here are Moss Pharmacy,
8 which is the UniChem tied chain.

9 THE PRESIDENT: So the green is now Moss?

10 MR. ROTH: And that is a UniChem tied chain, delivered to by UniChem. The buff is Lloyd’s
11 Pharmacy, which is an AAH tied chain. The blue is the Co-op, which is supplied by AAH.
12 The yellow is all others who are therefore not supplied by EAP or Phoenix and must get their
13 supplies from someone else.

14 You will note, if you would, two things about that. One is that the green dots, which
15 are being supplied Phoenix, are a tied chain but Phoenix has to go there in its vans – I am
16 sorry, UniChem, the Moss pharmacies. UniChem has of course to drive there and they are
17 spread quite widely. Then we go up to the top to Sherringham, to North Walsham on the top
18 left, north to Kings Lynn and north up to the coast to I think it is Heachem, and you also see
19 that the yellow dots go quite extensively and deep up to The Wash at the very top, and one of
20 the ones at the top is Burnham Market, and going along the coast where you have three dots is
21 Sherringham, and then there is Cromer, which is a buff dot, and again down the east coast,
22 Great Yarmouth, Lowestoft, you have yellow dots.

23 I think I should also draw your attention to what UniChem said on question 6 in the
24 covering document – what Phoenix said in question 6.

25 THE PRESIDENT: This is Phoenix, yes.

26 MR. ROTH: This is Phoenix’s confidential guidance submissions – information about cost of entry:

27 “The cost of establishing a new wholesale depot is the most significant to barrier to
28 entry and includes the cost of regulatory compliance ... The cost of such a depot
29 would vary considerably ... [several million pounds]. The parties believe that each
30 distribution route needs to carry a monthly turnover of at least £150,000 per month to
31 break even. Therefore, it is difficult to break into new areas within the area serviced
32 by a new depot without the support of at least five to six new customers over a short
33 period.”

1 But the OFT was not convinced by this and the arguments that are set out, but this
2 was sufficiently strong evidence to be able to give positive guidance and, as we know, they
3 gave negative confidential guidance on the 14th July. That is at tab 8 of this bundle, a letter to
4 Cameron McKenna.

5 “On the evidence presently available, it is likely this merger will be referred ...
6 However, at the public stage we may come to a different view if there is sufficient
7 evidence that other full line pharmacies or wholesalers provide an effective
8 competitive restraint within the regional market in which the parties operate
9 suggesting no SLC arises or benefits.”

10 Then there were the underlying internal reasons which Mr. Green read to you, which
11 are at tab 7, and which I am not going to repeat. So that was the confidential guidance.

12 We then move on ----

13 THE PRESIDENT: Which followed at least one issues paper, if not two, from memory.

14 MR. ROTH: I have not gone through the detail at the confidential guidance stage. There was an
15 issue paper leading to that. After the confidential guidance was given I think there might have
16 been a debriefing meeting, but, basically, there was then a little lull during which one
17 imagines, although I do not know, that Phoenix and EAP were considering their next steps.

18 Therefore one moves on a few months to September when Phoenix and EAP present a
19 draft submission to the OFT, a sort of pre-notification submission, and you see that in the
20 chronology. I was not going to take you to that because it is superseded by the actual
21 submission, but on the 24th September they sent the OFT hard copies of maps that were
22 referred to in their draft submission, and are then brought in again into their actual submission
23 when made.

24 THE PRESIDENT: Which maps are these?

25 MR. ROTH: Those are the maps which we now have in two places, and the clearest place will be –
26 I think the clearest ones to read are with Mr. Cole’s new witness statement which has recently
27 been served which substitutes the maps with the earlier witness statement, and those are the
28 maps that replace the maps I was addressing you on, and you will see, Sir, on those maps there
29 are no red dots, and that is why I was so confused by the red dots. There are four new maps.
30 In each of them the black bold line is the A14 of course, the same line as on my map.

31 THE PRESIDENT: These went in on the 24th September. We have got a covering letter to that
32 effect.

1 MR. ROTH: Yes, it is exhibit DRC2. They are referred to in the draft submission on p.3 and the
2 hard copy maps follow two days later, and DRC2 is the covering letter enclosing them. That is
3 why in our chronology we say DRC1 is the maps and 2 the covering letter. Those maps, the
4 four of them, all have identical dots on them but have different detail added, and the first one
5 to take I would suggest is the one with no detail boxes or bubbles added, headed “Independent
6 Sector Customers, excluding Co-op”. There you see the Phoenix independent sector
7 customers, and this is doctors and pharmacies with more than £15,000 a month turnover – the
8 same principle as on the big maps, marked in blue the Hawk independent sector ----

9 THE PRESIDENT: We know that, do we, more than £15,000, that is still the cut-off point?

10 MR. ROTH: That is still the cut-off they were working on.

11 THE PRESIDENT: And we find that where?

12 MR. ROTH: What I was going to do, Sir – it depends how much detail you want.

13 THE PRESIDENT: No, that is all right, we just want ----

14 MR. ROTH: They are all then resubmitted. This was a draft submission, and I always find these
15 draft submissions a bit like people talking about “non-paper” and then they hold it up and you
16 see it. But it is then superseded by the actual submission.

17 THE PRESIDENT: Yes, but you are going to take us through the maps that we have got in front of
18 us?

19 MR. ROTH: I was going to take you through the maps and then to the actual submission. The first
20 map, “Independent Sector Customers, excluding Co-op”, that is the sort of base map. Then
21 you get three supplementary maps, one headed “UniChem Independent Sector Customers”,
22 one headed “AAH Independent Customers” and the third heading “Maltby”. So what
23 Phoenix/EAP have done, if one takes the UniChem one first, they have shown actually for the
24 yellow dots for independent customers which ones are UniChem and who they are, because
25 from this map here, the big map, you just knew they were independents, you did not know who
26 served them, and you did not know who they are. They could have been supermarkets, many
27 of them, who, it is suggested as far as the OFT was concerned, might have less critical delivery
28 requirements, the point being that Sainsbury’s and so on and Tesco’s negotiate national
29 contracts on a quite different basis.

30 You may want to note that UniChem have pointed out that on that map Stewart’s
31 Pharmacy in Lowestoft – there are two of them – are both owned by Moss and so in fact are
32 tied and not independent.

33 THE PRESIDENT: I think Professor Stoneman has got a question.

1 PROFESSOR STONEMAN: Can I clarify: we are working with two definitions of “independent”
2 here. One is independent of UniChem and AAH and the other one independent meaning not in
3 a chain. This is independent meaning not in a chain of five or more pharmacies; is that
4 correct?

5 MR. ROTH: No, it is not meaning not in a chain of five or more. The working definition is
6 “independent” meaning neither tied, namely tied meaning effectively owned, nor a national –
7 just one moment.

8 PROFESSOR STONEMAN: I have a feeling that one of these maps has got Tesco’s ----

9 MR. ROTH: Yes, on this map it is everything that is not tied. When I take you to the submission it
10 is specified. It is not Boot’s because Boot’s have a self-supply arrangement, and it is not the
11 Co-op.

12 THE PRESIDENT: But whatever it is, it is not independent as defined in the Decision?

13 MR. ROTH: It is not the narrow definition of “independent” in the Decision, and that becomes very
14 clear when you look at AAH, the next map, because you can see from the AAH map we have
15 got Asda, we have got Tesco’s, we have got Superdrug, which are of course national chains.
16 Then there is the third map with Maltbys who serve pharmacies ----

17 THE PRESIDENT: Those are national chains that Phoenix and EAP do not aspire to deliver to, at
18 least at the moment?

19 MR. ROTH: Well, whether they aspire, I do not know, Sir, but they do not deliver. I suspect they
20 might aspire.

21 THE PRESIDENT: But they do not.

22 MR. ROTH: The point being the OFT wanted to see of all those yellow dots, who are they and who
23 supplies them, which the previous map did not tell you.

24 THE PRESIDENT: Yes.

25 PROFESSOR STONEMAN: So the purpose of that is to explore the practical competition in the
26 market, or just to look at the pattern of delivery in the market. What is the purpose?

27 MR. ROTH: This was at the information gathering stage in our submission. It was to get more
28 information as to the individual competitors, as opposed to all non-tied pharmacies which is all
29 the yellow dots, and ascertain what are the non-tied pharmacies? Are they national chains?
30 Are they local chains? Are they sole traders? What are they? This is to understand more what
31 the customer base is and who is supplying which part of it.

32 PROFESSOR STONEMAN: So it is really just the pattern of the market.

1 MR. ROTH: The pattern of the market, and the pattern of the wholesaler supplying the market by
2 the different wholesalers, exactly. That was put in, as you saw, on 24th September. The OFT
3 had some questions on the draft, there was a response to the draft, but I hope I can go on to the
4 actual notification document itself, which is 22nd October which, of course, built on the draft
5 and brings everything together again, and that is at tab 11 of Mr. Priddis' exhibit bundle. This
6 is the formal notification document, and you will see that it says on the first page, para.2:

7 "At the request of the OFT this submission and its annexes represent a consolidation
8 a complete version of all the information previously provided."

9 So it brings everything together in a rather convenient way and it is here with the various
10 attachments or annexes in the following tabs all the way up to tab 25, just to identify what one
11 is dealing with.

12 THE PRESIDENT: Yes.

13 MR. ROTH: If I could ask you in the notification document to look at paras. 18 to 19.

14 "The Office seems to be mainly concerned about the north of East Anglia and the
15 options available to customers in this area. Therefore, in addition to the maps
16 previously provided, showing the location of Phoenix, EAP throughout the whole of
17 annex 6..."

18 That is the big map at tab 15.

19 "In addition, the parties also provide at annex 7 maps showing only the area north of
20 the A14 with which the Office is chiefly concerned.

21 Those are the smaller maps that I have just shown you, which they had before and are now
22 being submitted again.

23 "The maps show that both AAH and UniChem now supply independent sector
24 customers"

25 and they are meaning not tied customers.

26 "Throughout the entire East Anglia region, for example, in Burnham Market, on the
27 North Norfolk coast, UniChem, Lowestoft and Galston on the North East edge. Maps
28 also show that Phoenix has very few customers in the North of East Anglia, certainly
29 fewer than either UniChem or AAH, despite the fact that Phoenix depot in Cambridge
30 is closer to the North than the AAH depots in Essex, and the UniChem depot at
31 Letchworth. This indicates that location of the depot is not the determining factor for
32 customers deciding which supplier to use."

33 Then it goes on:

1 “The parties have also produced spreadsheets at annex 8 showing the customer bases
2 of each of the parties. Each customer is matched against the service that the closest
3 other independent pharmacy is receiving. Lloyds, Moss and the Co-Op have been
4 excluded on the basis they are tied pharmacies and can only accept the service given
5 by the affiliated or contracted wholesaler, respectively AAH, UniChem, AAH.”

6 That brings in the spreadsheets. The spreadsheets you will find in two places. They are here
7 but in a cut up form at tab 17 and they are, I would respectfully suggest in easier to appreciate
8 form in Phoenix exhibit bundle at tab 8. If I could invite you, despite the nuisance of jumping
9 around to go to the Phoenix exhibit bundle. Here one has to be careful because there are
10 redactions. There is a redacted version, a non-confidential version and a confidential version.
11 There are a large number of them, but I only need to ask you to look at one, which is one of the
12 very big ones. These are coloured which makes them much easier, but one can tell it is a
13 redacted version because the left hand column is blank.

14 THE PRESIDENT: Which one do you want us to look at?

15 MR. ROTH: Professor Stoneman, I think -----

16 PROFESSOR STONEMAN: It is not as big as yours.

17 THE PRESIDENT: Do you want us to look at the redacted version? “Redacted for business
18 confidentiality”? Is that it?

19 MR. ROTH: It should say “Fork customers”, and it should be something like **this**.

20 THE PRESIDENT: Yes.

21 MR. ROTH: The one that has at the top left “Fork Customers”, as you saw from the maps “Fork”
22 means EAP. So what Phoenix and EAP were doing was to list all their customers down there
23 by name and address, with the afternoon delivery, give a map reference, given an AM cut-off
24 time, which of course they would know, these are their customers, the morning delivery time,
25 and the afternoon delivery time, because it is always twice daily, as you know, deliveries.
26 Then they plotted, or put on the spreadsheet, UniChem, AAH, regional wholesalers – like
27 Maltbys, and then they did closest doctor. What they were trying to show, as they make clear,
28 their purpose of putting this in was to say to the OFT wherever there is an EAP customer there
29 is not very far away – which is the nearest UniChem customer, AAH customer, Maltbys or
30 whatever customer, and then look at doctor – I will stick with pharmacies for the moment –
31 that is what they were trying to do.

32 They are putting the nearest UniChem non-tied, it is not Moss and it is not Lloyds for
33 AAH, and it is not Boots, but it could be, as you have seen, an AAH supermarket. Therefore

1 they were plotting, if we take the Unichem column, the green column, they are plotting where
2 is the nearest UniChem non-tied? In many cases it will be the same one, that is why many of
3 them are repeated. So after the first three EAP customers the nearest one they say is Stewart's
4 Pharmacy in Lowestoft, and then further down you get Hayden's the Chemist, also in
5 Lowestoft. They are showing what is their estimate, because this is, of course, Phoenix and
6 EAP, the cut-off time for delivery to the nearest for Phoenix to deliver. So if you go down
7 after the Stewarts you come to Hayden Chemists, the Park Pharmacy, Oulton branch,
8 Lowestoft, and you will see they estimate the cut-off time as early as 10.30.

9 THE PRESIDENT: That is the cut-off time for a delivery by UniChem?

10 MR. ROTH: By UniChem in the afternoon. The cut-off time being – I am sorry if I am saying what
11 you know already, but just to get it quite clear – there are twice daily deliveries. The morning
12 delivery you put in the order the night before, so there is no problem about distance and cut-off
13 time, because the order goes in before the pharmacy shuts, and they can send out the van in the
14 morning. The afternoon delivery they get the orders in the morning from patients who have
15 been to their GP go into the pharmacy with a prescription and if they have not got it you can go
16 back in the afternoon and get it. So for the afternoon delivery the further away the earlier the
17 morning cut-off time is the point being made. So it is said that people with distant depots,
18 disadvantaged, because you need an earlier cut-off for your afternoon delivery.

19 THE PRESIDENT: If we take, just at random, map reference 19 in the redacted list of Phoenix
20 customers which, on my document gives an AM cut-off time of 13.00, if we look across what
21 this is telling us is that the nearest UniChem customer to that is presumably Hayden Chemist
22 Ltd. in Oulton Broad, Lowestoft, and they have a cut-off time of 10.30 and that is what we get
23 from this.

24 MR. ROTH: And following across the nearest AAH one, on the same line, will be I think, is it
25 Superdrug in Lowestoft? Following further along, the nearest independent regional wholesaler
26 supply is Brian Foster in Hunstanton.

27 THE PRESIDENT: From which one is invited to draw the inference that – I think it is the inference
28 one is invited to draw, maybe it is not as detailed as this, but is one invited to draw the
29 inference – UniChem could easily add to the route that is currently serving Haydens in Oulton
30 Broad, with a cut-off time of 10.30, number 19 of Hawk with a cut-off time of 1 o'clock, and
31 that could easily be done, and UniChem could remain competitive with Phoenix EAP in that
32 respect, that is the inference, is it?

1 MR. ROTH: It would appear, well I think it is almost expressed in the submission document, if I
2 take you back to that, that appears to be the argument that Phoenix and EAP broadly were
3 putting to the OFT. That is broadly their argument. If perhaps you could kindly go back ----
4 THE PRESIDENT: Now we have understood what the spreadsheets are telling us ----
5 MR. ROTH: I am sorry to do it so ----
6 THE PRESIDENT: No, no, it is helpful, Mr. Roth.
7 MR. ROTH: I cannot think of a quicker way of doing it.
8 THE PRESIDENT: It is not a topic you can hurry, do not worry, take your time.
9 MR. ROTH: So if one puts that on one side, there is a side where it can be put – I have a slight
10 advantage in that respect now.
11 THE PRESIDENT: The Registrar was wise enough to design a courtroom large enough to take all
12 these things. Yes, let us go back to the submission.
13 MR. ROTH: If we go back to paras.21 and 22 of the covering document they explain the argument
14 they were making, Phoenix and EAP’s arguments. “The parties have produced spreadsheets”,
15 and again you see from the footnote, it is only monthly plan over 15,000.
16 THE PRESIDENT: We have nailed that one, yes.
17 MR. ROTH: Yes.
18 “Showing the customer base of each of the parties. Each customer is matched against
19 the service the closest other independent pharmacy is receiving, Lloyds, Moss and the
20 Co-Op being excluded. The resulting analysis shows that in the area North of the
21 A14, EAP’s....”
22 and if you just read perhaps those bullets.
23 THE PRESIDENT: Yes.
24 MR. ROTH: Then in paras. 23 and 24 they show what is the conclusion they were inviting the OFT
25 to draw.
26 THE PRESIDENT: Yes, minor adjustments to the existing...
27 MR. ROTH: That was their submission.
28 THE PRESIDENT: That is their submission.
29 MR. ROTH: And UniChem in its evidence, and Mr. Green in argument launched an extensive
30 critique of these spreadsheets as inaccurate or misleading way of showing what is the distance
31 to the nearest competitor, or that it is irrelevant, and so on. I accept that does appear to be,
32 from what one has seen, the purpose of UniChem and EAP in submitting them. There is force
33 in UniChem’s criticism in the use of average distances and so on.

1 THE PRESIDENT: Just let me find a place where I can actually make a note.

2 MR. ROTH: (After a pause) So UniChem in its evidence, and Mr. Green in argument launched an
3 extensive critique as inaccurate or misleading and of showing what is the distance, and what
4 inference you can draw, and we all see that seems to be the purpose of Phoenix and EAP in
5 submitting them, and we accept there is force in UniChem's criticism in the use of average
6 distances and so on.

7 THE PRESIDENT: Yes.

8 MR. ROTH: That was not the use which the OFT made of these spreadsheets in making its
9 Decision. It is explained in Mr. Priddis' witness statements, and I will take you to that in a few
10 moments, but it is very important to appreciate what the OFT took from these spreadsheets, as
11 opposed to what Phoenix and EAP were trying to argue, they took a much more limited piece
12 of information. They took the spreadsheets and the maps we have just seen – the small maps –
13 together, to show who the UniChem customers are, and that they are not all large national
14 supermarkets who negotiate national contracts, but include smaller groups or independent
15 pharmacies, meaning a one or two, or three, and they took from the spreadsheets what was the
16 estimate cut-off time for delivery to UniChem's customers.

17 THE PRESIDENT: I think we had better go to the witness statements to follow this.

18 MR. ROTH: Can you bear with me a moment before I take you to the references? I will jump back
19 and forth to the witness statement, I am a bit concerned about the number of open documents.

20 THE PRESIDENT: Yes.

21 MR. ROTH: What they took was – I say the identity of pharmacies tying up with the map, because
22 you actually have a list with addresses, the yellow dots on the old map, the big maps were not
23 just supermarkets, they include smaller independents, and the independent customers of
24 UniChem were accepted and getting supplies with much earlier cut-off times than Phoenix or
25 EAP. So the OFT was not looking at the comparison to the redacted column, they were just
26 looking at the UniChem list. Who are they? What is their estimated cut-off? The AAH list of
27 course, is concerned about AAH as well, who are they? What is their cut-off time?

28 THE PRESIDENT: Yes.

29 MR. ROTH: There are lots of other annexes to this document about all sorts of things, like short-
30 liners and depots and so on. What I was intending to do, Sir, if that is convenient, is to go to
31 the end and then go to Mr. Priddis.

32 Three days after getting the submission the OFT go out to public consultation, and on
33 the 3rd November they sent a questionnaire to UniChem, and to other competitors as well.

1 THE PRESIDENT: Yes, and the position, in very, very broad terms, and there may be one or two
2 differences of identity, but the picture that comes from the spreadsheets is rather similar to the
3 picture that UniChem presented in October 2003 in relation to the AAH turnover. The cut-off
4 time is similar and the whereabouts of pharmacies are similar and so forth and so on.

5 MR. ROTH: Yes, bringing the position up to date, and showing not only UniChem but the others.

6 THE PRESIDENT: Yes.

7 MR. ROTH: So on the 3rd November a questionnaire to UniChem, and a week later, on the 10th
8 November, with impressive speed, Allen & Overy respond to the questionnaire with answers
9 and the submission, and that is in the application bundle, the UniChem bundle, at tab 10,
10 p.316, and this is to the OFT Mergers Branch from Allen & Overy. Going to the second
11 paragraph:

12 “We enclose, on behalf of UniChem, a short note setting out UniChem’s response to
13 questions 1 to 5 of the attachment to your letter of the 3rd November. We also
14 enclose, on behalf of UniChem, three copies of a more detailed briefing paper setting
15 out UniChem’s concerns about the competitive impact of the proposed merger”

16 And if you want a marginal note, that more detailed briefing paper is tab 11.

17 But I first go to the next page, which is the short note, questions 1 to 5, pp.317 and
18 following. Question 2:

19 “Do you have any customers in the north and eastern parts of East Anglia (for
20 example north of the A14)? If so, please list them stating (a) whether they are your
21 own tied chains, or (b) independent pharmacies and dispensing doctors.”

22 That is the way “independent” is being used there. And the answer:

23 “UniChem supplies to the following categories of customers in the north and eastern
24 parts ... 38 branches of Moss Chemists ... 39 independent retail pharmacies; 2
25 dispensing doctors practices ... three hospitals ...”

26 Can I ask you to note if one adds that up that is 82, so that means 82 van delivery drops.

27 Contact details are provided in their spreadsheet.

28 “RBB’s report, attached as an appendix to UniChem’s detailed comments for the
29 proposed merger provides contact details of whole customers likely to be affected.

30 3. What cut-off and delivery times are you able to offer these customers? How many
31 deliveries a day do they receive? Does this differ between tied and independent ...?

32 3.1 UniChem delivers twice a day to all of its customers ...”

33 So that is tied, independent, the lot:

1 “... from its Letchworth warehouse which serves this area. There is no difference
2 between cut-off times for UniChem’s own (tied) pharmacies and independent
3 customers.

4 3.2. The key issues for the customers is the cut-off time by which it is required to
5 place an order for same day or next day delivery ... UniChem’s cut-off times for
6 same day delivery ...”

7 Which will be the afternoon delivery of course:

8 “... vary but tend to be an early 11.15 cut-off for a late afternoon delivery ...”

9 And the evening cut-offs are not important. No issue on that.

10 Then perhaps I should go down to question 6:

11 “Do you have any competition concerns in relation to the proposed transaction?”

12 Specifically, what do you expect the impact of this merger to be on ... prices ...”

13 THE PRESIDENT: Just before you get to 6, in 5 they give some information at least as to where the
14 customers are. The furthest away is in North Walsham; most are close to the depots. There
15 are 705 out of 786 in 90 minutes, etc., etc.

16 MR. ROTH: Yes, and they attach to what they call their “spreadsheets”, which are much shorter, a
17 list of their tied customers, their independent, i.e. non-tied, customers, and the dispensing
18 doctors and the hospitals, and those are the individual customers which produce the figures in
19 para.2.1. That is the breakdown of the ----

20 THE PRESIDENT: Yes.

21 MR. ROTH: ---- actually who they are all, and that is the 38, 39, the two and the three.

22 Then there is the briefing paper, which was also enclosed with this letter, which is at
23 tab 11. Mr. Green read the first page. You see on the second page, at 1.3:

24 “UniChem provided the OFT with a briefing paper on the proposed AAH/EAP
25 merger [back in October 2003]. UniChem submits that its detailed ...”

26 And that is tab 6, and I read that to you, and it is still applicable. Then 1.4:

27 “UniChem has also engaged RBB Economics to conduct a detailed assessment of the
28 competitive impact of the proposed transaction on the basis of a framework founded
29 on the actual logistics and practices of pharmaceutical whole supply. RBB’s report is
30 attached as an appendix ...”

31 I would ask you to note the footnote on p.3, which echoes something that I think was
32 in their earlier submission on the AAH bid.

1 “Despite having devoted substantial efforts to growing its share of the dispensing
2 doctors market, UniChem has found it remarkably difficult ... The new business unit
3 was specifically to target doctors ...”

4 THE PRESIDENT: Yes.

5 MR. ROTH: Then 4.6 and 4.7 over the page:

6 “Full liners typically provide twice daily deliveries to pharmacies and dispensing
7 doctors, and the majority of their customers are located within a one hour drive time
8 of their warehouse and virtually all are located within a one-and-a-half hour drive
9 time.”

10 They talk about hospitals.

11 “The actual distance that can be covered in a drive time of one-and-a-half hours is
12 sensitive to the particular features of local road network, traffic density and local
13 topography. 4.7.

14 Although a one-and-a-half hour one-way drive time is not a maximum distance,
15 UniChem is unable to provide more distant customers with the same quality of service
16 as those located closer to its warehouse. It also endures narrow margins on such
17 custom due to higher transport costs. As a result, UniChem does not believe that it
18 can provide full and effective competition for customers located further than 90
19 minutes drive time from its warehouse. This limitation is most likely to be very
20 similar for its principal competitors.”

21 i.e. a reference clearly to AAH.

22 That takes one to the attached report from RBB, which is at p.333, and this is a report
23 that puts forward the isochrone analysis. The problem, Sir, is that the copy that you have and
24 the copy that I have and everyone has, save of course UniChem, is not coloured, and without
25 colours it is incomprehensible.

26 THE PRESIDENT: Quite helpful though, yes.

27 MR. GREEN: I do not know if we can help. We have brought a blown up colour version of exactly
28 that if it would help.

29 THE PRESIDENT: It would help, I think, Mr. Green. [Document handed to the Tribunal]

30 MR. ROTH: That is very helpful, and I have got a small one here, which is the original. If I can try
31 quickly to explain. There are different colours for the different full line wholesalers. So if one
32 takes UniChem, which is green, the UniChem warehouse with the dot, which will be
33 Letchworth, and then the green sort of jagged line is the perimeter of the 90 minute one-way

1 drive time. EAP, on the top right at Norwich, which is blue, and the perimeter of the EAP one-
2 way drive time you see takes in the whole of the coast of East Anglia, comes down below
3 Ipswich, and then comes across and just comes into Cambridge, where Phoenix is. The AAH is
4 red, so the AAH is based down at Romford, so of course they go much further south. They
5 seem to deliver in the middle of the sea but I think that is just drawing the isochrone, going
6 down from below Ipswich and down much further south. Mawdsley Brookes, who are mauve,
7 exactly the same position. That is the basic isochrone.

8 Then you have the zones, and one looks at the text to explain what the zones are.

9 THE PRESIDENT: Sorry, can you tell us which one Phoenix was? Where is Phoenix?

10 MR. ROTH: Phoenix is in the middle and the Phoenix colour is black.

11 THE PRESIDENT: Yes, that is the black line.

12 MR. ROTH: It is the black line which, as you see, goes quite far up to the top. It goes a little bit to
13 part of The Wash, but then comes down, cutting down, just taking in Norwich and missing the
14 coast.

15 Then the explanation of the zone is given in the text on p.337. Zone A represents the
16 area that is within 90 minutes direct drive time of Phoenix and EAP only, and you see that of
17 course and the isochrone. Customers in this zone, which includes Norwich and Kings Lynn, so
18 although the one thing that is missing in this isochrone map is you do not actually know where
19 it corresponds to the geographical map, but we are told that Kings Lynn is in it, which will be

20 ----

21 THE PRESIDENT: We know where Norwich is.

22 MR. ROTH: We know where Norwich is.

23 THE PRESIDENT: And we can guess where Kings Lynn is.

24 MR. ROTH: Yes, so it is over on the sort of top left of the zone.

25 THE PRESIDENT: It looks as if Kings Lynn is in, yes.

26 MR. ROTH: Well, they say so in their text. They tell us.

27 "... would therefore face only one realistic choice of wholesaler. The merged entities
28 ... being unable to offer competitive service in this zone."

29 THE PRESIDENT: Yes, that is their argument.

30 MR. ROTH: That is the UniChem argument.

31 "Zone B lies within the feasible delivery range of UniChem as well as the merging
32 parties ..."

33 Because it is the green line beyond it:

1 “... while zone C lies within the parties and AAH’s Romford depot 90 minute
2 isochrones. Customers in these zones would suffer a reduction in number from three
3 to two.”

4 And they explain why that is important. And then there are zones D and E which are not so
5 significant. Then they say over the page, at 3.8:

6 “The following table lists the number of customers lying in each of the six zones
7 identified above. The numbers demonstrate that a significant proportion of
8 pharmacies and dispensing doctors in the region would suffer the loss of a credible
9 wholesaler as a result of the proposed merger. A full list of the affected dispensing
10 doctors and pharmacies can be found at the end of this appendix.”

11 We will come to that in a moment. Then there is the table, and you see zone A, two to one, that
12 is the reduction, 34 dispensing doctors, 40 pharmacies, 74 altogether – a significant number of
13 customers of both kinds being affected who would be going down from two to one alternatives.
14 That is the point that is clearly being made, and that is because of the point on the previous
15 page:

16 “... within the 90 minutes direct drive time of Phoenix and EAP only.”

17 If you see under zone A it says 34 dispensing doctors, that is the list that is then given
18 at table 3, p.341. They actually identify who they are. We have checked, that is 34 net, as you
19 would expect.

20 The other element of zone A, the 40 pharmacies, that is in table 9 at p.345, and these
21 are the 40 pharmacies in zone A where it is said they would face only one realistic choice of
22 wholesaler after the merger, the merging entities’ competitors being unable to offer a
23 competitive service in this zone, and you have a list, and indeed there are 40 names.

24 So the implication clearly is that those 40 pharmacies in the table will, following
25 merger, have only one choice of supplier, the merged entity, because the others cannot
26 effectively compete. But the fact is, Sir, that two of these 40 are actually supplied by UniChem
27 - the first one, at the top, Howell & Brooks in Aldeburg, and over the page the Clock Pharmacy
28 in Kings Lynn, the fourth from the end. And 20 of the 40 are supplied by AAH. So in fact
29 these are not Phoenix/EAP customers who will be down two to one, but 20 of them, AAH
30 customers, two of them are UniChem customers.

31 THE PRESIDENT: Where do we get the fact that 20 are supplied by AAH from?

32 MR. ROTH: You get it now from the witness statement of Mr. Cole, and you can get it also by
33 cross-checking against the spreadsheet where there is a list of customers, and from looking at

1 the maps that Phoenix and EAP put in where they identify pharmacies. Some of these indeed
2 are supermarkets being supplied by AAH. Although put to the OFT that these are the people,
3 the 40 people, who are going to go down from two to one because they have no effective
4 alternative, only one realistic choice of wholesaler, that factually is simply incorrect.

5 THE PRESIDENT: Because you accept Mr. Cole's evidence on this point? It is not disputed?

6 MR. ROTH: It is not disputed. He says three – UniChem dispute, one of the UniChem ones, I have
7 excluded that from what I have told you (sic).

8 THE PRESIDENT: And the AAH ones?

9 MR. ROTH: Are not disputed – and that was the basis on which we are asked by UniChem to take
10 that evidence and say, "In zone A, AAH and UniChem cannot supply effectively".

11 At the end of November the Issues Letter went, as you know, to Phoenix and EAP,
12 and on the 3rd December the parties responded to the Issues Letter, and for that response turn
13 back to Mr. Priddis's exhibit bundle at tab 32. The response explains on the first page, after the
14 covering email:

15 "We have inserted relevant sections from our consolidated submission of 22nd
16 October 2004 into this document...[tabs 11-25] .. In each case we have footnoted the
17 number of paragraphs of the Submission from which the inserted paragraphs have
18 been taken. As agreed in conversation with the Office, we have ain a number of
19 places reproduced full text from the Submission on the relevant points for
20 completeness of reference."

21 Then "... some have been slightly amended..."

22 "We have also made additional points in response to certain issues raised. These additional
23 points are highlighted in the text in italics under the headings "Additional points raised by the
24 Issues Paper.

25 "All Annexes to the Submission are resubmitted" except something to do with short-liner. The
26 numbering has been preserved. If I ask you to go to ps.10 and 11 within this document –
27 market entry, barriers to entry. You will see the issue which this comes under, which is in
28 bold, and the second bullet:

29 "There also appear to be impediments to expansion of delivery routes given the critical mass of
30 customers required to make such expansion profitable. It takes approximately 5-6 new
31 customers to make a new van route viable. However, it appears to be relatively easy to add
32 new customers on an existing 'route'."

1 They repeat, as they explain, the response from their earlier submission and then they add at
2 p.11 in italics additional points raised by the issues paper.

3 “*Mawdsley Brookes has over double EAP’s turnover*” and so on, then in the second paragraph:

4 *“It is misleading to suggest that 5-6 new customers make a new route viable. When a*
5 *wholesaler establishes a new customer, existing van routes are adjusted to*
6 *accommodate that customer. Full-liners use computerised systems to re-configure*
7 *van routes on a regular basis. It is not a question of waiting to recruit 5-6 new*
8 *customers and then putting on a new van route.”*

9 So in other words, if you have someone who says “I want to be your customer, you do not say
10 “I am sorry, I will have to see if I can find...”

11 THE PRESIDENT: But the five to six new customers make a new route viable is what Phoenix
12 themselves have said, or EAP have said at an earlier point, is it not?

13 MR. ROTH: Yes, if you need to put on a complete new route and cannot reconfigure your existing
14 routes in any practical way, then for a new van delivery service, five to six new customers are
15 what is needed to cover the cost. The first thing you do is look at the vans you have, the fleet
16 you have, the location of your customers and see can we rearrange it? They say “We do it by
17 computer, and everybody else does it by computer”, which is what you expect, “and we are
18 doing this on a regular basis”. No doubt if there are major road works somewhere they will
19 reconfigure to deal with that.

20 THE PRESIDENT: Yes.

21 MR. ROTH: Then at pages 13 to 14, they make some further additional points. That is the italics on
22 the key competition concerns. If I ask you to look at p.14, the last paragraph in italics, new
23 submission therefore:

24 *“Since the proposed merger of Phoenix and EAP has been announced, both AAH and*
25 *Unichem have initiated an aggressive sales drive in East Anglia intended to entice*
26 *customers of Phoenix and EAP away from the parties. The parties have anecdotal*
27 *evidence that AAH and UniChem are offering extremely attractive discounts to*
28 *customers of Phoenix and EAP ... This indicates that the acquisition may in fact lead*
29 *to stronger competition in the market, and certainly not lead to a lessening in*
30 *competition or tendency of the parties to offer less profitable terms or lower their*
31 *levels of service. Annex 23 is a list of over 40 independents, comprising both*
32 *pharmacies and dispensing doctors scattered across East Anglia which EAP or*
33 *Phoenix so far know have been approached. The parties do not doubt that there have*

1 *been many others. It has to be remembered that AAH and UniChem compete very*
2 *actively for the independent sector. The impression given by the Issues Paper is that*
3 *AAH and UniChem are only concerned with multiples and supermarkets and this is*
4 *plainly not true.”*

5 Then annex 23 you will find at the end of the tab, the final page is headed “David Blocksidge
6 Annex 26” and the page before that is also Annex 26, and the one before that is the end of
7 Annex 23, which is what is being referred to here. It is p.6 of annex 23, do you have that, Sir.
8 You see there a “Note from Phoenix Pharmacy Business Development Manager”. Hamblins in
9 Norwich being approached by AAH and UniChem, Village Rise in Lowestoft being
10 approached by UniChem, being targeted by UniChem and we know of course where is
11 Norwich, where is Lowestoft. This is not challenged by UniChem in their evidence in
12 response.

13 PROFESSOR STONEMAN: I would like to take a breather on where we are on this, and go back to
14 a point you raised at the very beginning about what is a substantial lessening of competition.
15 We are talking here about this isochrone analysis, and how many independent retailers would
16 go from two wholesale suppliers to one, or three wholesale suppliers to two, or four to three,
17 five to four, and the argument is whether those who are initially seen as going from two to one
18 would in fact be moving to a three to two. Is there a difference between a move from two to
19 one and a movement from three to two in terms of substantiality? Is it the case the move from
20 two to one is substantial whereas the move from three to two is not? Because if they are both
21 substantial then it does not make any difference, this argument, whereas three to two is not
22 substantial and two to one is substantial, then it is a crucial argument.

23 MR. ROTH: Yes, thank you. I see, it is a very valid point you are making. We were assessing here,
24 on UniChem’s case whether UniChem could be a credible alternative, and a constraint,
25 whether it actually got more customers or not, in the more outlying areas both through the
26 actual customers it had and its potential to get more, and we are doing exactly the same for
27 EAH – we were doing it for both, and we concluded that for both of them they could be. So we
28 are not being criticised by AAH now for the finding, we are being criticised by UniChem for
29 the finding as regards UniChem. AAH have not challenged the Decision. It was on the basis
30 that in fact, although it is being said by UniChem that all those 40 pharmacies cannot get
31 deliveries from anyone other than the merged entities, in fact they are getting deliveries from
32 AAH, some of them, and UniChem some of them, and that both AAH and UniChem, hence the
33 spreadsheet, we were not just looking at UniChem column, we also looked at AAH –

1 obviously I have gone straight to UniChem – to see who is delivering where, and both
2 UniChem and AAH in fact deliver to far regions, to the coast at the top, to Kings Lynn, to
3 Lowestoft, to Gt. Yarmouth and are therefore running their vans there, and for that purpose it
4 does not matter whether the van is going to a supermarket up there, to a tied outlet up there, or
5 an independent, because if it is going there it means it is feasible to make drops.

6 THE PRESIDENT: That rather depends on what cut-off time the customer is prepared to accept.

7 MR. ROTH: Yes, and we looked separately at cut-off time, absolutely. Therefore, it was important
8 to establish that some of the customers up there are independent pharmacies who are said by
9 UniChem not to accept early cut-off times, but in fact are accepting early cut-off times and in
10 fact, the cut-off times that UniChem gave us for their own customers are slightly later than the
11 cut-off times estimated by Phoenix for UniChem in the spreadsheet.

12 PROFESSOR STONEMAN: The areas to which UniChem can deliver will not be affected by the
13 merger itself, and therefore those suppliers who might, after the merger, be supplied by
14 UniChem could be supplied by UniChem now if that were possible. So what I am arguing is,
15 what we are really discussing here is whether this certain group of customers in the north of the
16 region, who were saying that through the merger EAP and Phoenix will go from two suppliers
17 to one, in fact the question is will they be going from three suppliers to two, because UniChem
18 is currently a possible supplier. What I am saying to you is that a big difference that question?
19 Is the move from two to one a more substantial shift than a move from three to two, and how
20 do you evaluate that in terms you introduced in your opening statement about what is a
21 substantial lessening of competition, and I do not think what you have just said addresses that
22 question.

23 MR. ROTH: I am sorry if I did not make it clear. Clearly, a move from two to one is a much more
24 significant restriction of competition than a move from three to two, that is the first point.
25 Secondly, a move from four to three is less substantial than a move from three to two, I think
26 that is self-evident. The OFT included, on the basis of what they saw both regarding AAH and
27 UniChem that this would be a move from four to three, because AAH is active in the outlying
28 areas and UniChem is active in the outlying areas. We are being attacked now specifically by
29 UniChem saying “We cannot be”, so I am responding to that. But the OFT’s finding was both,
30 and therefore it is four to three.

31 PROFESSOR STONEMAN: And that is not substantial?

32 MR. ROTH: Four to three, the judgment was that it was a sufficient competitive constraint, and also
33 of course that in part of the area up there Phoenix had never been a major constraint on EAP –

1 a point you made right at the outset – and so right at the top there, and one goes back to the
2 other map, the other big map, the constraint had never been particularly from Phoenix.

3 THE PRESIDENT: But does it depend, or does it partly depend on the proposition, jogging back to
4 the example we looked at on the spreadsheet that the customer who is currently being offered a
5 cut-off time of 1 o'clock by Phoenix would accept a cut-off time of 10.30 from UniChem.

6 PROFESSOR STONEMAN: Or the other way around.

7 THE PRESIDENT: Or the other way around, yes. I think I have got it the right way around.

8 MR. ROTH: I think it is the right way around. The cut-off time, I think they say ten past eleven,
9 11.30, whatever it is.

10 THE PRESIDENT: It depends which customer we are talking about. But anyway Phoenix, the
11 evidence suggests that for fairly obvious reasons, because of the proximity of EAP and
12 Norwich, that it is easier for EAP to offer a later cut-off time than it is for UniChem in
13 Letchworth, and to some extent perhaps in Thetford as well. That is one would have thought
14 fairly self-evident.

15 MR. ROTH: That is why, when I come to Mr. Priddis, which you asked me to do a while ago, you
16 will see that the OFT talked to customers about cut-off times and how important are they?
17 What they found was – we will see it in a moment – is there are the independents up there who
18 are getting the later cut-off times, and are continuing to take their service from AAH or
19 UniChem and are obviously continuing to trade, we accept that, and compete with pharmacies
20 supplied by EAP. One can see that there are some of these where you have a number you
21 would expect of course in Norwich, Gt. Yarmouth and Lowestoft, there are a number of
22 pharmacies, and they are not leaving UniChem and saying “This is no good because it is too
23 late.”

24 THE PRESIDENT: They are not leaving UniChem, but would an existing customer leave Phoenix
25 for UniChem if UniChem cannot offer an equivalent cut-off time. That is the question.

26 MR. ROTH: What one has to make an assessment of is that earlier cut-off time, is that an
27 impediment for independent pharmacies?

28 THE PRESIDENT: If it is the cut-off time the customer has already he presumably needs a fairly
29 big incentive to switch to an earlier cut-off time in order to do so.

30 MR. ROTH: Can I take you to the evidence?

31 THE PRESIDENT: Yes, absolutely, that is what I want to get to.

32 MR. ROTH: Yes, well I am sorry. I was trying to do the documents and then the evidence.

33 THE PRESIDENT: Yes, it is getting very much clearer as we go through.

1 MR. ROTH: These very points were, as you would expect, with all this material being put to the
2 OFT these very points were examined, and it was because the OFT could not be satisfied on
3 these points having only heard from Phoenix and EAP, they could not give positive
4 confidential guidance. We said “No, we have to go out to public consultation because there
5 are a lot of customers.” If I can ask you to go to Mr. Priddis’s witness statement. I have
6 referred to bits of it already on procedure. You see at paragraph 51, we are here dealing with
7 market definition and whether dispensing doctors should be treated differently.

8 “The OFT considered the following points were relevant to this .. the same
9 pharmaceutical supply wholesalers supply independent pharmacies, dispensing
10 doctors and they can switch from supplying one to another [wholesalers] Deliveries
11 for independent pharmacies carried on by the same vans on the same routes, the
12 evidence gathered from doctors was they consider the same range of wholesalers that
13 the independent pharmacies did included AAH, UniChem, Phoenix, EAP to the west,
14 Mawdsley Brookes and Maltbys. To the extent customers, whether independent
15 pharmacies, are generally reluctant to switch the pharmaceutical wholesaler this
16 characteristic is shared by both. Ultimately the OFT did not have to reach a firm
17 conclusion”.

18 and they look at the question of dispensing doctors and pharmacies both together and
19 separately. Going on to 105, he turns to more specific - because he is commenting on the
20 Decision – customer feedback, concerning the customer ability to switch which said were
21 effective suppliers. Having reviewed the evidence, the particular factors are relevant.
22 Notwithstanding UniChem’s assertions it could not provide a competitive service in certain
23 outlying parts of East Anglia customers noted it had persuaded a number of independent
24 pharmacies and dispensing doctors in those areas to switch to UniChem.

25 THE PRESIDENT: What is this evidence exactly, Mr. Roth? Who is it from; how many people;
26 when was it gathered, etc., etc.?

27 MR. ROTH: It was gathered at the public consultation stage, and in para.21 – you will appreciate,
28 I know, that there was a public announcement by the OFT inviting any interested party to
29 contact them, and then they also contacted ----

30 THE PRESIDENT: Yes, they contacted 21 customers who were independent pharmacies and 10
31 were dispensing doctors.

32 MR. ROTH: Four other wholesalers and comments from the hospital ----

33 THE PRESIDENT: Is this contact by letter?

1 MR. ROTH: That I would have to find out.

2 THE PRESIDENT: I think it would be useful to know how all this works.

3 MR. ROTH: Would you give me just a moment. (After taking instructions): There is no uniform
4 answer – sometimes by letter, sometimes we write to them and then they ring us up, sometimes
5 we write to them and they email, sometimes they do not ring back and we ring them.

6 THE PRESIDENT: But it is always initiated by a letter from the OFT?

7 MR. ROTH: Almost always, yes. That is the general practice.

8 THE PRESIDENT: What was the practice in this case?

9 MR. ROTH: A questionnaire to customers, and I imagine some never responded at all despite all
10 attempts ----

11 THE PRESIDENT: Yes, quite.

12 MR. ROTH: So in 105 ----

13 THE PRESIDENT: How many of the 21 customers responded?

14 MR. ROTH: This is dealing with all respondents.

15 THE PRESIDENT: These are the ones who responded?

16 MR. ROTH: Yes, and how many we actually wrote to and ----

17 THE PRESIDENT: But you had 21 responses?

18 MR. ROTH: Yes, 21 responses.

19 THE PRESIDENT: Thank you.

20 MR. ROTH: Then at 105:
21 “Customers noted it ...”

22 THE PRESIDENT: Sorry, you are on 105?

23 MR. ROTH: Yes, p.65.

24 THE PRESIDENT: This is para.36 of the Decision.

25 MR. ROTH: It is commenting on that, yes. Probably I should ask you to look at paras.34 to 39 of
26 the Decision, “Logically before Priddis ...” ----

27 THE PRESIDENT: It is just quickly to remind myself what is in those paragraphs. (After a pause):
28 Yes, a number of third parties had indicated they would quit in the event of poor service from
29 EAP and none had identified any significant ----

30 MR. ROTH: Yes, and the reference in para.38 to the route network, and then in 38 to what the
31 dispensing doctors said.

32 THE PRESIDENT: Sorry, what did the dispensing doctors at 38?

33 MR. ROTH: Paragraph 38, the last few sentences:

1 “Third parties indicated ...”

2 THE PRESIDENT: Yes, responses from dispensing doctors.

3 MR. ROTH: Yes.

4 “However, the dispensing doctors contacted by the OFT indicated no barriers to
5 switching supply. A number stated in principle there was no reason not to use AAH
6 or UniChem. They were reluctant to switch because they are happy with their current
7 supplier and because there is little difference in the offers from full-line competitors.”

8 And the evidence is that there is not a huge amount of switching generally in this market, it is
9 not price competition, and there is a lot of inertia, and basically, as in many of the markets,
10 unless you are unhappy with your service you stick with it.

11 MR. MATHER: Where is the competition if there is not much price competition and there is not
12 much service by the competition?

13 MR. ROTH: That is why I think it is always difficult for people to get new customers, but
14 sometimes it is on that little bit of price benefit that can be given. With the supermarkets there
15 is more because they negotiate nationally, and sometimes it is simply that there is decline in
16 the service and you rely on the dissatisfaction which you can then exploit, and it looks as
17 though from the evidence you have seen it is quite understandable that AAH and UniChem
18 thought the uncertainty over this merger will bring possible unhappiness with the customers
19 and there might be an opportunity to get in, and a lot of the competition therefore in fact is
20 potential competition, is the fact that there is an alternative whom you could switch to, and that
21 keeps the service up because the supplier knows, “If I slip in my standard of service they’ll go
22 to X and they’ll go to Y”. Indeed the evidence is that some of the pharmacies have stayed with
23 UniChem for a very long time.

24 THE PRESIDENT: The first sentence of para.37 probably identifies the most important aspect of
25 service quality.

26 “Customer responses in relation to this case indicate that cut-ff and delivery times are
27 one of a number of aspects to service quality which customers value highly.”

28 MR. ROTH: Yes. So that is one aspect, and then other factors, and you have seen, I am sure, the
29 contact on the phone – if they find they have moved they will take them, and I suspect it is all
30 the same, like with our bank, when sometimes they try and compete on interest rates, but there
31 is a lot of inertia, such as with your telephone provider and that sort of market. So that is 34 to
32 39 in the Decision.

1 Then there is Mr. Priddis's comment which I was looking at, at para.105. I have read
2 to you (a) and I was reading (b).

3 “A number of customers contacted in the course of the investigation leading to the
4 Decision said that, in the event of poor service from the combined Phoenix/EAP
5 business they would switch to another pharmaceutical wholesaler such as UniChem or
6 AAH. As noted above it is also true to say a number of customers identified Phoenix
7 and/or EAP as their most likely suppliers. While that is so it did not, in the OFT's
8 view, detract from the fact that UniChem are known as being active in outlying parts
9 of East Anglia.”

10 THE PRESIDENT: What is that a reference to? That is the existing deliveries?

11 MR. ROTH: That is the existing deliveries, their drops, as it were.

12 “No customer identified any significant barrier to switching that might lead to the
13 question whether switching would in fact occur.”

14 106, “Cut-off times”:

15 “As explained in the Decision ... these customers emphasised that order cut-off and
16 delivery times were only one aspect of service quality they valued highly. As noted in
17 the Decision, customers additionally identified customer service levels, order
18 accuracy, flexibility, discounts and friendliness of staff as being particularly
19 important. To this might be added product availability. In addition the majority of
20 customers indicated that a change in cut-off time of up to one hour would have little
21 or no impact on their business.”

22 More specifically ----

23 THE PRESIDENT: Are we talking about doctors or pharmacies now?

24 MR. ROTH: I think we are probably more talking about pharmacies because it elsewhere explains
25 that doctors are less concerned about delivery times and the cut-off time they are less
26 concerned about, if they have to put in an earlier ----

27 PROFESSOR STONEMAN: So this is a majority of the 11 pharmacies, is it?

28 MR. ROTH: I think that is right, yes.

29 THE PRESIDENT: It actually talks about customers. It is not really distinguishing at this stage
30 between pharmacies and doctors.

31 MR. ROTH: Well, the doctors would not be concerned, so there would be a bigger majority.

1 THE PRESIDENT: I was just wondering whether that is where the majority of customers come
2 from. If it is pharmacies and doctors and the doctors did not mind then one can understand
3 why the majority did not worry too much.

4 MR. ROTH: I am told it is the majority of both. They all got the same questionnaire.

5 Then they consider the following, and here is the reference to the spreadsheets and
6 what use the OFT made of the spreadsheets as opposed to the points put forward showing what
7 the OFT used it for.

8 “Spreadsheets provided by Phoenix and EAP showed that UniChem and AAH can and
9 do deliver to outlying areas of East Anglia ... For example, UniChem delivers to
10 independent pharmacies in Lowestoft and Great Yarmouth. Overall the service level
11 provided is competitive with EAP. UniChem deliveries ... may arrive earlier than
12 EAP in the morning and while arriving after EAP in the afternoon still arrive in
13 sufficient time to book in the delivery and dispense the prescriptions. The fact that a
14 material number of independent pharmacies in outlying areas accept this service
15 suggests that it is a competitive and effective service.

16 A number of third parties (in particular dispensing doctors) ...”

17 Making it clear what narrow group is being talked of:

18 “... noted it was not the time of the cut-off that was important but that their customers
19 were used to a particular delivery time and that they did not want this to change. In
20 this sense the accuracy and reliability of delivery time is the key.”

21 So that is, on these points, the customer evidence. There is a summary then at 108
22 and 109.

23 “In light of the above evidence the OFT were led to believe it would not be sensible to
24 rely on cut-off times as the key parameter of competition that dictated whether or not
25 a particular pharmaceutical wholesaler could supply a given pharmacy or dispensing
26 doctor. It was quite clear from customer evidence they used a number of different
27 factors to choose which full-liner to use. Accordingly, order cut-off times would not
28 act as a bar preventing them from being an effective competitor in the outlying areas
29 of East Anglia.”

30 Pausing there, Sir, on Professor Stoneman’s point about substantiality, if there are one
31 or two or three, a few, customers within that isochrone that is where the substantiality comes in
32 if one takes a view of looking at them as a broad group.

1 “To sum up this part of the witness statement, the OFT considered all of the evidence
2 taken together demonstrated that the merged Phoenix/EAP would continue to face
3 effective post-merger competitors in the outlying north and eastern parts of East
4 Anglia in the shape of AAH and UniChem.”

5 So it is four to three.

6 “This was based in particular on AAH’s and UniChem’s existing pattern of success in
7 these parts of the region and on the ease with which AAH and UniChem could expand
8 their existing customer base. The OFT believed the RBB isochrones were not borne
9 out by the evidence of actual supplier and customer behaviour.”

10 THE PRESIDENT: What is the evidence about the ease with which AAH and UniChem could
11 expand their existing customer base? What is the evidence for that?

12 MR. ROTH: That customers say they would accept the supply even if there may be an hour later
13 cut-off time, and the fact that the network of both AAH and UniChem, and for that purpose
14 when you are looking at the delivery network, the tied come in as well because the vans,
15 deliveries, the drops, stretches deep to the outlying areas across northern and eastern East
16 Anglia.

17 MR. MATHER: Could you just remind me at this time of the Decision, were the OFT aware of
18 approaches to potential customers by UniChem or AAH, or were such approaches – or did they
19 come to light later?

20 MR. ROTH: They were aware of such approaches because that was one of the points that was made
21 by Phoenix and EAP, an additional point, an italics point, as it were, in their response to the
22 issues paper, and the bit I read. In the witness statement now served by Mr. Cole he refers to
23 rather more approaches. We only knew about the ones that I gave you, that approaches were
24 being made, that I have taken you to in, I think, annex 23 to the response to the issues paper.
25 So of that we were aware.

26 The point about which the President has just asked me, regarding expansion by
27 UniChem and EAP – you will appreciate I have not read every paragraph of this long and
28 detailed statement – it is para.95(g) on p.55.

29 THE PRESIDENT: Thank you.

30 MR. ROTH: Rather than my reading out, if you would kindly care to read it to yourselves, and
31 para.96.

1 PROFESSOR STONEMAN (After a pause): The third block from the bottom on p.56, referring to
2 UniChem and AAH in the past expanding their routes to add additional customer drops, where
3 was the evidence for that?

4 MR. ROTH: There was, and I did not take you to that, some evidence about switching which came
5 with the submission.

6 THE PRESIDENT: The EAP submission?

7 MR. ROTH: The Phoenix/EAP submission. Now we know it was more – we did not know that –
8 which confirms that, but I am dealing with what we knew at the time.

9 PROFESSOR STONEMAN: At some point it might be interesting to have some argument on the
10 relevance of having learnt more subsequently as to the overall appreciation of the thing.

11 MR. ROTH: Certainly; thank you very much. That is indeed, if I may say so, a very pertinent and
12 important point.

13 So, Sir, we say it is against the totality of that evidence that one should ask the
14 question, has the OFT made a material error of fact that underpins this Decision? I have gone
15 through this in considerable and exhaustive, and you may feel exhausting, detail, becoming
16 more like an appeal on the facts than a Judicial Review, and we say there is no glaring error of
17 fundamental and clear fact, established fact, at all, and that takes one back, if I might for just a
18 moment, to look a little more carefully at that test in law. Starting with *Tameside* and looking
19 at one of the key points in it, which is in the Appellant's bundle of authorities, the UniChem
20 bundle, which in my case is green, at tab 2 – the age that takes one back to the mid seventies
21 and the battle over grammar schools and comprehensives. What happened here is the local
22 authority, the education authority for Tameside, had approved a scheme, put up the scheme for
23 comprehensive education, approved by the Secretary of State in November 1975 and then
24 there was a local government election May 1976 and the Tories won control of Tameside
25 Borough Council. They fought the election on a mandate strongly supporting grammar
26 schools, and you will see the first page – I am summarising it – to complete the three new
27 comprehensives already being built, to continue 16 secondary moderns, and to postpone the
28 plan for conversion of the grammar schools, and they said that is what they are going to do,
29 and grammar schools are not going to happen. The Secretary of State, you see on the second
30 page, the first new paragraphs, on June 11th, the Secretary of State, acting under s.68 of the
31 1944 Act, by nature of the authority, to give effect to the proposals which he had approved
32 back in November 1975, that is the comprehensives, and to implement the arrangements
33 previously made for the allocation of pupils to secondary schools for the coming year on a

1 non-selective basis. “A Change of plan at this stage of the year designed to come into effect
2 less than three months later must give rise to considerable difficulties”. I think the education
3 authority said “No”, we are not going to do that and the Secretary of State said you have no
4 power to do that and the Secretary of State took them to court. The case was brought by the
5 Secretary of State against the local authority, and the question was “Did he have power under
6 s.68 to make the direction which he made?”

7 You find s.68, which I think it is helpful to look at, at p.1046 in the report, at letter E:
8 “If the Secretary of State is satisfied, either on complaint, by in person or otherwise,
9 that any local education authority or the managers or governors of any county or
10 voluntary school have acted or are proposing to act unreasonably with respect to the
11 exercise of any power conferred or the performance of any duty imposed by honour of
12 this Act may notwithstanding ... etc.

13 and then the last words: “give such directions as to the exercise of the power or the
14 performance of the duty as appear to him to be excluded”. So he has to be satisfied that the
15 local education authority has acted, or here was proposing to act, unreasonably. That was the
16 question.

17 Lord Wilberforce, in the lead speech, from which I have just quoted the section, says
18 over the page, 1047 just below C:

19 “The critical question in this case, and it is not an easy one, is whether, on a matter
20 which appears to be one of educational administration, namely whether the change of
21 course proposed by the council would lead to educational chaos or undue disruption,
22 the Secretary of State’s judgment can be challenged. The section is framed in a
23 “subjective” form – if the Secretary of State “is satisfied”. This form of section is
24 quite well known, and at first sight might seem to exclude judicial review. Sections in
25 this form may, no doubt, exclude judicial review and that is or has become a matter of
26 pure judgment. But I do not think they go further than that. If a judgment requires,
27 before it can be made, the existence of some facts, then, although the evaluation of
28 those facts is for the Secretary of State alone, the court must inquire whether those
29 facts exist, and have been taken into account, where the judgment has been made
30 upon a proper self-direction as to those facts, whether the judgment has not been
31 made upon other facts which ought not to have been taken into account. If these
32 requirements are not met the exercise in judgment, however bonafides it may be
33 becomes capable of challenge” – quoting Lord Denning.

1 And then Lord Wilberforce looked and applied that in the present case by looking what were
2 the bases on which the Secretary of State had reached the conclusion that he was satisfied the
3 authority was proposing to act unreasonably. If I could ask you to turn on to p.1050, just
4 below letter B.

5 “These arguments [of the Secretary of State] were restated and expanded in the
6 affidavit sworn on behalf of the Secretary of State in support of the application for the
7 order of mandamus. The affidavit stated three points. Point(i): that 653 of the 802
8 transfers, promotions and other appointments of teachers required the reorganisation
9 had been made. Point (ii): that contracts had been entered into for building work
10 directly related to the change in character of two of the schools and work had started
11 under the contracts. In the case of a third school the authority had entered into
12 commitments for such building work. Point (iii) preparations had been made for
13 courses on the basis that the proposals communicated to the Secretary of State would
14 be put into effect.

15 So several factual findings on which the Secretary of State reached his view that this was
16 unreasonable.

17 “These points, 1, 2, and 3 were dealt with fully by the authority and I need say no more about
18 them, other than they were completely exploded. They were held to have no substance in them
19 by five of the six learned Judges who considered this matter, the sixth indicated general
20 agreement without specific discussion. Indeed, point 2 was criticised with some severity by
21 one of the learned Lords Justices in the appeal. Some attempt was made to rehabilitate these
22 points in this House but learned counsel decided, no doubt wisely, to concentrate on the
23 allocation issue. But these three points cannot just be discarded as if they had never been
24 made, they form part of a composite set of facts relied upon as showing unreasonable conduct.
25 I am not at all sure that the disappearance of so many planks does not fatally weaken the
26 stability of the platform, at the least, and I will give the Department the benefit of this
27 assumption, the remaining factual basis would need to be strong and clear if it alone were to be
28 the basis for the Secretary of State’s satisfaction as to unreasonable conduct.”

29 Then he examines the allocations point, and found that that did not stand up, and concludes at
30 p.1052 at F:

31 “On the whole case I come to the conclusion that the Secretary of State, real though his
32 difficulties were fundamentally misconceived and mis-directed himself as to the proper manner
33 in which to regard the proposed action of Tameside Authority after the collection ... but if he

1 had exercised his judgment on the basis of the factual situation in which this newly elected
2 authority was placed, with a policy approved by its electorate, and massively supported by the
3 parents, there was no ground, however much he might agree with the new policy and regret
4 such administrative dislocation which brought ... upon which he could find the authority was
5 acting or proposing to act unreasonably.”

6 So the whole factual foundation of the Secretary of State’s satisfaction the planks disappear
7 and the platform collapses.

8 Then one comes to the development of the law by the Court of Appeal in *Re E*. I
9 know I did mention one paragraph, but I think I need, if I may, ask you to look quickly before
10 lunch just a little more carefully at the authority which is in our authorities’ bundle at tab 6.
11 This was an asylum case. It was an appeal on a point of law, but the court held, as I
12 mentioned, that no difference. Can I ask you to go to para.44 in the Judgment, p.1064, under
13 the heading “Incorrect basis of fact.”

14 “Can a decision reached on an incorrect basis of fact be challenged on an appeal limited to
15 points of law? This apparently paradoxical question has a long history in academic
16 discussion, but has never received a decisive answer from the courts. The answer is not made
17 easier by the notorious difficulty of drawing a clear distinction between issues of law and fact.
18 “The debate received new life from the affirmative answer given by Lord Slynn in *R v*
19 *Criminal Injuries Compensation Board ex parte A*. In that case the claimant had claimed
20 compensation on the basis

21 THE PRESIDENT: Yes, you do not need to read it, just take us to the passages you really need, Mr.
22 Roth.

23 MR. ROTH: You see there the fundamental error of fact that arose. It was said that was an error of
24 fact you cannot quash. The conclusion of Lord Slynn, which is quoted at the next page 1065
25 at E.

26 THE PRESIDENT: Yes.

27 MR. ROTH: Then one comes on in para. 49 to the development in *Alconbury*. Then para. 51, and
28 the argument of the Home Secretary was well what Lord Slynn said was obiter and therefore
29 one should follow it. That is discussed at para..50. Paragraph 51:

30 “Although none of the parties found it necessary to examine in any detail the authorities it
31 seems to me difficult to avoid such examination, if we are to address properly the issues in
32 these appeals. Fortunately, the ground is well-covered...”

33 in referring to academic writing and you will see:

1 “ Michael Kent includes a useful comparison with a the concept of manifest error as applied by
2 the European Court of Justice.”

3 The view of the academic writer is quoted between G and H, and Lord Justice Carnwath says
4 it is similar to the formulation approved by Lord Slynn.

5 “Before reaching a conclusion that mistake of fact is now a ground for judicial review in its
6 own right, it is necessary to review briefly the authorities mentioned in those articles. Two
7 main points emerge: first, that widely differing views have been expressed as to the existence
8 or scope of this ground of review; but, secondly, that in practice, this uncertainty has not
9 deterred administrative court judges from setting aside decisions on the grounds of mistake of
10 fact when justice required it.”

11 Then he sets out the differing views of Lord Justice Buxton and Lord Justice Scarmon, and he
12 quotes on para.57, the bottom of 1068 Sir Robin Cooke (now Lord Cooke) from the New
13 Zealand Court of Appeal, giving his view, which clearly influenced the way it is formulated
14 here, and it is the top of 1069:

15 “To jeopardise validity on the ground of mistake of fact the fact must be an established one or
16 an established and recognised opinion; and ... it cannot be said to be a mistake to adopt one of
17 two differing points of view of the facts, each of which may be reasonably held.”

18 Then he talks about the practice and the underlying principle, and at paras. 63 to 67 sets out
19 the conclusion.

20 “In our view the CICB case points the way to a separate ground of review based on the
21 principle of fairness. It is true Lord Slynn distinguished between ‘ignorance of fact ‘ and
22 ‘unfairness’ as grounds of review. However, we doubt if there is a real distinction. The
23 decision turned, not on issues of fault or lack of fault on either side; it was sufficient that
24 ‘objectively’ there was unfairness. On analysis, the ‘unfairness’ arose from the combination of
25 five factors:”

26 and they are set out. The second one:

27 “The fact was ‘established’”, in the sense hat, if attention had been drawn to the point,
28 the correct position could have been shown by objective and uncontentious evidence;
29 the claimant could not be responsible... “

30 and so on.

31 “If that is the correct analysis then it provides a convincing explanation of the cases where
32 decisions have to be set aside on grounds of mistake of fact. Although planning inquiries are
33 also adversarial, the planning authority has a public interest, shared with the Secretary of State

1 through his inspector... Similarly, in *Tameside* the Council and the Secretary of State,
2 notwithstanding their policy differences, had a shared interest in decisions being made on
3 correct information as to practicalities.”

4 And we now know what that was referring to.

5 “The same thinking can be applied to asylum cases”.

6 Then at 65:

7 “The apparent unfairness in the CICB was accentuated because the police had in their
8 possession the relevant information and failed to produce it. But, as we read the speeches,
9 ‘fault’ on their part was not essential to the reasoning of the House. What mattered was that,
10 because of their failure, and through no fault of her own, the claimant had not had ‘a fair crack
11 of the whip’. If it is said that this is taking ‘fairness’ beyond its traditional role as an aspect of
12 procedural irregularity, it is no further than its use in...” other cases.

13 “In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is
14 a separate head of challenge in an appeal on a point of law, at least in those statutory contexts
15 where the parties share an interest in co-operating to achieve the correct result. Asylum law is
16 undoubtedly such an area. Without seeking to lay down a precise code, the ordinary
17 requirements for a finding of unfairness are apparent from the above analysis of CICB. First,
18 there must have been a mistake as to an existing fact, including a mistake as to the availability
19 of evidence on a particular matter. Secondly, a factor or evidence must have been established
20 in the sense that it was contentious and objectively verifiable. Thirdly, the appellant (or his
21 advisers) would not have been responsible for the mistake. Fourthly, the mistake must have
22 played a material (not necessarily decisive) part in the Tribunal’s reasoning.”

23 And that is the conclusion of a strong Court of Appeal where the law now has got to. Sir, if I
24 may mention just before lunch you helpfully directed us to the Judgment of the Court of
25 Justice the day before yesterday in the *Tetra-Laval* case, and I think it is in particular para.39
26 of that Judgment I suspect you have in mind. We say simply, either that is really saying the
27 same test applies under UK Judicial Review, or if it goes further and if it is envisaging from
28 the European Jurisdiction a more intensive review, then not only is it not binding on the
29 Tribunal it is, with great respect to the Judges in Luxembourg it is not relevant, because this
30 is not s.60 Competition Act territory, this is s.120 Enterprise Act and it is the principles of
31 UK Judicial Review that apply and bind and not the principles elsewhere. I have, I suppose, I
32 hope no more than 15 or 20 minutes left, just to tell everybody where I am, but that is a
33 convenient point.

1 THE PRESIDENT: I think we would like to inquire from the parties how they think we are getting
2 on from the time point of view. How long are you likely to want, Miss Bacon, do you think?
3 Quite a lot of ground has been covered this morning, I think?

4 MISS BACON: Yes, given that Mr. Roth has covered most of the ground that I was going to cover,
5 certainly no more than an hour, possibly less than that.

6 THE PRESIDENT: That would take us 2.15 to 3.15. What is your position, Mr. Green?

7 MR. GREEN: 20, 25 minutes maximum.

8 THE PRESIDENT: So we seem as if we are on course to finish today without difficulty.

9 MR. ROTH: I hope I said 20 minutes not 15 – 15 to 20. [Laughter]

10 THE PRESIDENT: We will say 2 o'clock.

11 (Adjourned for a short time)

12 THE PRESIDENT: Mr. Roth, before you go on I wonder if you could help me with a conundrum
13 that sometimes worries me about this particular jurisdiction. I do not know whether the
14 conundrum is a real conundrum or a false conundrum. Let us assume for the purposes of
15 argument that one of the functions of the Tribunal might be to answer the question whether the
16 inferences the OFT drew from the evidence were inferences that a reasonable authority could
17 have drawn that is within the bounds of a reasonable response by the authority on the basis of
18 the material that it had. What we have got in this case is the OFT has got a lot of evidence and
19 quite a lot of the evidence they had we have actually got too, but some of the evidence we have
20 not got and just to take hypothetically an example, in para.37 of the Decision in the first
21 sentence it is said that, in relation to cut-off and delivery times, that is one of a number of
22 aspects to service quality which customers value highly. In Mr. Priddis's witness statement,
23 round about 106 I think it is, maybe 105 and 106, there is a conclusion that the OFT at the end
24 of the day came to the view that cut-off times were not that critical for customers, and that is
25 apparently based on the responses of customers to a questionnaire which the OFT sent out.

26 How do we go about exercising some kind of Judicial Review of that conclusion
27 without quite knowing the basis upon which it was reached, i.e. without knowing what the
28 questions were, what the answers to the questions were, and whether a reasonable authority on
29 the basis of those answers could have drawn that conclusion, given, for example UniChem's
30 evidence that cut-off times are important and it has never really been able to compete in the
31 more far flung nether regions because it has not been able to offer competitive cut-off times
32 compared with EAD, who are sitting there in Norwich.

1 I only use that as a hypothetical abstract example to illustrate the point, because the
2 point is going to crop up in many cases, that we had evidence from this, we had evidence from
3 that, and we decided it on this basis. Is not the situation that we simply take what we are told
4 and there it is, and that is what we have been told and we will assume that that is right, or how,
5 in your submission, is this jurisdiction supposed to work? Do you see that point that I am
6 grappling with?

7 MR. ROTH: I see it exactly, absolutely. Could you give me just one second?

8 THE PRESIDENT: Yes,. Of course. Just to illustrate that, if one has a reference to the CC and there
9 is later what used to be called a report but is now a Decision, it normally has somewhere in the
10 body of the document at least a short summary of who gave evidence and what the gist of their
11 evidence was and all the rest of it, so one has got at least the beginnings of something that
12 shows one what material they had when they reached their view. But there is this sort of gap at
13 the moment in the process.

14 MR. ROTH (After taking instructions): Yes, and it is CC, because they produce a very full report
15 but are in a rather special position.

16 THE PRESIDENT: Yes.

17 MR. ROTH: Although of course even then people have latched onto traditional views. Well, they
18 did not take into account this or that.

19 THE PRESIDENT: Quite, yes.

20 MR. ROTH: But in the more normal traditional view of decision-makers, which happens of course
21 day in and day out down the road, one does not have that degree of detail; one has perhaps a
22 shorter decision letter even than the Decision here, because here we have a statutory duty to
23 give reasons whilst the ----

24 THE PRESIDENT: Yes.

25 MR. ROTH: ---- do not, and then it is amplified in a witness statement, as it can be in – as *IBA*
26 explains. The principle is that if a public servant gives a witness statement setting out what
27 they have done that should be accepted by the court as true unless there is any ground to
28 suggest that there is any suspicion of that ----

29 THE PRESIDENT: It is not suggested that it is not true, it is a question of what the evidence was
30 upon which the inference is based. Everything in the witness statement is a fully, honest and
31 frank witness statement, I am sure.

32 MR. ROTH: Then on the basis of the way it is described in the witness statement, of what customers
33 said and so on, then one is getting into the evaluation of evidence and one has got to say,

1 “Does the reasoning stand up”? Once you go beyond that and say, “We need to see the
2 evidence, we need to see the questions, we need to see all the answers, we need to assess
3 whether ...” – that is exactly where you get into a full appeal, the merits are ----

4 THE PRESIDENT: No, I do not think that is quite what one is – that is not where one wants to be,
5 that is the review jurisdiction, not an appellate jurisdiction. But the question is this: are we
6 driven to the conclusion that we have to accept what the OFT says is its evaluation of evidence
7 that nobody has seen from which a certain conclusion can so clearly be drawn that we can be
8 satisfied, in a negative sense, that it may not be the case that, etc. etc.?

9 MR. ROTH: Suppose they said, “We spoke to three customers ...” ----

10 THE PRESIDENT: Just as a matter of principle. Forget this case, let us think about another case.

11 MR. ROTH: Yes, I am just dealing with this case as a hypothetical ----

12 THE PRESIDENT: Let us assume, for argument’s sake, that the point is a fairly critical point in the
13 evaluation. How are the various parties supposed, analytically speaking, to approach the
14 conundrum those posed?

15 MR. ROTH: There are two ways of testing it, and I will use this case as a hypothetical because I am
16 changing the facts. Supposing the OFT said, “Three are doctors and they said they had no
17 problem, and so we assumed that all the customers would be customers”. You can say, “Well,
18 on the basis of three doctors, that is three people, not a single pharmacy, we had a major
19 problem with a pharmacy, that factual foundation is not adequate to support the contention and
20 you can intervene”. That is Judicial Review, not appeal. And you accept there were three
21 doctors and they did say what they say they said, but there is the factual foundation for the
22 support ----

23 THE PRESIDENT: Yes.

24 MR. ROTH: If they say in fact they have done a more intensive investigation of the kind you think
25 is adequate then, unless it is suggested by evidence there is something clearly wrong in the
26 facts so found, and that customers could not be found, then you have to work on the basis of
27 what you are told the decision-maker, and again speaking generally, and every administrative
28 court hearing an appeal – in the case of the Minister, the civil servant says, “This was the
29 material we had, these were the facts we had”. In *Tameside* they set out the factual basis on
30 which ----

31 THE PRESIDENT: Yes, they had actually got ----

32 MR. ROTH: ---- and then there is evidence showing it was just fundamentally wrong.

33 THE PRESIDENT: They had a lot of facts.

1 MR. ROTH: And it was wrong. In the case of the *Criminal Agencies Compensation Board* there
2 was the support of the Police which completely contradicted what was being said which had
3 not been placed before the Board. So there was a clear basis for saying this is on the basis of
4 evidence put forward, but if it is not that, you do not, with great respect, start looking into the
5 evidence that was there to see has it been weighed up correctly beyond the way it has been set
6 out in a very full witness statement, and it is incumbent on the decision-maker to put before
7 you the detail of the material summarising the factual points so that they can explain the logic
8 of their thought process, because the heads of review, if one comes back ----

9 THE PRESIDENT: It has been extremely helpful to have all this explained.

10 MR. ROTH: They have done it so that you can see that, but the heads of review are, as we know,
11 reasonableness, procedural unfairness, which I am about to come to, and now material over a
12 fact, which I have just taken you to, and it comes within – or proportionality as well – within
13 one of those things to make it just – those are the minutes of the Judicial Review jurisdiction,
14 and that is the ----

15 MR. MATHER: So you are saying that it must be apparent to the Tribunal that either the facts we
16 are discussing were inadequate or defective or the process of drawing inferences from them is
17 defective or wrong, and that is the area we should be looking at.

18 MR. ROTH: Yes, and they are saying – UniChem are saying, “You failed to think about an
19 important thing, which is capacity constraint. That is a material factor you failed to take into
20 account when one looks to see where that comes in and how significant it is”, and so on.

21 I wanted to come to that point, which is procedure, failure to consult, failure to put
22 matters to you, and the first point there is this point of capacity constraint, which they rely on,
23 of their delivery route. We say that clearly was a dimension of the central issue, or a central
24 issue I should say, of which UniChem was well aware, namely the constraints upon UniChem
25 and AAH as an actual or potential competitor, because UniChem was well aware that the
26 ability of it and other wholesalers to compete with the merged entity was a very important part
27 of the OFT’s assessment, and they also knew that service levels in outlying areas was
28 important, and yet again capacity constraints is simply a part of that analysis. Indeed it is, if
29 anything, more subtle. If UniChem knew that they could not supply to these other areas
30 specifically because they were operating at full capacity it would have been the most obvious
31 point to have made. The extent to which UniChem could compete was clearly raised in the
32 AAH proceedings, which I took you to at the beginning, included discussion directly with the
33 OFT, and in the letter to UniChem, when one comes to this merger, of the 3rd November 2004,

1 the letter poses the questions which you have in the Appellant's bundle at tab 9, pp.314 and
2 315. Page 314, a letter from the OFT seeking comments, and the third paragraph, posing some
3 questions:

4 "This is also your opportunity to raise with the OFT any concerns that you may have
5 regarding the merger."

6 And then over the page the questions, and in No.3, asking about cut-off times and delivery
7 times. There is a distinction – I should perhaps have mentioned, arising from question, the bit
8 you took me to in the Decision talks about cut-off and delivery times. They are different.
9 There is no suggestion I think from UniChem that there is concern about delivery times or cut-
10 off times, when you have to put your order in. No.6:

11 "Do you have any competition concerns in relation to the proposed transaction?
12 Specifically, what do you expect the impact of this merger to be on ... c) Your ability
13 to compete with the merged entity."

14 So the matter was clearly put on the table and the RBB report submitted in these
15 considerations of this merger, and indeed, as we saw, rather similarly in the AAH merger with
16 the isochrones, are arguing that UniChem is unable – it is constrained from competing in
17 outlying areas. So it shows the extent of competitive constraint was at the forefront of
18 UniChem's mind in making its submissions to the OFT, and we would suggest it is wholly
19 artificial to distinguish logistical constraints from other sorts of constraint which prevent or
20 restrict a competitor competing. They are all simply different considerations in answer to the
21 same question, and if that was UniChem's point they had every opportunity to put it amid all
22 the points that they did put, and the RBB approach is clearly predicated on there being
23 logistical issues, the time that could be driven to reach the destination. In fact UniChem states
24 in its submission which I read to you, at para.1.4:

25 "UniChem has also engaged RBB Economics to conduct a detailed assessment of the
26 competitive impact of the proposed transaction on the basis of a framework founded
27 on the actual logistics and practices of pharmaceutical wholesale supply."

28 There is no suggestion in the material that UniChem put in on that basis that particular routes
29 are capacity y constrained, either in their submission or in the RBB report.

30 THE PRESIDENT: It would be a bit surprising if they had routes that had much spare capacity
31 would it not? If you assume that UniChem was an efficient business, it is slightly unlikely that
32 they have a significant number of routes that are operating below capacity.

1 MR. ROTH: It comes back to the distinction between the existing route, the actual line you draw
2 down the road, an the route network, and the possibilities for reconfiguring the network to
3 absorb the additional customers who several times UniChem said they have been hoping to get
4 but not succeeded.

5 THE PRESIDENT: The Decision puts it in terms that it does not talk about a “route” it talks about a
6 “round”.

7 MR. ROTH: I think it uses, with respect, a number of different considerations. In para. 38 it talks
8 about adding dispensing doctors to their existing network. Paragraph 34 talks about drops to
9 an existing round, so one has both points being met. 36 – very importantly, talks about
10 network benefits and existing customer density, which is the key when you are looking, of
11 course, at a route network. But now they are seeking to make a specific point that we were
12 operating our vans at full capacity and that they could have made. It was clearly open to them,
13 and clearly they were being invited to put any considerations as they were dealing with
14 constraints to put it before the OFT. It is not something you go back for further consultation
15 on. They also say they had a right to see and comment on the Phoenix EAP response to the
16 Issues Letter. They say they had a right to see the Issues Letter and the response to it. Then,
17 of course, they would have responded to it and of course Phoenix and EAP would have the
18 right to comment on their response. This process, with respect, never ends.

19 As I said, I think on Monday, why only UniChem and EAP? What about the
20 customers who are directly affected, perhaps even more directly affected than UniChem?
21 Should they all see the Issues Letter?

22 THE PRESIDENT: The argument, I think, from UniChem’s point of view is possibly that the
23 Decision is predicated on the practicalities of what UniChem could do, and UniChem had said
24 “Well, it is not very practical”, and I think the question is, and it would only be a question of
25 writing a short letter or something that said “We have had all these submissions. It has been
26 suggested to us that the marginal cost of adding another drop on a route is very small”, or
27 whatever it is, can you let us have by tomorrow morning your brief comments on that point?”
28 or whatever.

29 MR. ROTH: Of course the Decision is predicated on the fact of UniChem’s customer spread tied
30 and whole. On the facts that there are independent pharmacies competing with other
31 pharmacies supplied by UniChem with the later cut-off time, who have remained with
32 UniChem and feel able to compete, they are not remaining with UniChem out of charity, they
33 are obviously feeding the service with its cut-off time, that they can compete on, and it is

1 predicated on the assertion from Phoenix and EAP (and not challenged) that all the full-line
2 wholesalers use sophisticated computer equipment to configure their networks most optimally
3 every time they get, or indeed lose, a customer, and they are regularly looking at the
4 configuration of their network, and if UniChem is not doing that, then it is such an inefficient
5 competitor that this point just falls away. They have not said they are not doing it in fact, they
6 have just said that their existing van routes, which I will come to in a moment, are capacity
7 constrained, and you say that is UniChem's point, but should we also be writing back to all
8 customers saying "A certain point has been put to us specifically and perhaps you would like
9 to think about it more carefully" and then should we show them UniChem's comments on that.
10 There has to be a point where the OFT will say "We have a lot of information, you have had
11 your go, you have had several go's, and now we have to pull it together and take a decision".

12 Mr. Green makes an analogy to the European Commission procedure, but what he
13 took you to was phase 2. This is not like phase 2 this is phase 1 and in any event this is not
14 s.60 Competition Act territory, it is the domestic ----

15 THE PRESIDENT: It is quite a time extended phase 1, is it not?

16 MR. ROTH: It is a more extended phase 1 and it leads to fuller investigation and of course
17 UniChem and the other competitors were consulted and invited to comment, and what they
18 said was conceded. 40 days is not vastly longer, I think, than the EC phase 1.

19 THE PRESIDENT: I think the underlying point, Mr. Roth, and it is another conundrum with the Act
20 and the system, and the structure that we have, and the rest of it, is whether it is the case that to
21 some extent the detail of the OFT's investigations is tending to deepen at a stage before a
22 reference is made, and whether that raises issues of process that become more relevant issues,
23 if the centre of gravity, as it were, is going to be the OFT stage and is not going to involve the
24 Competition Commission's more structured procedures, and the judgment of the Competition
25 Commission Panel. We have a sort of procedural distinction between the two stages, and the
26 first stage, at the moment, for very good reasons, the OFT has done I am sure a great deal of
27 work and effort to make it as fair and workable and transparent as possible, and the Issues
28 Letter, which I am sure is a good invention, all those sorts of things, but the more the system
29 does not involve the kind of procedural safeguards that you have at CC level, to what extent
30 does that raise process issues at the OFT level. That is the question. I have put it rather
31 broadly. We say you should not ask broad questions, you not ask broad questions, you should
32 get on with the facts of this particular case and see that answer.

33 MR. ROTH: No, I would not presume to say that, not for a moment.

1 THE PRESIDENT: We have to try, between all parties, to make all this system work.

2 MR. ROTH: It has to be “fair”, to use the general term.

3 THE PRESIDENT: Yes. It was perfectly fair because they had every chance to put in the capacity
4 point.

5 MR. ROTH: It was fair, and UniChem were approached right at the beginning, have sent their
6 questions – I will take you to the phone conversation in a moment – they put in a detailed
7 submission. It was brining in the previous one, so one brings in the whole AAH process, and
8 right at the outset of my submission I said “This is a somewhat unusual case, because the OFT
9 had been on and off looking at this market intensively over a period of a couple of years, which
10 enabled them to get more information in the time than might otherwise be the case.

11 It does take me to that telephone conversation which Mr. Green was suggesting
12 misled UniChem. It is in the UniChem evidence bundle, that which you have just been
13 looking at, I think, at tab 7. This is the attendance note of 19th November. They called the
14 OFT case officers to discuss the case.

15 “She said she had reviewed the submission and thought it was “very helpful and
16 comprehensive”. She did not envisage the OFT would be sending you any further information
17 requests. I raised the question of possible meetings. She said the OFT were running to a “tight
18 timetable”, from their perspective did not think it would be necessary. She reiterated the
19 submission was comprehensive, did not require clarification. However, she said the OFT
20 would consider a meeting if UniChem had any additional issues or concerns it wished to
21 raise.”

22 And it was suggested that because the OFT case officer said the submission was very helpful
23 and comprehensive, UniChem believed from this that the OFT had accepted their arguments.
24 That was said by Mr. Green, transcript of Monday, p.7, lines 25-28. Well, Sir, really, I have
25 been at the Bar for more years than I care to mention and occasionally – very, very
26 occasionally – when I sit down at the end of submissions the Judge will say to me “Thank
27 you for your clear and comprehensive submissions,” but I know, and everybody knows that
28 does not mean that we have won. Allen & Overy, with great respect to them, they are not
29 innocents abroad in this field. That is, with respect, a wholly disingenuous point.

30 So I come to the question raised by Mr. Mather, with respect raised a very pertinent
31 question, what difference could it have made if additional material had been put before it as
32 such. It is important in general terms, and also because of course you are invited to quash and
33 that is a discretionary remedy for the Tribunal. Suppose there was a failure to consult,

1 amounting to unfairness, what could UniChem have said? Well we know what they would
2 have said now, because we have the witness statement of Mr. Johnson, and I have just shown
3 you an exhibit to it, but I would ask you to look at the actual statement. He says at para.6:
4 “The small number of independent pharmacies that UniChem has in the outlying areas ... are
5 in many instances a legacy from the days when UniChem was a pharmacists’ cooperative and
6 should not be taken as an indication of UniChem’s ability to win new business ...”

7 THE PRESIDENT: Yes.

8 MR. ROTH: It does not matter how long they have been UniChem pharmacies, the point is that they
9 are not owned by UniChem, they are not staying with UniChem as I said a moment ago out of
10 a sense of charity. They are competing with other pharmacies and their locality, and obviously
11 they are satisfied. I talked about the inertia for switching, and if they were not they would
12 move ----

13 THE PRESIDENT: Did I gather they were shareholders of UniChem?

14 MR. ROTH: I think UniChem started as a co-operative a long time ago, but it is not suggested, I
15 think that these pharmacies – well one sees what is said –it is said some of them may be but it
16 is not certain which ones are, or how many are. Then he goes on to say, he adopts the same
17 definition.

18 “I would point out that the data on UniChem’s independent pharmacy customers
19 supplied to the OFT ... on 24th November included pharmacies that are parts of
20 chains with 5 or more... some in the south. The customers in that list were identified
21 on the basis that they are located outside ... the 90-minute isochrone. Similarly, the
22 list of independent pharmacy customers north of the A14 provided to the OFT on 10
23 November ...”

24 That is in response to the queries for this investigation, 18 pharmacies, and it is full of
25 mistakes. He sets out the various mistakes, I think there were six too many and there were two
26 left out. We all make mistakes, heaven knows, I make lots of mistakes, but you cannot
27 complain of a fairness to consult if you have put in evidence to the OFT of something as
28 important as this and you have made about your own customers a series of mistakes. That is
29 not a basis for saying “failure to consult”. We similarly have another mistake, which comes in
30 ahead, in para.30, something else they have got wrong. He quotes Mr. Priddis’s witness
31 statement:

32 “The OFT argues (Priddis para.96(c)) That UniChem is an effective competitor in the supply
33 to dispensing doctors in the outlying areas:

1 “Both UniChem [sic] already deliver to dispensing doctors in the relevant
2 parts of East Anglia. UniChem has 2 dispensing doctor accounts in East
3 Anglia north of the A14...”

4 “However, the OFT jumps to this conclusion without checking the facts or asking
5 UniChem for its views.”

6 He says the A14 does not count as the range. Then he says:

7 “Further, ‘the dispensing doctor’ we identified in Stowmarket is actually a health centre that
8 incorporates a Boots pharmacy and is located just to the south of the A14 (although I do accept
9 that in our response to the OFT of 10 November we included this customer in the list of
10 dispensing doctors north of the A14.”

11 So they made a mistake.

12 “As for the ‘dispensing doctor’ in Thetford, this refers to Baxter Health Care which I have
13 since ascertained...”

14 is apparently not a dispensing doctor at all but something called a “global medical products and
15 services company” which for some reason needs pharmaceuticals.

16 “(It is serviced by the same sales force that deals with our hospital accounts and was included
17 in the list of dispensing doctors provided to the OFT in error.)

18 Well if they tell us they have two dispensing doctors and they get it wrong, they cannot
19 complain if the OFT then relies ----

20 THE PRESIDENT: That is a perfectly fair point, but it illustrates a wider problem with this process
21 that there does not seem to be any factual checking of what is being told to the OFT by the
22 various parties, because the timescale does not really permit it.

23 MR. ROTH: Well there is some factual checking, I know it is not developed yet. But if you go to
24 the principal players and say “Give us a list of your customers”, the OFT surely cannot be
25 criticised for not ringing up the customer and saying “Well UniChem has told us you are their
26 customer, can you confirm that is true? UniChem knows who their customers are.

27 THE PRESIDENT: We all know the scope for human error on difficult operations, difficult analyses
28 like this. That is the only point being made.

29 MR. ROTH: Sir, as I said, everyone makes mistakes, but in something as serious as a merger
30 investigation where you and your solicitors are putting in answers to questions on something as
31 important as this, if you do not get it right, and then start saying there are all these mistakes,
32 you cannot use that as a basis for saying there is a failure to consult us.

1 MR. MATHER: Would it, on that last point, be different for the Competition Commission on
2 checking, for example? Would they be expected to check the sort of material that you were
3 just describing?

4 MR. ROTH: With respect, on this question “Who are the customers?” I would say “no”, they are
5 perfectly entitled to rely – it is quite different if UniChem says “Our customers would not be
6 happy with this, or our customers would be happy with this, then you would expect that you go
7 and speak to the customers because there is, as it were, a sort of hearsay being passed on by a
8 party with a clear commercial interest and a certain outcome, and you would expect not only
9 the Commission but even the OFT to check with some customers. That is different, but on the
10 question of – and of course it is a standard question in Competition Commission inquiries,
11 “Give us a list of your 10 major customers”, or “your 20 major customers” and you assume
12 they get that right.

13 Mr. Johnson says that UniChem has gained few new accounts since 1990, and Mr.
14 Green made that point. But the issue is not the actual number of gains, but their presence in the
15 market as a potential supplier if a customer is dissatisfied.

16 THE PRESIDENT: Yes.

17 MR. ROTH: If a customer finds that the merged entity is declining its service levels, they can then
18 switch. So the number of gains is not important. Paragraph 22 of Mr. Johnson is going to your
19 point, Sir, about shareholding, 21 gives the origins of UniChem, which is quite interesting,
20 where it was some sort of private company and relaunched, and then a public company. Then
21 22:

22 “This historical background is important because it explains why we have a long-standing
23 customer base of retail pharmacists that are loyal to UniChem ... When UniChem became a
24 public company, the member pharmacists became shareholders and many of those pharmacists
25 remain shareholders.”

26 And at 13, six are owned by customers who have been customers, it does not say they are
27 shareholders incidentally.

28 “Six have been customers since 1988. These six customers are willing to accept the
29 early cut-off times offered by UniChem ...”

30 And it says for reasons of historical -- who on earth would accept in 2005 the only cut-off
31 times, just because you were originally part of the historic – when you are a competing
32 independent business if the service is not satisfactory. And what about of course the other
33 seven out of the 13 who have come since?

1 MR. MATHER: This question of potential competition as opposed to actual competition. I think
2 this morning you told us that Phoenix and EAP did not cover the same areas and therefore there
3 was not a great deal of loss of competition between them. What about the loss of potential
4 competition?

5 MR. ROTH: I was talking about the very top, and the point I was making is that actually there is
6 more spread of UniChem and AAH up there than there is of Phoenix. But, yes, you are
7 absolutely right, Sir, and when one looks at the other part of the assessment, because I have
8 been focusing on the area at the top, which is to what extent is Phoenix presently a competitive
9 constraint on EAP and vice versa, and that has to be considered and was because it comes into
10 that part of the analysis. There was another part of course ----

11 MR. MATHER: It just seemed to me you were trying to use the same argument in two different
12 directions.

13 MR. ROTH: I think one starts by saying, "What is your network spread? Within your network
14 spread are you a potential competitor in certain areas or not? If you are it applies as much to
15 Phoenix as to AAH as to UniChem. There has to be the same standard for all."

16 Then Mr. Johnson sets out the – I am just trying to see where it is that he exhibits the
17 existing routes of Phoenix, which is at tab 2, showing how Phoenix does deliver, and I am told,
18 I think that is right, this is not redacted, it is not confidential.

19 THE PRESIDENT: You mean UniChem.

20 MR. ROTH: Unichem, tab 2.

21 THE PRESIDENT: But how UniChem delivers or how ----

22 MR. ROTH: How UniChem delivers – I am so sorry, I mean UniChem – and they have done, in two
23 maps, one for the northern part and the second one, which is blue, for the southern part, and we
24 are concerned with the southern part.

25 Following those two maps they set out their actual runs route by route, and you see
26 there the base case route report dated the 27th January, and you see there is, if you look at the
27 top left, "Base Case", and we have No.1 a.m., and these are all the morning runs, and then No.
28 2 a.m., 3 a.m., 4 a.m., 4000, 401, 402, 3, 5, 6, 7, 8, 9 – there are nine runs – concentrating on
29 the morning. And Mr. Johnson explains that they have eight vans and they have a sub-depot
30 where they offload from the lorry, and the lorry does one run and the eight vans do the other
31 eight.

32 You can see, looking down those lists of the stops, that – say, in looking at No.2, that
33 they are going to hospital as well as to – "BTC" is Boot's the Chemist, Moss is the tied, and

1 some independents. So the run of course does not distinguish between whether it is tied,
2 hospital or independent; it just drops, and that is why, for the purpose of the route network,
3 you look at tied, independent, even hospital – there are a few hospitals – altogether. In fact the
4 map that we have with the green lines, the first map, is clearly not complete as an illustration of
5 the runs because the first run under base case No.1, from Thetford-Brandon-Numarket, is
6 clearly not shown on that map.

7 THE PRESIDENT: Hang on, Thetford?

8 MR. ROTH: Thetford is in the middle. You go down to the left to go to Numarket, and it is not
9 shown as a run – no green line – but it is a run, it is No.1. If we go down to No.5 in the list of
10 runs, also starting in Thetford, and you see it goes up to Swaffham, Dursingham, Heacham,
11 Kings Lynn. We know where Kings Lynn is – in The Wash. Swaffham is, if you diagonally
12 down to the left from Kings Lynn, it is a little obscure but that is Swaffham where a blue dot is.
13 There is no green line but there is a run going there, so it is not in fact ----

14 THE PRESIDENT: Is it down to the left or down to the right?

15 MR. ROTH: Down to the right. Then Fakenham is up above. So that run does not correspond to
16 what is on the map, so it is not in fact a complete illustration of all the runs although it is put
17 forward as if it is.

18 But even from what it shows in those details, you can see from this how they are
19 covering, because of their tied outlets, the outlying areas of East Anglia – Great Yarmouth,
20 Lowestoft, up at the top right Cromer, to the left of Cromer Sherringham, further along the
21 north Norfolk coast at Burnham Market, and that run going there and turning to the south.
22 They are covering that with their network. That is the additional material. But it shows how
23 deep they go even on an incomplete document. This does not change the analysis of the OFT;
24 on the contrary, it confirms it. It shows the very point that the OFT were relying on, that the
25 runs and breaks, the network is tied, independent and hospitals all together. It looks for the
26 best configuration and they reach deep into the outlying areas of East Anglia, the very point
27 that the OFT was making.

28 THE PRESIDENT: Perhaps Mr. Green can help us. Mr. Johnson's affidavit at para.10 says that
29 there are nine delivery routes covering parts of Norfolk and Suffolk, and covering parts of
30 Essex. I think that is the other map. So he refers to MPJ2 which shows these routes, and
31 I think that must mean the green routes shown on the first map, the northern part of East
32 Anglia. I have not counted up to see whether there are in fact nine, but it looks rather as if
33 there are nine. Then he says there is the link system, which seems to be what is on the list of

1 base cases that seem to follow. I have not been able to quite work out the relationship between
2 what is on the map and what is described as the “Thetford link”, because these all seem to lead
3 from Thetford. But the Thetford link does not seem to be comprehensively shown on the map.
4 That is the point you are making?

5 MR. ROTH: That is one point. We count eight runs on the map, not nine. The first one is clearly
6 not on the map at all, the Numarket run, and base case 5 you can see a bit of it on the map but
7 not all of it because it clearly goes to Kings Lynn.

8 THE PRESIDENT: He has got 16 base cases here.

9 MR. ROTH: That is because there is morning and afternoon. There is the morning ones for north
10 and south, so you have nine – what Mr. Johnson is saying is they have nine runs in the north.

11 THE PRESIDENT: He has got 16 labelled “a.m.”

12 MR. ROTH: He says nine in the north and seven to the south, so that is the 16.

13 THE PRESIDENT: I see, yes.

14 MR. ROTH: And then you have p.m.

15 THE PRESIDENT: I see, so they do relate to each other.

16 MR. ROTH: They clearly relate to each other, but the map clearly does not show the full extent of
17 the drops the runs make. Even with what it does show, it shows extensive coverage, and if you
18 start adding on the bits left out it is still more extensive, going right to the furthest reaches.

19 THE PRESIDENT: So what is it you say it does not show? It does not show base case 1.

20 MR. ROTH: Base case 1 and, so far as we can see, base case 5, which shows a little bit of – which is
21 Swaffham, Hunstanton, Kings Lynn and Fakenham, and I think it is Mareham, is it? That is the
22 RAF station which they have lost now. He says in his witness statement they have lost that
23 contract, but obviously in January they had not. The afternoon runs, and he explains that, are
24 not quite the same but are slightly differently configured, and there are slightly few drops in the
25 afternoon, and I think some of the customers, maybe the doctors, do not always want two
26 deliveries.

27 So that does not take it any further, and I say, on the contrary, it demonstrates the
28 route network and the penetration going right to the end.

29 Then he says in para.15 of his witness statement, having talked about the routes:

30 “The very simple point is that the addition of a new customer on any of these routes
31 would require reorganisation of the routes. The addition of even one extra drop
32 would have a knock on effect on all other customers.”

33 He talks about the road network in Norfolk, and he says:

1 “If UniChem was to succeed in winning more than a handful of new accounts it will
2 need to set up a new route.”

3 Pausing there, yes, the addition of a new customer leads to reorganisation, and that is
4 the very point that Phoenix and EAP made. Every time they said even a single new – you put it
5 in your computer and see how you reconfigure. It is actually the same thing; that does not
6 change anything. He says:

7 “If UniChem were to seek more than a handful of new accounts ...”

8 Well, I make a handful about five, and the evidence relied on is that five new accounts is what
9 gives the turnover that justifies putting on a whole new route cost-effective. So that does not
10 take one any further.

11 What else does he say? In para.32 of his witness statement he talks about one of the
12 reasons why UniChem finds it difficult to win new business for dispensing doctors is that,
13 unlike Phoenix and EAP, it has encountered significant obstacles in gaining admission to
14 wholesaler-administered manufacturers’ discount schemes under which dispensing doctors –
15 well, with great respect, that was never mentioned to the OFT in all these extensive exchanges
16 that you have seen, although there was a clear invitation in that letter to UniChem to put any
17 matter that they wanted the OFT to have regard to. One cannot put in evidence at this stage ----

18 THE PRESIDENT: Did the OFT not know that there were wholesaler-administered manufacturers’
19 discount schemes in this industry?

20 MR. ROTH: I think no, no, they did not. They would not know unless somebody told them.

21 THE PRESIDENT: Phoenix did not tell them?

22 MR. ROTH: Phoenix had put in evidence saying that this does not amount to anything and
23 challenging this, and we cannot take a position on that because it is all new stuff. You saw the
24 detailed submission they put in, and it was their second time because they done it before – they
25 never raised this point. They cannot complain about that now, and I am not sure it is even
26 admissible certainly under the *Ladd v. Marshall* test, to put in new evidence about that.

27 Then there is para.36 about the Phoenix constraint, the point that Professor Stoneman
28 made, and Mr. Johnson says:

29 “In my experience, the cut-off time for the afternoon drop is a more important factor
30 influencing customer choice rather than the ability to supply the full range of
31 products. But in any event, if the morning drop is more important than the afternoon
32 drop ... then the fact that Phoenix’s depot is a link depot should not be relevant.”

1 With great respect, it is something he may have wished to say, but we say that the OFT would
2 be failing in their professional duty if they did not prefer the evidence of the customers as to
3 what is more important than the evidence of Mr. Johnson with all of seven months experience
4 in this industry, based in Surrey, come in from UniChem with a commercial interest in stopping
5 this merger.

6 THE PRESIDENT: That is the problem, Mr. Roth. We have got the evidence of Mr. Johnson but
7 we have not got the evidence of the customers which you say has to be preferred.

8 MR. ROTH: We have got Mr. Priddis telling you what it is, and unless it is said it is not in good
9 faith – if the OFT on a Judicial Review ----

10 THE PRESIDENT: We all know what the sort of exercise involves. Customers are often not
11 particularly focusing on exactly what is the issue. They get a letter from the OFT, they may
12 ring up, they may say something or other. We do not really know the questions they were
13 asked or in what terms those questions were answered, and whatever the answers were, those
14 are answers on which conclusions can be safely be drawn is a not a matter we can really
15 pronounce on, so we have no idea. Mr. Priddis I am sure honestly believes that that is the case,
16 but it is very difficult for us to be able to say one way or the other.

17 MR. ROTH: Then one gets to a situation where whenever there is a challenge all of the evidence to
18 the OFT, or any decision-maker had already challenged in the Judicial Review case, has to put
19 it before the court, and that is not ----

20 THE PRESIDENT: This is the crucial point in the inquiry, and you are relying for this crucial point
21 in the inquiry on evidence that nobody has seen.

22 MR. ROTH: With respect, it is not the crucial point, it is an important point.

23 THE PRESIDENT: An important point.

24 MR. ROTH: Looked at in the round, and it supports – the evidence you have seen is that there are
25 customers of UniChem and AAH in the outlying regions, independent pharmacy customers,
26 with that cut-off time that UniChem has told the OFT and you have seen is an earlier cut-off
27 point, continuing, UniChem says, over a long period to take their service from UniChem, that
28 UniChem has a route network stretching into the outlying areas and there is then a – there is a
29 limit in Judicial Review to the extent of inquiring into the evidence, unless there is a really
30 solid basis for saying that that is wrong. I explained that the OFT wrote to customers – I think
31 they wrote to more 21. They are talking about responses – over 21, they are followed up, and
32 then there are telephone interviews.

33 THE PRESIDENT: There are telephone interviews?

1 MR. ROTH: Yes, they speak to them on the phone. They do not go round and put it to them.
2 THE PRESIDENT: So what is the sequence with that? You write to the customers?
3 MR. ROTH: You write to a selection of customers inviting them to respond. Some contact you and
4 you then speak to them on the telephone, some you ring up and some do not want to talk to you
5 at all and are not interested – and some write in and some write in unsolicited, Mr. Priddis
6 points out, and you just get responses from some people without having contact with them
7 because of course they all know that we are ----
8 THE PRESIDENT: But are the contacts in this case mainly telephone interviews?
9 MR. ROTH: They vary; some were and some were not, and we cannot give you a breakdown.
10 THE PRESIDENT: How difficult would it be, and I imagining it is a bit like the letter that is written
11 to UniChem, to let us have a copy of the questionnaire that the pharmacies and dispensing
12 doctors got, just to complete our information?
13 MR. ROTH: It is not in court but it would not be difficult to send it to the Tribunal. It is in the file
14 at the office.
15 THE PRESIDENT: Yes, that would be helpful.
16 MR. ROTH: Yes, we can certainly do that, and that will I imagine have a series of questions, and
17 that is it, if you think the questions were completely relevant and nothing to do with this that
18 would be ----
19 THE PRESIDENT: Yes.
20 MR. ROTH: But, as I say, the consumer evidence – they are the consumers in this case – is more
21 significant than Mr. Johnson’s personal experience of being with UniChem for a very short
22 time in the company. So that is what I say about what difference would it make, this evidence,
23 merely to know that the routes, the network, actually supported, reaffirming the Decision taken.
24 So the last item, and I am sorry, my 20 minutes ----
25 THE PRESIDENT: No, it was my fault, Mr. Roth. I have been interrupting you.
26 MR. ROTH: That is legitimate expectation, which was one of the heads, and I was ----
27 THE PRESIDENT: I do not think you need trouble us on that.
28 MR. ROTH: I was just going to say it seems to be something that has rather dropped away in this
29 case. Would you give me just one moment? (After a pause): Mr. Beard helpfully makes
30 mention of the fact that on this question of getting in evidence on the facts, there is a helpful
31 passage in Wade, and if I just give you the reference, which is 272 to 279.
32 THE PRESIDENT: Thank you.
33 MR. ROTH: That is in the ninth edition, published last year.

1 THE PRESIDENT: Miss Bacon, would you just give us five minutes before we start. We will just
2 rise for five minutes.

3 (Short break)

4 THE PRESIDENT: Yes, Miss Bacon.

5 MISS BACON: I appear on behalf of Phoenix, as Mr. Green said. I should make clear that this
6 intervention is very strongly supported by EAP as well, who played a very active role in the
7 OFT investigation, something which they did not do, to be fair, in the AAH merger
8 investigation, and this is one of the reasons why in the Phoenix merger we have been able to
9 put forward so much more evidence than was put forward in relation to the AAH bid because
10 EAP was so closely involved at all stages of the process, and I have EAP's manager director as
11 well, Mr. Jonathan Briggs, sitting behind me.

12 Before I turn to law and the evidence can I also offer our very sincere apologies for
13 the mix up that occurred in relation to the annex 7 maps. This was because we had actually
14 given all our hard copies of the original maps to the OFT, and so when my solicitors came to
15 prepare the bundle they printed off what they had on their electronic system, and that turned out
16 to be an earlier draft, and that has been explained in the second witness statement of Mr. Cole.
17 So I hope the position is now straight on that.

18 Secondly, could I address a point raised by Mr. Mather as to the relevance of new
19 evidence, and I know this is obviously going to be a point of concern to the Tribunal because
20 both Mr. Johnson and of course Mr. Cole have made a number of submissions which were not
21 in the evidence before the OFT. Our position is we have tried to be very careful not to suggest
22 that the OFT should base its defence in these proceedings, or that we should base our
23 intervention, on new evidence which was not before the OFT at the time the Decision was
24 made. As far as our position is concerned, we are very clear that this Tribunal should review
25 the evidence which was before the OFT. That raises a point in relation to Mr. Johnson's
26 evidence, as to the factors that the OFT should have taken into account, and also in relation to
27 our evidence on matters such as Safeway.

28 Dealing with Mr. Johnson's evidence first, our position is we firmly support the OFT
29 in this in relation to matters such as cut-off times and capacity constraints. This is evidence
30 which could and should have been put before the OFT, and when I come to address the main
31 factors which UniChem rely on I will take you to the places in which in many cases this
32 evidence was before the OFT and UniChem did raise these points, but extremely half-
33 heartedly, and the fact that they did not make a good job of it first time round does not mean

1 that they are entitled on further reflection to come to the Tribunal and say, “Well, we’ve
2 thought of some better arguments for it”. That is just not good enough.

3 That brings me to our new evidence and the witness statements of Mr. Cole. We do
4 not suggest that the Tribunal should suddenly start making a finding based on MDS accounts
5 and so on. That matter, as with the Safeway matter, was referred to by Mr. Cole to put the
6 record straight, but we are not suggesting that the Tribunal should infer from that that it should
7 go on an inquiry into a lot of new matters such as this. The point made on MDS accounts is
8 simply that it was never raised, as Mr. Roth said, because it was a completely trivial point.
9 MDS exclusive accounts form a tiny part of our business with dispensing doctors, and that
10 explains why UniChem never raised it, and UniChem raised a whole host of other points on
11 dispensing doctors, and if they had wanted to raise this point they could have done so at the
12 time.

13 As for the Safeway issue, of course this seems to have been based on a misreading of
14 what Mr. Priddis said in para.88 of his witness statement, and what Mr. Priddis said was that
15 the OFT had to take into account the fact that Phoenix did not have multiples in its customer
16 base in East Anglia, did not have the kind of network densities that UniChem and AAH can
17 benefit from. Mr. Priddis was not saying that Phoenix cannot ever bid for national contracts;
18 well, that is also true, but the point was that it does not have in East Anglia any supermarket
19 customers. And Mr. Johnson comes back and says, “Well, we’ve got evidence that Phoenix did
20 bid in the Safeway contract”, and it puts forward some memo which we have not seen because
21 that has been redacted from our bundle. Quite apart from that, I am not asking that we should
22 be able to see the memo, but Mr. Cole has explained to the Tribunal that what actually
23 happened was that Safeway came along and said, “Can you bid?” We thought we will have a
24 look at it, and when we actually looked at it and we saw the coverage that was required we
25 could not possibly bid, and then the Safeway tender was – that all fell by the bye, and the
26 meeting was cancelled and discussions went no further. So, if anything, this reference to the
27 Safeway bid shows the point we have been making for a long time, that Phoenix has not got a
28 national capacity, so that is the end of our new evidence.

29 THE PRESIDENT: I think we are most unlikely to want to go into the Safeway matter.

30 MISS BACON: I just mention it for completeness.

31 I do not want to go through all the authorities because we have now seen *E* and
32 *Tameside* at least three times. What I thought I would do is draw together some strands of
33 thought as to what this applies for the approach of the Tribunal.

1 Standing back from it all, I tried to think of a way in which the Tribunal – one can
2 marry the fact that in this case there is a factual precondition to the Tribunal’s analysis. The
3 Tribunal first has to look at the facts that were found by the OFT and some kind of factual
4 review is necessary. Obviously in a case where the OFT decides not to refer and facts are not
5 in issue then the Tribunal has an easy job because you can go straight to the consideration of
6 whether on the facts that are not in dispute the OFT was reasonable to find on a test of
7 *Wednesbury – Wednesbury* reasonableness, that no SLC would or might exist, and that is a
8 straightforward question of Judicial Review applying standard tests of irrationality, illegality
9 and procedural impropriety, and, for the most part, that will turn on analysis of law. Do the
10 facts fit into the context of the competition law analysis required lead to the conclusion that no
11 SLC will exist.

12 In the present case obviously the analysis is more multi-layered because the Tribunal
13 first has to ask whether the OFT was reasonable to reach the factual conclusions which it did.
14 But the question is not whether the Tribunal might substitute its own judgment for that of the
15 OFT. The question is whether there is a judicially reviewable ground which goes to the factual
16 findings made by the OFT - so, for example, as we have seen in *E*, a manifest error of fact that
17 appears on the face of the record which can be objectively established. The question is not at
18 that stage, “Well, can the Tribunal say it might have preferred to reach a different factual
19 conclusion?” So the first question is, is there a judicially reviewable basis on which we can
20 impugn the factual findings of the OFT, and only logically after that question has been
21 answered can the Tribunal then go on to say, “If I assume the factual basis of the Decision to be
22 correct can the OFT then reasonably, rationally and legally correctly infer from that that there
23 will be no SLC?” So there seems to me a two-stage analysis in cases like this.

24 The reason why I think that is important is because that provides a framework for
25 looking at the grounds of review which are put forward by UniChem, not only the four grounds
26 of review which it puts forward in its notice of application but also the new procedural point
27 which it says is essentially one or other of the four grounds of review.

28 If you look at ground 1, this seems to be saying that, even given the facts found by the
29 OFT relating to UniChem’s ability to supply, they say that is not enough because, on the basis
30 of the other facts found – market share, barriers to entry and so on – there was no alternative
31 but to refer, and that seems to me a question which goes to the second stage of the analysis:
32 having found the facts can you then draw the inference that there was no SLC.

1 Ground 2 turns on the reasons. Again that seems to me more to go to the second stage
2 of the analysis, and if this is a pure reasoning point, having found the facts have they set those
3 out properly in the Decision? And I do not really seriously understand that to be pursued in the
4 present case. This seems to have mutated into more of a fact-based challenge under ground 2.

5 Ground 3 is whether the facts have been properly resolved. In the end, when you look
6 at their notice of application even you see what they are saying is not whether they have been
7 resolved but whether they have been resolved correctly. So that turns on stage 1 of your
8 analysis; can the Tribunal impugn the findings of fact made by the OFT.

9 Their final ground 4, I do not understand that to be seriously pursued in relation to the
10 AAH precedent, but if that were a separate ground of review that would relate the second stage
11 of the analysis; having found the facts, are they bound by some other inconsistent precedent.

12 So that is a quick run through of how that notice of appeal fits into the two-stage
13 analysis that I proposed.

14 What then do you make of the new procedural point that this is all something that
15 should have been put to UniChem? As I see it, it is not saying that there is some procedural
16 failure in the way that the OFT approached this as such. There is no statutory duty to reconsult
17 third parties ad infinitum with every new point of evidence that is put before by the merging
18 parties, or customers for that matter, nor can they point to anything in the procedural guidance
19 that says that the OFT should go back. So, at the end of the day, as I understand it, what they
20 are essentially saying is that the analysis of the facts were such that it was unreasonable to
21 reach that conclusion without obtaining further evidence. So again this is simply a challenge to
22 the factual basis – that is stage 1 of the analysis that the Tribunal has to go through.

23 So, as I say, that is how I would approach the framework within which the Tribunal
24 has to reach its judgment. Most of UniChem's challenges go to the simple question, as
25 Mr. Green said the key issue of fact, which is whether UniChem and AAH can actually supply
26 the customers of the merged entity after the merger. I make that distinction because of course
27 I am going to jump forward now and presume that the Tribunal has found that the OFT's
28 decision on that cannot be impugned, and that the OFT was correct to conclude that UniChem
29 and AAH – of course AAH is not here so in fact we are only talking about UniChem.

30 THE PRESIDENT: I think that is the most we can possibly talk about.

31 MISS BACON: Indeed - so whether the OFT was correct to conclude that UniChem could supply
32 the merged entity's customers. Where does the Tribunal go from there? I can deal with that
33 shortly before I even get into the basic question here. Once the Tribunal has concluded that

1 UniChem can supply to Phoenix and EAP's customers we would submit that, on the way that
2 UniChem itself have put the case ----

3 THE PRESIDENT: Sorry, just to be absolutely clear: it is not for the Tribunal to conclude whether
4 UniChem can ----

5 MISS BACON: Once the Tribunal has concluded that the OFT's Decision cannot be ----

6 THE PRESIDENT: The conclusion that the OFT reached that UniChem could do that.

7 MISS BACON: Exactly – cannot be challenged.

8 THE PRESIDENT: It is not impugnable.

9 MISS BACON: Yes, is not impugnable – I stand corrected, but that is exactly the way we put our
10 case. Once the Tribunal concludes that the OFT's Decision on that is not impugnable on a
11 Judicial Review basis then because of the way that UniChem has always put its case, I would
12 submit that that is the end of the matter. In this case there is not a further inquiry as to whether
13 that is sufficient to lead to the conclusion of no SLC. Although Mr. Green puts it differently in
14 the notice of application in his ground 1, he did not on Monday seek to advance the point that if
15 on the key factual issue we were correct then there would still be a ground for review by the
16 Tribunal, and that I would say is entirely correctly. He rightly did not take that point because
17 that accords with what UniChem itself told the OFT was the key issue both in the AAH bid and
18 the Phoenix bid.

19 Could I then ask you to turn to the UniChem bundle at tab 6, p.291. I will come back
20 to this later because I want to make some comments on the similarity of this with what was said
21 in the RBB report. If you go to the bottom of p.291 ---

22 THE PRESIDENT: This is the 2003 document?

23 MISS BACON: This is the 2003 document. This was the briefing paper that was put forward in
24 relation to the AAH bid, which very probably formed the reason for UniChem's miraculous
25 one week turn around of its briefing paper in relation to the UniChem bid. As Mr. Roth said,
26 there seems to have been a great deal of cutting and pasting going on. If you look at the bottom
27 of that page:

28 "The effect of the proposed transaction would be to remove EAP's Norwich
29 warehouse as a competitive constraint on AAH, which operates warehouses in
30 Romford and Northampton."

31 And then this sentence:

1 “The extent of the resultant impact on competition depends upon other
2 pharmaceutical wholesalers’ ability to supply those customers for whom the number
3 of potential suppliers has fallen ...”

4 So, in essence, UniChem is saying in order to judge the effect on competition, i.e.
5 SLC, this is what you look at, the extent of the other wholesalers’ ability to supply. It says
6 something very similar in relation to the Phoenix merger, and that is at tab 11 of the same
7 bundle, at para.5.1 on p.327.

8 “The anti-competitive nature of this proposed merger can best be understood by
9 examining the extent to which Phoenix and EAP currently compete head-to-head in
10 particular parts of the areas served by EAP’s Norwich warehouse and the difficulty
11 that competing warehouses have in serving those localities.”

12 And then they refer to their isochrone analysis, and at para.53 they say that this detailed
13 isochrone analysis gives the best indication of how this proposed merger may be extended to
14 lessen competition to the detriment of customers; or, put a slightly different way, it is saying
15 exactly the same thing: at the end of the day you have to look at the extent to which we can
16 carry on supplying the competitors, which is why I say once the key factual issue is decided in
17 this case there is no further question as to whether the OFT was incorrect to infer that there
18 would be no SLC. So there is, as Mr. Green said on Monday, only one real issue in the case
19 today, as it has now evolved, and I accept when the notice of application was prepared they did
20 not have the benefit of the witness statement from Mr. Priddis and so on so they raised slightly
21 different grounds, but as it is now there is only one key issue, which is the facts.

22 Can I then address the main issue. I was going to say something about the Phoenix
23 constraint on EAP, but I think that has been dealt with by Mr. Roth. The only additional matter
24 we put forward on that was the Safeway point, and I have dealt with that. I am also not going
25 to deal with dispensing doctors because that has also been dealt with by Mr. Roth.

26 I just wanted to pick up a few points regarding the main issue, which is the competitor
27 constraint post merger, and I think the way to look at this is as follows: you have to start off by
28 looking at the evidence in the case and seeing the factual basis on which the OFT reached its
29 judgment and its evaluation, and seeing whether on that basis, and leaving aside anything new
30 that the parties have put forward, whether the OFT was *Wednesbury* reasonable, or putting it
31 another way, in fact they have to show that the OFT was *Wednesbury* unreasonable, or
32 whether there was some manifest error or failure to take into account some relevant fact. We
33 submit there are two competing views: on the one hand, there was the famous isochrone

1 analysis and, on the other hand, there was a wealth of information not only from the merging
2 parties but from the customers and from UniChem itself which contradicted the isochrone
3 analysis. We would submit that in fact when you look at the evidence which contradicted the
4 isochrone analysis in fact if the OFT had reached a contrary conclusion on the evidence that
5 would have been *Wednesbury* unreasonable because the isochrone analysis was entirely
6 fanciful, it was totally flawed from start to finish. It made statements that were completely
7 contradicted even by the evidence of UniChem, and my clients have very grave concerns about
8 the way in which UniChem has repeatedly and consistently misled the OFT and continues to
9 mislead the Tribunal on this.

10 Can I just take you to ----

11 THE PRESIDENT: You need to try to make that good I think, Miss Bacon, if you would.

12 MISS BACON: Yes. Can I just take you to the isochrone analysis itself. That is at tab 11. Right at
13 the start there is a fundamental issue regarding this isochrone analysis, which is the evidential
14 basis on which it is prepared. UniChem does not put forward factual basis on the matters
15 which underlie assumptions made in the isochrone analysis regarding, for example, the number
16 of customers that are located at particular locations. For example, at 2.1:

17 “As can be seen, the majority of customers are within a 1 hour drive time with only
18 10% located more than 1.5 hours distant. On the basis of this, it is reasonable to
19 conclude that the effect of the economic catchment area of a pharmaceutical
20 wholesaling warehouse is 90 minutes.”

21 Is this talking about independent customers? Is this talking about all customers? Is
22 this talking about independent customers in the north of East Anglia or the whole of East
23 Anglia? We just do not know. But it seems to be that the basis for this 90 per cent./10 per
24 cent. figure is actually independent customers, and I say that because if you look back at p.318,
25 and this is in the same bundle, and if you look at para.5.2, we then get the figure of the 786
26 independent customers served by UniChem’s Letchworth warehouse, 705 lie within a 90
27 minutes non-stop drive of the dept, and then it says that these 90 per cent. of independent
28 customers lie within around 60 miles of the warehouse. So the 90 per cent. figure appears only
29 to relate to independent customers, which means that if this is correct, and we have nothing else
30 to suggest that in fact RBB were looking at the whole customer base, if it is correct it
31 undermines the whole basis of the RBB report because of course what the OFT were not
32 looking at was simply independent customers, they were actually looking at the extent to which

1 UniChem could supply, and that question is not related to whether it can supply from an
2 independent customer base, it is related to whether it can supply from its whole customer base.

3 I accept that if RBB had actually said there is some fundamental difference between
4 independent and tied pharmacy customers, for example, they go out on different routes, our tied
5 pharmacies can accept much later cut-off times, so we send the vans out later, then they might
6 have had a basis for drawing a distinction of a distinction was drawn, but there does not seem
7 to be anything in the evidence of UniChem that there was such a distinction, and in fact
8 UniChem has stated the cut-off times and delivery times are exactly the same for our tied and
9 independent customers. So that is one problem/

10 But even leaving that aside, if you actually look at the conclusions that are reached by
11 the RBB report, you can see that the conclusions were wholly inconsistent with the evidence
12 that UniChem itself had put forward. Could I take you to table 9, and I know that you have
13 seen this table 9 already. UniChem were putting forward the proposition in their expert report
14 that pharmacies in zone A, which we have now seen on our maps, will reduce from two to one
15 wholesalers, and Professor Stoneman correctly asked, “What happens if it’s actually three to
16 two?”, and Mr. Ross said, “It’s not three to two, in fact it’s four to three”. RBB were saying in
17 this two to one wholesalers, carrying the clear inference that these pharmacies were served by
18 Phoenix or EAP, and that is entirely consistent with what it says in the text of its report, that
19 customers in this zone, which includes Norwich and Kings Lynn, would therefore face only
20 one realistic choice of wholesaler, the merged entity’s competitors being unable to offer a
21 competitive service in this zone. With respect, saying that the merge entity’s competitors
22 cannot offer a competitive service in Kings Lynn is contradicted by UniChem’s own customer
23 lists in which it showed it had a number of customers in Kings Lynn and Norwich. It is not that
24 we are putting forward new evidence on this, and I refer to our table in para.35 of Mr. Cole –
25 this is not simply something we have produced now. You can see that UniChem are serving
26 customers in this area from UniChem’s own customer lists.

27 The point on this is that of course what they are saying in table 9 – they are only
28 referring to independent pharmacy customers – but, as Mr. Roth has said, the OFT was not only
29 looking at independent pharmacy customers, the OFT was also looking at tied customers, and
30 to suggest that competition would reduce from two to one when you have a whole host of tied
31 customers in exactly the towns where you are saying you cannot compete was highly
32 misleading.

1 We also note, in passing, that no analysis is made in the RBB report of the fact that in
2 fact UniChem has a trunking system based in Thetford and Marks Tey which must make a
3 difference as to the dynamics of competition, and they are talking about the logistics and they
4 are saying it will take a 90 minute radial drive time from Letchworth. There must be some
5 difference made to that by the fact that you actually do not drive 90 minutes from Letchworth
6 and spend your time driving round in a circle from Letchworth and returning to the depot there,
7 you actually have a trunking depot you take your van to and you send out loads of mini vans
8 which go in a mini radius ----

9 THE PRESIDENT: Yes.

10 MISS BACON: There is no mention of this at all in the isochrone report. That is just to pick up a
11 few more points, apart from the more obvious ones made by Mr. Roth, that when it is saying it
12 cannot feasibly compete in this isochrone report, and it has got independents and it has got
13 dispensing – not in the case of UniChem dispensing doctors but independents, tied pharmacies
14 and Boot’s dotted all around East Anglia, on the further reaches of East Anglia, it is simply not
15 credible to believe what was said in that report.

16 There are other fundamental misstatements made by UniChem. For example, could
17 I take you back to p.318 of the same bundle. When UniChem is asked, “How far away from
18 the depot are your furthest independent customers?”, and UniChem says, “Our furthest
19 independent customer is in North Walsham, 80 miles by road from Letchworth”, and in fact the
20 evidence of Mr. Briggs is that is not 80 miles, it is in fact 97 miles, and that in fact they have
21 got customers, independent customers, much further than that. UniChem has told the OFT it
22 has got independent customers in, for example, Lowestoft, in Suffolk, and we have seen the
23 map, it is right on the east coast, and Great Yarmouth, and they are both more than 100 miles
24 away from the Letchworth depot.

25 So we do have concerns about the way UniChem has put its case and put its case to
26 the OFT, and if you look then at the way it now puts its case it comes to the Tribunal and says,
27 “We’ve been trying and we’ve been failing to compete”. Well, that is not quite true. If you
28 look at what it is saying, its assertions are wholly based around its independent customer base,
29 and it is very convenient for UniChem to limit its submissions to its independent customer
30 base, but it has been gaily acquiring Moss pharmacies, and if I can invite the Tribunal to look at
31 our switching tables, and these were put before the OFT. This is at annex 4 and annex 5 of our
32 bundle, and UniChem has now been provided with these tables. If you look, for example, at
33 annex 4, which is EAP customer movements, and if you turn to the second page ----

1 THE PRESIDENT: You probably ought to be careful about mentioning particular customers.

2 MISS BACON: No, this has been now unredacted.

3 THE PRESIDENT: So it is open now, is it?

4 MISS BACON: This is open now. If you turn to the second page you see, for example, “Numark,
5 Thunder Lane, sold to Moss”. Numark were sold to Moss. Numark, Aylesham Road – that is
6 in Norwich – sold to Moss. You can go down and see the number of pharmacies that UniChem
7 have acquired from EAP. This is obviously a factor in their competition of course. There are
8 not that many independent pharmacies left in East Anglia because many of them have been
9 bought by the large chains, but that does not mean that UniChem is unable to compete. So the
10 whole focus in UniChem’s submissions – knowing the basis of the OFT’s Decision being on
11 the whole spread of UniChem’s outlets – it knows now that Mr. Priddis said, “We didn’t take
12 the decision based on independent pharmacies alone, we took it on the tied outlets as well”. It
13 is still saying, “We can’t compete because of our independents, because of the limitations of
14 our independent base”, and Mr. Roth has taken you to the statement of
15 Mr. Johnson where he says lots of these independent pharmacies we refer to are actually Day
16 Lewis multiples and so on. But all this is completely irrelevant. It does not go to the
17 fundamental issue at the heart of the case, which is UniChem’s customer density, and the fact
18 that on exactly the same van routes it can supply independents, it can supplied ties, it can
19 supply multiples.

20 What UniChem suggest in order to answer the points about independents and ties is
21 that its tied pharmacies are less demanding, and so it says, and this is in Mr. Johnson’s witness
22 statement, “We can reach tied pharmacies which are further afield”. We have got three points
23 on that. The first is that if you look at the map, and I will not take you to the maps again –
24 Mr. Roth has taken you to the maps – the maps show that UniChem’s independent customers
25 are equally as far away from Letchworth as the tied ones. So the point that UniChem is
26 supplying tied customers which are a lot further away simply does not stack up, and I have an
27 issue with the maps because what they do not do, in terms of the maps that we put forward to
28 the OFT is ever superimpose one on the other. We have maps showing the tied customers, and
29 we have separate maps showing the independent customers, and it is very difficult for anyone
30 to make much of, f how these interrelate, so what I asked my clients to do for the purpose of
31 this proceeding is simply to superimpose one on the other, and it might be helpful if the
32 Tribunal could look at that. That is at tab G of our bundle, and again I would stress I am not
33 inviting the Tribunal to take account of new evidence. What is done on this map is that we

1 took the independents, and we took the tied, and we put them altogether, and this is just
2 UniChem and I hope this makes it quite clear the geographic spread of the independents as
3 opposed to the tied, to make good my point that it is not my point that UniChem's tied are
4 somehow further away than the independents.

5 We have yet further colours on this. The red are the tied customers, that is the Moss
6 Pharmacy, the yellow are the independents. The green are Boots, and as Mr. Roth explained
7 on the original maps with which we supplied the OFT we did not include Boots because we
8 had always treated them differently, and the reason why we did this is that Boots are primarily
9 self-supply and UniChem is a second-line supplier. UniChem have on its own lists provided to
10 the OFT in response to the OFT's questionnaire, included Boots as an independent customer.
11 So UniChem's analysis is that Boots is an independent customer, so that Boots are included
12 here in green. Mr. Roth is reminding me we now know that Boots are on the van drops from
13 the new evidence, of course I have not seen any of that because we have not been shown the
14 routes or the van drops but Mr. Roth referred to that this morning. If you look at the map at G,
15 now the blue dots are simply the places where UniChem has approached our own customers
16 with offers. You can leave those out of consideration for the moment. I would only ask you to
17 look at the distribution of the red, the yellow and the green, and you can see that the yellow
18 and the green, which are not tied customers, go right round the coast of East Anglia. There is
19 one, for example, at Ringstead, and then you go round to Holcombe and you see one at West
20 Runton, Cromer, and then you go down and you see them at Gt. Yarmouth and Lowestoft,
21 which are at the furthest reaches from the Letchworth depot. The cluster of tied customers is
22 actually mainly around Norwich with individual red dots dotted around over East Anglia. The
23 point that I am making here is that UniChem comes to the Tribunal and says "Our tied
24 customers are somehow different, we need to treat them differently because they accept
25 different conditions, and we can therefore reach further away for our customers", and that is
26 not the case at all on the evidence which was before the OFT.

27 THE PRESIDENT: Miss Bacon, I am sorry to ask for just a bit more work. How difficult would it
28 be for your clients to reproduce this map yet again, but this time without the blue dots?

29 MISS BACON: It would be very easy, we could do it overnight. Would you like us to do that?

30 THE PRESIDENT: I think that would be helpful

31 MISS BACON: We would be very happy to do that. Is there anything else that you need which
32 would enhance the map in any way?

33 THE PRESIDENT: No, I think apart from that, that would be helpful

1 MISS BACON: Yes, we would be very happy to do that. We did think that that would be a useful
2 exercise because from the existing maps it is very difficult to compare the spread of tied and
3 independents and that is what we hope to show on that.

4 So that was my first point in response to their suggestion that tied pharmacies are less
5 demanding. The second point is if that really is the case then you would expect there to be
6 different cut-off times, and different delivery times, and UniChem stated in response to the
7 OFT and Mr. Roth has already taken you to that, the cut-off times and delivery times for the
8 tied pharmacies are exactly the same as for the independents, and they all get two deliveries a
9 day. I do not know if you would like me to take you to the relevant part of UniChem's
10 submission on that?

11 THE PRESIDENT: Can you give us the reference?

12 MISS BACON: Yes, for your note, it is at tab 10 of the UniChem bundle, on p.318, and it is
13 para.3.1. It is in response to the question "What cut-off and delivery times are you able to
14 offer?" and 3.1:

15 "UniChem delivers twice a day to all its customers from its Letchworth warehouse which
16 services this area. There is no difference between cut-off time for UniChem's own tied
17 pharmacies and independent customers."

18 So it is not the case that it offers a different service to its tied pharmacies.

19 The final point is really a matter of practicality, which is, is UniChem really saying
20 that its tied pharmacies are less able to compete than independent pharmacies? Because that is
21 what its submission amounts to. It is saying "you have to accept our terms and if we deliver
22 late in the day well that is tough because you are just tied to us and you do not have an
23 alternative competitor. But of course, if that really were the case, and it did make a
24 competitive difference, what would happen would be that those tied pharmacies would go out
25 of business, and in that could I just refer you to a point that UniChem itself made to the OFT in
26 relation to the AAH merger, and I am sorry to take you to a different bundle, it is the OFT
27 bundle, tab 28, p.4. para. 3.2. If you looking the middle, they are talking about the quality of
28 service in relation to cut-off and delivery times, and what they say is:

29 "Pharmacy patients in particular are forced to wait until late afternoon or even the next day to
30 collect their prescriptions are likely to switch to a pharmacy that can offer same day delivery
31 and a quicker turnaround."

32 Now, what they are saying here is if you cannot actually do the afternoon delivery your
33 customers will go away because they will not be able to get their prescription or whatever on

1 the same day. If you look at where UniChem's tied outlets are, I have just shown you, there is
2 a whole cluster in places like Norwich, and of course it is tied outlets, these are in towns – of
3 course there are some in rural areas – but the majority are in towns which are likely to be
4 served by at least two pharmacies. The fact of the matter is that if UniChem really were saying
5 that it was offering an uncompetitive service to its tied outlets those customers would simply
6 go away and they said that on their own evidence to the OFT. They said that it is really
7 important to get your afternoon delivery in and that applies equally to Moss as it does to any
8 other pharmacy. So that was really my answer to the suggestion which UniChem is still
9 making that you have to leave tied customers out of the picture, when you are looking at the
10 competitive constraints post merger. The OFT was entirely correct to take tied into account.
11 Even if this was somehow a point which is valid to make, and even if there is some substance
12 in the issue concerning cut-off times and the ability to compete, there are two other answers,
13 and one is that in any event the OFT found in its Decision that cut-off times only really applies
14 for the afternoon delivery; and 70 per cent. of deliveries are made in the morning, and it is
15 only 30 per cent. that are made in the afternoon, and I do not understand this to be a
16 distribution that has ever been challenged. It was assumed all the way through the OFT
17 investigation I am told by my clients, and we submitted it very early on. This is the figure on
18 which the OFT have been working. That means it is really only in respect of a small
19 proportion of the customers in which there is any issue regarding cut-off times at all, and the
20 OFT have stated in its Decision, and I know you have had exchanges with Mr. Roth on this
21 regarding the evidential basis, that customers do not exclusively look at cut-off times, they
22 look at other issues.

23 There is one other point, which is that in any event this is not an argument that
24 UniChem was deprived of putting to the OFT in some way. The whole issue of cut-off times
25 was put forward repeatedly, and I did say I was going to take you to the RRB report and
26 compare it with what was said in relation to the AAH merger, and I would just like you to do
27 that to make good this point. If you go back to the UniChem bundle and you look at tab 6,
28 which is its AAH briefing paper, could I ask you to look at the second paragraph on that page,
29 which starts "As figure 1 shows..." p291

30 THE PRESIDENT: Yes

31 MISS BACON: This is what it said in relation to AAH:

1 “As figure 1 shows, UniChem does make a small number of deliveries to customers located
2 more than 90minutes from its warehouses. However customers employing distant suppliers re
3 required to place their orders much earlier than are those using a closer supplier.”

4 Then it makes the cut-off time point.

5 “Since the cut-off time for orders is a key determinant of the quality of service that a
6 wholesaler provides ... the inevitably earlier cut-off time for more distant suppliers places
7 them at a significant disadvantage compared to more local competitors...”

8 And it goes on: “In addition, the higher costs [are] associated with transporting”. Can you just
9 keep your finger in that page and then turn to p.335, and you see the words starting “Of
10 course”, and then you go on:

11 “However, UniChem is unable to provide these customers with the quality of service it can
12 offer those located closer to its depot.”

13 Very similar language to use.

14 “Customers provided by a distant warehouse cannot provide their patients with
15 effectability of service.”

16 Very similar language.

17 “The result is that customers served by a distant warehouse have a strong incentive to
18 choose nearby wholesalers.”

19 This also refers to the figure 1. If you look at the table there above it, you have this figure 1
20 distribution and if you go back to p.291, you have the same figure 1. So they were making the
21 same point in the two reports. The first one seems to be authored by UniChem, the second one
22 seems to be authored by RBB. But the same points were being made in both, and what notice
23 is that in the later report by RBB it does not explicitly make any mention of cut-off times, even
24 though in the earlier reports in relation to AAH cut-off times are explicitly mentioned. Now it
25 is clear that whoever authored the RBB report had in front of them the AAH report, because the
26 wording is so similar. Figure 1 is almost exactly the same. The language in some places is
27 almost verbatim the same. So if there was a cut-off point to be made it should have been made
28 there, it was made in relation to AAH. For some reason UniChem did not include it in the RBB
29 report here. I find that odd, because UniChem is now coming and saying this was such a big
30 point, but it seems that some conscious decision was made not to include it there. However, in
31 case of any doubt we have seen, Mr. Roth showed you, that they incorporated the AAH report
32 by reference, so what they had said in relation to AAH they were saying was still consistent.
33 So I am presuming they did expect the OFT to have regard to what they said earlier regarding

1 cut-off times, but it does seem to be strange that they had plainly the words in front of them,
2 and they deliberately not to make a point in the RBB report about cut-off times. I would say it
3 lies ill in the mouth of UniChem to come forward and say “You never asked us about cut-off
4 times when they plainly had this in mind and did not mention it.

5 That brings me on to capacity constraints, and I would like to explain to the Tribunal
6 how the 5:6 run point came about, because as you said, Mr. President, this morning I think, of
7 course it was Phoenix who raised the point and I am afraid that we may have set a hare running
8 which we are now responsible to explain why this hare was running and why we then stopped
9 it. What happened was that in Phoenix’s second confidential guidance submission – would you
10 mind if I gave you the references in the Phoenix bundle, because they are the ones I have been
11 marking up?

12 THE PRESIDENT: Absolutely

13 MISS BACON: It is at tab B of the Phoenix bundle, if you want for your note, that is equivalent to
14 annex 2 in the OFT bundle. If I could ask you to turn to p.4 of that. Mr. Roth did take you to
15 this but did not entirely explain the context within which the remark was made. Question 6
16 was on “Information on barriers to entry/Cost of entry”. You will see that we started off
17 talking about the cost of establishing a new wholesale depot. What we were talking about was
18 the cost for an entirely new entrant in to the area. So we start off talking about the cost of the
19 depot, and then of course, you do not only have depot, you have to establish your delivery
20 routes, so we say the cost of the delivery route would be about £150,000 to break even and
21 therefore it is difficult to break into new areas without the support of at least five to six new
22 customers.

23 Now, the context of that, and my clients are very anxious that this should be
24 emphasised, is that this was in the context of an entirely new entrant into a new area. For
25 example, let us take a fanciful example, if EAP were to start delivering in Cornwall. But as this
26 evolved it seems that the OFT may have misunderstood what we said, and may have
27 interpreted this to mean the cost of establishing a new route in an existing area. So what
28 happened was that it was then raised by the OFT in the Issues Letter which was sent on 30th
29 November. That is at the OFT bundle at para.30, and I am just tracing the history of this point,
30 because it is quite an important point that is relied on by UniChem.

31 THE PRESIDENT: OFT bundle at tab

32 MISS BACON: Tab 30. It is on the back of the third page, and it has a page 2 at the top of it, and if
33 you go down to market entry, and the second bullet point:

1 “There also appeared to be impediments to expansion of delivery routes, given the critical
2 mass of customers required to make such expansion profitable. It takes approximately five to
3 six new customers.”

4 Of course we were very surprised to see this, because what we have been talking about was
5 new entry into a new area. We did not intend by this to mean that every time you need to add a
6 new route where you have an existing customer you need five to six new customers, because
7 what we had always said was that you would reorganise your route. So this is the background
8 to what Mr. Cole explains in his second witness statement, which is that they went along to the
9 Issues meeting and discussed it at length and explained that the five to six new customer issue
10 related only to cases where you would have an entirely new area in relation to cases where a
11 wholesaler had an existing customer network. You are not saying that you needed five to six
12 new customers, what we were saying was that you would simply reorganise your route. That is
13 the background to the comment that is then made at p.11 of the Issues response, and I will not
14 take you to that because Mr. Roth flagged it explicitly this morning, at p.11 of the Issues
15 response, which says that it is not the case that you need five to six new customers, what you
16 would do is reorganise your existing route.

17 So that explains where we got the five to six new customer point, it was not intended
18 to refer to the situation which we have here in relation to UniChem.

19 THE PRESIDENT: Thank you very much

20 MISS BACON: Mr. Beard is pointing to para.43 of the Decision, where OFT says:

21 “Further barriers exist at the route level where the parties estimate that in order to make a new
22 route in a new geographic area viable...”

23 Certainly by the time of the Decision it was clear that the OFT understood the point that we had
24 been making.

25 THE PRESIDENT: The “new geographic area” being the key words

26 MISS BACON: The “new geographic area” being the key words, yes. Sir, that is one of the points
27 that we make, to say that in terms of the capacity constraint issue, this was a matter that was
28 discussed at length with the OFT. It was not a case that the OFT jumped to conclusions based
29 on an absence of evidence. It was put to the merging parties, and it was discussed at length. At
30 the end of the day, as I said at the start, the issues as to whether one can say that the OFT’s
31 Decision on this is wholly unreasonable, within the *Wednesbury* test, or based on a manifest
32 error of fact, and you see that the OFT did have in front of it extensive evidence on that. But
33 can I also take you to what UniChem itself said about its capacity constraints, and it is a slight

1 correction to what Mr. Roth said this morning, because he said UniChem could have mentioned
2 it but did not. In fact, UniChem did mention it but very half heartedly, and if I can ask you to
3 look again at what UniChem said in its briefing paper to this merger, which is in the UniChem
4 bundle at para.5.8, this is at p.330, para. 5.8.

5 THE PRESIDENT: Yes

6 MISS BACON: This is in the context of the dispensing doctor point. Half way through that
7 paragraph Unichem says:

8 “It is unlikely that UniChem would consider it worthwhile to target supply to dispensing
9 doctors faced with the significant cost of introducing new long van routes to sparsely
10 populated rural areas with little likelihood of being able to generate meaningful market share
11 growth.”

12 So the genesis of this capacity constraint point was there in UniChem’s submission. It clearly
13 had this point in mind, because what it was saying was “we cannot deliver to them because we
14 have to introduce all these new routes”, which is exactly the point that it is making now to the
15 Tribunal, “we have to introduce a new route because we have not got capacity on our own
16 routes.” If it could have made it there in relation to dispensing doctors, it could have more
17 generally developed the point, and if it really is the case that its logistics are so different from
18 that of any other customer it should have made the point. I note that UniChem does not say in
19 this briefing paper that we have some special problems that apply to us that do not apply to
20 EAP, to Phoenix or to EAH which mean that we cannot add new customers or we cannot
21 organise our route. As my clients have told the OFT all of the wholesalers of course use
22 remodelling. UniChem is a sophisticated operator, it is a national chain. If it is capacity
23 constrained applies in East Anglia it applies anywhere in the whole of Gt. Britain where it has
24 customers. Is it really coming to the Tribunal and saying “Anywhere that we take on a new
25 customer, because we are very efficient, as you, Mr. President, made the point this afternoon,
26 because we are efficient and we do not operate at under capacity, and we do not send a van out
27 just to deliver to one customer, does that mean that it cannot ever add new customers, well of
28 course not it is a national supplier. With respect the submissions that it has made to the
29 Tribunal regarding capacity constraints are just untenable, they are just contradicted by the way
30 that the industry works, as Mr. Cole has explained in his witness statement. The industry does
31 not work like that. It is not a case that a wholesaler who has customers in an area, and you have
32 seen now the spread of customers that UniChem had would turn down a customer in the same
33 area based on a capacity constraint.

1 In any event, as Professor Stoneman remarked on Monday, the suggestion that
2 UniChem was somehow capacity constrained and cannot add new customers on is entirely
3 contradicted by the fact that UniChem says itself we have a full-time sales rep. touring East
4 Anglia touting for business. If that is true that they have someone touting for business it must
5 also be true that they can satisfy that business were they to be able to gain some.

6 Those are all the points I had to make on capacity constraints. Those are all the points
7 I wanted to make in addition to those Mr. Roth made, otherwise we entirely endorse the
8 submissions that Mr. Roth made.

9 THE PRESIDENT: Thank you very much, Miss Bacon.

10 MR. MATHER: I just wondered, Miss Bacon, if you wanted to say anything whether byway of
11 confirmation or otherwise about Mr. Roth's comments and his exchanges with the President at
12 the start of this afternoon's session on the hypothetical issues about the inadequacy of evidence
13 if the OFT had not consulted, for example, enough or the right type of pharmacies or doctors,
14 and Mr. Roth gave us some views on that. Do you adopt those views?

15 MISS BACON: Generally, we would say that the OFT had a huge amount of evidence before it. It
16 had sufficient evidence before it on which it could reach the conclusions that it did. Of course,
17 had it decided to carry out a much longer exercise it could have gone back to UniChem, it
18 could have put all the evidence back to UniChem. We would not accept UniChem's
19 submission that there is some fundamental inadequacy of evidence in the material that we have
20 seen which meant that UniChem can come forward and say that the OFT's Judgment was based
21 on a fundamental lack of evidence, or a manifest error of fact, or an insufficiency of evidence
22 on these points. As far as I understand Mr. Green his main submission is that on the
23 spreadsheet the OFT simply accepted the parties' submissions regarding his own business,
24 regarding UniChem's own business, and he said that on that basis the OFT were not entitled to
25 reach these conclusions based on what we had said without going back to UniChem and
26 reconsulting them. Our answer to that is simply the point that was made by Mr. Roth this
27 morning, no, they were not relying on our comments about UniChem in those spreadsheets,
28 they were relying on our description of our own cut-off times, our lists of our customers bases
29 and the evidence we gave on the spread of UniChem pharmacies, all of which could be
30 corroborated by looking at the maps. In relation to the cut-off times they relied on UniChem's
31 own evidence regarding UniChem's own cut-off times. It was not at all the case that they
32 simply took the information that we gave about UniChem's business and accepted it without
33 putting it back to UniChem.

1 I do not know if that entirely answers the point that you were putting to me, or whether
2 there was a different point?

3 MR. MATHER: I think it does. My particular interest was on the adequacy of the fact-finding – the
4 surveys, the questionnaires, and so on

5 MISS BACON: Well obviously we have not actually seen all of the surveys. We have seen what
6 was put to us. I cannot comment on what the OFT may have asked other parties, for example,
7 customers, but I entirely endorse Mr. Roth's submission that one cannot in a proceeding of this
8 nature expect the OFT to produce a complete file as one would, for example in an appeal in the
9 CFI on a merger, a phase 2 procedure where you are entitled to see the Commission's file.
10 This is not that kind of a case. You cannot expect the OFT to come forward and give you
11 copies of all of the customer replies for the Tribunal to actually assess whether all those replies
12 were adequate. This is a judicial review procedure and this brings me back to the comment I
13 made at the start, which is at the end of the day one has to show that the factual basis was either
14 manifestly in error, in which case UniChem can come forward and say "This is what we said,
15 this entirely contradicts what you said", and one can see from the face of the documents that
16 there was a manifest error, or some kind of *Wednesbury* unreasonableness. Also it is for
17 UniChem to come forward and say, "Here is the evidence we put in, your conclusion was so
18 unreasonable that no reasonable person could have reached it". Or again, a failure to take into
19 account a matter that was before the OFT, so again UniChem can come forward and say we put
20 this forward and you just did not take it into account. None of that is the case here, and the fact
21 is that one cannot inquire – the nature of this Judicial Review process does not mean that you
22 can inquire and say "Oh well, we are going to look at all of the evidence and somehow weigh it
23 all up to see whether it was reasonable or not". The circumscribed nature of the Judicial
24 Review process explains why one has to rely on the statement of someone like Mr. Priddis,
25 instead of going back to the primary evidence, and I would entirely endorse Mr. Roth's
26 statement when he said that in proceedings of this nature you do have to rely on that witness
27 statement of Mr. Priddis, because there is nothing to contradict it, which UniChem have put
28 forward on the record.

29 MR. MATHER: Thank you.

30 THE PRESIDENT: Mr. Green, we will just rise for five minutes before you make your closing
31 statement.

32 (Short break)

33 THE PRESIDENT: Yes, Mr. Green.

1 MR. GREEN: It being Friday afternoon, we have reduced your reply to three-and-a-half pages, and
2 if I could hand that up. [Document handed to the Tribunal] I lied actually, it is four-and-a-half
3 pages – a three-and-a-half page note plus a very short note which extrapolates from the maps
4 we were served with yesterday from Phoenix, and I will pick up the points made by Mr. Roth
5 and Miss Bacon this afternoon as I go through our short note.

6 There is a considerable amount of common ground in this case, which is that at the
7 heart of the Decision is the question of the possible constraint offered by both UniChem and
8 AAH, and we say that logically to resolve this issue the OFT have to be completely satisfied
9 about two points: the first was whether UniChem and AAH could offer any competition to
10 Phoenix and EAP and, if so, the extent of that competition.

11 As to the first question, we have reiterated in para.3 some of the bullet points: we had
12 no independent dispensing doctors north of the A14. We had only 1.5 per cent. of supplies to
13 all dispensing doctors across the whole of the East Anglian region, where dispensing doctors
14 are 40 per cent. of the value of sales. We have only a very small share indeed of contestable
15 outlets north of the A14, and just so that you understand the scale of that, we have been able to
16 put together the dots, joined dots, based upon the evidence we were served with yesterday, and
17 the note attached to the note gives you our summation of the dots, and it transpires that
18 UniChem has north of the A14 between 5 and 7 per cent. contestable outlets based on
19 Phoenix's evidence as served yesterday. That is, and this is important, despite the fact, as
20 everybody now knows, we have tied customers and chains who are customers north of the
21 A14. So we have these chains yet we still have only been able to mount a credible customer
22 attack on 5 or 7 per cent. of the contestable outlets. The combined market share, according to
23 Phoenix's evidence, of Phoenix and EAP, depending on how you define the outlets, is between
24 57 and 61 per cent. and AAH between 32 and 34. So this is notwithstanding 15 years' worth
25 of being able to sell something north of the A14, having a tied estate, if one wants to use that
26 language. After all these years UniChem still has only got 5 to 7 per cent. of the contestable
27 outlets. Why, after all these years, is that such a deplorable result which applies? It is because
28 the network focuses on the chains and the tied outlets and is capacity constrained, as
29 Mr. Johnson explained. It is not, as is suggested, patently absurd to suggest that that is the
30 case, a quote from Mr. Cole's statement; that is the facts relating to UniChem's distribution
31 system.

1 In that time, as you know from the evidence, over the course of the 15 years UniChem
2 has acquired and retained a very small number of customers, three in the last five years, only
3 seven since 1990.

4 Analysis of the customers lost by EAP, which was provided in Mr. Cole's statement
5 of yesterday, is extremely revealing. Mr. Roth suggested this morning that the switching
6 analysis set out in Phoenix's new evidence demonstrates the points that he wishes to make.

7 MR. ROTH: Sir, I think my friend is mistaken. I was not referring to new evidence, I was referring
8 to the evidence put in to the OFT before the Decision. I was specifically asked by you, Sir,
9 was this before the OFT, and I took you to annex 23.

10 THE PRESIDENT: The point you were mainly making was that UniChem had bought a number of
11 outlets.

12 MR. ROTH: I think that was Miss Bacon's point. I was referring to the extent to which UniChem
13 had approached some outlets asking them if they were interested in becoming customers.

14 THE PRESIDENT: In the recent period?

15 MR. ROTH: In the recent period, but ----

16 THE PRESIDENT: This is on another point I think.

17 MR. ROTH: I am sorry.

18 MR. GREEN: This is information which is new to us. We know the OFT have seen it, but it was
19 only redacted for the first time to us yesterday – the 15th, so only a couple of days ago. So we
20 have only literally just seen it in the last day or so. But if you would look at Mr. Johnson's
21 statement, which we put in yesterday in response to this new material, starting at para.7 – the
22 head of line point is that all the customers which have switched from EAP, not one has
23 switched to UniChem. 77 per cent. switched to Phoenix and 23 per cent. to AAH. Paragraphs
24 7 to 9 of our second witness statement served yesterday. Not a single one switched to us. This
25 is the table in para.9 – 77 per cent. to Phoenix, which gives you an indication of whether they
26 are actual or potential competitors with EAP, and 23 per cent. to AAH. There were some very
27 odd things in this information, and if it was even remotely influential on the OFT's thinking
28 then they should have picked these things up. We notice, and this is para.7, that there are some
29 serious inconsistencies. Phoenix claims to have lost three pharmacy customers to EAP in
30 2003/2004, but EAP does not record winning the business. Similarly, of the 11 separate
31 pharmacy customers identified by Phoenix as 15 separate entities ----

32 MR. ROTH: Yes, you are right.

1 MR. GREEN: ---- so Phoenix won from EAP, and only two are recorded as losses by EAP.

2 Furthermore, the data provided for Phoenix reveals a large number of repeat entries whereby
3 particular customers repeatedly gained or lost without apparently having been re-lost or
4 regained. Then he makes the point in para.8 about the acquisition of the Moss chemists, but
5 the short point of that is that, as he says, they had had a lack of success in expanding
6 incrementally so the way to expand is through the much more expensive time-consuming and
7 arduous process of acquisition. That is an entry and expansion barrier if ever there was one, as
8 the OFT recognises in the Decision.

9 So the evidence, is there competition by UniChem de facto today of some nature,
10 there is but it is but it is pretty small. Well, what does that mean about question 2? Point 1 is
11 we have given evidence that we are capacity constrained. There is a clash of evidence.
12 Mr. Roth said this morning, and indeed on Monday, that that really was not the issue. They
13 did not examine capacity constraints. They did not take, for example, from us all of our
14 networks, look at them and get any idea of their configuration to see whether they did look like
15 a mass of squashed spiders all over the north of the A14, and they did not ask us what
16 consequences flowed from that in terms of how you could reconfigure it or what our software
17 was. We never got into that level of detail with them, but that is our evidence; that is the case
18 which the OFT never grappled with.

19 But even if the OFT's position were entirely true, and we have some nine networks
20 north of the A14 route, if you are going to expand each of those routes to cover the entirety of
21 East Anglia and represent a credible, viable constraint on Phoenix/EAP you are going to have
22 to add a lot of new customers to your existing route. Each route is going to have to acquire
23 five to 10 new customers. There is no evidence the OFT ever remotely considered anything
24 more than just adding the odd one here or there, but if you are going to take over or exercise a
25 constraint on the entirety of the Phoenix/EAP customer base, there is a wholesale addition to
26 each route which has to occur, and again there is no evidence of that, the OFT did not think
27 about it, it is not just something which crossed the OFT's radar and it is not in the Decision.
28 The OFT's case, as it has developed, is that it is logical to jump from dots on the map to a
29 conclusion that UniChem can expand its existing network structure to compete in the
30 contestable market or market segment, and I use that phrase advisedly, either a contestable
31 market or a market segment because Mr. Priddis leaves open the question of whether it is a
32 segment or in fact a market. So the OFT have got to win on the hypothesis that it is a market
33 in its right because they have left that open as a serious question.

1 THE PRESIDENT: Do you mean the dispensing doctors?

2 MR. GREEN: No, they have left open both, dispensing doctors against pharmacies. I think that is
3 para.81 of the statement (I may be wrong), but also I think para.50 which is contestable
4 segment as against all pharmacies.

5 As to the spreadsheets, they were never put to us. Now we have seen them they show
6 a lot of revealing information, which you have seen already. Mr. Roth accepts the criticisms
7 we make of the spreadsheets, but he says that the OFT did not rely upon them for very much.
8 With respect, we disagree because the Decision makes clear what the OFT relied upon then
9 spreadsheets for. In para.35 of the Decision, in terms of the conclusions it arrives at on the
10 basis of the spreadsheets, it would suggest to us that the OFT viewed it as pivotal. They say in
11 para.35 that Phoenix and EAP have provided detailed spreadsheets setting out the distances
12 between and cut-off times for independent sector customers supplied by all full-liners
13 operating in the region, and that the spreadsheet suggests that the service levels of all suppliers,
14 and that includes of course UniChem, do not necessarily deteriorate significantly in response to
15 distance. So that is a very important proposition for the OFT's case, that there is no
16 deterioration of quality of service, and quality of service is the key to competition with
17 distance; and, secondly, the OFT say that it undermines the suggestion that the full-line
18 wholesalers, including UniChem, cannot effectively compete in parts of East Anglia, and here
19 we are talking about the area north of the A14, because they clearly do provide services for all
20 types of customers in this area.

21 So the conclusions the OFT draws as set out in the Decision are important conclusions
22 for the OFT's analysis.

23 This brings me briefly to cut-off times, and would you please have a look at tab 8 of
24 Phoenix's submission because Mr. Priddis in his statement about cut-off times ----

25 THE PRESIDENT: Just a moment – tab 8 ----

26 MR. GREEN: I am sorry – tab 8 of Phoenix's submission, in their bundle. Just for your note, or for
27 the transcript, Priddis 50, leaving open the product market question of tied or independent, and
28 52, pharmacies and dispensing doctors.

29 Tab 8 gives you an indication of the different ----

30 THE PRESIDENT: Hang on, I just need to open it up.

31 MR. GREEN: I am sorry, it is not that, it is the front piece. It is this little summary. It is a summary
32 chart which has at the top cut-off and delivery times. Mr. Priddis in para.106 says that their
33 view of cut-off times is that pharmacies do not mind if there is a cut time difference of, and he

1 says up to one hour. You can see the difference in cut-off time here between EAP and Phoenix
2 and UniChem, for Ipswich and Norwich, which roughly equates to the area of the A14. If we
3 take Hawk first, which is EAP and “IP” for Ipswich, the cut-off time in the second ----

4 THE PRESIDENT: Which one are we looking at?

5 MR. GREEN: The top left-hand box, Hawk, second box down, “IP”, Ipswich, cut-off 1205 for
6 Hawk, UniChem 1107, so an hour. And then for “NR”, Norwich, cut-off time 1301 and then
7 1101, so two hours difference. Then for Phoenix, “PHD”, Ipswich 1230, the second box down,
8 and 1134, so again about an hour. Then Norwich 1230 and 11 o’clock, so an hour-and-a-half.
9 So the cut-off times are substantial even on Mr. Priddis’s own analysis in para.106, and, as has
10 been pointed out, in the Decision in para.37, cut-off times are valued highly by customers.
11 Well, there is a substantial difference on a matter which customers value highly, and that is
12 simply because, as the OFT recognised elsewhere, UniChem’s depot is further away, and as
13 you get further away you get more time constrained, you can stretch the margins on occasions,
14 but in general terms you become more stretched.

15 THE PRESIDENT: What does it mean, the spreadsheet suggests that the service levels of all
16 suppliers do not necessarily deteriorate significantly in response to distance?

17 MR. GREEN: I think what is being suggested is that, for example in relation to UniChem, even if it
18 is – we have had the example repeated time and time again that we have got one pesky
19 customer on The Wash, and if we can get that far then, blimey, we can sell to anybody. If we
20 can get up to The Wash then what is the problem, and so therefore it cannot deteriorate with
21 distance. We say, and we have given the evidence, we have got a 90 minute isochrone – that is
22 not a marketing tool, it is just simply a description of what happens after the event where most,
23 not all but most, of our customers are based, and that reflects an economic truism for us, that
24 most of our customers are relatively close to us where we can deliver to them quickly and
25 efficiently within the constraints of delivery time, but the further we go out the greater the risk
26 to delivery time and the greater the inability to compete. There is a gradual lessening of the
27 ability to offer the sort of service that the local suppliers, EAP and Phoenix, can offer, and we
28 can still offer a service, and there are one or two customers who are willing to take a service,
29 but in the main it becomes more and more difficult the further we go away from our depot.

30 These factual matters should have been uppermost in the OFT’s thinking, and we
31 have set out some staging posts in para.5. The MMC report in 1996, which we have referred to
32 in our notice of application, but has not figured to date, contains an illuminating table, and

1 I would ask you to look at it. It is a notice of application, the MMC report, p.92, which is p.99
2 of the bundle. These were the MMC's conclusions, or the Competition Commissions'
3 conclusions about drive time on effectively a national basis, and in para.4.50, based upon
4 evidence which they had collected via a survey, which is referred to in an annex, and which
5 they chronicle in table 4.10, they say that the average drive time across the UK is about one
6 hour, and you will see that in the middle of 4.50.

7 If you look at the table 4.10 it is quite illuminating. UniChem – the distance of the
8 average pharmacy from warehouse, the second one down, is 33 miles, and the time taken –
9 0.70 is 0.70 of one hour, so in fact it is about 45 or so minutes. Phillip Harris, a few down,
10 which is now owned by Phoenix, 37, 1.15, 1 hour 15, but if you look at the footnote:

11 “Phillip Harris told us that its average figures relating to third party retail pharmacies
12 only, and that if its dispensing doctor clients and its own retail chains are included, the
13 average mileage would rise to 65 miles.”

14 So they were suggesting that if it is independents they have to be closer to their base than if
15 they are supplying to tied.

16 Then at the bottom, under the heading “Average”, 34 miles and 0.96, so that is
17 fractionally under one hour, which is why the MMC comes to the conclusion that it is about an
18 hour. The entire report was predicated upon the notion that quality of service deteriorates as
19 you move away from your depot, which is a proposition which the OFT apparently rejected on
20 the basis of the spreadsheets. So that was the first staging post.

21 The AAH Decision itself, which we refer to in 5(b) ----

22 THE PRESIDENT: Do we find that in the MMC report, that service deteriorates with distance?

23 MR. GREEN: I have a variety of references which I was not going to ----

24 THE PRESIDENT: We have not really been taken much to this.

25 MR. GREEN: You have not been taken to it. There is a lengthy appendix which is quite
26 informative, starting at p.245 of the bundle, p.197 of the report, which provides some
27 conclusions. Of course these are 1996 conclusions and we do not know whether the market
28 has materially changed. They are almost 10 years old. But there is a great deal of evidence
29 that price was not the principal matter governing competition but the quality of service was,
30 and that is why this table 4.10 was included, because it gave the CC some indication at least of
31 how close people had to be in order to be able to compete. And they say that the conditions of
32 competition vary enormously depending upon such matters as topography, roads, distribution,
33 structure and so on – that is in 4.50 itself. It does not say explicitly that quality of service

1 deteriorates with distance, but the proposition they are seeking to prove in 4.50 and by the
2 table is precisely that.

3 The next staging post on the route to the decision is the AAH Decision. I will not
4 take you back to it, but the OFT recorded in that that having concluded their investigation they
5 were not able to decide whether third party full-line forces could exert a sufficient competitive
6 constraint. So they left that as the open question – see para.34 of the Decision - and it was
7 because they said they had insufficient information on this exact point. So again as of
8 December 2003 the OFT recognised there was a crucial issue in this market in this region.
9 They also recognised they had insufficient information on the point at the confidential
10 guidance stage and the first Issues Letter in July 2004, and they were still raising the same
11 concerns in the second Issues Letter of the 30th November.

12 Mr. Priddis explains in his statement at paras.13 and 24 that the OFT only issues an
13 Issues Letter if there are complex and material concerns about competition, and that is stated
14 explicitly in the covering letter with the second Issues Letter, JSP1, tab 30.

15 That brings me to the question of consultation of third parties. The argument this
16 afternoon has very largely been turned on its head. It has been said of us that we have had
17 ample opportunity to put the information in. With great respect, that is a very unfair
18 submission. There are only two alternative interpretations of the conversation on the 19th
19 November, at tab 7 of our black bundle. They are either that as of that date the OFT had
20 rejected our evidence but, on the contrary, told us it was comprehensive and helpful and they
21 did not want a meeting, in which case they should have told us what their concerns were
22 because they were rejecting our evidence, or they accepted it, and of course 11 days later, on
23 the 30th November, the issued a second Issues Letter reflecting those concerns, so it is entirely
24 credible that they accepted our evidence on the 19th, issued an Issues Letter on the 30th, and
25 thereafter came to reject it, in which case either they should have been clear and told us they
26 rejected it on the 19th or some time after the 2nd or 3rd December they should have come back
27 and said, “We now reject your evidence having accepted it. The real crux of the point is this.
28 Give us your answer, you’ve got 24 hours.” And then they could have come back with a more
29 educated view.

30 We are not saying they have to consult third parties on every single case. Our case is
31 very limited. We do not invite the Tribunal to make sweeping new legal principles about third
32 party rights in this case; we simply say the evidence is such that we were pivotally concerned.
33 The OFT’s crucial point concerned us. In some way, shape or form it should have been put

1 back to us, and we rely on the Court of Appeal’s decision in *IBA* indicating that third parties
2 are at the very least entitled to see the Issues Letter and responses thereto. That is stated in the
3 Court of Appeal’s judgment, and that is guidance for this Tribunal. With respect, we think you
4 ought to take that particular cue. There may be many circumstances ----

5 THE PRESIDENT: It is not explicitly stated.

6 MR. GREEN: It is not explicit.

7 THE PRESIDENT: The Vice-Chancellor simply notes that the Issues Letter was not seen by a third
8 party.

9 MR. GREEN: It is in the context – I entirely accept that, that is absolutely right. It is in the context,
10 we say, of the Vice-Chancellor saying, “Well, at least it could have been done”. We do not go
11 so far as to say we have to see the Issues Letter or the responses thereto, but we do say we
12 should have seen the gist of the spreadsheets, because we say that is crucial and it concerned
13 us. But we could have had communication in some other way, and an appropriate method of
14 communication of the key issues we submit was required at that stage.

15 I would like to now sweep up, for the last few minutes, and deal with some of the
16 points raised by Mr. Roth and Miss Bacon. First of all, the meaning SLC: again there is
17 guidance for you in the Court of Appeal’s judgment, and the relevant paragraphs are the Vice-
18 Chancellor at para.57, Lord Justice Carnwath at para.100. Both of them said that when you
19 have an Issues Letter which raises hypothetical concerns, and they did not put it higher than
20 that, that it was incumbent upon the OFT to explain how those concerns had been dispelled.
21 We are not submitting to you that the second Issues Letter reflected the OFT’s considered
22 Decision. We do submit that it reflected considered concerns which justified the OFT going to
23 a second Issues Letter after all this period, and we take from Mr. Priddis’s statement, paras.13
24 and 24, that the OFT considered those issues to be complex and material concerns.

25 So all you have to do, with the greatest respect, is follow the Vice-Chancellor and
26 Lord Justice Carnwath’s indication that that stage having been reached it is incumbent on the
27 OFT to justify with strong evidence and cogency how those concerns are dispelled or
28 eradicated. But we do submit, and this helps one put the position of AAH into context, that if
29 you assume for the sake of argument that AAH has all the attributes that the OFT attribute to
30 us, namely that it is a vibrant, clear and viable competitor, if you assume that is the case and
31 ask, “Well, all right, UniChem now appears not to be so vibrant, is there an SLC?” So we
32 now, north of the A14, go from effectively from three to two. We submit that, on any view, a
33 duopolistic market a segment market with that concern gives rise to a serious risk of SLC. We

1 would say that in many circumstances going from four to three does because you have got an
2 oligopolistic market. I will not take you back to the references but we have already set out that
3 throughout the investigation the OFT had a concern about four to three, which was that it gave
4 rise to the risk of co-ordinated effects, and those were in the second Issues Letter, and the
5 Decision does not dispel or remove or even address that risk, which is four to three.

6 I should make clear, just to deal with a point raised by Miss Bacon, we are not
7 abandoning any particular points. We accept as the case has gone on the case has become
8 refined, and indeed there are a number of ways in which one can put the case, and in para.10,
9 the last paragraph of our written note, we have categorised the different ways in which the
10 Court of Appeal and in other cases areas of fact have been described and we submit that almost
11 any one of more of these might fit the bill in the present case, and we have given you the
12 relevant paragraphs to the relevant judgments. Each and every one of these we submit could
13 apply, in essence, to the present case.

14 Some final sweeping up points, and I deal with the question of the evidence gap, the
15 point raised by Mr. Mather, which is an important point, and indeed by you, President. This is,
16 we submit, dealt with quite comprehensively by the Court of Appeal in *IBA*, in particular in
17 para.106, and it may just be convenient to very briefly look at the last sentence of 106, which is
18 the last part of Lord Justice Carnwath's judgment. He say, summarising the point shortly ----

19 THE PRESIDENT: Do you want to go to it?

20 MR. GREEN: I think it would be helpful – tab 1 of the OFT authorities. It is the very last paragraph
21 of the judgment. The short point is this, that the Court of Appeal picked up a point made
22 indeed by the Tribunal in *IBA* about the relevance of *Ex Parte Huddleston*, that the obligation
23 of the OFT is to come to the Tribunal with its cards face up on the table, and the Court of
24 Appeal accepted that submission, and in the particular context of merger cases, because it was
25 accepted that a merger decision, given time constraints, may not be as complete as the OFT
26 would otherwise like if they had unlimited time. Therefore the Decision sets out the reasons.
27 They may be somewhat elliptical at times, but nonetheless when the OFT comes to the
28 Tribunal they can expand upon the reasons. They cannot invent new reasons but it can expand
29 and clarify its reasons. It must do so by disclosing the underlying material to the court because
30 otherwise you cannot review those reasons, which may be some what opaque, which is why
31 the Court of Appeal ultimately come to the view that you should be entitled to see the material
32 as a whole. *Ex Parte Huddleston* means the OFT disclose all the relevant material. You can

1 then see all the relevant material and you can judge whether the decision is a good one or a bad
2 one.

3 THE PRESIDENT: *Huddleston* says all the relevant material, does it?

4 MR. GREEN: The Court of Appeal says the relevant material ----

5 THE PRESIDENT: Where do they say that?

6 MR. GREEN: Paragraph 105, all the cards, and then the last sentence of 106:

7 “The question for the Tribunal was not whether the reasoning was adequately
8 expressed in the decision, but whether the material ultimately before it, taken as a
9 whole, disclosed grounds on which the Tribunal could reasonably have reached the
10 decision ...”

11 And then indeed in 105:

12 “... when a challenge is made, there is, at the Tribunal noted, an obligation on a
13 respondent public authority to put before the court the material necessary to deal with
14 the relevant issues ...”

15 THE PRESIDENT: I do not know whether the learned Lord Justices – it is a question of Homer
16 nodding. But does he mean the Tribunal in the last line there or does he mean the OFT?

17 MR. GREEN: No, you are talking about the reviewing process. The question for the Tribunal –
18 stage one is decision, stage 2 is supply of all the relevant material, stage 3 is – as indeed the
19 Tribunal found in *IBA*, you can review the decision in the light of the subsequent material.

20 THE PRESIDENT: I am sorry, forgive me for a minute. The last sentence of 106 says:

21 “The question for the Tribunal [presumably us] was not whether the reasoning was
22 adequately expressed in the decision, but whether the material ultimately before it,
23 taken as a whole, disclosed grounds on which the Tribunal could reasonably have
24 reached the decision it did.”

25 MR. GREEN: I think it is referring to the Tribunal because this is in the context of the argument we
26 were having about the OFT’s time constraints. Sometimes the decisions are not as elegant as
27 they might otherwise be, therefore we have disclosure, therefore the Tribunal can assess the
28 Decision in the light of the disclosed material.

29 PROFESSOR STONEMAN: I think he clearly means the lower Tribunal, the final use of the word.

30 THE PRESIDENT: The second Tribunal means ----

31 PROFESSOR STONEMAN: The OFT.

32 THE PRESIDENT: In this context the OFT I think.

1 MR. GREEN: Yes, I can see that, but I do not think it alters the point, which is that the process
2 contemplated by the Court of Appeal, and was the point which was canvassed, was that
3 because of time constraints these things are never going to be perfect and the Tribunal accepted
4 that evidence would come forward, as did the Court of Appeal, is the point specifically made.
5 The evidence must address the issues which are key to the Decision.

6 THE PRESIDENT: So you say that there will be a lot of evidence that will not necessarily be
7 material to the final decision or maybe peripheral or something, it maybe rather general in
8 nature, but at least evidence that is regarded by the decision maker as material to his decision
9 ought to be before the Tribunal when the challenge is made.

10 MR. GREEN: Yes, at the very least, otherwise this Tribunal cannot perform its function. There may
11 be material which the OFT wrongly concludes in a particular case is irrelevant, but which turns
12 out to have been relevant, and one comes into the *Tameside* position that they failed to address
13 their minds to relevant facts. So what becomes material may be a question of dispute, there
14 may be disclosure arguments about it.

15 THE PRESIDENT: But what are they supposed to do? Are they supposed to cough up the whole
16 file, or are they supposed to be selective, or what?

17 MR. GREEN: There will have to be judgment exercised over it because the OFT are the only people
18 who know what is in the file in the first instance, but it cannot be the case that if the OFT adopt
19 a very broad and abstract description of the case in the Decision that then leaves little or less
20 material comes before the Tribunal which then fetters the ability of the Tribunal to exercise a
21 supervisory function.

22 MR. MATHER: I think his Lordship was saying that it does relate to the time at which the evidence
23 becomes available and later evidence. He does not say whether the material ultimately before
24 our Tribunal taken as a whole disclosed grounds on which the OFT could reasonably have
25 reached the decision it did. Is that not the import of this?

26 MR. GREEN: No.

27 MR. MATHER: It is not.

28 THE PRESIDENT: It does not work grammatically to say the question for us is whether we could
29 have reached the decision we did. It just does not work grammatically.

30 MR. GREEN: Another way of putting it is the way that it was put by the same Lord Justice at para.
31 93:

1 “Although the question is expressed as depending on the subjective belief of the OFT
2 there is no doubt that the court is entitled to inquire whether there was adequate
3 material to support the conclusion.”

4 How can you perform that task unless you have seen the gamut of the evidence? One has to be
5 careful not to get into a semantic quibble which then justifies limited disclosure which then
6 limits the nature of the review.

7 THE PRESIDENT: But the logic of that is they have to disclose the whole lot.

8 MR. GREEN: It is entirely possible in a particular case that might arise, in the compass of the facts.

9 It may not be vast, but in the present case we have had a dispute, or an issue ---

10 THE PRESIDENT: That would be close to the CFI position, I think.

11 MR. GREEN: That is the CFI position.

12 MR. MATHER: I think his Lordship is not actually expressing a view on the volume of material, is
13 he? He is saying it is the material ultimately before it taken as a whole. He is not expressing a
14 view on the quantum in that last sentence.

15 THE PRESIDENT: Going back to 105.

16 MR. MATHER: Going back to 106. He has taken the generality of the evidence which is finally
17 before the reviewing Tribunal, which he calls “The material ultimately before it”. He then says
18 that should be taken as a whole and he then poses the question which should be asked. “Does it
19 disclose grounds on which the ... “ and here I interpolate “lower Tribunal could reasonably
20 have reached the decision it did?”

21 MR. GREEN: I can see that, but it is in the context, for example, of what is stated at 105.

22 THE PRESIDENT: Yes.

23 MR. GREEN: I mean one can become too tied down to particular words in three different
24 paragraphs of the Judgment. One has to stand back and recognise ----

25 THE PRESIDENT: What he is saying to us is “Do not worry too much about the reasons because
26 the reasons in a fast moving scenario like this will necessarily be amplified in the course of
27 proceedings. Look at what you finally know was before the decision maker and see whether
28 that material supports the decision that was reached.

29 MR. GREEN: One would be very loathe to suggest that that would not be appropriate for the OFT,
30 they would be in a difficult situation if we only spent our time haggling over the semantics of a
31 paragraph, which would be unsatisfactory.

32 THE PRESIDENT: Yes.

1 MR. GREEN: Fun – but unsatisfactory. But that is not the process we are engaged in, and that is
2 because of the particular nature of the merger regime under the Enterprise Act because it is fast
3 moving.

4 THE PRESIDENT: I think the Tribunal made in its original Judgment was that the more the
5 material is in the Decision the less of a problem this is, because you do not have to have the
6 whole thing unfolded to go behind the Decision.

7 MR. GREEN: I suspect that in the small minority of cases that come to the Tribunal they will be the
8 sort of cases where there will be a degree of complexity and it will happen. They are, of
9 course, a very small minority.

10 THE PRESIDENT: Yes.

11 MR. GREEN: A couple of final points. I think you have now seen the evidence – Sir, you asked for
12 Miss Bacon’s table to have the blue dots removed, that is because of Mr. Johnson, who
13 explains about the sales force who were alleged to have been aggressively touting that in fact
14 UniChem asked some of its staff to collect information, as it had done in the AAH inquiry, in
15 order to put it in front of the OFT, and that is explained in Mr. Johnson’s statement at paras. 24
16 and 25, that they went out on a fact finding exercise for the purpose of putting submissions
17 forward to the OFT. Yes, there were salesmen out there, and yes, they were talking to
18 customers but it was not for the reason that Miss Bacon suggests it was therefore. Moreover,
19 we have not won a single customer out of that exercise, so if we had been going after business
20 it was singularly unsuccessful.

21 THE PRESIDENT: Yes.

22 MR. GREEN: Finally, *Tetra-Laval*, if I can just make three points about *Tetra-Laval*. We submit
23 that it is relevant simply because it is of persuasive value, it plainly does not bind the Tribunal.
24 It is persuasive because of two reasons. First, because it is based on policy considerations
25 about the review of mergers which are apposite to this Tribunal, they are of general
26 application. More particularly, secondly, it is relevant because it is entirely possible that a
27 merger will come before the Tribunal which falls within the EC merger regulation, but which
28 has been remitted back to the UK under Article 9 to be dealt with under national competition
29 law – Article 9(3)(b). The *Interbrew* case, which went on Judicial Review to the
30 Administrative Court a few years ago, was precisely such a merger. So it can happen. It
31 would be curious if the Tribunal adopted an approach which was entirely out of kilter with that
32 of the CFI.

1 Secondly, so far as the standard of review is concerned, the relevant paragraph is
2 para.39 which has a haunting similarity to *Tameside* and *IBA*. The ECJ said that the CFI's
3 function when reviewing a Commission Decision was – and this is para.39 –

4 “The court recognises that the Commission has a margin of discretion with regard to
5 economic matters but it does not mean that the Community courts must refrain from
6 reviewing the Commission's interpretation of information of an economic nature. Not
7 only must the Community courts inter alia establish whether the evidence relied on is
8 factually accurate, reliable, and consistent, but also whether that evidence contains all
9 the information which must be taken into account in order to assess a complex
10 situation, and whether it is capable of substantiating the conclusions drawn from it.
11 Such a review is all the more necessary in the case of a prospective analysis required
12 when examining a planned merger with conglomerate effects.

13 So the words “inter alia” mean that this is not an exhaustive analysis, but the CFI must
14 examine factual accuracy, reliability, consistency, whether the information was complete, and
15 whether it was capable of substantiating the conclusions. That is very similar to *Tameside*. It
16 is very similar to *IBA* in the way in which the Court of Appeal addressed the facts in *IBA*, your
17 task in *IBA* and therefore we think it is a persuasive value. If the Court of Justice had gone in
18 entirely the opposite direction and had walloped the CFI then I think you would have had
19 problems, because English law might have taken cognisance that the ECJ was moving in an
20 entirely different – I might then have been arguing well, it is nothing but Judicial Review, and
21 it is English and it is parochial. But it has not, it is consistent.

22 The only other point I would like to raise arising out of *Tetra Laval* comes out of
23 para.83, in which the court was considering the question of time, and the short point is, as you
24 may recollect from the *Tetra Laval* Judgment in the CFI. The court said that when you are
25 looking at prospective mergers with future effects, and we are here, we are dealing with what
26 Mr. Roth describes as the potential constraining effect of UniChem, that you must put a time
27 frame to that, in other words if there is a constraining effect is it going to occur next week, or
28 in one year's time or in five years' time? The ECJ said that the CFI was quite right to require
29 the Commission to analyse the effects of any particular conduct or consequence as a question
30 of time, introduced and approved of the temporal element, and we would submit that that is a
31 relevant matter in the present case, because if it is said that UniChem constrains the merged
32 entity, the answer is (a) does it? (b) to what extent, but (c) when? Five years' time, ten years'

1 time? If so that might not be good enough. So there is a temporal element which we would say
2 is also relevant to this particular case.

3 Unless I can assist further, those are my submissions.

4 THE PRESIDENT: Thank you, Mr. Green. Yes, Mr. Roth.

5 MR. ROTH: Sir, the last thing I want to do is to detain the Tribunal at 4 minutes to 5 on a Friday
6 afternoon, but if I could have one minute, because Mr. Green referred to the MMC report
7 which really was not a reply to any point I made, or it had not been opened to you. I would
8 simply ask you, when you look at the report, to note paras. 2.127 and 2.165 because that was
9 an investigation in to a bid by UniChem for Lloyds Pharmacy and you will see the majority
10 recommended that as regards competition in East Anglia it should only be allowed if UniChem
11 divested the Cambridge depot. Also para.6.59 regarding evidence from UniChem as to the
12 extent to which it can compete throughout Gt. Britain. That is the first point.

13 Secondly *ex parte Huddleston* and cards on the table. We have not brought *ex parte*
14 *Huddleston* with us, because I did not know it was going to be relied on in this way. I simply
15 invite you, if I might, with respect, to read it and you will see – it is a very short case – the
16 context in which that is said. Speaking from memory it is a case where the local authority, a
17 county council, was decision challenged and basically said in it first affidavit or letter that this
18 decision was reasonable because we took everything into account that we should have taken
19 into account, and the Court of Appeal went into some detail.

20 THE PRESIDENT: The Tribunal is just going to rise, if you would just be kind enough to rise for
21 wait for a moment.

22 (Short break)

23 THE PRESIDENT: The Tribunal proposes to reserve its Judgment in this case. We will give
24 Judgment as soon as we can. We are aware of the urgency, and the parties should keep in
25 touch with the Registry to discover what progress we are making if you would be kind enough
26 to do so.

27 Thank you all very much indeed for the argument and for all the effort that has gone
28 into producing which we found to be extremely helpful, and we are conscious that it has been
29 done in a very short space of time, and people have worked extremely hard and that has been
30 of very great assistance to us, so thank you all very much indeed.