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

Case No 1059/4/1/06

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

11<sup>th</sup> April 2006

Before:  
MARION SIMMONS QC  
(Chairman)

PROFESSOR ANDREW BAIN

VIVIEN ROSE

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**CELESIO AG**

Applicant

and

**OFFICE OF FAIR TRADING**

Respondent

Supported by

**ALLIANCE UNICHEM PLC**

and

**BOOTS PLC**

Interveners

Mr. Mark Hoskins and Miss Kelyn Bacon (instructed by Linklaters) appeared for the Applicant.

Mr. Peter Roth QC and Mr Daniel Beard and Mr Julian Gregory (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Nicholas Green QC and Miss Maya Lester (jointly instructed by Slaughter and May and Allen & Overy LLP) appeared for the Interveners

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**PROCEEDINGS**

1 THE CHAIRMAN: Can I say at the outset how helpful all the submissions have been. We  
2 appreciate the work which must have gone into it by all the parties, and the co-operation  
3 between the parties in order to prepare the case within the tight timetable. So, thank you very  
4 much. Can I also warn everyone that at ten o'clock the fire alarm goes off. Hopefully we can  
5 ignore the fire alarm today. The timetable for today: you will have seen the letter sent by the  
6 Tribunal yesterday afternoon. We would appreciate those time limits being kept to. We have  
7 included in that timetable forty-five minutes for the intervener, but we do wonder whether, on  
8 the issues that now remain, the intervener adds very much to the OFT. So, we flag up again  
9 our concerns about avoiding duplication.

10 Admissibility. We do not intend to make an interim decision, but will deal with admissibility  
11 as part of our overall decision. I assume that is what was intended. The issues today: we are  
12 proceeding on the basis that Issue 1 of the Grounds of Appeal is no longer being pursued. We  
13 received last night a note from the OFT containing further disclosure of third party material.  
14 At the last CMC it was indicated that the parties probably were not relying on third party  
15 material. We are unclear as to why it is still a live issue. If there is still a live point perhaps  
16 that can be addressed at the beginning of the submissions of Celesio so that, if necessary, the  
17 point can be dealt with at the outset.

18 Can I just mention the question about Mr. Ash's evidence which was the subject matter of  
19 some correspondence yesterday. In Mr. Ash's witness statement, he refers to para. 2.16 of the  
20 Response to the Issues letter. He gives the reference for that as IB32 – it is actually IB30. We  
21 note the response of Celesio. The matters referred to by Mr. Ash were part of the evidence  
22 before the OFT, and accordingly possibly part of what is relied on in para. 46 of the decision as  
23 elucidated in para. 57 of Pritchard. We are therefore a little uncertain as to the effect of the  
24 Linklaters' letter of 10 April, yesterday, and would just like some clarification as to the point  
25 so that we are clear as to the submissions that Celesio are making.

26 Finally, I would just mention the question of how confidentiality is being dealt with today,  
27 having regard to the fact that this is a public hearing. If confidential material is being used  
28 today, then I want to make sure how we are just going to deal with that. Those are my  
29 opening remarks.

30 MR. ROTH: Thank you. First, just picking up your last point, Madam, about confidentiality, just  
31 so that everyone is clear. I hope the Tribunal received a version of the decision which is the  
32 unredacted version, but with those matters that are confidentiality not only, but also, in bold?

33 THE CHAIRMAN: We did.  
34

1 MR. ROTH: I hope it is therefore clear what can be said publicly, and what not. Where express,  
2 specific figures are given in that document, one can, of course, refer to them by giving a range  
3 as in the non-confidential version which is with the application. That is the first point.

4 The second point is just to correct a cross reference in Mr. Pritchard's witness statement, in  
5 Footnote 16 on p.15. This is a Boots document. It should not be OFT1, Tab 11. It should be  
6 intervener's bundle ----

7 THE CHAIRMAN: Sorry? Mr. Pritchard's witness statement?

8 MR. ROTH: It is p.17, I am told. But, it is Footnote 16. The reference should be not OFT bundle,  
9 but intervener's bundle at Tab E/11. We have, I think, managed not to duplicate documents  
10 between the bundles, but that led to some last minute re-bundling. Finally, just in response to  
11 your observation about our note of yesterday – as I am sure the Tribunal will appreciate – that  
12 was purely responsive to the submissions made about disclosure in the Celesio skeleton. That  
13 is why it was put it, and put it when it was put in – because we got that on Friday.

14 THE CHAIRMAN: Thank you. Mr. Hoskins, taking the last point first, is the third party matter still  
15 a live issue?

16 MR. HOSKINS: I think it is, because our understanding at the CMC was the same as you have  
17 indicated this morning. I do not know if you have the transcript in front of you of the CMC. At  
18 p.3 of that transcript I say at the top, "I think we're pretty well there in relation to our material,  
19 which is one outstanding issue which Mr. Roth and I have been discussing, but I'm hoping we  
20 can simply agree that between us, but it's not been raised with me as an issue". Third party  
21 confidentiality ---- I do not how big an issue it is at this stage. Obviously, all I can say is that  
22 we will want to see anything that is relevant, but I do not see how they are to seize that issue. I  
23 was certainly under the impression that if third party material was going to be referred or relied  
24 upon by the OFT, some steps would be taken to have it disclosed – or a least the OFT would be  
25 alive to the issue that it is wanted to rely on third party material; that there was an issue about  
26 disclosure.

27 Mr. Roth dealt with third party material at p.6 of the transcript. It begins at l.3. He says,  
28 "The third category is what has been referred to as third party material. At the moment I would  
29 ask you not to hold me to that because we have not finished our submissions. Really, the only  
30 third party material concerned is that from the applicants themselves, either in this case or in  
31 the Lloyds case just beforehand". So, that is what I understood they were going to refer to and  
32 rely upon. Indeed, at the end of that section – if we pick it up again at l.12, Mr. Roth said,  
33 "Beyond that we do not at the moment see that we would be wishing to disclose third party  
34 submissions. That does, as you know from previous cases, present problems" because the third

1 party who is concerned about the confidentiality is not here to address you because in the past  
2 in these cases one has managed without having to do that.

3 So, my understanding, coming away from that CMC was that there would be no reliance on  
4 third party material by the Office, and yet when one got the skeleton and Mr. Pritchard's  
5 witness statement, there is reference frequently, particularly in Mr. Pritchard's witness  
6 statement, to third party material.

7 THE CHAIRMAN: Have you identified what the third party material you consider the OFT are  
8 relying on which you want to see?

9 MR. HOSKINS: Madam, that is not the way we put the point. The point is this: the respondent in  
10 judiciary proceedings has an obligation of full and frank disclosure. We know, because Mr.  
11 Pritchard tells us, that the Office received submissions from twenty-eight third parties,  
12 including Celesio. The only material we have before the Tribunal are the merging parties  
13 materials and our materials. We have seen nothing of the 27 other third parties. Mr Pritchard  
14 refers to third parties' materials in part of the narrative and very much so in support of the  
15 Office's case; he will refer to third parties where it supports the Office's case. We say it is  
16 self-evident that amongst the material provided by the 27 other third parties there must be  
17 some material that undermines the Office's case, it would be extraordinary of all the 27 other  
18 third parties who intervened were all in support of the merger – it is possible, but we say highly  
19 unlikely.

20 Sir, the problem we have is that in a normal judicial review if the respondent wants to rely on  
21 third party material, it would start with the obligation of full and frank disclosure and should  
22 have to say "This is the third party material that helps us, but in order to be fair there is some  
23 third party material that does not help us, and here it is. The problem here, of course, is the  
24 confidentiality issue: because of the expedited nature of the proceedings, technically what the  
25 Office could and should have done, if there were a longer timetable, is to deal with the third  
26 party issue, because of course it is not simply that it can never disclose third party material. If  
27 the Tribunal makes an order, for example, then that third party material can be used, but ideally  
28 one would want to hear the third parties before making an order. That is the catch 22 and that  
29 is the situation we are in. It is not that we want to say well actually we want to see all 27  
30 documents for the sake of it, our point is the one that we refer to in the skeleton and it is a point  
31 that was grappled with by the Tribunal in the *IBA* case, which is how do you deal with this  
32 catch 22? On the one hand judicial review requires full and frank disclosure – good and bad  
33 material has to be disclosed – and on the other, because of the confidentiality issue – you often  
34 do not see it. That is the way we raise the point and that is why we rely on the way in which  
35 the President dealt with the point in *IBA* because it seems to us that that is the only place where

1 it has actually been considered as a specific issue, and it seems to us that that is the right  
2 solution.

3 That is the way we raise the point and that is the way in which we rely upon it, that is the  
4 issue that was dealt with by the President in *IBA* and we say that is the proper approach in this  
5 case. There is no specific disclosure application, that is not our point, our point is that it is the  
6 Office's full and frank disclosure and their hands are tied by confidentiality; the question is  
7 what flows from that.

8 THE CHAIRMAN: Shall we hear what Mr Roth says?

9 MR ROTH: Thank you. I can either deal with this fully now, or in substantive submissions, but the  
10 short point is that this is really quite an extraordinary opposition that Celesio is taking. Third  
11 party material is relied on repeatedly in the Decision; this is a challenge to the Decision. You  
12 have read and I suspect re-read the Decision by now, and repeatedly in the relevant sections is  
13 reference to third parties saying this; indeed, at the end there is a whole sub-section of the  
14 Decision headed "Third party submissions", saying how important they are, and of course they  
15 are important in every one of these cases – that is well-known to everyone involved in the  
16 procedure. When at the CMC I broke down the issues of disclosure into three and said that the  
17 first was the Decision itself, which is the page before that was read, you may remember, the  
18 second those UniChem submissions, the third the third parties, and I said the only third party  
19 submission that seems to create any issue is the Lloyds Cohen because we wanted to rely on  
20 that because of who the applicant is in this case. I made quite clear that we would wish to  
21 disclose other third party submissions; you made clear, madam, that if there were any wish to  
22 see them, because I referred also to our restrictions on the Part 9 of the Enterprise Act – so we  
23 are not like any other respondent, we cannot just put it on the table.

24 THE CHAIRMAN: That is accepted by everyone.

25 MR ROTH: Which is accepted. That you would be available for an application to make an order if  
26 necessary. The applicants did not make any application; having decided not to make an  
27 application they say now the Tribunal is stuck in a catch 22 and the only way that can be  
28 resolved is by annulling the decision and making, effectively, instruction that when it is  
29 reconsidered should be referred to the Competition Commission. They rely on what the  
30 Tribunal said in *IBA*; the Tribunal indeed did say that that is a problem and those are precisely  
31 the remarks of the Tribunal which received, to put it slightly impolitely, robust criticism from  
32 Carnwath LJ in particular in the Court of Appeal, saying there is not that problem at all and  
33 that that is a misunderstanding of how judicial review works. I can take you to the passage,  
34 but I suspect you are familiar with it and we refer to it in our skeleton argument. So there is no  
35 such grounds for complaint here whatsoever, and no difficulty arises, there is no catch 22 and

1 what the applicants are seeking, as Mr Hoskins, frankly, made quite clear in what he just said,  
2 is to fish around and see if there is something that might help them, because as he put it is very  
3 unlikely that among the 27 third parties there is not something that might help the applicants, so they  
4 want to conduct a sort of adversarial litigation – in fact going beyond that even under the  
5 traditional old-fashioned disclosure test, a *Peruvian Guano* exercise, seeing if they might find  
6 something there, and they are relying on it. That is not the approach to disclosure in judicial  
7 review and this whole point is completely misconceived.

8 THE CHAIRMAN: What concerns us is the relevance and whether, in fact, on the issues which are  
9 now going to be decided there is any third party material which is relied upon.

10 MR ROTH: You appreciate, of course, Mr Pritchard made his witness statement before ---

11 THE CHAIRMAN: Absolutely that is why ---

12 MR ROTH: So a lot has fallen away now.

13 THE CHAIRMAN: And whether there is anything there. That is why I put it in the way I did at the  
14 beginning, whether there is anything there that is relied on which is third party material, or  
15 whether that really all went to the first issue which has now gone.

16 MR ROTH: This is now, effectively, a reasons challenge, saying that the reasoning is not adequate.  
17 That is what it comes down to, in effectively the amended grounds, and on that I think the answer  
18 is not, although looking at Mr Hoskins and Ms Bacon's skeleton it does sometimes seem to  
19 stray back occasionally into a sort of substantive grounds as opposed to a reasons ground, but  
20 on the approach whereby the OFT decided that there is no risk of an SLC at a four to three  
21 reduction as opposed to the possibility of a three to two eventual reduction, that is not on the  
22 basis of third party comments and so, if I may say so, it is not relevant to what seems to be now  
23 the real point in this case.

24 THE CHAIRMAN: We will have to see how that turns out.

25 MR HOSKINS: If Mr Roth's position is that he is not relying on this any more, I do not have a  
26 problem, but if when Mr Roth comes to make his submissions he is saying that we have found  
27 that there was limited competition etc because Pritchard tells us that it is so, and one of the  
28 reasons is because third parties told us, that is where the problem arises. As you will see from  
29 our skeleton, our challenge is a clean judicial review one, but it is the OFT that has muddied  
30 the waters because the first point I am going to turn to is you have the Decision and you have  
31 Pritchard and they do not match.

32 THE CHAIRMAN: Probably the way to proceed now is just to see what Mr Roth does, but Mr Roth  
33 having heard what has been said, my understanding at least at the moment is that you are not  
34 relying on any third party material for the issue which is now before us.

1 MR ROTH: Not on that specific point, but of course the decision, as Mr Pritchard explains, on four  
2 to three, as on three to two, as on two to one – although it is not complained of – all of them  
3 are based on the evidence of how the market works and what sort of competition in the market  
4 exists, and that did of course depend on evidence from everyone – third parties, Celesio, the  
5 merging parties, customers, ECTs and so on, and that is of course what is in 36, where they  
6 describe the nature of competition and pricing and so on. Yes, all of that is the background  
7 against which one judges how much competition is there in this market. That is clear, it is  
8 clear from the Decision, you do not need to look at Mr Pritchard.

9 MR HOSKINS: It strikes me that there is probably not much point in debating it any further now, let  
10 us see where it goes.

11 In relation to Mr Ash's evidence, Mr Pritchard made some factual points that were not in the  
12 Decision so it was the first time we had seen them, about regulation of opening hours and the  
13 requirement to have a consultant's area. Obviously, my clients, when they saw this, said that is  
14 simply not right, so we thought it was important, given that that had arisen that Mr Pritchard's  
15 witness statement should correct that. As I said, I am not intending to make a free-standing  
16 submission on it, but it seemed to us that it was important to correct what we believed to be a  
17 factual error in Pritchard. It is probably not going to go anywhere with the Tribunal today  
18 because it is not the sort of issue that you can decide. It may well be that if it goes back to the  
19 OFT the point will be taken up.

20 THE CHAIRMAN: Except if we referred it on a point it would not be taken up.

21 MR HOSKINS: Sorry, if you referred it on a point it would not be taken up?

22 THE CHAIRMAN: If we quashed the Decision and referred it back completely then the whole thing  
23 is going to be considered, but we do not have to refer back the whole of the Decision so it may  
24 be, I do not know, that we decide to refer back on a limited basis, and then it would not be  
25 taken up.

26 MR HOSKINS: It depends whether it was relevant to the particular reference back, but that is  
27 something that can be worked out after the event. It just seemed to us it was important not to  
28 leave that issue unchallenged, but it is not something I am going to make a free-standing  
29 submission on today. If, by the time we come to the end of my reply, there is a concern with  
30 the Tribunal about relevance and how that is viewed, obviously I can address it then, but I  
31 suggest it is probably one where we see if there really is a need to focus on it in submissions.

32 THE CHAIRMAN: Is it part of the evidence on which the OFT would rely in paragraph 46?

33 MR HOSKINS: Of the Decision? We say the first sentence of paragraph 46 is a statement of a  
34 conclusion not a reason, but it is material that Mr Pritchard refers to when he tries to gloss the  
35 Decision, so our submission would be that this point is not relevant to the Decision, certainly

1 not in relation third party paragraph 46, but if we get into looking at Mr Pritchard then it might  
2 become relevant.

3 THE CHAIRMAN: You say it is not a point that was taken in the Decision.

4 MR HOSKINS: It is not on the face of the Decision.

5 THE CHAIRMAN: It is now being said that it is somewhere in the Decision, by Mr Pritchard. If Mr  
6 Pritchard is elucidating the point paragraph view which is the OFT's point of view then it  
7 would be part of the Decision.

8 MR HOSKINS: We have made the point that we actually think that is an error of fact, but if I lose  
9 on all my submissions today and that is the only thing that is left, I will not be submitting that  
10 we nonetheless win the case on that point.

11 THE CHAIRMAN: Thank you.

12 MR HOSKINS: In terms of the bundles, it is probably worth making sure quickly that we are all  
13 working from the same script. There should be three applicant's bundles, there are the first  
14 two which are white bundles and are our applications and authorities, and we have submitted a  
15 further short bundle with our skeleton in.

16 THE CHAIRMAN: If it helps you, the two white bundles are marked for us 1 and 2. The extra  
17 bundle is bundle 6. I have it as a blue bundle. Then we have Confidentiality A and B as 3 and  
18 4. The intervener is 3, the OFT is 4 and we have a bundle of authorities which is 5.

19 MR HOSKINS: Thank you very much.

20 THE CHAIRMAN: Does that sort that out?

21 MR HOSKINS: It does, and I will try and keep to those numbers. If I could just base my  
22 submissions on the skeleton argument as I think that is the quickest way to do it, the scope of  
23 the appeal we have set out and I will obviously take you through that. The test for review by  
24 the Tribunal – this is picking up the skeleton at para. 3 ---- There is probably no harm in just  
25 starting at the beginning and very quickly looking at the sections. I am sure you are well aware  
26 of them. We have copied them, just for ease of reference. I do not know if that is going to be  
27 easier if I hand them up. (Handed) We are concerned primarily with three sections, but it is  
28 worth looking at four of them. Section 33 is the duty to make references, and, in particular,  
29 Section 33(1)(b) is the section we are concerned with. Obviously, the crucial point there is that  
30 the OFT has to make a reference if it believes that it is, or may be, the case that the creation of  
31 that situation may be expected to result in an SLC. So, the double 'may' is obviously  
32 important. Section 36 is just useful terms of contrast, and one sees it in the judgments –  
33 because that is the obligation on the Competition Commission if a reference is made. Again, it  
34 is Section 36(1)(b): "The Commission shall, on a reference under Section 33 decide the  
35 following questions". One sees in the cases the distinctions made between the OFT's role and



1 the ---- Section 73 is the power to accept undertakings in lieu of a reference and it is  
2 particularly Section 73(2) that we are concerned with. Section 120 is the power of the Tribunal  
3 to conduct a review, and, in particular, one needs to look at Section 120(1), 120(4) (which is  
4 where one sees the parallel of a review being drawn) and (5) which is the powers of the  
5 Tribunal which differ from an infringement appeal. (After a pause): That is the complete  
6 statutory framework that we are concerned with.

7 In terms of the cases, all the parties have summarised bits of the cases, etc. Can I just take  
8 you to just a very few paragraphs, just to highlight the particular ones upon which we rely. If I  
9 can start with IBA in the Court of Appeal. That is in Bundle 2, Tab 6. First of all, looking at  
10 the Judgment of the Vice-Chancellor which begins at para. 1, I would like to pick it up at para.  
11 47, at p.10. Paragraph 47 distinguishes between Section 33(1)(b), which is the OFT's  
12 obligation under Section 36, "The belief that must be held by OFT under Section 33(1)(b) is  
13 that it is, or may be, the case that this introduces two alternatives. The certainty posed by the  
14 word 'is' and the possibility envisaged by the words 'may be'---- " and the Vice-Chancellor  
15 goes on to distinguish between Sections 33 and 36.

16 Paragraph 48 is important because he explains: "At the other end of the scale, it is clear that  
17 the words 'may be the case' exclude the purely fanciful because the OFT, acting reasonably, is  
18 taken to believe that fanciful may be the case. In between the fanciful and the degree of  
19 likelihood less than 50 percent, there is a wide margin in which the OFT is required to exercise  
20 its judgment".

21 So, if the prospects of there being an SLC are between fanciful and 50 percent or above, then  
22 there is an obligation to refer.

23 Then para. 58 – this is the debate about the application of the Wednesbury test in the context  
24 of this particular statutory context. First of all, at para. 58 the Vice-Chancellor sets out certain  
25 of the paragraphs in the CAT Judgment (223, 224 and 225). If I can ask you to look at 225,  
26 which is at the top of the second column on p.12, "As a matter of general approach, the broad  
27 question we ask ourselves is whether we are satisfied that the OFT's decision was not  
28 erroneous in law, and was one which it was reasonably open to the OFT to take, giving the  
29 word 'reasonably' its ordinary and natural meaning". That is what the CAT said was the  
30 approach. At para. 64 the Vice-Chancellor accepts that is a proper approach. "For these  
31 reasons I reject the first and third objections raised. I do not consider that CAT adopted the  
32 wrong standard of unreasonableness when seeking to apply the Wednesbury test". So, their  
33 application is, "Was the decision reasonable in the ordinary meaning of the word?"

34 If I can look at UniChem, which is in the same bundle at Tab 3? UniChem was a decision of  
35 the Tribunal, having had the benefit of the Court of Appeal's Judgment in IBA. If I can ask

1 you, first of all, to turn to para. 168, which is on p.67 ---- The previous pages, beginning at  
2 p0.63, are where the Tribunal sets out what the Court of Appeal found in IBA. So, it is simply  
3 a recitation of IBA. But, a new point comes in at 168 and 169. There is a reference to the  
4 European Court of Justice and Tetra-Laval. Simply picking up the quote as to the standard of  
5 review to be adopted ---- I pick it up about half-way through: “Not only must the Community  
6 courts **inter alia** establish whether the evidence relied on is factually accurate, reliable and  
7 consistent, but also whether that evidence contains all the information which must be taken  
8 into account in order to assess a complex situation, and whether it is capable of substantiating  
9 the conclusions drawn from it”. We are going to rely in particular on those two principles –  
10 the need to take into account ---- the need to make sure that the evidence before the decision-  
11 maker contains all the information necessary to take account of a complex situation, and also  
12 whether the evidence that is before the decision-maker is capable of substantiating the  
13 conclusions drawn from it. Those will feature very heavily in our submissions.

14 Over the page, at p.68, para. 172 elucidates further on this notion of something between  
15 fanciful and less than 50 percent. The Tribunal said in the third sentence of para. 172, “We  
16 also accept Unichem’s point that when, in para. 48 of IBA the Vice-Chancellor said ‘between  
17 the fanciful and the degree of likelihood of less than 50 percent there is a wide margin on  
18 which the OFT is required to exercise its judgment’, he was not implying that the OFT had a  
19 wide discretion – only that the degree of likelihood of an SLC will vary widely, depending on  
20 the circumstances”. That meets a point which one finds in the interveners’ skeleton argument  
21 where they say that that passage of IBA means the OFT has a wide discretion. That is clearly  
22 not correct, because the Tribunal has told us that in UniChem.

23 Paragraph 173 – “We also accept the submission that the Tribunal’s approach must be multi-  
24 layered. The first question is whether the OFT has properly evaluated the primary facts of the  
25 case. The second question is whether on those facts the OFT was entitled to draw the  
26 conclusion that there was an insufficient likelihood of SLC”. One sees there an echo – a  
27 parallel – with the second part of Tetra-Laval that I just referred to, and indicated that we are  
28 relying on.

29 Then, para. 174 – “A succinct expression of the legal test is set out in ----“ etc. It looks at the  
30 concept of reasonableness. Picking it up about half-way through that paragraph, “Indeed, it  
31 appears to be common ground that the Tribunal has jurisdiction, acting in a supervisory, rather  
32 than appellate capacity to determine whether the OFT’s conclusions are adequately supported  
33 by evidence; that the facts have been properly found; that all material factual considerations  
34 have been taken into account and that material facts have not been omitted”. So, again, one  
35 sees the two points that we are focusing on. First of all, have all material factual

1 considerations been taken into account? Secondly, have the facts that have been taken into  
2 account ---- are they sufficient to support the conclusion? Are they adequate to support the  
3 conclusion? That, we say, is the legal framework. That is certainly the legal framework that  
4 we rely upon.

5 If I can pick up our skeleton argument at the bottom of p.4 – the nature of the appeal – I can  
6 begin to look at the relationship in law between the decision and a witness statement that seeks  
7 to expand upon it. In this case, obviously, the review is of the decision, and the question is  
8 what relevance, what weight, etc., what admissibility does Mr. Pritchard’s evidence have?  
9 The best place to see the legal principles applicable to this is in Somerfield, which is in Bundle  
10 5, Tab 13. Somerfield was an appeal against a decision of the Competition Commission –so,  
11 the next stage from this. But, at p.24 and onwards the Tribunal considered the issue as the  
12 heading indicates – Witness Statements in a Judicial Review under Section 120. It made  
13 general observations that apply equally to this sort of review.

14 If I can look at two particular paragraphs – the ones identified in the skeleton argument. First  
15 of all, para. 64. This is looking at the general principle in judicial reviews. We are not looking  
16 at just Section 120 reviews. This is the general principle of judicial review in **Ermakov**. “The  
17 court can and, in appropriate case, should admit evidence to elucidate or, exceptionally, correct  
18 or add to the reasons; but should, consistently with Steyn LJ’s observations in **Ex Parte**  
19 **Graham**. Be very cautious about doing so”.

20 That is clearly a statement that applies generally to judicial review. Equally at para. 67:  
21 “Accordingly, we would anticipate that in most cases such as this supplementary witness  
22 evidence from the CC should be kept to a minimum. As with judicial review generally [so we  
23 are about again to get a general statement about judicial review, not just a review of CC  
24 decisions] any witness statements that are necessary should be closely cross-referred to the  
25 report under consideration with any appropriate explanation of the relevance of the additional  
26 evidence, bearing in mind that it is the report, not the witness statement that is the subject of  
27 the review. While it may be helpful for a witness statement to elucidate technical matters  
28 contained in the report or respond to evidence submitted by the applicant, witness statements  
29 are not submissions and should not need to repeat or place any particular gloss on the report in  
30 question”.

31 The interveners say Somerfield is only about a review of CC decisions, and these two  
32 paragraphs clearly show that there are general statements about the scope for evidence  
33 supplementing a decision in judicial review.

34 THE CHAIRMAN: In para. 66 there was a distinction made between the CC and the OFT, and that  
35 is, for my part, quite an important distinction.

1 MR. HOSKINS: There is a distinction. However, at para. 64 **Ermakov** is undoubtedly a general  
2 judicial review, and para. 67, because of the words in the second sentence, as with judicial  
3 review generally, is clearly making a statement that is valuable. I accept that CC decisions are  
4 more fully reasoned. I simply rely on the general statements that we see.

5 I am sorry to switch back - but I think it is important to take these things in order – to IBA  
6 very briefly in the Court of Appeal. In Bundle 2, Tab 6, at para. 106 he says there is certainly  
7 nothing unusual, particularly in a case which has to be dealt with in a relatively short time  
8 scale for the stated reasons that will be amplified by evidence before the court. “In some areas  
9 of the law the court may need to be circumspect to show that this is not used as means of  
10 concealing or altering the true grounds of the decision. That does not arise in this case. As I  
11 understand it, no objection had been taken to any of the evidence to be put before the Tribunal  
12 or additional evidence adduced in the Court of Appeal”.

13 So, the first point is that whilst in that case no objection was taken to the extra evidence  
14 submitted, it is clear that evidence may not be admitted which is used as a means of concealing  
15 or altering the true grounds of the decision. That is probably self-evident. We probably do not  
16 need Lord Justice Carnwath to tell us that. There it is in black and white.

17 You will have seen from our skeleton argument that our submission is that Mr. Pritchard  
18 does introduce evidence that is inconsistent with the decision, or at the very least glosses the  
19 decision. I will develop that point when I come to Mr. Pritchard’s witness statement. What I  
20 would like to begin with is the decision itself. In the skeleton argument at p.6 onwards I have  
21 set out the relevant paragraphs of the decision. It is probably also useful to have a copy of the  
22 decision open at the same time so that one can see the context. The decision is in Bundle 1 at  
23 Tab 3. As the Tribunal will be aware, in the decision there is a finding that an SLC may arise  
24 in relation to areas where there is a reduction from two fascias to one, and three to two areas.  
25 In relation to four to three areas, the conclusion is that there may be a lessening of competition,  
26 but it is not expected to be substantial. That is basically what that bit of the decision is about.

27 However, it is important to look at the reasoning by which that conclusion is reached in the  
28 decision. First of all, the starting point at para. 38 ---- If one looks at the decision at para. 33  
29 on p.9, different evidence that was available to the OFT is set out, and then at para. 38, the sub-  
30 conclusion in terms of the reasoning that has been put forward there is that there is nonetheless  
31 some evidence to suggest that the reduction in pharmacy fascia numbers could bring about a  
32 reduction in competition whether by lowering service/quality levels, or reducing choice in the  
33 quality of level, or affecting prices, particularly for fee medicine. So, an acceptance that there  
34 is some evidence to suggest possible reduction in competition as a result of reduction in fascia  
35 numbers.

1        Then, if one looks through the decision and goes to para. 43, one finds what is entitled  
2        ‘Conclusion on Local Overlap Analysis’. So, this is bringing everything together. In para. 43  
3        one finds the conclusion which is reached in relation to two to one areas. I have picked up ----  
4        It is the last part of para. 43. It is in my skeleton argument at para. 16. “The parties internal  
5        documents do, however, show that a level of competitive interaction between retail pharmacies  
6        does exist, and that new entry will usually prompt some competitive response. Such evidence  
7        will clearly [and obviously I emphasise the word ‘clearly’] suggest that the reduction in  
8        pharmacy fascias from two to one within a one mile radius could lead to reduction in the  
9        incentives to compete, and have a detrimental effect on various matters”.

10       So, the structure of para. 43 is that there are things that go in terms of finding a reduction in  
11       competition, and things that suggest not a reduction in competition, and then the conclusion in  
12       relation to 2(1). There is clearly, in relation to two to one reductions, the possibility of a  
13       reduction in competition. It is important to understand the structure of the reasoning –  
14       weighing up in conclusion the use of the word ‘clearly’.

15       One then finds the same structure in relation to three to two reductions in para. 44. It starts  
16       with, “The pharmacy sector is unique in terms of being a highly regulated retail sector ----“  
17       etc., etc, but then comes the conclusion: “What does the OFT actually conclude?” Again, I am  
18       going to set it out in our skeleton at para. 17(a) . It is the last few sentences of para. 44. “Even  
19       in those areas [that is the three to two areas] switching of customers between Boots and  
20       UniChem stores may be high [not just ‘may happen’; ‘may be high’] and for a large proportion  
21       of customers [so, not for some customers – for a large proportion of customers] Boots and  
22       UniChem would be the closest competitors.” Then the next part: “This may arise particularly  
23       in those localities where the merging parties’ pharmacies are located close together. In such a  
24       situation, the competitive scenario post merger does not significantly differ from that in the  
25       two to one areas”.

26       Then, at para. 45 it considers the barriers to entry and concludes, “On balance the OFT  
27       believes that an SLC may go beyond those areas outlined at para. 43 [that is, two to one areas]  
28       and may also arise where facia are reduced from three to two within a one mile radius”. So,  
29       those are the conclusions in the decision on three to two reductions. It is clear that the  
30       conclusions are as follows (and this is para. 18 of our skeleton), “The OFT finds in the decision  
31       that a reduction from three to two may lead to an SLC in all such areas – not just some three to  
32       two areas, or a very limited number of three to two areas” – because that is what is said in para.  
33       44. One can see that point particularly if one looks at the third last sentence of 44 and the  
34       second last sentence of 44. The third last sentence has the general conclusion of an effect on

1 competition. The second last sentence says, “And this is a particular problem in certain  
2 areas”. It is not saying that it is not a problem in the other areas.

3 PROFESSOR BAIN: Could I just ask, Mr. Hoskins: you are distinguishing between the word  
4 ‘particularly’, which you stress, and an alternative which might have been ‘in particular’.  
5 These would have different connotations. You are stressing that the word used is actually  
6 ‘particularly’.

7 MR. HOSKINS: I am stressing what we say is the juxtaposition between the third last sentence and  
8 the second last sentence, and we say the only natural reading, given the general terms of the  
9 third last sentence which finds that switching of customers in three to two areas may be high,  
10 and for a larger proportion of customers in three to two areas means UniChem would be the  
11 closest competition. We say the only natural reading of that is in three to two areas generally.

12 PROFESSOR BAIN: If you were to change ‘particular’ to ‘in particular this may arise in those  
13 localities’, that, to you, would change the sense of that sentence.

14 MR. HOSKINS: I am not sure. My submission would be that it would not make a difference.

15 THE CHAIRMAN: Mr. Hoskins, following on from that, in such a situation is that referring to the  
16 previous sentence so that there were sort of three levels, and they are looking at the whole area,  
17 and they say that for a large proportion of customers ----- and then ‘this may arise particularly  
18 where the merging parties’ pharmacies are located close together’ ---- in such a situation, i.e.  
19 where the merging parties’ pharmacies are located close together, the competitive scenario post  
20 merger does not differ.

21 MR. HOSKINS: I think it is ambiguous. I think it could either refer to ‘in such a situation of  
22 three to twos’ or in the particular situation of three to twos, where Boots and UniChem are the  
23 closest competitors. I do not know the answer. It is ambiguous.

24 THE CHAIRMAN: Is that not an area where maybe we ought to look at Mr. Pritchard and see  
25 whether he helps us out?

26 MR. HOSKINS: If he helps us out on that. But, of course, as we will see when we come to Mr.  
27 Pritchard, he throws the baby out with the bath water because he does not get anywhere close  
28 to this sort of analysis. That is the problem with Mr. Pritchard. But, certainly, if Mr. Pritchard  
29 dealt with that ambiguity in a way which was not a gloss or inconsistent, yes, that is the sort of  
30 thing one could look at Mr. Pritchard for.

31 So, there are two points in relation to the three to two reductions. First of all, the finding is  
32 that there may be an SLC in relation to all three to two areas. Secondly, it is important to look  
33 at the nature, or the degree, of the lessening of competition that is identified. It is not low  
34 level; it is not marginal. It refers to high switching of customers, and it refers to ‘for a large

1 proportion of customers Boots and UniChem would be the closest competitors'. So, it is not  
2 marginal competitive effect – it is high, and it is a large proportion of customers affected.

3 THE CHAIRMAN: So, for your case do you need to go as far as the highest – in other words, all  
4 cases – or is it sufficient for you that it is limited to the last sentence?

5 MR. HOSKINS: It depends how tailored the Tribunal's remittal is, because we say there is a  
6 problem with all three to two areas, and we also say, further or alternatively, the OFT has  
7 failed to appreciate that insofar as there as there may be a problem with just some three to two  
8 areas, you may have a problem with just some four to three areas. But, I certainly do put my  
9 case at the moment on all three to two areas – on our further or alternative reasons.

10 Then one goes to what is said in relation to para. 46, which is obviously the most crucial  
11 paragraph of the decision for the purposes of this appeal. It really breaks into three sections.  
12 The first section is the first sentence: "Any higher reduction in facia number than this – for  
13 example, four to three or higher – could also give rise to a lessening of competition. But, on  
14 the basis of the evidence before the OFT it believes that this cannot be expected to be  
15 substantial".

16 The second part is the next sentence. "One major competitor suggested that it would be usual  
17 to face two other competitors within a local area".

18 THE CHAIRMAN: That is abandoned, is it not?

19 MR. HOSKINS: Exactly. That is abandoned. The third part is, "Moreover, the CC's 1995 report  
20 considered only two to one facia reductions. While there have been small changes to the  
21 market since then ... removal of resale price maintenance on OTC medicines, which might  
22 suggest some small increase in the scope for potential competition, these changes do not  
23 support an argument that reductions from four to three fascias might give rise to competition  
24 concerns". There is an obvious typographical error there. It should be the 'MMC's 1996  
25 report' that is referred to.

26 So, let us break down the three sections of para. 46. The first sentence is not a substantive  
27 reason at all. It is simply a statement of the OFT's conclusion. It is simply saying, "On the  
28 evidence we conclude this ---- "It has got a reason which explains why that conclusion was  
29 reached. But, in any event, one has to bear in mind what has already been said in relation to  
30 two to ones and three to twos. In relation to two to ones, the decision has already said that the  
31 reduction could clearly have an SLC. It is important that that is the conclusion that is reached  
32 in the decision. It is not simply part of the reasoning. That is the conclusion, weighing up  
33 everything that went before. Similarly, with three to two, the conclusion that is reached is that  
34 in three to two areas generally, switching between Boots and UniChem may be high, and for a  
35 large proportion of customers, Boots and UniChem would be the closest competitors. So,

1 against that backdrop, having identified significant competition concerns two to one and three  
2 to two, if all that was in the decision was the first sentence of para. 46, we would have an open  
3 and shut case because against that backdrop, simply to turn round and say, “Having looked at  
4 everything we think there is not a problem with four to threes” really does not take anyone  
5 anywhere. There is no attempt to give reasons. There is no attempt to grapple with the  
6 substantive issue.

7 So, the first sentence, we say, is not a reason. It is simply a conclusion. Let us look at the  
8 two substantive reasons that are giving in the decision. The first one, madam, as you pointed  
9 out, is abandoned. So, that goes. Strike it through. The second one is the reference to the  
10 findings of the 1996 report, and the suggestion that even with the removal of resale price  
11 maintenance there might have been some small increase in the scope for potential competition.  
12 Again, it is inconsistent with what has gone before, because what has gone before includes  
13 consideration of the MMC’s 1996 report and what happened thereafter, and contemporaneous  
14 evidence it comes to the conclusion of a significant problem for two to ones and a significant  
15 problem of three to twos. So, having said that against the backdrop of the 1996 report, to then  
16 simply turn round when one gets to four to threes and say effectively the opposite – “Oh,  
17 actually it’s not a problem at all” – is simply not good enough.

18 But, there is another problem that the OFT has, which is effectively all but disavowed. This  
19 particular reason as well ... (inaudible) ... conclusion in relation to four to threes. That is clear  
20 from Mr. Pritchard’s witness statement at 118 – 119. We will obviously have to come back to  
21 Mr. Pritchard, but at p.44 he deals with the four to three areas. At paras. 115 to 117 he puts  
22 forward what we will say is inconsistent new reasoning. But, at 118 – 120 he deals with what  
23 was actually in the decision. At 118, he says, “At the drafting stage two supplemental  
24 observations were added to the key conclusions set out in the first sentence.”. At 119, “One  
25 relates to the MMC report and was intended to add some historical context to the OFT’s  
26 conclusions”. So, Mr. Pritchard’s own evidence is that that reason was a supplemental  
27 observation added to give some historical context. He puts it no higher.

28 So, what one is left with in the decision is that there are three parts to para. 46. One is not a  
29 reason – it is a trite statement of conclusion. No. 2 is abandoned. No. 3 is unsustainable in  
30 view of what has gone before, but, in any event, on the OFT’s evidence is merely a  
31 supplemental observation that was added to provide some historical context. That is not  
32 enough to substantiate the conclusion that there is not a problem with four to three areas.  
33 Once one has stripped out the irrelevancies, the abandoned points, etc. in para. 46, all one is  
34 left with, at its highest, in relation to para. 46 of the decision is that they say, “Well, because  
35 four to three reductions are higher than three to two reductions, there is not a problem”. That



1 is really all it comes down to. What is clear is that the OFT has not carried out any  
2 substantive analysis of the effect on competition in the four to three areas. In the decision, it  
3 looked at two to one in detail, and said that there was clearly a problem. In relation to three to  
4 two, it looked at them and said that there was clearly a problem – a high proportion, a large  
5 number of customers. Suddenly they stopped. No attempt to look at four to three. Just  
6 stopped. Logically, as a matter of reasoning, that is simply not sufficient.

7 I think it is probably useful for us to say, “Well, is there a problem here?” We can look at  
8 some of the factors that suggest that the OFT has failed to look at something it should have  
9 looked at – i.e. actually looked at four to three areas. I am going to refer here – as we have  
10 indicated in the skeleton – to some of the LECG material. What I would like to do - given the  
11 way that Mr. Roth has indicated he is happy for it to be dealt with, and the Tribunal has  
12 indicated it is happy to be dealt with – is to make my submissions on that material; to explain  
13 why we rely on it; and then to explain why we say it is admissible. So, as long as you are  
14 happy with that approach, I will explain why we rely on it, and then hopefully the Tribunal will  
15 be in a better to say, “Admissible”, or, “Not admissible”.

16 This is para. 32 of our skeleton argument. LECG obviously had very limited information  
17 when it produced its first report. But, what it did – part of what it did – was obtained  
18 information from Lloyds (which is the chemist chain in the chain in the Celesio group) as to  
19 what Lloyds thought were the relevant four to three areas for this merger. As explained at  
20 para. 99 of the application, LECG identified forty-eight possible four to three areas, and it  
21 accepts that they may not be an exact fit with what the four to three areas are, given that it does  
22 not have that complete information. But, it shows that statistically it has probably got most of  
23 them right.

24 I say by way of aside – because I will come back to admissibility – that identifying four to  
25 three areas on the basis of information from Lloyds is probably something that we could have  
26 done by way of witness statement from Lloyds, but the easiest way certainly for us to do it  
27 practically and to present the information was for Lloyds to provide the information to LECG  
28 and for LECG to present that information. But, there is no magic here. It is simply that factual  
29 information from Lloyds.

30 When it looked at the forty-eight four to three areas, what LECG did – just as a very simple  
31 starting point – was to look at the number of stores that were in each four to three area, just as  
32 a starting point. In forty-one of the areas, the merged entity would end up having half, or more,  
33 of the outlets. There is a very useful diagram – and we have actually reproduced it - in  
34 Bundle 6, Tab 2. This is an indication of all the four to three areas identified on the basis of  
35 Lloyds information in which there are more than four stores, and then colour-coding to show

1 how many of the stores in that area Boots and UniChem would have vis-à-vis all the other  
2 competitors. The ones to look at are (b) ---- In (b) out of nine total stores, Boots and  
3 UniChem would have five after the merger. In (c) Boots and UniChem would have five out of  
4 seven. In (d) four out of six. In (e) four out of six. In (f) three out of six. Then, (h), (i), (j),  
5 (k), (l), (m), (n), and (o) are all three out of five. 66 percent-odd of the outlets.

6 The point is simply this: this is information that the OFT could easily have got from the  
7 merging parties. It got the information on two to one. It got the information on three to two. It  
8 did not even ask for this sort of basic information in relation to four to three, and yet when one  
9 looks at four to three, without going into an economic analysis, one can see, “Well, there may  
10 well be a problem here. This may be something we should follow up”. Even that initial process  
11 was not done by the Office.

12 I should point out by way of contrast that in our merger case, the Cohen Scholl case, Lloyds  
13 did provide information of all the overlaps in a one mile area (even above four to three) and  
14 provided detailed maps for all of them. I do not think I need to show them to you. It is  
15 referenced. It is para. 32(b) of our skeleton. That gives the reference. In fact, the maps that  
16 we provided are in the OFT bundle, Bundle 4, Tab 3(f). But, we do not need to look at them in  
17 detail.

18 PROFESSOR BAIN: Mr. Hoskins, I just want to be quite clear what you are saying. Are you  
19 saying that really we have to be concerned with the information that is contained within this  
20 chart, or are you saying that the OFT could not properly take a decision without having before  
21 them information of the kind that is in this chart?

22 MR. HOSKINS: The latter.

23 PROFESSOR BAIN: The latter. Thank you.

24 MR. HOSKINS: I am relying on this evidence to show the paucity of the investigation that the  
25 OFT carried out in relation to ... (inaudible) ... Paragraph 33 of our skeleton ---- I think that is  
26 certainly the point we are trying to make there. We are not suggesting the Tribunal goes on an  
27 analysis. It is simply the narrow point that the OFT failed to do the simplest things.

28 The other point – and I will develop this later, but I will put down a marker now – is that in  
29 relation to three to two areas, what the OFT did (and Mr. Pritchard tells us this) was that it got  
30 detailed maps, and it looked at the areas to see where Boots and UniChem stores were closest  
31 together in the three to two area. Where they were closest together, and the third facia was  
32 outlying in comparison to them, it is said there was an SLC problem. The OFT did not ask for  
33 any maps in relation to four to three areas to see how the geographical spread looked.

34 So, for those reasons we say the decision is clearly flawed. The reasoning does not stand up,  
35 and the OFT did not even begin to do the most basic things that one would have thought of in

1 order to check whether there was actually a problem in four to three. They simply relied on  
2 inferences and presumptions from three to two, which we say were unjustified.

3 Let us move on to Mr. Pritchard's evidence and see what it says and compare it to the  
4 decision. If I can begin by picking it up at para. 100 ---- Again, I have set out the relevant  
5 paragraphs in the skeleton, but it may be useful to have the witness statement open as well.  
6 Paragraph 100 on p.39 tells us that the OFT considered it appropriate to use a iterative  
7 approach beginning with the most concentrated markets, the two to one, or post merger  
8 monopoly areas where consumer choice is effectively eliminated. "If further competitive  
9 effects analysis reveals ongoing concerns for two to one areas, the OFT next considers three to  
10 two areas, and the iterative process continues until no concerns arise at a given facia  
11 reduction".

12 So, what one would expect from that is that you look at two to one. "Is there a problem?"  
13 "Yes." We have to look at three to two. "Is there a problem?" Here, in fact, we see from the  
14 decision the answer was 'Yes'. So, even on the OFT's own iterative approach they should  
15 have gone on to look at four to three. But, they did not. They looked at two to one. "Is there a  
16 problem?" "Yes." They looked at three to two. "Is there a problem?" "Yes", Mr. Pritchard  
17 says, "but not a very big one". And then stop. But, that is not even what he says was the test  
18 they were trying to apply in para. 100. They could only have stopped on the iterative approach  
19 if there were no concerns at three to two.

20 Let us move into the gloss. Paragraph 105. This is where Mr. Pritchard deals with two to  
21 one areas. He says, "Although the evidence was not entirely conclusive, the internal  
22 documents of the merging parties supported the conclusion that there existed some, albeit  
23 limited, competition". Those are the crucial words – 'some, albeit limited, competition'.  
24 Then he goes on to give more of an explanation of that.

25 The attempt to play down the effect of competition of a two to one reduction in that  
26 paragraph of Mr. Pritchard's witness statement is clearly inconsistent with para. 43 of the  
27 decision which states that a two to one reduction could clearly give rise to an SLC. Contrast  
28 'some, albeit limited, competition' with 'clearly giving rise to an SALC'. Also contrast that  
29 conclusion in Mr. Pritchard's witness statement on two to ones with the decisions finding in  
30 relation to three to two areas. Even in relation to three to two areas the decision found that  
31 switching of customers between Boots and UniChem stores may be high, and that a large  
32 proportion of customers would find Boots and UniChem as being their closest competitors. So,  
33 simply contrast 105 Pritchard with paras. 43 and 44 of the decision.

34 Then, in relation to three to two areas one finds the same downplaying in Pritchard which  
35 simply clashes with the decision. Para. 109 – "The OFT developed concerns in relation to the

1 three to two areas only because following our scrutiny of the relevant maps [I have already  
2 referred to the fact that the OFT requested detailed maps in relation to three to two areas] we  
3 could identify a minority of three to two areas that closely resembled two to one areas”.

4 Then, at para. 112, “Given its position, the OFT then considered whether it was possible to  
5 segregate the vast majority of three to two areas that were not marginally problematic from the  
6 minority that were”.

7 At para. 113 he says that, “Having considered that it was not possible to do so within the  
8 statutory timetable [that is, separate out the three to two areas] the OFT was therefore obliged  
9 to conclude reluctantly, as a result of the limited number of three to two areas that were  
10 marginally problematic, its duty to refer applied across the board to every three to two area”.

11 So, Mr. Pritchard in his witness statement – this is para. 40 of our skeleton – suggests that the  
12 OFT concluded, first of all, that there was no problem in relation to the vast majority of three  
13 to two areas, but that a minority of them were marginally problematic. No more than that. A  
14 minority were marginally problematic. Again, compare those paragraphs of the witness  
15 statement with paragraphs 44 and 45 of the Decision. I have already made the point that  
16 paragraphs 44 and 45 make it clear that the OFT concluded that there was a problem with three  
17 to two reductions in all areas; a particular problem in some but nonetheless a problem in all of  
18 them, and the problem in all of them was not marginal, it was – I am sorry to keep repeating  
19 this – that there would be high switching of customers between Boots and UniChem stores and  
20 for a large proportion of customers Boots and UniChem would be the closest competitors, so it  
21 is all three to two areas, not a small minority, and the effect on competition is not marginal, it  
22 is high, it is a large number of customers who are affected.

23 We say this, that having regard to the case law that I have already referred you to, when one  
24 compares the reasoning in Pritchard with the conclusions in the Decision, they are clearly  
25 inconsistent. The most charitable one can be about Mr Pritchard is that he applies a couple of  
26 coats of gloss, but even that is not permissible and, therefore, when the Tribunal comes to  
27 judge the legality of the Decision it cannot and should not look at those bits of Mr Pritchard  
28 because he contradicts the Decision.

29 THE CHAIRMAN: What you are really saying is that we should ignore those bits of Mr Pritchard  
30 which are inconsistent with the Decision.

31 MR HOSKINS: Precisely. Madam, I have reached page 14 of my skeleton, paragraph 42. That  
32 deals with one of the points we dealt with first thing this morning, which is what to do about  
33 the catch 22 situation where the OFT in its skeleton argument and in Mr Pritchard relies on or  
34 refers to third party evidence, yet because of confidentiality problems does not disclose that

1 evidence. As we agreed this morning, I will simply park that and we will see how Mr Roth  
2 deals with it, and then if needs be if I will come back to that in reply.

3 I would simply, at this stage, highlight paragraph 46 of the skeleton argument which is where,  
4 in *IBA* the Tribunal identified this problem, analysed it and indicated how it felt the problem  
5 should be dealt with. We will see what Mr Roth says, but in my submission Lord Justice  
6 Carnwath's judgment in the Court of Appeal does not expressly overrule what the Tribunal  
7 said.

8 PROFESSOR BAIN: Mr Hoskins, as you know, I am a layman. Are you contesting any of the  
9 references to third party material in the Decision, other than perhaps the third party material  
10 that came from your own side which I assume you are not contesting. The rest is rather  
11 general statements, it is allegedly consistent with what Celesio told the OFT; are you actually  
12 contesting it? It would help us, I think, if you could point to particular statements referring to  
13 third party evidence that Celesio think are questionable.

14 MR HOSKINS: Sir, I hope that we do not have to get into the detail. That is not avoiding the  
15 question and I will explain why I say that. If our submissions on the Decision are correct, and  
16 if our submissions on the clash between the Decision and Mr Pritchard are correct – and I will  
17 go on to make submissions on Mr Pritchard in any event – hopefully we do not have to get into  
18 the question of the degree of competition that existed, was there limited competition or not.  
19 Our concern is simply this: if the Tribunal in its judgment feels the need to look at the degree  
20 of competition in any substantive way, shape or form, it should be aware that it does not have all  
21 the material before it. That is as high as I want or need to flag the point at the moment, so to  
22 try and answer your question more directly in a different way, why are we concerned, why  
23 have we raised this point, it is because the OFT, in Mr Pritchard's witness statement,  
24 continually says there was limited competition, there was marginal competition, and the point  
25 is that the Tribunal and us have not seen all the evidence upon which that is based.  
26 Mr Pritchard's witness statement can only be the rosy side of the picture for the OFT because it  
27 simply beggars belief that all the 27 objectors all said this is the best merger since sliced bread,  
28 but that is as high as I need to put the point.

29 THE CHAIRMAN: Would you not need to be alerting us to some factual evidence that you say the  
30 OFT has missed in order to make good that submission? Just to turn round and say you may  
31 not have all the material before you, without saying that the OFT failed to take account of  
32 some evidence – it might be that you put it in a very broad way. You do not have to go and get  
33 the evidence etc, but the broad way that you put it identifies something that magnetises a  
34 review.

1 MR HOSKINS: That is the catch 22. In a normal judicial review situation the OFT would be under  
2 an obligation to disclose the evidence that harmed its case.

3 THE CHAIRMAN: But if you go off to experts who look at this – and you have gone off to an  
4 expert who has looked it – therefore if you know about the market, you are not completely  
5 outside, you are involved in all this market and you have actually been through one of these  
6 mergers very recently, you know what it is about and, therefore, if there is something there  
7 which is relevant – and it would have to be relevant because the judicial review test is also this  
8 broad whether they came to the right decision at the end of the day – or may be relevant, one  
9 should be able to put it out so that it does not magnetise the judicial review.

10 MR HOSKINS: It is probably my fault. I do not want this point to become more important than it is;  
11 we simply put it down as a caveat, that if the Tribunal felt the need to go into the material in  
12 detail it has not seen everything. In our submissions our primary submission will be the  
13 Tribunal does not need to do that.

14 THE CHAIRMAN: When would the Tribunal need to do it?

15 MR HOSKINS: If there were particular factual issues between the parties, for example, and it is  
16 possible that some of the third parties would support our view of the facts, then we might want  
17 to look at them.

18 THE CHAIRMAN: I think that is what we are asking you. Where is that material?

19 MR HOSKINS: Madam, my fervent hope is that the Tribunal will not have to look at this; therefore,  
20 I do not really need to take the point any further, I think it would not be a good use of  
21 everyone's time.

22 THE CHAIRMAN: You say we have to wait and see.

23 MR HOSKINS: Yes. The way I put my case I do not need to go into the facts, my only concern is  
24 that if Mr Roth starts digging into the facts, and that is why we put the marker down there, but  
25 we are not running any free-standing argument on it, we do not need it, it is a marker for the  
26 OFT. I am not simply trying to sidestep it because I do not fancy dealing with it, I just do not  
27 want the Tribunal to spend time on something that may not arise.

28 THE CHAIRMAN: Let us just see where we go. Can I move on to paragraph 47 of the skeleton  
29 argument? Let us assume that you are against me and we have to look at first Pritchard. Our  
30 submission is that even on the basis of the arguments in Mr Pritchard's witness statement, the  
31 OFT has failed to obtain all the necessary evidence, it has failed to carry out the obvious  
32 investigations.

33 We have identified a number of concerns and these begin at paragraph 50 of the skeleton  
34 argument. First of all, the OFT of course accepts that it had to consider four to three areas, that  
35 is why one sees paragraph 46 in the Decision, that is why one sees a section in Mr Pritchard's

1 witness statement dealing with them; it had to deal with them, it had to consider them, but what  
2 is clear is that the OFT did not at all give active consideration to the particular four to three  
3 areas. What it did, according to Mr Pritchard – because here I am assuming that we are  
4 working on Mr Pritchard’s basis – was it looked at two to one areas and drew conclusions, it  
5 looked at three to two areas and drew conclusions and then on the basis of that it presumed or  
6 inferred that there was not a problem with four to three. So it was an inferential form of  
7 reasoning rather than an investigation of the actual four to three areas.

8 The second point is this. The new case which is put by Mr Pritchard is that there was only  
9 very limited competition in the relevant markets, and I take you to the particular paragraphs –  
10 throughout his witness statement I have highlighted the ones in relation to two to one and three  
11 to two. He says that because there is only limited competition, that is a reason that excuses the  
12 OFT from conducting any detailed consideration of four to three areas. Limited competition in  
13 two to one, limited competition in three to two, you do not have to worry therefore about f our  
14 to three.

15 The problem with that is that it actually reverses the proper approach. In a market where  
16 firms are competing fiercely, a loss of one competitor out of four may not be a problem,  
17 because the ones that are left are competing fiercely, but it is a very odd way to approach the  
18 problem, to say where competition is weak, where one of the parties drops out we do not have  
19 to be worried about it.

20 PROFESSOR BAIN: Something has been puzzling me in your papers here. Are we talking about a  
21 substantial lessening of competition, or are we talking about the competition that remains  
22 afterwards? It seems to me that if you take a market that is very competitive, if you take out  
23 one competitor you will take out quite a lot of competition and that might be substantial. If  
24 you take a market that is very uncompetitive, maybe it would not matter how many  
25 competitors you took out, the competition would never be substantial so there could not be a  
26 substantial lessening of it. It seems to me that in your submissions you are focusing on what  
27 remains, whereas the test if one looks at the words of it, on the face of it, seem to me that it  
28 should be looking at what is taken away. Have you any comment on that?

29 MR HOSKINS: Sir, the question of what is substantial must be looked at in context. It would be odd  
30 if merger control only bit in situations where pre-merger there was health competition and  
31 post-merger there was healthy competition. It would be odd if the test did not bite where  
32 before the merger there was inadequate competition and after the merger the competition was  
33 even worse, so in our submission when one is looking at the question of substantial lessening  
34 of competition, it has to be looked at in context.

35 PROFESSOR BAIN: So in a sense it is a proportionate concept rather than an absolute concept.

1 MR HOSKINS: One might see the point if there were no competition in the market and a merger  
2 took place because there is no lessening at all, but it is different where there is weak  
3 competition and we say it is actually even more important where there is only weak  
4 competition to make sure the merger does not harm it further. That is the logic point that we  
5 make in paragraph 51 of the skeleton argument.

6 The third point we make is that it is very instructive to look at what the OFT actually did in  
7 relation to analysing the test. The first chronological document one finds in this investigation  
8 is actually in the interveners bundle, bundle 3.

9 THE CHAIRMAN: This is the bundle we have to be careful with.

10 MR HOSKINS: Yes, I understand it is. I shall have to be careful because mine has completely  
11 collapsed. What I intend to do, if there are any confidential matters is simply say please read  
12 and endeavour not to say it out loud.

13 THE CHAIRMAN: The only problem arises if we have a question which relates to it.

14 MR HOSKINS: I understand. If there is a serious issue we may just need to have a very short period  
15 in private. Tab 1 is the first document chronologically that we have been provided with, but it  
16 is apparent that there was some contact before that. This is the first one we have been provided  
17 with and it is an e-mail from the OFT to the solicitors acting for Boots and it attaches a “list of  
18 the further information we consider should be included in the submission you make on this  
19 case.” Then over the page one sees the request of what is asked for, seven bullet points.  
20 “Details of all areas in addition to those provided in the two to one analysis where the parties  
21 are each other’s closest pharmacy competitors”, and I do need to refer to that document  
22 specifically. Then, at the bottom, the final two, the only specific requests for detailed  
23 information in relation to particular fascia areas are for three to two and two to one areas.

24 The other requests that were made by the OFT which are relevant are at tab 15, and if one  
25 turns to the third page I think some of this may be confidential so I simply refer to numbers 1,  
26 2 and 10. The only inquiry is in relation to two to one and three to two areas.

27 Tab 24, the second page, the same point.

28 THE CHAIRMAN: The second page?

29 MR HOSKINS: My 24 is a letter from the OFT to Slaughter & May dated 6 January 2005.

30 THE CHAIRMAN: No, tab 23.

31 MR HOSKINS: I am sorry, my tabs are different.

32 THE CHAIRMAN: At 24 we have the first page of something headed “Potential issues raised”.

33 MR HOSKINS: In the short adjournment I may just have to check because something has gone  
34 wrong. All our bundles are 24.

35 THE CHAIRMAN: Have you got as 23 what we have got as 24?



1 MR HOSKINS: My 23 is headed “Potential issues raised”.

2 THE CHAIRMAN: So they have just been reversed.

3 MR HOSKINS: Thank you. It is the second page of 23 and it is same point, the only request for  
4 detailed information relates to three to two fascia. Then tab 26, the second page, exactly the  
5 same point. The only detailed information relates to three to two. Then 27, item 3, again just  
6 three to two. There is one that is slightly different that I should flag up, it is tab 20.

7 THE CHAIRMAN: We have got “Deliberately blank”.

8 MR HOSKINS: Can I just check we are looking at the same document. It is 21 December 2005.

9 THE CHAIRMAN: No, our document just says “deliberately blank”.

10 MR HOSKINS: If the document is no longer relied on, it makes my job easier.

11 THE CHAIRMAN: Are you sure that is the document or is it 21?

12 MR HOSKINS: The document I am looking for is a letter from the OFT to Slaughter & May dated  
13 21 December 2005.

14 THE CHAIRMAN: Mr Roth will know whether that was 20.

15 MR ROTH: I am not sure I can help.

16 THE CHAIRMAN: Could somebody behind you help?

17 MR ROTH: It was that document.

18 MR HOSKINS: So it is no longer relied on. The point under this heading – it is paragraph 52 of my  
19 skeleton argument – is that detailed information was requested to study two to one and three to  
20 two fascia, and no detailed information at all was requested in relation to four to three fascia,  
21 so it is not simply that the OFT failed to give active consideration to the detail of four to three  
22 fascia, it did not even ask for the information necessary to carry out such an analysis.

23 The first point may be subsumed by the point I have just made, it is paragraph 53 of the  
24 skeleton argument. The OFT did ask the merging parties to provide maps of each two to one  
25 and three to two overlap area, and it might be useful just to have a quick look at what those  
26 look like. They are in the OFT bundle, bundle 4. There are a number of annexes here and  
27 annex 1 is maps of two to one local overlap areas, and there are nice coloured maps showing  
28 where the Alliance, Boots and other pharmacies are within a one mile radius. Annex 4 is the  
29 same, details of three to two local overlap areas, and these are the maps that Mr Pritchard says  
30 were scrutinised very carefully to identify which of the particular three to two areas according  
31 to him created problems, because Boots and UniChem were close competitors whilst the other  
32 competitor was outlying.

33 If we look at page 54 of the maps that shows details of three to two local overlap areas within  
34 a one mile radius. I am told the numbering does not quite work because the maps are also  
35 numbered.

1 THE CHAIRMAN: Page 54 says “Annex 4, details of three to two local overlap areas.  
2 MR HOSKINS: That is the one I am looking for, madam, yes.  
3 THE CHAIRMAN: So it must be the maps for page 5, the numbers at the bottom.  
4 MR HOSKINS: That is right, yes. These are the maps that Mr Pritchard tells us the OFT pored over  
5 to discover the three to two areas that he says were a problem. While we are wrestling with  
6 this, I am going to come back in a minute to annex 5 and it may be worth just slipping a yellow  
7 sticker or something on that. If one goes to the end of the bundle it is about eight pages in, it  
8 says “Page 55” at the top and I am going to come back to that.  
9 Madam, the point in relation to this is again it shows that the OFT did consider it necessary to  
10 get detailed maps for two to one and for three to two areas, and it was only by obtaining such  
11 maps for three to two areas that the OFT, according to Mr Pritchard, was able to conduct its  
12 analysis. No maps in relation to four to three were ever requested.  
13 When one thinks about the logic one sees why that is an important omission because in  
14 relation to the three to two areas, what Mr Pritchard tells us at paragraph 109 of his witness  
15 statement is that for certain of the maps, when one looks at them, Boots and UniChem are each  
16 other’s closest competitors, and the other competitor in that one mile overlap is sufficiently  
17 outlying to give rise to a competition concern. We simply say it is perfectly possible, if one  
18 looks at the four to three maps, one would find Boots and UniChem are the closest competitors  
19 and the other two competitors, because here it is four to three, are sufficiently outlying that one  
20 would get a similar sort of problem. Having identified that sort of problem with three to two,  
21 the OFT did not consider the same issue in relation to four to three; it looks like it did not even  
22 direct its mind to the possibility.  
23 There is some limited information that goes to this issue, and again this is the second and  
24 final time I need to refer to the LECG report. This is annex 5 of the OFT bundle, bundle 4.  
25 THE CHAIRMAN: That is the document we were just looking at.  
26 MR HOSKINS: It is the one I asked you to flag, yes. On my title page this is marked “Confidential”  
27 but I am not sure that the rest of any of the text is confidential. Mr Green will probably be able  
28 to tell me whether that is the case or not. Annex 5 is entitled “Overview of local overlap areas  
29 where the parties are located in the areas nearest to each other.  
30 THE CHAIRMAN: What is the distance in miles between the two?  
31 MR HOSKINS: I obviously do not want to refer out loud to something I should not.  
32 THE CHAIRMAN: Only if the whole information ... (inaudible) ...  
33 MR HOSKINS: I am obviously just trying to be as cautious as possible.  
34 MR GREEN: ... comments are going to be made about it.  
35 THE CHAIRMAN: There are no maps here. Annex 5 is about seven pages in.

1 MR ROTH: Just to clarify the word “confidential” at the top, that is from the original document that  
2 came with the replies while a merger was being considered. It has not been put on for this  
3 hearing, so it is different from the manuscript confidential written in other places. Quite what  
4 the status of it now is, is for my learned friend Mr Green, not for us.

5 MR GREEN: I do not think this is problematic. This is what I am looking at and there is no  
6 problem with that.

7 MR HOSKINS: Excuse me for being cautious, but you understand.

8 THE CHAIRMAN: You are absolutely right.

9 MR HOSKINS: The OFT asked for a list of areas where the Boots and Alliance stores were the  
10 closest to each other. What LECG have done is I referred to the fact that in their first report  
11 they identified 48 four to three areas on the basis of information provided by Lloyds. This is  
12 probably something we could have done by way of submission or by expert, but what they  
13 have done is they have taken those 48 four to three areas and they have checked which ones  
14 have Alliance and UniChem close together, indeed as the closest competitors within that one  
15 mile overlap area. The chart that is produced as a result of that exercise is in our reply bundle,  
16 bundle 6 at tab 5, the very last page of tab 5. What one has is a list of 48 four to three areas  
17 that LECG have identified as four to three areas, then they have taken these areas and looked at  
18 the list in Annex 5 to the OFT submissions to find out in which of these four to three areas  
19 Boots and Alliance are close to each other. It is simply that.

20 THE CHAIRMAN: Can you just explain why it has the three to two areas?

21 MR HOSKINS: Simply because, as I said, we did not have the same information as the OFT so some  
22 of the four to three areas are Lloyds information and some are three to two areas in the OFT’s  
23 information. We are trying to recreate information that we do not have.

24 The point is that if one looks at the 48, the total four to three areas we have identified, in 24  
25 of them Boots is the nearest pharmacy to Alliance and vice versa. If one takes the first  
26 example, Frome, and call that number one, the postcode is BA11 1EU and if one goes to the  
27 third page of annex 5 to the OFT’s bundle and goes down 16 entries, it is the first 0.35 miles  
28 entry. That is how the comparison has been done.

29 THE CHAIRMAN: Wait a minute.

30 MR HOSKINS: There are two different postcodes because there are two different shops, one is an  
31 Alliance shop and one is a Boots shop, but they are both BA11. It does not quite tally here  
32 because we have got 1EU and it is 1EZ in the list, but that is how it fits. If one takes the  
33 second one on the list which is Littlehampton, if one goes to the second page of annex 5 to the  
34 OFT it is the first heading at 0.12 miles ---

35 THE CHAIRMAN: AM16 3NR.

1 MR HOSKINS: And then 3DJ is the Boots postcode. Madam, I am not pretending that this is very  
2 sophisticated, but that is the point. If one identifies the four to three areas and then one asks in  
3 which of those areas are Boots and Alliance the closest to each other out of the competitors in  
4 that area, one finds that in 24 of the 48 they are the closest competitors in the one mile area.  
5 Given the OFT's reasoning in relation to three to two areas as described by Pritchard, which is  
6 that you have to look at the maps, and where Boots and Alliance are the closest shops and the  
7 other competitor is outlying, the alarm bells start ringing for four to three areas if half the four  
8 to three areas have those closest competitors. It cries out to say you need a map to see where  
9 the other competitors are for you to identify whether there is a problem, on your own approach.  
10 That was not done.

11 MR ROTH: While the Tribunal has that table open I wonder if Mr Hoskins could clarify the last but  
12 one of the two columns on the right. Four to threes by type, four to threes by number. This is  
13 on the table exhibited by the expert with the blue and orange. You see in the far right  
14 "Number of stores" but in the previous two columns you see "Four to threes by type, four to  
15 threes by number". We cannot follow that.

16 MR HOSKINS: I will take instructions on that at the next adjournment.

17 THE CHAIRMAN: You can deal with it over the luncheon adjournment and if it proves relevant  
18 then we can deal with it.

19 MR HOSKINS: Certainly. The final point, just to remind ourselves where we are – we are looking  
20 at Mr Pritchard's evidence, assuming it is admissible – the final point in relation to that is one I  
21 have already made, so I can make it very quickly, it is at paragraph 57 of the skeleton  
22 argument. It is Mr Pritchard's own iterative approach

23 THE CHAIRMAN: Yes.

24 MR HOSKINS: It is paragraph 57 of our skeleton argument, it is paragraph 100 of Mr Pritchard  
25 which I have set out in the skeleton. His iterative approach is that you look at two to one and if  
26 there is no problem you do not have to go any further; if there is a problem you have to go  
27 further. On his own evidence he went to two to one and there was a problem, so he had to go  
28 to three to two. He went to three to two, there was a problem, but he did not go any further.  
29 Even on his own methodology he has not done what they are supposed to do because his  
30 iterative approach is not based on if you get to a certain level and there is not much of a  
31 problem we do not have to go any further. That is not the approach he has followed.

32 Just to compound matters, and this is a point that comes out of the submissions I have been  
33 making and also was a question that you asked me earlier, another problem with the OFT is it  
34 is not simply that they assumed that there were no SLC concerns in any four to three areas.  
35 They did not ask themselves whether there might be problems in some areas but not others; for

1 example, using the OFT's own reasoning, areas where Boots and Alliance were the closest  
2 competitors in a one mile radius and the two other competitors were on the outskirts of the one  
3 mile overlap. They do not consider the nuance – they considered it for three to two and they  
4 simply do not turn their mind to it in relation to four to three. It is for that reason that we say  
5 that even if Mr Pritchard's witness statement is admissible, which it is not, the OFT case falls  
6 down for two reasons: one, it failed to carry out the necessary investigations which were  
7 simply asking the merging parties for the same sort of basic information it had asked for in  
8 relation to three to two, and further or alternatively the reasoning set out in Mr Pritchard's  
9 witness statement is not sufficient to justify the conclusion reached for the reasons I have just  
10 described. Those are the two tests I highlighted in *Tetra-Laval* and in *UniChem* etc.

11 Paragraph 60 of the skeleton argument is simply a continuation to the interveners' witness  
12 statements. It seems to us, having read them, that either they do not add anything to the OFT  
13 and therefore we do not need them because the OFT has already said it, or if they do gloss the  
14 Decision then they are inadmissible, so again we do not need to look at them, so query what  
15 those witness statements add.

16 The second ground which we are still pursuing – we are now pursuing three grounds, but they  
17 are all linked to the first one and if we fail on the first one then the second and third ones go,  
18 they are all consequential on each other – is the national retail markets analysis. We say that  
19 because of the way the Decision links the national analysis to the local analysis, if the Tribunal  
20 quashes the local analysis it must follow that the national analysis will also have to go back to  
21 the Office. This is paragraph 61 and onwards of the skeleton argument.

22 If you look at the relevant parts of the Decision, first of all it is clear that there is this linkage  
23 between national and local markets. I have set out again the relevant paragraph – it is  
24 paragraph 62 of the skeleton – it is paragraph 14 of the Decision. That states: “The OFT notes  
25 that the extent to which national chains face each other across the country. Two issues are  
26 relevant in this regard: first the degree of overlap as a proportion of each party's national  
27 estate, second, the degree of competition concerns in those overlap areas.”

28 That is precisely what we say the OFT failed to do in the local areas. Having failed to do  
29 that, it cannot then have done a proper analysis of national areas.

30 Paragraph 40: “As to the degree of competition concern in local areas, this goes to the heart  
31 of the local analysis conducted in this case. The OFT decided that local divestment in two to  
32 one and three to two areas addresses concerns at the local levels and in turn those that may  
33 arise at the national level ...”

34 I think you should say “through increased instance of problematic overlaps within the  
35 merging parties national store portfolio.”

1 Again, express acceptance that the local analysis impacts on the national analysis, there is a  
2 necessary link.

3 Our case on this is very simple: yes, there are other factors that are considered at the national  
4 level, but clearly a material factor was the local analysis, and if the local analysis fails, because  
5 that was a material consideration, then the OFT will have to go back and reconsider the  
6 national analysis as well in light of the new local analysis.

7 It is also important to realise what is actually relied upon heavily in the decision about the  
8 nature of competition between Boots and UniChem, and this is paragraph 31 of the Decision,  
9 and it is set out at paragraph 65 of the skeleton argument. One sees, again, a very strong theme  
10 in Mr Pritchard's evidence is that there is not a problem at the national level, because Boots  
11 and Alliance are said not to be close competitors.

12 How does the OFT come to that conclusion? It relies on two things. First of all – this is  
13 paragraph 31 – the point is made that one would argue that competition in retail pharmacies is  
14 in the main driven by local competition. “In respect of the argument about local competition  
15 influencing national policies, the parties would note that, on the whole, Boots & UniChem do  
16 not tend to be located close to each other”. So, that is what the parties have told the OFT. It is  
17 not something that the OFT has checked itself.

18 Let us look at the evidence that was provided about the general suggestion that Boots and  
19 Alliance generally do not face each other, or compete with each other, in local markets. “The  
20 Boots stores tend to be based in High Street locations while UniChem's pharmacy stores fit  
21 the community pharmacy model and are generally found in residential areas, health centres or  
22 smaller shopping centres. Boots' own analysis of catchment areas breaks down pharmacy  
23 coverage across classes of shopping centre areas. Boots appears most frequently in major  
24 regional centres. UniChem's most frequent location is small district centres. However, both  
25 appear with relatively high frequency in rural towns, and such locations form the majority of  
26 the local overlap analysis discussed below. Overall, the evidence suggests limited competition  
27 between the parties in respect of the pricing of P medicines. However, any pricing concerns  
28 which may arise on a local level will be addressed below.”

29 The point that is being made, and the point that is being relied on, is that Boots stores and  
30 Alliance stores do not tend to be located close to each other. The evidence that is relied on for  
31 that is – and we see this as Footnote 8 of the decision – referring to a Boots' internal document  
32 which one finds in the intervener's bundle, Bundle 3 at Tab 11. There is confidential material  
33 here, and so I do have to be careful with this. This is a document from Boots, entitled  
34 ‘Analysis of Store Catchments’. Then one sees on the left-hand side a description of  
35 locations. Then, under ‘pharmacy facia’ one sees how often Boots appeared as a facia in each

1 of these areas; how often Lloyds appears in each of these areas; how often Moss appears in  
2 these areas, etc.

3 The point that the OFT makes is that in major regional centres that is where Boots appears  
4 most often (this is the second row down) and that Moss does not appear very often. That is the  
5 point that is made. In relation to Moss, in relation to small district centres (that is, four up  
6 from the bottom), it is suggested that Moss appears quite a lot, and it is suggested – though  
7 query whether it is actually right to suggest – that Boots does not appear that often. In fact,  
8 one sees there is not a great deal of difference between the figures. Two points in relation to  
9 this. First of all, it is not information about actual area overlaps. It is not an indication that  
10 Boots and Moss stores overlap in a number of areas. It is simply telling you the number of  
11 Boots facia in, for example, major regional centres and the number of Moss facia in major  
12 regional centres. Almost certainly, the actual overlap numbers will be less than the total  
13 number of Moss numbers. So, it is not an overlap analysis at all. It is only at the very highest  
14 level.

15 Even if one were to accept this as evidence of how often Boots stores and Alliance stores are  
16 close to each other in terms of location, the analysis which was adopted by the OFT actually  
17 suggests that one cannot simply look at the area in which Boots appears most often in major  
18 regional centres, and the area in which Moss appears most frequently in small district centres.  
19 That clearly shows that there are no other areas to be particularly concerned about. One only  
20 has to look at other examples. Look, for example, at small rural centres. Yes, there is a  
21 disparity in numbers, but that by no means precludes that there may well be a number of  
22 overlaps between Boots and Moss in those areas. Look at small suburban centres. Again, this  
23 is not a particularly sophisticated analysis, but it is the one the OFT adopted. Even on its own  
24 approach, it is quite clear that one cannot look at these numbers and say, “It’s obvious from  
25 this that Boots and Alliance do not face each other ---- do not tend to be located close to each  
26 other [I will use the words of the decision]”.

27 So, the point in relation to this document is that it is not actually an overlap analysis, and  
28 even on the OFT’s approach it does not show what the OFT suggests it shows. So, on this  
29 crucial area of national competition, which is the question of the extent to which Boots and  
30 Alliance tend to be located close to each other, the evidence relied on in the decision is the say-  
31 so of the merging parties, and the evidence they provided which is this, which does not prove  
32 the point. The OFT did not conduct any further investigation of the issue as far as we can see.

33 THE CHAIRMAN: Can you just help me? Why does that not apply to three to two areas as well?

34 Why is it confined to the four to three?

35 MR. HOSKINS: It is not.

1 THE CHAIRMAN: But you are not challenging it on the three to two, are you?

2 MR. HOSKINS: Because in relation to three to two, they found in our favour.

3 THE CHAIRMAN: But it does apply across the board.

4 MR. HOSKINS: Well, if one were to take this form of analysis, then, yes, one could say, “Well,  
5 look. They’re not located close to each other. Therefore we don’t need to look at three to  
6 twos”.

7 Those are the submissions we need to make in relation to the national analysis, and that is  
8 why we say if we are right on the local area, then ... (inaudible) ... local and national issues.

9 The third ground, which is wholly dependent on the first certainly, is the acceptance of  
10 undertakings in lieu, because clearly if the OFT got its analysis wrong of local areas, then it  
11 cannot accept undertakings in the form currently suggested. I do not think there is any dispute.  
12 I think the OFT’s skeleton accepts that that would be the position if we win on local areas.  
13 Then, obviously, the undertakings will have to fall.

14 THE CHAIRMAN: If we went with you and we agreed on the national/local point, and it was sent  
15 back to the OFT, including that point, does that upset their three to two and two to one analysis  
16 so that they would have to reconsider the undertakings in relation to the three to two?

17 MR. HOSKINS: But we have not challenged the three to two and two to one areas. So, no, in our  
18 submission, you would not have to revisit those issues. The problem would be that the  
19 undertakings currently suggested are intended to solve not just the local two to one and three to  
20 two issues, they are also intended to solve the national issues, and if we are right ----

21 THE CHAIRMAN: Well, are they?

22 MR. HOSKINS: Yes.

23 THE CHAIRMAN: What did they find in relation to national issue?

24 MR. HOSKINS: Well, they found that there was not a problem – because in relation to the local  
25 areas where there were problems - two to one and three to two – there was going to be  
26 divestment. So, for example, if the merging parties had refused to offer undertakings on two to  
27 one and three to two, there would have been a reference on local and national issues.

28 THE CHAIRMAN: Well, no. Would it be on local and national, or would the reference have been  
29 limited?

30 MR. HOSKINS: It would have to have been on both.

31 THE CHAIRMAN: Why?

32 MR. HOSKINS: The local issues are not solved. Because of the reasoning in the decision ----

33 THE CHAIRMAN: But I am not sure that is the way ----



1 PROF: Mr. Hoskins, can I just refer you to para. 82 of the decision where it reads, “The parties  
2 overlap in the provision of retail pharmacy services. In terms of national competition, no  
3 concerns arise”.

4 MR. HOSKINS: Sir, if you would just bear with me. There is another paragraph of the decision I  
5 want to refer you to. (After a pause): Madam, rather than doing this on my feet, I think it is  
6 probably more helpful if I consider it and I will deal with it in reply, because it is a point,  
7 obviously, that is important, and I would rather do it having considered the point properly  
8 rather than on the hoof. If that is satisfactory ----

9 THE CHAIRMAN: It may be something that over the short adjournment there might be some  
10 discussion about it.

11 MR. HOSKINS: I think that is probably the best way to deal with it. You have my understanding.

12 THE CHAIRMAN: You can see we were slightly confused about it.

13 MR. HOSKINS: I need to check it and make the point good.

14 THE CHAIRMAN: We need to know before everybody leaves this evening as to what the position  
15 is because I think it does make, or could make, a difference to the way one considers it.

16 MR. HOSKINS: I think we will need to look at what the actual situation was, but the finding on  
17 national competition was premised on the fact that there were not problems in four to three  
18 areas. It was also premised on the fact that one needs to take account of local problems. I am  
19 sorry. It was premised on the fact ---- Let me start the logic again ----

20 THE CHAIRMAN: I think you may need to think about it.

21 MR. HOSKINS: Certainly. I am probably going against myself.

22 THE CHAIRMAN: I think you might be better just to go away and think about it before you ----

23 MR. HOSKINS: -- put my foot in my mouth.

24 The skeleton argument at p.23. Miscellaneous points. The first point is the admissibility of  
25 the LECG evidence.

26 THE CHAIRMAN: As I understand it, you are only relying on the LECG evidence of the two  
27 matters that you have shown us.

28 MR. HOSKINS: Yes.

29 THE CHAIRMAN: And you say that those could have been dealt with by you in submissions which  
30 would have got the factual matters from your clients, and then you could have worked it out,  
31 and you did not need ----

32 MR. HOSKINS: It could have been dealt with that way, yes. That was partly because of time  
33 constraints and the nature of the team. That was the natural way to deal with it. But, I think, in  
34 reality, yes, that is what I ----

35 THE CHAIRMAN: Also because you had Issue 1.

1 MR. HOSKINS: Yes, that is certainly fair, yes.

2 There is a legal point here as well. There is a legal point and a practical point. The legal  
3 point is that it is clear from the case law that evidence post-decision is admissible in judicial  
4 review proceedings in order to support the proposition that the decision-maker failed to  
5 conduct proper inquiries, and therefore failed to take relevant material into account. I will take  
6 you to two cases that make that good, but there is a certain ineluctable logic to that as well. If  
7 the argument is that the OFT failed to take this matter into account, how do you introduce what  
8 the matter is, if it is a factual issue without evidence? So, one starts from the premise that it  
9 has the right feel about it, and this is one of the areas where the court has confirmed the logic.  
10 The first one, I am afraid, is not in the bundles. (Handed) This is **R –v- Rochford District**  
11 **Council, ex parte Ferdinando**. You will see from the headnote that it is a decision of Roger  
12 Henderson, QC, sitting as a Deputy Judge in the Queen’s Bench Division. It relates to a  
13 judicial review relating to homelessness, and the dispute was whether a family had become  
14 intentionally homeless. The detailed facts are set out, but for our purposes what is important is  
15 that after the decision was taken that the family had become intentionally homeless, certain  
16 witness statements were produced which challenged that fact. There are a number of them,  
17 but, for example, on p.2 the penultimate paragraph indicates that an affidavit was obtained  
18 from a midwife called Mrs. Tinglin who gave evidence that the flat they were in was in an  
19 appalling condition. That was obviously relevant as to whether they became intentionally  
20 homeless because they walked out on somewhere that was perfectly suitable for them, or  
21 whether they were required to leave because it simply was not habitable. That was evidence  
22 that was introduced after the event.

23 Then, on p.3, in the second paragraph, certain of the matters which were now being relied on  
24 were not known to the District Council when it took its decision. Part of this background  
25 history and these matters became known to the respondents. Some responsibility for the gaps  
26 must lie with the Ferdinandos. But, the following three salient elements, including the opinion  
27 of the health worker, etc. were unknown to the respondents when they took the decision on 7  
28 August, 1991, and such matters could, on reasonable enquiry, have been discovered. So, they  
29 were not known to the decision-maker. That was partly the fault of the claimants in the case,  
30 and they could, on reasonable discovery, have been discovered before the decision was taken.

31 At p.6 of twelve, in the paragraph slightly under half-way: “Then there was further advice.  
32 The basis upon which the applicants impugn the decision are the traditional Wednesbury  
33 grounds”. Perhaps it would be appropriate here (because I will need to come back to it) to go  
34 to the summary of Lord Green, the Master of the Rolls, where he said, “The court is entitled to  
35 investigate the action of the local authority with a view to seeing whether they have taken into

1 account matters which they ought not to take into account, or, conversely, have refused to take  
2 into account or neglected to take into account matters which they ought to take into account.  
3 Once that question is answered in favour of the local authority, it may still be possible to say  
4 that although the local authority have kept to the four corners of the matters which they ought  
5 to consider, they have nevertheless come to conclusions so unreasonable that no reasonable  
6 authority could ever have come to it”.

7 That is quite interesting, because, of course, *Wednesbury* is used as shorthand for the latter  
8 proposition – a decision that is so unreasonable that no authority could ever have reached it.  
9 What this quote shows is that also it has a different point which is a failure to take account of  
10 relevant information, or neglecting to take into account matters which they ought to take into  
11 account is also a ground of judicial review.

12 Counsel for the *Ferdinandos* – Mr. Ayer – says that the respondents took relevant matters into  
13 account: “They failed to make due inquiry into relevant matters and to take those into  
14 account”, which is clearly part of our case here. Counsel for the Council (the first complete  
15 paragraph on p.7) in response said, “First, you have no jurisdiction to admit the further  
16 evidence contained in the second affidavit of Mr. Fernando and the affidavits of Mrs.  
17 Fernando, Mrs. Tinglin, Mr. Calder and Mrs. Sert ----“ and then reference to various  
18 authorities. At p.8 of twelve, in the second paragraph up from the bottom, “It will be apparent  
19 from my reference to the facts ... that I have found myself unable to accept the submission  
20 made by Mr. Campbell that the court has no jurisdiction to admit such evidence, and it is now  
21 right that I should give my reasons, i.e. later evidence is admissible”.

22 Over the page, at p.9 of twelve, again just under half-way, “I would next turn to the  
23 **Prohoffer** decision ----“ Can I ask you simply to read from there, through to p.10 up to and  
24 including the paragraph that begins, “Although it is not included in that note”? (Pause whilst  
25 read): Madam, the crucial paragraph really is at the bottom of p.9. There is an analysis of the  
26 **Powis** case, which, of course, is a case that the OFT relies upon. What this Judgment makes  
27 clear is that given what was said in *Wednesbury* itself, it must be implicit that if there be a  
28 question of fact not only where jurisdiction depends on it, but which should have been elicited  
29 in the public law inquiry, then that would be a case where evidence should be admitted for that  
30 purposes. That is the reason why we say that the LECG evidence upon which we rely should  
31 be admitted in this case. It complies with the logic I have described, and it complies with  
32 authority as set out in this case.

33 The same point is actually made in another, more recent, case which is **Harlow –v- South**  
34 **Cambridgeshire District Council**. That is in Bundle 5. This is the Judgment of Mr. Justice  
35 Richards in the context of a planning case. Can I ask you to read paras. 1 and then paras. 30 to

1 32? (Pause whilst read): Madam, you will see again, quite clearly an indication that where  
2 expert evidence here in this case is relied upon in order to enable the court properly to  
3 understand the argument that the committee took into account irrelevant factors, or failed to  
4 take into account relevant factors. Again, that is the basis upon which we rely on the LECG  
5 report in this case.

6 So, that is a reason why it is admissible – because of the nature of the reliance we have placed  
7 upon the authority. There is another. I have made a logical point. I have made a legal point.  
8 There is also a practical point which is also supported by the case law. One has to be aware of  
9 the context in which this material has come to be produced. Celesio was a third party in the  
10 OFT’s investigation, and the flow of information as between us and the Office was all one  
11 way. The Office said, “Do you want to make submissions?” We said, “Yes, please”, and  
12 provided information. We did not get anything back from the Office in terms of seeing other  
13 parties’ submissions or having an indication of what the OFT’s thinking was – for example, we  
14 did not see the issues letter. So, we do not know all of what the Office was looking at. We do  
15 not know what the Office was thinking during the process. Nor did the OFT come back to us  
16 and ask us any particular questions on our information. So, it is all one way.

17 Against that background, we say it is pretty unfair to say that when Celesio comes to put in  
18 some further evidence we are not allowed to do so, because what would the practical  
19 implication of that be? It would mean that whenever a third party such as Celesio is taking  
20 part in a merger investigation, and has concerns about the merger, if it wants to protect itself in  
21 case it subsequently appealed, it would have to put in detailed evidence, and indeed detailed  
22 expert economic evidence, on all the issues it thought might be an issue when the decision  
23 came to be adopted and when the appeal came up, because if, as the OFT suggests it is all or  
24 nothing, you either have to put it all in in an investigative procedure or you cannot put  
25 anything in. In order to protect yourself, that is what you would have to do.

26 Now, in our submission, that is unfair and an impractical suggestion in terms of what you can  
27 expect from a third party in a merger inquiry. But, it is also extremely unattractive from the  
28 Office’s perspective because given the need for speed in dealing with merger issues, the last  
29 thing it wants is detailed economic reports from a number of third parties which it has to take  
30 account of. It is completely counter-intuitive to the process that is being adopted. There is  
31 again authority for saying that one has to look at the context when one is deciding these sorts  
32 of issues. That is the case of **E –v- Secretary of State for the Home Department**. That is in  
33 the authorities bundle, Bundle 5, Tab 7. If I could ask you to read, first of all, the factual part  
34 of the headnote. It is quite convoluted, but I do not think we need to get into the detail. It is  
35 sufficient to see the general context. (Pause whilst read): Basically, the position was an

1 asylum application was rejected. An appeal to the Immigration Appeal Tribunal. Between the  
2 hearing and the promulgation of the decision, further evidence was sought to be introduced,  
3 and the Immigration Appeal Tribunal refused to admit that evidence, followed by an appeal to  
4 the Court of Appeal on that basis – because of the refusal to look at the new evidence.

5 Then, the relevant paragraphs for this purpose are paras. 68 to 69. (Pause whilst read): The  
6 final sentence of para. 69 is obviously the point I am making here. “In such cases it inevitably  
7 overlaps the question of unfairness. A claimant who had the opportunity to produce evidence  
8 and failed to take it may not be able to say that he has not had a fair crack of the whip.” But, in  
9 this context that was the position, and one sees that at para. 94. Here it is slightly odd because  
10 it is an appeal, and so we are looking at Ladd & Marshall principles rather than a straight JR –  
11 is new evidence admissible after a decision. But, what is clear from para. 94 is that you  
12 cannot ignore the practical realities. It is unrealistic to expect continuous monitoring of  
13 potential new evidence in the intervening periods. One also looks at administrative difficulty  
14 for the IAT in dealing with the evidence. So, the importance of practical realities; the  
15 importance not to be unrealistic; administrative burden. Then, at para. 98 – the conclusion,  
16 “We think it right for the appeals to be allowed in the narrow ground that in each case the IAT  
17 wrongly failed to consider the new evidence in the context ----“

18 THE CHAIRMAN: Do you make a distinction between the OFT and the CC on this point? As I  
19 understand it, you ----

20 MR. HOSKINS: I think it would be difficult to imagine the situation would arise in relation to the  
21 CC. So, this is probably particularly pertinent to the OFT, yes.

22 THE CHAIRMAN: Well, different considerations may arise in relation to the CC.

23 MR. HOSKINS: Yes. But, in a sense, the question of practical realities ---- It is a stronger  
24 argument at the level of the OFT than it would be for the CC certainly.

25 So, there are three reasons why we say the evidence is admissible: first, because really it is  
26 just fact; it is submission, albeit it comes in an expert’s report; secondly, because we rely upon  
27 it to show what investigations the OFT could/should have done, but did not (and case law tells  
28 us it is admissible); and, thirdly, just looking at the practical realities of this, it should be  
29 admissible (and, again, case law supports this).

30 In terms of full and frank disclosure on our part in relation to Lloyds Cohen, we say there  
31 really is nothing in this point. I am actually quite surprised that it is even taken. But, Mr. Roth  
32 will no doubt disagree with that. Far from attempts to conceal the fact that we had been  
33 through a merger in the same markets fairly recently, we actually flagged it up. We put it in  
34 our application. We produced the decision. Our take on our submissions is that they are not  
35 inconsistent with anything we are running here. But, clearly, having flagged it up to the

1 Tribunal, if the OFT wanted to make a particular point about anything that happened in that  
2 procedure, it was obviously open to them to do so, and it has done so. There is no question of  
3 us concealing something that would not otherwise come to the Tribunal's attention. We  
4 flagged it up, and the OFT made its submissions, and that is what happened.

5 Part of the oddity here is that the OFT – and it would have been a shout very loudly – is  
6 inconsistent. What you are seeing now is inconsistent. But, there is nothing in their skeletons  
7 which actually point to any actual inconsistency. The only time one sees any suggestion of  
8 inconsistency is in Mr. Pritchard's witness statement. It is instructive to look at what he  
9 actually flags up. It is right at the end of Mr. Pritchard's witness statement, at para. 137. You  
10 will see there are three bullet points. This is apparently what makes the failure to disclose.  
11 First of all, in Lloyds Cohen School, Celesio argued that the relevant geographic market should  
12 have a one mile radius, except in relation to the single two to one overlap area ... argued in  
13 favour of a three mile radius. In this case Celesio has not argued that the scope of the  
14 geographic market in any of the local overlap areas should be extended beyond a one mile  
15 radius.

16 Well, our case here is that the proper radius is a one mile radius. That is the OFT's position.  
17 That is the intervening parties' position. The only reference to this three mile radius comes up -  
18 --- If I can ask you to look at our submissions in Cohen Scholl. It is the OFT bundle, Bundle 4,  
19 Tab 3, Tab C. This our merger notice – what we submitted to the OFT. If I can ask you to look  
20 at paras. 4.2 to 4.4, which are at p.20 of this document ---- Madam, my Tab C is entitled  
21 'Merger Notice under Section 96 of the Enterprise Act ----' At p.20 of that document ----  
22 These are our submissions. If I can ask you to read paras. 4.2 to 4.4 ----

23 THE CHAIRMAN: (Pause whilst read): So, you say it is peculiar to that situation, do you?

24 MR. HOSKINS: If one turns back to p.17, para. 3.1, the general premise was that the proper radius  
25 is one mile.

26 THE CHAIRMAN: You just say in that particular situation.

27 MR. HOSKINS: Exactly. So, the idea that somehow there has been fundamental non-disclosure  
28 because we are inconsistent simply does not ---- There is not actually an inconsistency at all.  
29 The second point identified by Mr. Pritchard is, "In respect of its own transaction in Lloyds  
30 Cohen & School, Celesio argued that a facia test would provide an appropriate framework for  
31 the OFT's competition analysis. It argued that it would not be appropriate to ... the particular  
32 facts of this case". Again, if one looks at our submission at Tab 3C ---- We have already  
33 looked at paras. 4.2 to 4.4, and if one reads on between 4.4 and 4.8 ---- (Pause whilst read):  
34 Madam, what Mr. Pritchard alleges ---- He says, "Celesio argued that a facia test would  
35 provide an appropriate framework for the competition analysis". Again, there is absolutely no

1 difference in Lloyds Cohen. A facia test was part of our analysis, along with lots of other  
2 elements of competition. When we actually made our application for appeal, the first ground --  
3 -- Because the way we had understood the decision was that we were criticising the OFT for  
4 adopting only a facia test and not looking at other factors. So, again, far from being an  
5 inconsistency, there was complete consistency between what we say is the proper approach in  
6 Cohen Scholls and what we say is a proper approach here – a facia test as a starting point. But,  
7 you have to look at all the other factors. No inconsistency whatsoever.

8 Finally, Mr. Pritchard’s third alleged inconsistency, “In Lloyds Cohen & School Celesio did  
9 not argue that different competitor types – for example, independent supermarket pharmacies -  
10 Boots should be treated differently or considered to offer differentiated degrees of competitive  
11 constraint, but has reversed its position in the Boots/UniChem merger”. It is very odd to see  
12 how an inconsistency arises out of something we did not say. It is not that we said something  
13 and we now say something different. This issue did not arise in Scholl and Cohen because the  
14 nature of the merger was completely different. Except for Mexborough, the lowest facia  
15 reduction was five to four. Simply a different context. Again, no inconsistency whatsoever.

16 So, in terms of the alleged inconsistencies, there are not any. Mr. Pritchard does, very fairly,  
17 at 138, recognise, “These inconsistencies do not mean that Celesio’s arguments should be  
18 rejected out of hand for it is possible for a party first to submit a poor argument, but later to  
19 submit an argument that is better, albeit inconsistent”. That is fair as far as it goes ...

20 (inaudible) ... factual substance in any sort of knock-out blow in terms of this appeal. So,  
21 there is no inconsistency. There is no failure to disclose. In any event, even if there were,  
22 where would it take us? As Mr. Pritchard accepts, it cannot realistically be suggested that  
23 because of what has been alleged somehow the Tribunal should not hear this appeal, or, if  
24 having heard this appeal, it finds that there is a problem with the OFT’s decision but should  
25 nonetheless do something about it. I am not even sure if that is what is suggested by the OFT.  
26 It does not seem to be suggested by Mr. Pritchard. But, if that is correct, if they do not go that  
27 far, it is difficult to understand where this allegation takes them. Our submission is simply  
28 that the issue before the Tribunal is the legality of the decision and not the strength, or  
29 otherwise, of Celesio’s submissions in a different, albeit related, matter.

30 The final point I do not need to dwell on. It is simply the intervener’s attempt at prejudice  
31 point. They say, “You have an interest in stopping this”. Of course we do – otherwise we  
32 would not be here. They have an interest in making sure it goes through. This really takes us  
33 nowhere.

34 Unless you have any further questions – and I am sorry I have slightly overrun – those are our  
35 submissions.

1 THE CHAIRMAN: Thank you very much.

2 (Adjourned for a short time)

3 MR HOSKINS: Madam, at the risk of outstaying my welcome I have had a chance to consider the  
4 relationship between national issues and undertakings, and I can deal with it quite quickly. I  
5 have two points to make in relation to that. The first one is that our understanding was that the  
6 undertakings did also relate to national competition, and I have to say it was partly based on  
7 and certainly confirmed by Mr Pritchard's witness statement at paragraph 40. If one looks at  
8 the heading on page 16, this section is entitled "Relevance of local overlaps to national issues"  
9 and then paragraph 40: "As for the degree of competition concern in local areas, this goes to  
10 the heart of the local analysis conducted in this case. The OFT decided that local divestment in  
11 two to one and three to two areas addressed these concerns at the local level and, in turn, those  
12 that may arise at the national level through increased instance of problematic overlaps within  
13 the merging parties' national store portfolios."

14 The clear indication from Mr Pritchard seems to be that the undertakings are geared to  
15 national because there is a relationship between local and national. Mr Pritchard seems to  
16 share our understanding.

17 There is also a substantive point in relation to this ----

18 THE CHAIRMAN: That paragraph is not to do with undertakings, is it?

19 MR HOSKINS: It refers specifically to the two to one and three to two divestments and those are the  
20 undertakings. The undertakings are undertakings to divest.

21 THE CHAIRMAN: Yes, I see.

22 MR HOSKINS: If I could ask you to take up the Decision, bundle 1, tab 3, first of all one has at page  
23 4, paragraph 14, the explicit recognition of a link between national concerns and local  
24 concerns. If I can then ask you to turn to the section on national issues, it begins at paragraph  
25 26, there are a number of factors that are considered at the national level. I referred you  
26 specifically to paragraph 31 and there are two sub-issues if you like that go to national analysis  
27 in paragraph 31.

28 THE CHAIRMAN: You did refer us to paragraph 31 before.

29 MR HOSKINS: I did, exactly. There are two issues that come out of it: first of all, the extent to  
30 which there was sufficient investigation by the OFT to substantiate the claim that Boots and  
31 Alliance stores do not tend to be located close to each other, and I showed you the evidence  
32 relied upon for that. Also, very importantly, at the very bottom of paragraph 31, "Overall, the  
33 evidence suggests limited competition between the parties in respect of the pricing of P  
34 medicines. However, any pricing concerns which may arise on a local level will be addressed  
35 below" and then we have, of course, the local analysis beginning at paragraph 33 which goes



1 from a problem at two to one, a problem at three to two, no problem at four to three. So the  
2 point is that it is a material consideration in reaching a conclusion at the national level that  
3 Boots and Alliance stores do not tend to be located close to each other, and it is also a material  
4 consideration that the findings on local areas are material to the finding on the national area – I  
5 take that from paragraph 31.

6 It is against the backdrop of those findings, including paragraph 31, that one then finds the  
7 statement that I was referring to at paragraph 82 which is the final conclusion. The second  
8 sentence: “In terms of national competition no concerns arise.”

9 Madam, on this point you asked me a question in relation to what happens if we win on the  
10 local, what happens in terms of the remittal. In our submission, if we establish that either or  
11 both of the two reasons given in paragraph 31 is flawed, then because they are both clearly  
12 material reasons because they are relied upon in the Decision, then the OFT would inevitably  
13 be required to reconsider first of all the local issues that have been remitted, and having come  
14 to a new conclusion on those issues, which may be the same as before or it may be different,  
15 they would then have to reconsider whether they still concluded that there is no concern at  
16 national level. For example, if the decision was quashed in relation to local areas, it went back  
17 to the OFT and they found actually they were concerned about 24 of the 48 areas of four to  
18 three, then we say it is inevitable because of the linkage in the decision that they would have to  
19 reconsider whether that change made a difference to their conclusion in the Decision, no  
20 concerns at national level. They would also, by definition, have to then consider what  
21 undertakings were appropriate, having come to a new conclusion on local issues, having come  
22 to a new conclusion on national issues, because that is the logic of the way the process works.  
23 We do say, therefore, if we win on local inevitably national has to go back, because although  
24 the finding in the Decision was no concerns, that may well change. I hope that deals with the  
25 concern.

26 THE CHAIRMAN: Thank you, Mr Roth?

27 MR ROTH: May I just enquire about the mundane matter of timetable because I see that I was  
28 scheduled to finish?

29 THE CHAIRMAN: You were scheduled to have an hour and a half.

30 MR ROTH: An hour and three-quarters, I think, but I would hope that I am not obliged to stop at  
31 2.30 as in your original timetable, and I would not be very popular if I suggested we all give up  
32 our lunch. I am certainly not going to suggest that.

33 THE CHAIRMAN: What we suggest is that we go on to 1.15 and then probably start at 2.00 or five  
34 past, and then somebody can work out the maths from that.

1 MR ROTH: Yes. There is possibly a little slippage built into your timetable on the basis of stopping  
2 at 4.15.

3 THE CHAIRMAN: Absolutely.

4 MR ROTH: Thank you. Can I at the outset deal with three preliminary, yet potentially important  
5 matters, which involve the fundamental principles of judicial review and then make some brief  
6 observations about the statutory test for reference by the OFT under the Enterprise Act? The  
7 three issues are first the admissibility of expert evidence insofar as that is still relied on at all in  
8 his case; secondly, the use of a witness statement by a respondent as regards the reasons in the  
9 Decision; thirdly, the issue of disclosure.

10 First, expert reports. I have to say, having listened to Mr Hoskins and his responses to your  
11 questioning, it seems that they are now relied on only for a very limited purpose indeed. If it  
12 is, as it may be, only the fact that there are 48 four to three areas on the Celesio count, the table  
13 in Appendix B, which is the colour chart – in the original Appendix B we had a black and  
14 white bar chart – and, thirdly, the appendix to Mr Coombes' new report, which is just, again, a  
15 list of the 48 areas and that is it, then I am not going to object to those being put forward.

16 THE CHAIRMAN: Shall we just check that that is it?

17 MR HOSKINS: Yes, those are the references.

18 THE CHAIRMAN: So we do not have a problem as to the admissibility of that evidence.

19 MR ROTH: Of that evidence. There is of course a lot more, as you know, in the three reports, some  
20 of which has obviously gone with the first ground of appeal review, the challenge on the fascia  
21 test, but some of it, which does go very materially to some of the arguments and expressions of  
22 opinion by the experts as to whether the decision is convincing and so on, I will not get into.  
23 You will appreciate that I therefore park this for possibly another day because it does raise an  
24 important issue ---

25 THE CHAIRMAN: Park it for another case you mean.

26 MR ROTH: For another case, yes, exactly, not another day. There is a lot of case law in it, as you  
27 saw, and all the rest of it.

28 THE CHAIRMAN: As it normally turns out, these things can be resolved quite often on the facts.

29 MR ROTH: Absolutely, helped by the fact that of course the first round of challenge has been  
30 abandoned.

31 The second point, moving on swiftly, is the question of reasons and the respondent's  
32 evidence because Mr Hoskins contends that Mr Pritchard's witness statement is inadmissible,  
33 although when it suits him he certainly relies on it to support his case, as for example his points  
34 on national competition, so it has an evanescent quality in that it becomes important as the  
35 proceedings require.

1 The role of evidence from the decision-making was expressly conceded by the Court of  
2 Appeal in the *IBA Healthcare* case, concerning of course an appeal from a decision of this  
3 Tribunal of a judicial review of a decision on a matter of reference by the OFT. You were  
4 taken to that briefly, but may I ask you to look again at *IBA* which is in volume 2 at tab 6? It is  
5 in the judgment of Lord Justice Carnwath, beginning at paragraph 102.

6 “Adequacy of reasons

7 Finally, although inadequacy of reasons is not a ground of challenge as such [that is to say it  
8 was not in *IBA*, of course it is very much here] it may be helpful to comment briefly on the  
9 Tribunal’s observations on this aspect.

10 The Tribunal expressed concern at having to consider material outside the decision letter. It  
11 noted that the OFT was under a statutory duty to give it reasons, and referred to what is called  
12 the ‘well-known principle’ that –

13 ‘the Court should at the very least be circumspect about allowing material gaps to be filled by  
14 affidavit evidence or otherwise’ (... *Ermakov* ...)

15 It commented: ‘If a material element is not set out in the decision it is very difficult for the  
16 reviewing court or tribunal to be satisfied that the matter was properly investigated or that the  
17 supplementary reasons did in fact form part of the decision-making process.’

18 In other parts of the judgment the Tribunal criticised the failure of the OFT to set out all the  
19 underlying material.

20 With respect, I think this concern, and the associated criticisms, were misplaced. The  
21 statutory duty to give reasons is an important one, but it is not the same as a duty to give a  
22 ‘judgment’ (such as that of a court) or a duty to make a ‘report’ (such as that of an inquiry  
23 inspector). Again reference to the textbooks might have assisted. The numerous cases on the  
24 subject lay down no general test other than the requirement that reasons must be ‘intelligible  
25 and must adequately meet the substance of the arguments advanced’ ....”

26 Moving on to the next paragraph:

27 “In such a case as the present, where the subject matter is complex and the supporting  
28 material voluminous, there is no statutory requirement for all the evidence to be set out in the  
29 decision letter. However when a challenge is made, there is, as the Tribunal noted, an  
30 obligation on the respondent public authority to put before the Court the material necessary to  
31 deal with the relevant issues; ‘all the cards’ should be ‘face upwards on the table’ ...

32 There is certainly nothing unusual, particularly in a case which has to be dealt with in a  
33 relatively short timescale, for the stated reasons to be amplified by evidence before the court.  
34 While in some areas of the law, the Court may need to be circumspect to ensure that this is not  
35 used as a means of concealing or altering the true grounds of the decision, that does not arise in

1 this case. As I understand it, no objection has been taken to any of the evidence being put  
2 before the Tribunal (or to the additional evidence adduced in the Court of Appeal). The  
3 question for the Tribunal was not whether the reasoning was adequately expressed in the  
4 decision, but whether the material ultimately before it, taken as a whole, disclosed grounds on  
5 which the Tribunal could reasonably have reached the decision it did.”

6 That is the context in which amplification evidence can be put in.

7 Somewhat surprisingly, Mr Hoskins relies on *Somerfield* as demonstrating that the *Ermakov*  
8 principle applies, much like a statute, to a section 120 judicial review of an OFT decision. It is  
9 in his skeleton argument to which he took you at paragraph 10 of Celesio’s skeleton, where he  
10 sets out what he says are the two key paragraphs from the *Somerfield* decision of this Tribunal.  
11 Of course, that leaves out the crucial paragraph 66, the paragraph to which you, ma’am,  
12 referred when Mr Hoskins was addressing you, which draws a very clear distinction between  
13 the situation that arises on a traditional view of the Competition Commission, producing a very  
14 full report over a much more extended timetable, and a judicial review of the OFT on a merger  
15 reference. It is that paragraph., paragraph 66, in *Somerfield* which is the crucial paragraph, and  
16 not paragraphs 64 and 67 which Mr Hoskins, somewhat surprisingly, isolates in his skeleton.

17 Of course, one cannot by a witness statement put forward reasoning inconsistent with a  
18 decision, but I will address that when I deal with the substance of the arguments that are being  
19 put. Mr Hoskins’ main point seems to be that it is inconsistent, but that is a different point  
20 from amplification of the reasoning in the decision.

21 THE CHAIRMAN: What about new reasons?

22 MR ROTH: It should be really by way of amplification or explanation of the reasoning process, but  
23 way reasons may be expressed in an OFT decision under section 33 may, we say, quite  
24 understandably be somewhat abbreviated and concise.

25 The third limb of the preliminary matters is disclosure by the OFT of third party evidence. I  
26 have to say I had a little difficulty following Mr Hoskins’ case on this now. Much has fallen  
27 away because the fascia test is no longer under challenge by the third parties, in so far as they  
28 take issue with it, much of it related to the fact that nobody else objected to the fascia test.

29 I refer, with respect to the very pertinent question, if I may say so, from Professor Bain: what  
30 actually is being contested in the third party evidence? As I understood it, it is being said the  
31 evidence that there was limited competition in local markets and the national market. Among  
32 the third party evidence that we managed to rely on that is what Celesio, a third party in this  
33 case, said to the OFT in its own acquisition of Cohen and Scholl. I will come to it in due  
34 course, but they said quite a bit about how limited competition is between retail pharmacies,  
35 and I do not think that has been contested by Mr Hoskins, they were his clients. Beyond that, I

1 really did not see that it goes to anything that is actually in issue here. Nonetheless, the  
2 skeleton argument, even at the stage where the challenge to the fascia test has been abandoned,  
3 seeks to criticise the OFT very strongly for not producing the third party evidence and says it is  
4 impossible to judge the case properly without such disclosure.

5 At page 14 in his skeleton argument there is a section just above paragraph 42 headed  
6 “Problems in the evidential approach adopted by the OFT” and you see what is said over the  
7 page at paragraph 43. “Mr Pritchard refers to third party materials insofar as they support the  
8 OFT’s case. However, it is inevitable that not all of the third party materials will support the  
9 OFT’s case. Some will undermine [it]. However, neither the Tribunal nor Celesio is in a  
10 position to evaluate all relevant evidence, because the OFT has not sought to have all that  
11 evidence admitted before the Tribunal.” We have not sought to and there is no application that  
12 it should be. “The evidence made available to the Tribunal is skewed towards that which  
13 supports the OFT’s case. It is not the whole picture.”

14 It then goes on, as you see, to refer to *Ex parte Huddleston* the passage cited in Lord Justice  
15 Carnwath’s judgment that I just read, and then at paragraph 46 there is a long recitation of  
16 what this Tribunal said in *IBA* before it went to the Court of Appeal, sub-paragraphs (a) to (d)  
17 of the skeleton argument.

18 There seem, therefore, to be three grounds for saying there are problems. It is not suggested  
19 that Mr Pritchard, not to mince words, is lying, but it seems to be said that he is being  
20 deliberately misleading by selective reference to the evidence, skewing the evidence. That is a  
21 serious allegation, it is wholly unfounded, it is wholly unsustainable and it is unworthy of those  
22 representing the applicant.

23 Secondly, it is said that the OFT fails to meet its duty under *Ex parte Huddleston*. With  
24 respect, one needs to read that dictum in the context of the case as a whole, and I can ask you  
25 to look at our supplementary skeleton, the note that was served yesterday, at paragraph 4, so  
26 far as submissions of third parties or other material may be relevant to a decision under  
27 challenge, the duty of the decision-maker is to ensure the court has a full and fair picture of the  
28 basis for the decision and the procedure of the decision-making process insofar as it involves  
29 interested parties. It is to that duty that Lord Justice Parker was referring in *Ex parte*  
30 *Huddleston* and we set out the quotation which I would ask you to read.

31 Just for reference *Ex Parte Huddleston* is in your bundle 6 at tab 7, which was a challenge to  
32 the refusal of a local authority grant to a student. That simply made a bald statement saying  
33 “We have taken everything relevant into account” and the Court of Appeal said that will not do  
34 ... (inaudible) ... being challenged you have got to have concern to the particulars. If one  
35 looks at that report at tab 7 of bundle 6, page 946, just below letter J, Lord Justice Parker:

1           “Having said this, I should make it plain that it is the special circumstances of this case which  
2 in my view render the bare statement that all the circumstances were taken into account an  
3 adequate answer. No one should suppose that, where leave has been given by the Divisional  
4 Court to apply for judicial review on the ground that an authority has taken into account  
5 irrelevant considerations or has failed to take into account relevant considerations or had made  
6 an ‘irrational’ decision, it can be regarded as sufficient to say ‘We took into account all  
7 relevant considerations and took no account of any irrelevant considerations’. Where leave has  
8 been given on any such ground the authority would normally have to explain what it did and  
9 did not take into account. I say ‘normally’, for applications for leave and on the grounds on  
10 which they are granted vary enormously. So too do the answers which an authority may  
11 properly make.

12           “If, for example, the allegation on which leave is given is that consideration A was not taken  
13 into account, the authority’s answer may be merely: (i) ‘We admit it was not taken into account  
14 but it was not relevant’; or (ii) ‘We did take it into account’.

15           Depending on the basis of the attack, it may however have to go further. If the applicant’s  
16 case is that the particular consideration was not taken into account and that, if it had been, no  
17 reasonable authority properly directing itself could have refused the application, the authority  
18 will almost certainly have to go further and say, ‘We did take it into account, but we also took  
19 into account considerations B, C and D which were equally relevant and, having regard to A,  
20 B, C and D together, our refusal was not one which no reasonable authority could reach.’ I say  
21 ‘almost certainly’ for I do not myself consider it possible to generalise.”

22           Then below that there are the paragraphs which are quoted in our skeleton argument, except  
23 as you see, just above letter F, the words “so far as is necessary fully and fairly to meet the  
24 challenge” are actually emphasised by Lord Justice Parker, something we failed to do when  
25 quoting it in our skeleton argument.

26           That is even in the context when there is no statutory restriction on disclosure, such as the  
27 restrictions that apply to the OFT under part 9 of the Enterprise Act such that we could not  
28 simply disclose. That is as regards the second basis of criticism, that we are somehow not  
29 complying with *Ex Parte Huddleston*, we say we clearly are.

30           The third ground of criticism, based on those passages from the Tribunal in *IBA*, the passages  
31 set out and paraphrased at length in all the sub-paragraphs of paragraph 46 of Celesio’s  
32 skeleton argument, are the very passages which Lord Justice Carnwath criticises in the Court  
33 of Appeal in the section of the judgment that I read to you. As for a right to disclosure, even if  
34 it is asked for or specially applied for, that has been discussed in two cases at senior level, the  
35 two cases that we refer to in our supplementary note. At paragraph 6 we refer to the case,

1 usually more popularly known as the London Lesbian and Gay Centre case and we have  
2 provided this in a small clip to go into bundle 5.

3 THE CHAIRMAN: Yes.

4 MR ROTH: If we go to bundle 5 at tab 17 we see the Court of Appeal judgment where a challenge  
5 was brought by the London Borough of Islington and the London Lesbian and Gay Centre to a  
6 decision of the Secretary of State which disapproved of a scheme regarding the premises that  
7 they occupied. On the interlocutory hearing Mr Justice Rose (as he then was) ordered the  
8 Crown to give discovery of documents and the Secretary of State appealed. Picking up the  
9 second page:

10 “Held: allowing the appeal, Mr Justice Rose had misdirected himself in ordering discovery.  
11 The previous authorities on discovery are not altogether easy to reconcile with each other and  
12 each depended to a large extent on the actual circumstances of the case. It was well established  
13 that it was not right in any litigation to order discovery by way of a ‘fishing expedition’. An  
14 applicant was not entitled to go behind an affidavit in order to ascertain whether it was correct  
15 or not unless there was some material available outside that contained in the affidavit to  
16 suggest that in some material respect the affidavit was not accurate. Without some prima facie  
17 case for suggesting that the affidavit was in some respects incorrect, it was improper to allow  
18 discovery of documents, the only purpose of which would be to act as a challenge to the  
19 accuracy of the affidavit. If, however, an affidavit only dealt partially, and not sufficiently  
20 adequately, with an issue it may be appropriate to order discovery to supplement the affidavit,  
21 rather than to challenge its accuracy. That must depend on the nature of the issue.

22 In view of the history of attitudes to homosexuality in this country, it was perhaps  
23 understandable that there was a suspicion that the real reason for the refusal of consent on the  
24 sale of the LLGC premises was disapproval of homosexual activities. Insofar as it was  
25 founded on such suspicion, the application for discovery was a fishing expedition. It was  
26 deposed that the Minister had no bias for any kind against the carrying out of the services  
27 offered by the centre. There was no prima facie case disclosed of inaccuracy, much less  
28 falsehood, in any evidence put before the court by the Secretary of State. There was no basis  
29 for going behind his statements.”

30 That is a very robust judgment in a case where the Centre thought there might be something  
31 there.

32 Moving on to the next tab, in 1994 the Divisional Court, here Lord Justice Rose, by now in  
33 the Court of Appeal and perhaps somewhat chastened by the experience of being overturned in  
34 the previous case, this is the well-known case of the Pergau Dam where the World  
35 Development Movement, you may recall, brought a challenge to the government’s decision to

1 give a grant of aid to Malaysia for the construction of the dam. A major issue was whether the  
2 World Development Movement had standing in the court. An important judgment held that  
3 they did and indeed they quashed the decision, but they also considered disclosure and one  
4 sees that at the bottom. I will not read the whole head note, but on the second page, 387 at the  
5 bottom, letter H, per Lord Justice Rose:

6 “Whilst discovery in judicial review proceedings can be made under Order 24, Rule 3, which  
7 will, by virtue ... be refused if it is not necessary for\* disposing of the case fairly, the  
8 Secretary of State’s letter to the Foreign Affairs Committee in conjunction with the summaries  
9 of the departmental minutes exhibited in evidence provided an effective answer to the claim for  
10 discovery and as there was no basis for questioning the accuracy of the summaries, which was  
11 a necessary prerequisite for obtaining discovery of original documents, discovery of the  
12 minutes was not necessary.”

13 That is quite a strong case because it was found in fact in that case that the affidavits put  
14 before the court in the first instance were incomplete and the court was critical of the  
15 affidavits, but even so there was no duty to make further disclosure and the application for  
16 general disclosure was refused.

17 I think that probably deals with the third of my three points because we say there is no failure  
18 by the OFT to provide information here. Even if disclosure had been applied for, which it was  
19 not, despite the express invitation to make such an application if it was thought appropriate, it  
20 would in our respectful submission properly have been refused within established principles.  
21 There is no difficulty for this Tribunal to carry out its traditional function under the statute,  
22 with which it is entrusted under section 120. The criticism in this part of Celesio’s skeleton  
23 argument is completely misplaced. That bell tells me, perhaps appropriately, that it is five past  
24 one.

25 THE CHAIRMAN: I am not sure what that bell was telling you.

26 MR ROTH: It was deceiving me into thinking it is time for me to stop; it was not set by me. In that  
27 case I can deal with the other preliminary matter which is the test for reference under the  
28 Enterprise Act. I will just say a few words, without wanting to retread well-trodden ground,  
29 about what is said there. It is in your bundle 2 at tab 6. In the pages we have here, the Vice-  
30 Chancellor, in paragraph 33 of his judgment (at the bottom of the left hand column) quotes in  
31 full from the judgment of the CAT. I will not read the whole quote, but picking it up within  
32 the quotation at 191 (the right hand column), the Tribunal said:

33 “In other words, putting the matter less technically, if there is genuinely ‘room for two views’  
34 on the question whether there is at least a significant prospect that the merger may be expected



1 to lead to a SLC, then in our opinion the requirement in section 33(1) that ‘it may be the case’  
2 that ... [the merger] may be expected to lead to a SLC, is satisfied.

3 “[192]. In our opinion, in such circumstances, the statutory duty of the OFT under section  
4 33(1) is not to decide, definitively, which of those two views, it, the OFT, prefers. Under the  
5 scheme of the Act, the definitive decision maker, in a case where there is room for two views,  
6 is not the OFT but the Commission. If there is room for two views, the statutory duty of the  
7 OFT is to refer the matter to the Commission, whose duty is to *decide* on the question whether  
8 the merger may be expected to lead to a SLC, as section 36(1) expressly provides.”

9 Then if I can take you over the page, please, still within the quotation, to the left hand column  
10 at paragraph 197, after referring to the fact that there will be some cases which are clearly  
11 likely to create an SLC and some clearly will not, the sort of black of white cases, there is a  
12 grey area where they may be room for more than one view. That is referred to at the bottom of  
13 the previous page in paragraph 195. Then paragraph 197:

14 “What is the correct approach in cases in the ‘grey area’ in between? In a case where real  
15 issues as to SLC potentially arise, it seems to us that the words ‘it may be the case’ imply a  
16 two-part test. In our view, the decision makers(s) at the OFT must satisfy themselves (i) that  
17 as far as the OFT is concerned there is no significant prospect of SLC and (ii) there is no  
18 significant prospect of an alternative view being taken in the context of a fuller investigation  
19 by the Commission. These two elements may resemble two sides of the same coin, but in our  
20 view they are analytically distinct.”

21 That analysis was challenged, as you know, in the appeal as being the wrong interpretation of  
22 the statute, challenged by the OFT, and on the next page, paragraph 38, the Vice-Chancellor  
23 says this:

24 “I have no hesitation in preferring the submissions of the Appellants [the OFT] on this issue.  
25 The statutory test, so far as relevant, imposed by section 33(1) is ‘whether the OFT believes  
26 that it is or may be the case that the [merger] may be expected to result in SLC ...’

27 Thus the relevant belief is that the merger may be expected to result in SLC, not that the  
28 Commission may in due course decide that the merger may be expected to result in SLC.  
29 Further, the body which is to hold that belief is OFT not the Commission.”

30 He then explains how, by construction, he reaches that view, and then paragraph 42 in the  
31 next column:

32 “For all these reasons I would reject the two part test formulated by CAT in paragraph 197 of  
33 their judgment and applied in paragraph 228 and 232.”

34 So it is not a question of whether there is room for two views or an alternative is credible.

1 He then goes on to consider what is the test that should be applied given that the CAT's  
2 formulation is disapproved? He does that through a series of propositions and I would ask you  
3 to go to paragraphs 47 and 48 of the judgment, in particular at paragraph 48:

4 "At the other end of the scale it is clear that the words 'may be the case' exclude the purely  
5 fanciful because the OFT acting reasonably is not going to believe that the fanciful may be the  
6 case. In between the fanciful and a degree of likelihood less than 50% there is a wide margin  
7 in which the OFT is required to exercise its judgment. I do not consider that it is possible or  
8 appropriate to attempt any more exact mathematical formulation of the degree of likelihood  
9 which the OFT acting reasonably must require. As Lord Mustill observed in [the South  
10 Yorkshire case] 'The courts have repeatedly wanted against the danger of taking an inherently  
11 imprecise word, and by redefining it thrusting on it a spurious degree of precision'."

12 He then comments on the OFT's published advice. With great respect to Mr Hoskins he does  
13 not say, as was attributed to him, that if it is more than fanciful the OFT must refer, that is  
14 quite clearly not so. He is saying that there is margin between the fanciful and more than 50%  
15 as to the degree of likelihood, and that is a matter of judgment for the OFT whether there is  
16 sufficient likelihood of substantial lessening of competition as to warrant investigation by the  
17 Competition Commission. The degree of likelihood of SLC will vary with the circumstances,  
18 to adopt the phraseology of this Tribunal in the UniChem case, and that is something that we  
19 strongly rely upon, given the way the application is put. I think it now is 1.15 and that is  
20 indeed a convenient moment because that concludes the preliminary matters. Thank you.

21 THE CHAIRMAN: Five past two.

22 (The luncheon adjournment).  
23  
24  
25

1 MR. ROTH: Good afternoon. The substance of the judicial review challenge. This is, of course, as  
2 you appreciate, judicial review – not a Competition Act appeal on the merits. So, it is not a  
3 question of whether the Tribunal agrees or disagrees with the decision, but whether it is within  
4 the range of reasonable decisions that the OFT can take – whether, put colloquially, it stacks  
5 up. This is a case where the OFT, working within the statutory deadline that arises on a  
6 reference back from the European Commission (because unlike a purely domestic case where  
7 there is just an internal published working guideline, here there is a statutory guideline under  
8 Section 34A of the Enterprise Act of forty-five working days), the OFT in fact gathered a very  
9 great deal of material, and, we submit, conducted a careful assessment. There is a helpful  
10 chronology which is at the end of the intervenor’s bundle – that is, Bundle 3. If I can just ask  
11 you to look at the very last tab? There is a two-page chronology, I think at the very end. You  
12 see there that there are some initial meetings – both with the OFT and with the European  
13 Commission in Brussels. This is, of course, Alliance/UniChem and Boots. Then, on 30  
14 November the European Commission make the decision referring back to the UK authorities  
15 under the EC Merger Regulations, and that really then starts the thing rolling. As you see, just  
16 going down there, there are meetings, and repeatedly the OFT sends information requests on 7  
17 December ---- They get some information back. They digest it. 21 December – another  
18 information request. That is considered. There is then a break for Christmas. But,  
19 information comes in on 30 December, 6 January. Another information request sent back on  
20 10 January. Another information request. There is then a meeting on 11 January. Further  
21 information request. Still on 18 January the OFT is sending information requests to the parties.  
22 So, it is an ongoing process, and the information requests, of course, develop and become  
23 refined according to the information that is provided in response to the previous request – as  
24 one would expect. Subsequent requests follow on, digesting that, and what is said in meetings.  
25 So, the fact that they do not at the outset – or early on – ask for information about four to three  
26 areas (the point that Mr. Hoskins made), but they start with certain request, then look at them  
27 and see where does it take them, and then ask for further information is entirely natural, and,  
28 indeed, accords with common-sense and how an investigation should be conducted. If they  
29 come to a point where they thought, “Well, we need detailed maps on four to three areas”, they  
30 would have asked for it. But, if they come to a point where they say, for reasons that I come  
31 to, “We don’t”, they do not ask for it. No conclusion can be drawn from that simply by looking  
32 at the earlier request and saying, “Well, what was asked for, and what was not?”  
33 So, that takes me to, really, the substance of what this case is really about, which is the  
34 finding that a reduction of four to three fascia in local retail markets would not be expected to  
35 give rise to SLC. The reasoning in the decision, I have to say, has been really quite

1 fundamentally mis-characterised by Celesio on several key points. It is, as everyone  
2 appreciates, a process of reasoning. I think Mr. Pritchard describes it as an iterative process. I  
3 would tend to say an incremental process. That means the same thing. Those paragraphs at  
4 43 to 46 – of the decision. I know one gets to the point of almost knowing it by heart, but  
5 could I ask you to open the decision at paras. 43 to 46? What is going on here? The OFT  
6 starts at the case that is likely to cause most concern – a two to one fascia reduction. That is the  
7 starting point in para. 43. They conclude that it is likely to result in SLC – not that it will  
8 result in SLC (that is the test for the Commission under Section 36 of the Act) but that it is  
9 likely to. It could lead to a reduction in the incentives. It is expected to result in SLC. I will  
10 come on in a moment to para. 82 (not now) where that is picked up again. There is no criticism  
11 about that – not only as regarding the conclusion, but also that this is a sensible starting point.  
12 Then they go to the next level up – three to two fascia reduction. They look in detail at those  
13 areas. They find that when stores are the closest competitors in those three to areas, then it is  
14 similar to a two to one area. That is, of course, at para. 44, and one sees how closely they  
15 looked at the three to two areas from the maps that were provided to them. If, perhaps, you  
16 could keep the decision open, and if you could go to the OFT bundle, Bundle 4, at the first tab  
17 at 1A. As pointed out before, it is a bit hard to find because there is no continuous pagination.  
18 But, about two-thirds of the way in, one comes to that p.54, Annex 4, and then you have the  
19 three to two local areas, one mile radius, and a separate map for each one so that they can be  
20 analysed. If, for example, you go to Map 2, one sees the situation there. You have the blue dot  
21 at Boots. You have the red triangle in the middle of an Alliance pharmacy, and you have two  
22 white dots – one right next to Boots; one about probably 100 yards away – which are the other  
23 two. One notices, incidentally, if you go just outside the one mile radius you have what looks  
24 like Ashby Common Road ---- Ashby Lane. There is another white dot just outside. There is  
25 another one a bit further away. That is that area. One can see the position going through.

26 If we go on a couple of pages to Map 4 – Cambridge (it may be that some members of the  
27 Tribunal are familiar with Cambridge) – you will see there the red triangle right in the middle;  
28 there is a blue dot to the left (that is Boots); and there is a white dot (I cannot quite read it),  
29 which is the other one inside; then there are a lot of other white dots around. Down at Cherry  
30 Hinton at the bottom, and up towards Chesterton at the top ---- Indeed, all over the place. But,  
31 that is outside the perimeter. That is the level of detail which the consideration got to. One can  
32 work through all the different maps.

33 So, that was the analysis that they did in looking at it, and saying, well, in some cases the  
34 merging parties' pharmacies are located close together. In those cases it may not differ from  
35 that in a two to one area.

1           Then they go on at para. 45 – you have got to consider also what is said in the parties’  
2 internal documents about how they monitor competitors. Then they conclude that on balance --  
3 -- on balance, the OFT believes an SLC may go beyond the two to one areas, and may also  
4 arise where fascia are reduced from three to two within a one mile radius. Then they go to the  
5 next level up and they confront the question about any higher fascia reduction. It is not  
6 ignored or forgotten about. They conclude, as explained in the first sentence of para. 46, “Any  
7 higher reduction in fascia number than this – for example, four to three, or higher – five to four  
8 – could also give rise to a lessening of competition, but on the basis of the evidence before the  
9 OFT it believes that this cannot be expected to be substantial”. That has been criticised – that  
10 sentence – as being no reason at all, or else ---- also, illogical. But, with great respect, this first  
11 sentence is not to be read in isolation of what has gone just before. It is in the context of  
12 discussion of the evidence in the decision as a whole and the findings in the previous  
13 paragraphs. It is entirely logical.

14           First, it is now accepted that the fascia test is a valid basis for assessing competitive  
15 constraint based on the number of competing ... (inaudible) ... The challenge saying that that  
16 was unreasonable has been abandoned. Secondly, one is looking at a very small geographical  
17 area – a one mile radius around these stores. Thirdly, this is a very regulated market with  
18 limited scope for competition anyway. So, that is the counter-factual against which the effect  
19 of the merger is being assessed. Fourthly, when a three to two fascia reduction is only just a  
20 candidate for SLC – on balance, a candidate for SLC having regard to all the evidence –  
21 although not at all conclusive that it creates SLC ---- Indeed, the OFT tried to see if it could  
22 segregate those three to two areas where there might be a problem from the rest of the three to  
23 two areas, but it could not come up with a sufficiently robust method of doing so. Mr.  
24 Pritchard explains that in his witness statement at paras. 107 to 114. Nothing there is  
25 inconsistent with the decision at all. Fifthly, on that basis they could readily conclude, on the  
26 same evidence, that four to three is not a concern. Well, Mr. Pritchard explains that in his  
27 witness statement at para. 117. I just ask you to look at 117 of his statement. “The OFT’s  
28 conclusion in respect of four to three areas was, as in the case of other areas, reached after  
29 detailed consideration of all the evidence in the case. In short, the OFT was already concerned  
30 ... a finding of SLC, even on the lower ... was marginal in respect of those limited number of  
31 three to two areas that arguably resemble two to one areas felt obliged to extend this lower  
32 level of belief across the entirety of the sixty-one three to two overlaps ... Once an additional  
33 effective competitor of choice for consumers within one mile of the merged firm was added to  
34 the competitive assessment, the merged firm would be disciplined by two effective competitors  
35 within one mile of its operations. Any protection that harm would occur in the circumstances

1 of local competition among pharmacies became, in our judgment, plainly speculative and  
2 fanciful because it was unsupported on the evidence. Hence the OFT's reference to its  
3 positive belief on the basis of the evidence before the OFT. Having established lack of  
4 concern of four to three, there was no need to proceed further with the iterative approach".

5 Is that inconsistent with the decision, or seeking to gloss it, or give it a different meaning?  
6 We say, "Not in the least". Indeed, the OFT was careful in the three to two case because it did  
7 not find that SLC is likely to result, but that it may be the case that it may result. That is what  
8 Mr. Pritchard here says, applying the lower standard stipulated by the Court of Appeal in **IBA**,  
9 and made clear in the decision, in para. 82 ---- If you could please look at para. 82 of the  
10 decision, which is the assessment section of the decision – because the decision, as you will  
11 have noticed, has various capitalised sub-headings ---- Right from the beginning the  
12 transaction, jurisdiction, relevant market, and so on ---- horizontal issues, vertical issues, third  
13 parties, and then assessment. This is the assessment section. There, in para. 82, starting at the  
14 second sentence, on a local level on the basis of a one mile radius around both Boots and  
15 UniChem pharmacies, a thirty-eight areas merger will result in two to one reduction ... and a  
16 further sixty-one areas where it would result in a reduction in the number of fascias from three  
17 to two. The evidence considered during this assessment clearly shows a reduction in pharmacy  
18 fascia from two to one in a local area is, despite the restrictive terms of the NHS concept,  
19 expected to result in an SLC. Such an SLC could take the form ... There may be also an  
20 impact on pricing, particular of P medicines".

21 Then it goes on, "The evidence of whether an SLC would arise in the case of three to two  
22 overlaps is less conclusive. But, on balance, the OFT takes the view that it may be the case  
23 that the merger may be expected to result in an SLC within these three to two overlap areas,  
24 given the high barriers to entry present in this market as a result of the control of entry  
25 regulations". That is their finding regarding the three to two areas.

26 I ask you to compare the way the decision is characterised by Celesio in para. 26 of my  
27 friend's skeleton argument where they set up their foundation for what they say is the illogic in  
28 the OFT's approach. Paragraph 26. "Having concluded that there have been sufficiently  
29 significant changes in the competitive environment so that an SLC will now arise in relation to  
30 two to one and three to two reductions. The OFT cannot then seek to argue any such changes  
31 should have been small, let alone so small as to justify itself finding no SLC would arise in the  
32 four to three areas".

33 Well, if that is what they had found – and one can see some force in the point ---- But, of  
34 course, it is not what they found. They did not find that SLC will arise in three to two areas.  
35 They did not even find that it will arise in two to one areas. They found it likely in two to one,

1 and, on balance, it may be the case in three to two, but they cannot be conclusive. That is the  
2 fundamental mis-characterisation of the approach that the OFT took. Of course, the decision  
3 has to be read as a whole, and para. 82 has to be read with paras. 43 to 46. This is not to be  
4 construed as though each paragraph of the decision is a section of the statute that one pours  
5 over and looks at fine grammatical distinction. I take Professor Bains' forceful point – “Well,  
6 if it was slightly differently worded, you get a different view”. One takes a sensible analysis of  
7 what is the logic of what is being said.

8 Celesio then say, “Well, they might be a Boots and Alliance UniChem pharmacy, in closest  
9 proximity geographically in a four to three case”. Well, so they might. So, also, in a five to  
10 four case, or a six to five case. But, they do not suggest that we had to look at all six to five or  
11 even five to four cases. Why is it not relevant in a five to four case if the Boots and the  
12 Alliance UniChem pharmacy are the two that are closest together, because, very obviously,  
13 when you are looking at a very small local area there is a point when the other fascia, albeit  
14 800 yards away/1000 yards away, provide sufficient constraint, particularly when the scope for  
15 competition is so limited in the first place. Opening hours on service seems to be the main  
16 form of competition, and then you are into qualitative things like friendliness of staff, or a  
17 home delivery service, or whatever.

18 Celesio says, “Well, the line should be drawn at four to three”. Someone else might say, “The  
19 line should be drawn at five to four”. Celesio, of course, cannot say that because in its Cohen  
20 and Scholls merger it was contending that the five to four case raises no worries at all; indeed,  
21 there, even in a two to one case, they said there were reasons why the OFT should not be  
22 concerned. But, the judgment to draw the line at three to two, based on a detailed examination  
23 of what happens in three to two areas – to what extent is there any concern – is exactly what  
24 falls within what the Court of Appeal in IBA Healthcare described as ‘the margin of  
25 assessment’ of the OFT in determining whether the lessening of competition is substantial.  
26 The likelihood of SLC which is appropriate for the OFT’s judgment. That is exactly what they  
27 did. They did not say that the loss of a fourth choice in this very local area when three remain  
28 means that there is no lessening of competition. They have been very careful not to say that.  
29 They say, “Yes, there is some lessening, but on the evidence we have had, and in our  
30 judgment, it will not be substantial”.

31 Has the OFT acted irrationally in exercising that judgment here? It is now said, “Well, it’s  
32 irrational because when competition is weak, one should be more, not less, concerned about  
33 any reduction”. But, with respect, the assessment the OFT has to conduct is not quite so  
34 simple. SLC is purely an effects test. It is asking, “How much competition is lost?” –not,  
35 “How much was there in the first place?” It is a point, if I may say so, which was made in

1 Professor Bain's very pertinent question. A merger could create a big loss of competition in  
2 what was a highly competitive market, or it could have negligible effect in a market where  
3 there was barely any competition at all because it was highly regulated in what the parties can  
4 do. SLC is a measure of change by reference to material harm to consumers. The point is  
5 made very clearly in the OFT's substantive assessment guidance, which you have in Bundle 5,  
6 Tab 2. On p.15 at para. 3.7, "A merger may be expected to lead to a substantial lessening of  
7 competition when it is expected to weaken rivalry to such an extent that customers would be  
8 harmed. This may come about, for example, through reduced product choice or because prices  
9 could be raised profitably; output could be reduced and/or product quality or innovation could  
10 be ---" etc.

11 It is said also that the last sentence of para. 46 – the second sentence to be disregarded, but the  
12 last sentence – about the MMC report is inconsistent with what has been said before, the  
13 sentence saying that the report considered only two to one fascia reductions while there had  
14 been small changes in the market since then, primarily the removal of resale price maintenance  
15 on over-the-counter medicines which might suggest some small increase in the scope for  
16 potential competition. These changes do not support an argument that a reduction of four to  
17 three might give rise to competition concerns. There is nothing inconsistent with what has  
18 been said in para. 43 above. The Monopolies & Mergers Commission said that a two to one  
19 reduction in fascia down to monopoly, in other words, would produce some small reduction in  
20 competition, but that is outweighed by customer benefit. The OFT considers that at para. 43,  
21 and says, "Well, now some more competition developed. So, that is not a basis for saying there  
22 is no concern about two to one". But, when they get two levels up in the incremental process,  
23 to considering four to three, they say, "Well, it's still relevant in that context that even in two  
24 to one at that time they thought there was no problem, and the changes which now lead us to  
25 re-visit the matter on two to one, and just, on balance on three to two ---- But, once you get up  
26 to the level of four to three, it ceases to be so significant". That is all that is being said.

27 Then, although Celesio, initially, in its grounds of challenge said that the fascia test should  
28 not be applied, and argued in favour of a market share test by outlet numbers – the first ground  
29 of challenge now abandoned – they now seek effectively to resurrect it with regard to the four  
30 to three areas in the second stage of analysis which they say the OFT should have carried out.  
31 That is the coloured bar chart which was explained this morning, where what is done is to take  
32 four to three areas and then look at market shares by outlet numbers. I think it was produced in  
33 the new bundle, but it actually belongs to Dr. Pedilia's report. But, we have got a coloured  
34 copy. I think that is the way it came in. It is the one with the coloured bars. I am told it is  
35 Tab 2 of Bundle 6. As you see, it is p.30 of 35, which is a reference back to Dr. Pedilia's



1 report. What that is doing is counting up the number of stores and then showing market shares  
2 by outlet ... (indistinguishable) ... That is the approach that has been adopted.

3 I would say by way of observation that reliance on this document ---- That is not a recent  
4 challenge at all. I am not saying, therefore, that the thing is inadequately reasoned. This is a  
5 substantive challenge, saying, "It is irrational because we did not conduct an outlet market  
6 share examination". That is what this point goes to. Whether that is technically there on the  
7 new grounds of judicial review put forward, I am not sure, but I do not take a technical point  
8 on that. That is what it is saying.

9 The illogicality here lies with Celesio, because if that is the correct approach – that you look  
10 within the individual local areas at market share by outlets – well, that should be applied  
11 equally on five to four areas, because you could certainly get more than 50 percent resulting ---  
12 - or, even on six to five areas. And it should be used as a filter to exclude from concern some  
13 of the three to two areas. One has to be consistent when applying that approach. It is  
14 explained by Mr. Pritchard in para. 78 of his witness statement – the problems that it causes  
15 and how it would work. If you do that, it could be under-inclusive. He gives the example that  
16 a third party has four outlets, while the parties have one each in a densely populated one mile  
17 area. Market share by number of outlets approach, which would suggest the third party is by  
18 far the leading player with 67 percent compared with the market merged firms' more modest  
19 33 percent. In other words, they would exclude that area. The decisive point, however, from  
20 the OFT's perspective is that the better measure for this market is the fascia test which  
21 emphasises the question best calculated to capture the merger effect – how many rival  
22 suppliers, and how many competitive consumer choices will remain in the area post-merger.  
23 For this example, the answer is only two, such that the area is classified as the three to two  
24 area, and thus worthy of further consideration.

25 Secondly, it could be over-inclusive with potential local problem areas where the merging  
26 parties operate more than one pharmacy outlet apiece between them within a one mile radius.  
27 Assuming it is a densely populated area, the parties' own two stores each, compared to only  
28 one apiece by four other rivals. These are not fanciful examples. One just thinks of a densely  
29 populated town. The parties' market share might prompt initial concern at 50 percent, despite  
30 the fact that the merger is a six to five, i.e. consumers can choose from no less than five rival  
31 suppliers. The OFT notes ... who did not contend in the Lloyds Cohen and Scholl, and does  
32 not contend now, six to five merger prima facie raises competition concerns here. That is  
33 precisely what a market share by store number test would suggest in such a case.

34 So, once one accepts, as Celesio now does, that a fascia test is the appropriate starting point  
35 as the rough and ready first indicator, the next stage is to look in more detail at location – not

1 to apply another basis of concentration analysis which is less appropriate. That is why there  
2 is nothing wrong or inadequately reasoned, or inconsistent, in the approach taken by the OFT  
3 in working out one to two, two to three, and then saying, “We need not be concerned, given  
4 what we have found about four to three, or higher”.

5 That it the local area of the four to three.

6 I move on to the national market assessment, because Celesio contends that the unreasonable  
7 exclusion of four to three reductions in the OFT’s assessment of local competition so infected  
8 the OFT’s separate analysis of national competition that the conclusion in the decision  
9 regarding competition at national level is vitiated. That is, I think, I hope, a fair summary of  
10 what their new ground are, as set out in their skeleton argument at, I think, para. 1(b): “This  
11 error of assessment in relation to local retail markets necessarily vitiates the OFT’s conclusion  
12 relating to the national retail market”. That is their skeleton argument at para. 1(b).

13 That really is, with respect, an extraordinary contention. This is a merger of Boots (which  
14 has 1,350 retail pharmacies) with Alliance UniChem (which has 958 retail pharmacies). How  
15 many local areas with a four to three reduction is one talking about? Forty-eight, say Celesio  
16 in their Notice of Application at para. 99. In fact, now that one can look at the list of those  
17 forty-eight in the appendix to the new expert report of Celesio served on Friday, one can see  
18 that actually within that forty-eight, which Celesio counts as a four to three (in Bundle 6 at Tab  
19 5, the last page), headed ‘Four to Three Areas’ with the orange and blue colouring ---- Well,  
20 the blue colouring, in fact (and these are the forty-eight areas) ---- Incidentally, I asked for  
21 clarification of the last but one, and last but two columns on the right. I am told they can be  
22 deleted – they survived from an earlier draft and tell us nothing. The blue ones, as explained  
23 in the legend at the top, are in fact areas that have been identified as three to two areas by the  
24 OFT. There are seven of those. So, the forty-eight now go down to forty-one, because they  
25 have already been caught by the findings in the decision.

26 So, one is talking about forty-one areas overall. Under 5 percent of either party’s estate.  
27 They involve, if one counts them up, forty-four Boots pharmacies and 52 Moss pharmacies  
28 (Alliance/UniChem pharmacies). In fact, they are not saying, as they made clear, that all of  
29 these forty-one should be subject ---- should give rise to a possibility ---- It may be the case of  
30 SLC ---- They say one ought to look at them more carefully to distinguish which do and which  
31 do not. But, even if it is all forty-one, to say that an error of assessment of that number of  
32 cases vitiates the OFT’s conclusion that the position at national level of 1,000 plus stores is  
33 really quite preposterous.

34 In a sense, I could leave it there, but one can see very clearly from the decision the basis for  
35 the OFT’s conclusion regarding competition at national level. Again, one goes back, as always,

1 to the decision at para. 26. Horizontal issues; retail pharmacy; provision of services to  
2 consumer; national overlap. First, they look at the increase in overall market share nationally,  
3 and find that there is no particular cause for concern in that – an increment of 8 percent to 19  
4 percent. However, then they look more closely at different product categories – the three  
5 product categories that have been identified. What does that show? That shoes UniChem is  
6 much more dependent on sales from dispensing than Boots (para. 27 – the figures (the exact  
7 figures are confidential, but a huge difference, almost the opposite ends of the spectrum)). So,  
8 that is dispensing. They then look at GSL medicines at para. 28. Little significance for  
9 UniChem. Boots - the main competitors, are Tesco and SuperDrug. They then look rather  
10 more carefully at P medicines, and note that Boots has a much higher share, and sees  
11 supermarkets as the price-setters here too. They rely on internal documents from Boots which  
12 are referred to in the confidential part of that paragraph. But, an internal document – not  
13 something created for the merger, like an expert’s report, but something that Boots had, and on  
14 which it was running its business.

15 They note further, in para. 30, that 40 percent approximately of P medicines have HESL  
16 alternative. For example, the one that comes out from the papers that caught my eyes is  
17 Ibuprofen, because a twelve-pack of pills of 200mg, painkiller, is a GSL medicine, but a  
18 twenty-four pack of 200mg Ibuprofen is a P medicine. So, you can go to the supermarket with  
19 a pharmacy there and you can buy two packs of twelve each as opposed to one pack with  
20 twenty-four. The point being made is, well, obviously then the packs of twelve are going to  
21 constrain the price of the packs of twelve in Boots, because that is GSL, and it is going to  
22 constrain the price of the pack of twenty-four, even though that is a P medicine. You cannot  
23 sell it for more than twice the price of two packs of twelve.

24 Similarly, the 400mg strength of Ibuprofen is a P medicine. A pack of twelve – any strength.  
25 But, as I explained, the 200mg pack of twelve is a GSL medicine, but you can take two pills at  
26 once and you get exactly what you get if you swallow one pill at 400mg. That is the point that  
27 is being made. There is a huge amount of overlap, and therefore the pricing of one constrains  
28 across a large range of the pricing of the other. Not all, but 40 percent.

29 Then they find that pricing policies are set nationally. That is something that was referred to  
30 back in para. 14. It is picked up in para. 31. They refer to third parties – not, I think, one that  
31 Celesio quarrel with – and that competition is, in the main, driven by local competition (in  
32 respect of para. 14), but local competition influencing national policies. Then they look – and  
33 criticism is made of this paragraph, though actual figures are confidential – and what they are  
34 saying here is, I suggest, absolutely clear: that while local competition can feed in to national  
35 competition, Boots and Alliance UniChem basically have different business concepts, or a

1 different spread of their portfolio stores. Boots is primarily a High Street store, while Alliance  
2 UniChem fits more the community pharmacy model, generally in residential areas, health  
3 centres and smaller shopping centres. But, their breakdown by areas does suggest that both  
4 have a relatively high frequency in rural towns. So, they do not dismiss local competition  
5 between them. They do not say, “We don’t worry about it in considering national price  
6 competition on P medicines”. They say, “On the contrary, overall evidence suggests limited  
7 competition between the parties in respect of the pricing of P medicines, and any pricing  
8 concerns which may arise on a local level will be addressed below”. So, they say, “Yes, we do  
9 need to look at P medicine pricing, but it is appropriate doing it locally where we can actually  
10 see where is it that they are within the same local area, and do not face significant competitive  
11 constraints from a competing fascia”.

12 Then they note that there are many other major players operating nationally – not just the top  
13 chains (Boots, Lloyds and UniChem) – but also SuperDrug, the Co-Op, Rowlands, and of  
14 course supermarkets and then there are regional chains and independents, and that is para.32.

15 So, what they say is that overall there is no national concern at national level, and once you  
16 remedy those local areas where the merger might lead to a lack of competitive constraint, that  
17 deals with any concern at national level regarding pricing of P medicines. On any fair reading  
18 of that section I suggest that is entirely clear.

19 That takes me, I think, to the issue of the undertakings. Of course, we accept that if you say  
20 they were wrong to exclude a finding of SLC potential ---- maybe the case of SLC in four to  
21 three areas ---- the undertakings cannot be adequate. They made that clear from the outset.  
22 But, if we are wrong on four to three for not considering, and applying, a market share test, as  
23 in the bar chart, or applying the geographical proximity test also being suggested, well, then  
24 the OFT would need on a reference back, on a remittal, to apply that objective test and assess,  
25 on the basis of that test all local areas. It could not just do it for the four to three areas. We  
26 would have to apply it fairly to the three to two areas as well. Can they be segregated out?

27 So, if you were to remit, we would say it cannot just be, on those grounds, circumscribing  
28 four to threes. It would have to cover three to twos, because it may be we would find then, yes,  
29 some four to threes – if there is some new test we have to develop – would, and some three to  
30 twos would not. We say all the reasons are set out, that the approach the OFT adopted is well  
31 within its margin of judgment of assessing, “When is a lessening of competition substantial?”

32 As regards national competition as a whole, I say that if we are right on the four to three  
33 areas, and therefore there is no problem with what we did, well, now that the fascia test has  
34 been abandoned as a basis of challenge, then the challenge to the national assessment falls  
35 away. That is the converse.

1 Finally – and I will finish within time – I come to the question of reasoning in the decision  
2 and the Tribunal’s discretion. I have dealt with the process of reasoning and elucidation by a  
3 witness statement already, and I am not going to repeat what I have said. I hope that that will  
4 resolve the matter. But, if the Tribunal should be against us on that point, and say, “Well, the  
5 reasoning is not adequate. It should have been fuller”, that does not in itself mean that the  
6 decision should be quashed, because being judicial review, the remedy is a matter for the  
7 discretion of the Tribunal. Here we say there are several reasons why your discretion should be  
8 exercised not to quash the decision for inadequate reasoning – in other words, even if you find  
9 the reasoning is inadequate, it should not lead to a remedy of quashing. I make this  
10 submission, you appreciate, out of an abundance of caution.

11 There are three reasons. First if you find the reasoning in the decision was inadequate, it has  
12 now been fully explained by Mr. Pritchard, and there is absolutely no point sending it back for,  
13 effectively, a redrafting process to produce a better document when the outcome would be the  
14 same. Authority for that is in the more striking case, an **ultra vires** decision, is **ex parte**  
15 **Argyle**, and that is in authorities Bundle 5 at Tab 19. This, indeed, arose in the context of a  
16 contested merger where acquisition by Guinness of Distillers – I say ‘contested’; there was  
17 another suitor ---- The jilted suitor, Argyle, had failed to get Distillers, but the Guinness bid  
18 for Distillers had been referred to the Monopolies Commission for inquiry. Then, as a result  
19 of, I think, some divestitures, the reference was set aside by the Chairman of the Commission.  
20 That setting-aside was challenged by Argyle. The Court of Appeal held that, indeed, the  
21 Chairman had no jurisdiction to set aside the reference. So, it was **ultra vires**, but they did not  
22 quash the decision. It is in the headnote at para. 2 on the second page ---- The Commission  
23 then approved what the Chairman had done. Sir John Donaldson, M.R., Lord Justice Neale:  
24 “Although the Commission had tacitly accepted an approved the practice of the Chairman  
25 himself deciding in an interval before a group of members had been formed to investigate a  
26 reference, whether a particular proposal had been abandoned, there was no power under the  
27 Act for the Commission to do so, and the Chairman could not be said to derive any  
28 independent authority from the Act to take such decisions”.

29 “3. But that there was little doubt that a properly constituted group of members of the  
30 Commission would reach the same conclusion as had the Chairman, that in view of the  
31 purpose of the Act, and the fact that third parties might have acted in reliance on the decision  
32 to lay aside the reference, and taking into account the needs of good public administration, the  
33 court would, in the exercise of its discretion refuse to grant relief”.

34 Then, if one goes to the Judgment of the Master of the Rolls at p.774C – discretion – the  
35 Judge accepted that the Chairman derives authority to act as he did from the Act ---- The Judge

1 accepted because the Judge had found he had the power to do what he did. “The Judge  
2 therefore did not have to consider the issue of discretion. As I respectfully disagree with the  
3 Judge on this aspect, I do therefore have to consider how discretion should be exercised. We  
4 are sitting as a public law court concerned to review an administrative decision, albeit one  
5 which has to be reached by the application of judicial or quasi-judicial principles. We have to  
6 approach our duties with a proper awareness of the needs of public administration. I cannot  
7 catalogue them all, but in the present context would draw attention to a few which are relevant:  
8 good public administration is concerned with substance rather than form. Difficult although  
9 the decision upon the fact of abandonment may, or may not, have been, I have little doubt that  
10 the Commission, or a group of members charged with the conduct of the reference, would now  
11 reach the same conclusion as did their experienced Chairman. Good public administration  
12 concerned with speed of decision, particularly in the financial field. The decision to lay aside  
13 the reference was reached on 20 February, 1086. If relief is granted, it must be some days  
14 before a new decision is reached. Good public administration requires a proper consideration  
15 of the public interest. In this context, the Secretary of State is the guardian of the public  
16 interest. He consented to the reference being laid aside, although he need not have done so if  
17 he considered it to be in the public interest that the original proposal should be further  
18 investigated. He could have made a further reference for the new proposals, if such they be, but  
19 he has not done so.

20 “Good public administration requires a proper consideration of the legitimate interests of  
21 individual citizens, however rich and powerful they may be, and whether they are natural or  
22 juridical persons. But, in judging the relevance of an interest, however, legitimate, regard has  
23 to be had to the purpose of the administrative process concerned. Argyll has a strong and  
24 legitimate interest in putting Guinness ... but this is not the purpose of the administrative  
25 process under the Fair Trading Act 1973. To that extent, their interest is not therefore of any  
26 great, or possibly any, weight.

27 “Lastly, good public administration requires decisiveness and finality. Unless there are  
28 compelling reasons to the contrary, the financial public has been entitled to rely upon the  
29 finality of the announced decision to set aside the reference and upon the consequence that  
30 subject to any further reference, Guinness were back in the ring from 20 February until at least  
31 25 February when leave to apply for judicial review was granted, and possibly longer in the  
32 light of the Judge’s decision. This is a very long time – five days – in terms of a volatile  
33 market, and account must be taken that probability deals have been done in reliance upon the  
34 validity of the decisions now impugned.

1           “Taking account of all these factors, I do not consider that this is a case in which judicial  
2 review should be granted. Accordingly, I would dismiss the appeal” and the other two Lords  
3 Justices agreed. I do not think I need read their decisions on that basis.

4           We say here that on the basis of Mr. Pritchard’s explanation ---- if you say, “It’s not fully  
5 reasoned. More of that could have been in the decision itself”, yes, it could have been ---- It  
6 does not make sense, frankly, to quash for that on those grounds. That is the first under  
7 Discretion.

8           The second point under Discretion is material non-disclosure regarding the position adopted  
9 by Celesio; the fact of Lloyds’ bid for Cohen and Scholl pharmacies. We do not say that is a  
10 ground to refuse leave in isolation. I make that very clear. But, we say it is a factor that the  
11 Tribunal can, and should take into account on a matter of discretion. We do say, with great  
12 respect that it is quite serious. The Notice of Application refers to the Cohen and Scholls case,  
13 but it dismisses it as irrelevant. That is in para. 67(b) Can I ask you please to look at that?  
14 That starts, "No useful comparison may be made with the previous cases relating to mergers in  
15 pharmacy markets. As explained in (b) above, two of the cases concerned only the wholesale  
16 market. Of the other two cases in which the retail market has been considered in detail; (b) as  
17 for Lloyds, Cohen and Schools, as set out in para. 25(b) above, the merger resulted in, at its  
18 narrowest, a reduction from five to four fascia which neither the OFT, nor any third parties  
19 considered gave rise to any competition concerns. At its narrowest, a reduction from five to  
20 four fascia ----"

21           Well, on a technical reading, that is correct. But, it is very misleading, because in fact the  
22 transaction, as notified to the OFT, included in one area a reduction which Lloyds first thought  
23 was two to three, and then, on re-checking found was two to one. That was Mexborough. You  
24 see how that was addressed by Lloyds in the merger notice which is in the OFT's bundle,  
25 Bundle 4, Tab 3C. That is the merger notice under Section 96 of the Enterprise Act. If you  
26 turn to p.11 of the Notice, you see that it has been signed by Mr. Justin Ash, who is the  
27 deponent, and is the further witness statement in the present case. He pens a detailed account  
28 on competition, and the issues, and at p.20 the impact of the transaction on competition in  
29 retail pharmacies. You see how it is addressed at paras. 4.2, and 4.6 with the discussion of the  
30 two to one case, which was Mexborough, and at paras. 4.3 and 4.4 he explains why Lloyds was  
31 arguing that although there is two to one in Mexborough, it will not lead to an SLC (para. 4.4).  
32 Local conditions in 4.6. Perhaps 4.4 is interesting because it says that there are a number of  
33 other independent pharmacies on all the main routes into and out of Mexborough which could  
34 be convenient for patients, particularly in relation to repeat prescriptions, for example, going to  
35 and from work. "Lloyds therefore considers the three mile radius is a valid geographic market

1 for a location .. in respect of additional introduction of services, many of which are free ---"  
2 The next paragraph talks about the PCT. At 4.6, "Lloyds does not consider that any of these  
3 levels of local concentration will lead to a reduction in price or non-price competition ... to  
4 maintain competition".

5 What then happened was this: because the OFT expressed concerns about this locality,  
6 because it is a two to one, the Mexborough pharmacy was removed from the transaction, and  
7 that is why the statement in the Notice of Application is technically correct. But, the process of  
8 assessment in that case, as Celesio and Mr. Ash know only too well, did indeed involve a case  
9 in excess of a five to four reduction, and one which the pharmacy contended did not cause  
10 SLC. It really is no good saying that there is no need to disclose because the OFT knew this.  
11 That cannot excuse a statement such as appears in the Notice of Application which the  
12 respondent (though quite possibly not their counsel or their solicitors - because they were  
13 different solicitors in the Cohen and Scholls case, and so it is not a criticism of the lawyers as  
14 they are acting on instructions, and would have known very well what the position was) ---- Of  
15 course, the relevance of some of the material - because it said it is not relevant ---- That is the  
16 material for non-disclosure. But, then Mr. Hoskins and Miss Bacon say in their skeleton,  
17 "Well, beyond the fact of the acquisition which is dealt with, the rest of the submissions were  
18 not relevant".

19 Well, they are clearly relevant to one of the main points of Mr. Hoskins' argument, saying,  
20 "Well, on what basis is it said that competition is rather limited in pharmacy markets?" Well,  
21 that is all dealt with rather effectively at Lloyds' own submissions that you find at Tab D of this  
22 same section. Parts of this are confidential, but not the part that I am about to read. This is a  
23 paper dated 5 October which was put into the OFT. If you could cast your eye down para. 18  
24 (a) to (e), you will see there is set out in great detail various points as to why competition  
25 between retail pharmacies is limited. The effect, indeed, on pharmacies outside the one mile  
26 radius has a pricing constraint on pharmacies within a one mile radius.

27 The third of the three points regard discretion, which we say is, here, very relevant when  
28 deciding whether or not to quash and remit to the OFT, is the interest of Celesio when looked  
29 at in an objective sense regarding this merger. The OFT has the responsibility to guard against  
30 the possibility of SLC for the benefit of customers and consumers. That is the purpose of  
31 merger control, and the purpose of the statutory regime. Celesio is not complaining about the  
32 vertical aspect of the merger. It is not saying that its pharmacies, or customers, are foreclosed  
33 from access to wholesale supplies from UniChem as a major wholesaler, and therefore that it  
34 would have trouble competing with other pharmacies. It is complaining only about horizontal  
35 aspects of the merger, and complaining as a competitor. Celesio states at the end of its



1 skeleton argument that it has brought this appeal as it has a commercial interest in preventing  
2 the merger which it believes is both anti-competitive and against its interests. It is in the  
3 skeleton argument at para. 85. The second sentence: "Of course, Celesio has a commercial  
4 interest in preventing a merger that it believes to be both anti-competitive and against its  
5 interests".

6 I would invite you just to pause and consider that statement for just a moment. What does it  
7 mean if the merger is anti-competitive? It means that there may be higher prices or reduced  
8 quality of service in Boots and Alliance UniChem stores. How can that possibly be against  
9 Celesio's commercial interests? On the contrary, if Boots, Alliance UniChem are a less  
10 effective competitor, that is to Celesio's benefit as more custom diverts to its Lloyds  
11 pharmacies. You will recall that it now has some 1500 Lloyds pharmacies all over Britain.  
12 There are only two possible ways, they suggest, that preventing the merger can be in Celesio's  
13 commercial interests, either because it would create a more effective competitor to Lloyds in  
14 various localities and/or if sustaining the objection to the four to three areas would lead to a  
15 requirement, or an undertaking, for further disposals of pharmacies that Lloyds could then  
16 hope to purchase. You have seen some evidence - and, indeed, Cohen and Scholls shows it  
17 itself: Lloyds has been increasing its estate in acquiring pharmacies. We say it is relevant  
18 when one is concerned - in the words of Sir John Donaldson - with public administration, and  
19 when the statutory context is effective merger control, to have regard to the interests of the  
20 applicant when deciding not whether a decision is impeachable (it is not suggesting that), but  
21 when deciding what is the appropriate relief in your discretion that you should grant.

22 Those are our submissions.

23 MR. GREEN: I am not going to a deal with a number of issues which Mr. Roth has very  
24 comprehensively dealt with - such as the admissibility of experts, the admissibility of the  
25 witness statement, and judicial review principles. Nor am I going to deal with a detailed review  
26 of evidence. Mr. Roth has dealt with a number of documents, and where those are relevant to  
27 my submissions I will simply refer you to the relevant paragraph numbers or document.

28 What I would like to do is to address five issues relatively briefly from the perspective of the  
29 merging parties in this case. Let me tell you first of all what the issues are and then I will just  
30 go through them. The first issue concerns the four to three issue from the perspective of the  
31 merging parties. We submit this is quite important. The importance of this Tribunal not  
32 allowing, or tolerating, Celesio's approach, again, from the perspective of the merging parties.  
33 So, Issue 1 concerns the four to three issue, but with a particular optic that we are going to  
34 examine the issue from. The second issue concerns the test for an SLC, as applied in this  
35 case, and what is meant by the counter-factual in this case. The third issue that I am going to

1 address concerns the essence of this decision, again from the perspective of evidence submitted  
2 by Boots and Alliance UniChem. The fourth issue, which I will deal with briefly because Mr.  
3 Roth has largely covered the territory I wish to address you on, concerns the national market.  
4 Then, fifthly and finally, I want to show you how Celesio's submissions in Lloyds Cohen not  
5 only were, in a sense, identical to the submissions made by Boots and Alliance UniChem in  
6 this case, but in terms of time overlapped. Almost wholly at the same time as they were  
7 making submissions in relation to this case, they were making submissions in relation to their  
8 own case. Let me deal with those five issues then.

9 First of all, the issue of four to three from our perspective. Why is this important? From the  
10 perspective of the merging parties, para. 46 - and in particular the first sentence of para. 46 in  
11 the decision is a very important one, and it has wider repercussions. As you will recollect, para.  
12 46 - a key paragraph in this case - is the paragraph which addresses the reduction in fascias,  
13 and gives us an example of four to three. I would like to just concentrate for a moment on that  
14 first sentence. Mr. Roth has made a number of contextual points about its position in the  
15 decision as a whole, but there are a number of important points to make. The first sentence  
16 says, "Any higher reduction in fascia number than this, e.g. four to three or higher [so they  
17 were not talking about four to three particularly; they are giving that as an illustration] could  
18 also give rise to a lessening of competition". But, then you get these critical words, "But on  
19 the basis of the evidence before the OFT it believes that this cannot be expected to be  
20 substantial".

21 So, the Office of Fair Trading, as Mr. Roth has emphasised, was making a point about the  
22 state of the evidence. Mr. Hoskins seeks to persuade you that the next two sentences are the  
23 full content of the first sentence - in other words, the first sentence is not a freestanding  
24 reference to the evidence as a whole, but in some way, shape or form is simply the conclusion  
25 it arrives at from the next two sentences, as Mr. Roth has shown you. By reference to the  
26 decision as a whole, that is utterly unsustainable, particularly in the light of para. 82 of the  
27 decision, and, indeed, the first thirty or so paragraphs which address relevant matters which I  
28 will briefly allude to in a moment.

29 But you also have Mr. Pritchard's statement - in particular, paras. 115 and 117, which make  
30 any such ambiguity which might theoretically arise completely transparent. Mr. Pritchard, in  
31 para. 115, makes the point that that first sentence is the decisive point so far as the OFT is  
32 concerned. He refers to the fact in para. 115 of his statement (p.44 of the witness statement)  
33 that this, to them, was 'decisive'. That is the language he uses. In para. 117 he says that the  
34 conclusion about four to three was, as in the case of other areas, reached after a detailed  
35 consideration of all the evidence in the case. He says (and I am jumping to the last sentence

1 on this page), "Any prediction that harm would occur in the circumstances of local competition  
2 among pharmacies became, in our judgment, plainly speculative and fanciful" because it was  
3 unsupportable on the evidence. So, what Mr. Pritchard says is entirely consistent with the  
4 decision. The decision says that there was insufficient evidence.

5 Now, why is this important from the perspective of the merging parties? It is this: that in our  
6 submission a complainant against a merger should - and, indeed, should be required as a matter  
7 of principle - submit all of its relevant evidence before the decision is adopted. Merging  
8 parties have very important procedural rights which are not, and cannot be, respective if the  
9 complainant does not put in its evidence before the decision is taken. Can I show you a point  
10 made by the OFT in its guidance? This is the joint authorities' Tab 1. It is the OFT's  
11 procedural guide in merger cases.. Paragraph 5.6 concerns the position of third parties in  
12 relation to mergers. It is at p.29 on the internal numbering of the document. In para. 5.5 the  
13 OFT state that they will invite comments from third parties. In 5.6 they say as follows: "The  
14 OFT may also wish to target consultations more specifically, and so asks merging parties to  
15 provide contact details for their main customers, suppliers and/or competitors. Customers'  
16 views may be of value in assessing the degree of substitutability between different products or  
17 services, and therefore in defining the relevant market. In addition, the OFT seeks to estimate  
18 the degree of buyer power exercised by major customers which may act as a constraint on any  
19 market power resulting from the merger.

20 "Competitors, as well as customers, may be asked for their opinions on such matters as the  
21 degree of substitutability between their product and those of the merged company, and whether  
22 they believe that the merged company might behave anti-competitively. Generally, the OFT  
23 may give more weight to the views of customers and competitors, though this partly depends  
24 on the quality of the opinions.

25 "Where adverse views raise significant competition issues, the parties proposing the merger  
26 are told of the nature of the concerns expressed, but not the identity of the persons involved,  
27 and are given the opportunity to respond to them. It has become part of the procedure adopted  
28 by the OFT that they will ferry backwards and forwards adverse comments to the merging  
29 parties so that they have an opportunity to address them, and the OFT can then take a decision  
30 based upon the fullest possible analysis and information".

31 If a company such as Celesio in this case can raise new evidence or lines of attack, this  
32 undermines the robustness and integrity of the OFT's procedure plainly. It undermines the  
33 merging parties' procedural rights because they do not have an opportunity to address the  
34 criticisms made about their conduct or their merger. Perhaps very importantly, it creates a  
35 new, but not statutorily contemplated procedure, such as Celesio wishes to adopt in this case.

1 The procedure which is now being pursued, and which is a twisting of the statutory procedure,  
2 is as follows: that before the OFT, rivals keep their powder dry; before the Competition  
3 Appeals Tribunals, rivals launch new attacks with new evidence or new lines of argument.  
4 Before the Tribunal, the complainant, the third party rival invites the Tribunal to remit upon  
5 the basis of a failure to address facts (which is Mr. Hoskins' submission this morning). It is  
6 said that these are matters which the OFT failed to address, even though of course, the third  
7 party failed to bring those matters to the OFT's attention. If the Tribunal succumbs to such an  
8 invitation, it remits it back to the OFT, and so we have a third stage. Then, possibly a fourth  
9 stage with a reference to the Competition Commission.

10 Now, that is not the structure contemplated by the Act, and it is contrary to public policy. It  
11 permits and encourages game-playing such as we have in this case. It adds to the risk of  
12 mergers in the United Kingdom market. It is thorough undesirable. In the present case,  
13 Celesio has failed to raise matters in front of the OFT which it now seeks to raise. Indeed - and  
14 I will show you this in a moment - in this present case it expressly invited the OFT not to  
15 address certain matters which it now says to you the OFT has failed miserably in because it did  
16 not address. In this case it expressly invited the OFT not to address the fascia issue, for  
17 example.

18 What we have in this case is a company, an aggressive rival of the merging parties, who  
19 made a series of submissions to the Office of Fair Trading, virtually all of which side-stepped  
20 the issues that we are concerned with today. What I would like to do very briefly is to just  
21 take you through the documents. I can do it quite briefly by identifying the references and  
22 really the contents without reading them to you. But, you will see very quickly that Celesio  
23 made none of the points that it makes in the appeal in the course of its submissions to the  
24 Office of Fair Trading. Again, as I will show you later, not only was it ---- It was running two  
25 horses at the same time, because it actually had the first Boots questionnaire before it started to  
26 make its own submissions in is Lloyds Cohen merger to the OFT. So, it was running two  
27 horses at the same time, and you will see the nature of the arguments.

28 I would like you, if you will, to take the Notice of Application. You will see from the  
29 references that I am going to skim quite quickly through that Celesio barely referred to the four  
30 to three issue at all. The concentration in these documents was on the issues which Celesio  
31 has now abandoned, or which they do not appeal on. Starting with Bundle 1, Tab 6, a  
32 document of 13 December, 2005, this was a briefing paper from Celesio to the Office of Fair  
33 Trading. You can see the nature of the submissions without having to read the detail. In  
34 Section 3 of this document on p.2 of the internal numbering ---- This is a confidential  
35 document, and so ---- In fact, I am not certain how much of it is confidential, but I am not

1 going to read it to you. I will just ask you to cast your eye over it. You will see the first part,  
2 Section 3.1, entitled 'Strength of Merged Entity'. A number of points are made. These are not  
3 points which are now pursued. Section 3.2. If you read the first paragraph you will see there  
4 is the first, and just about the only, reference to four competitors anywhere in Celesio's  
5 submissions. They say they have not had an opportunity to carry out an full analysis 'yet'.  
6 They never, of course, did. It is all very hypothetical. It is very abstract. There is no analysis,  
7 but that is just about the only reference we see to a four area and anything below a four. That  
8 is what we see in that document. Nothing which addresses the issues in this appeal.

9 If you turn over to Tab 7, this was a questionnaire sent to Celesio. If you jump to 11 and 12  
10 on p.4 of the internal numbering, again one sees a reference to four - this is the height of it - in  
11 the last sentence. You will see in the first paragraph there is a downplaying of the importance  
12 of fascias, but in the last sentence you will see the reference to, "The total number of  
13 competitors depends on the nature of the community, but the average is, say [which sounds  
14 very much like guesswork] four or more within a one mile radius". Now, the questioned posed  
15 was a very direct question and there was ample opportunity for Celesio to put in direct,  
16 detailed evidence from an economist, or an expert of whatever nature in response to this  
17 question. One of the questions was, "How many competitors might you expect to face within a  
18 one mile radius?"

19 If you turn over to Tab 8, a document of 19 December, 2005, Section 2.1, as you will see,  
20 addresses the question of whether or not the OFT should use fascias as a method of analysis.  
21 Celesio says, on 19 December, that in principle fascias can be a useful starting point, but on the  
22 facts of this case 'it should not be used'. That is in the second sentence. Then they go on to  
23 identify a number of what they describe as 'specific features' as to why fascias should not be  
24 used. Well, it is pretty rum for Celesio to say that the failure of the OFT to conduct a fascia  
25 analysis of four to three is fundamental, key, and critical when they themselves, in the course  
26 of this procedure, invited the OFT not to pursue a fascia analysis. Why can it not pursue a  
27 fascia analysis? Because, on their case, it cannot capture and cure the national issues or the  
28 competitive issues arising. That text follows on into the second page of this document, in  
29 particular at the top.

30 Elsewhere in this document you will see that Celesio addresses a variety of matters, but none  
31 of which concern local retail competition. They are predominantly pricing issues, levering  
32 issues, general market implications, and so on. But, it is all very broad brush.

33 You will see also, in para. 2.1.3 of this document on p.7, that it is certainly not the case that  
34 the OFT was not relaying its concerns back to Celesio, because Celesio says in the first two  
35 lines, "The OFT has indicated it has concerns that the risks we have raised are speculative

1 only". That is an invitation to put in evidence when the OFT is telling you that they consider  
2 your position to be speculative. They had plenty of additional opportunities to put in  
3 evidence. Indeed, right at the very end, the OFT invited them to put in further evidence if there  
4 was any issue which they felt they had not adequately address. But, if you jump to Tab 9, one  
5 sees the level to which they were prepared to descend - and they had, embarrassingly, to retract  
6 this shortly afterwards: an allegation of market-sharing in the e-mail, as a precursor to some  
7 further submissions, none of which actually address the question of four to three local areas.  
8 The allegation made in the e-mail was withdrawn in the e-mail which is at Tab 10. You only  
9 have to look at the e-mails and the sorts of things that were being submitted in Tabs 9, 10, 11,  
10 and 12, and you will see that there was an air of desperation about it to say the very least.

11 Indeed, on 16 January (and I think this is Bundle 4, Tab 3B) there is a note of a telephone  
12 conversation between the Office of Fair Trading and Celesio's legal advisors. It is a one-page  
13 handwritten manuscript note in which the Office of Fair Trading invite Celesio to put in any  
14 further submissions that they would wish to do.

15 So, where does all this lead to? The applicant's analysis of four to three is an after-the-event  
16 trumped-up submission. It is an argument of convenience. It is inconsistent with the  
17 arguments which Celesio itself advanced to the OFT during the course of this procedure, and it  
18 supports the OFT's comment in para. 46 that there was no evidence submitted that a four to  
19 three area gave rise to a problem. When they said there was no evidence, they meant it. There  
20 was no evidence. This was not like some markets where you get a groundswell, a rumbling  
21 about a particular issue for years. The OFT had been examining the pharmacy market for a  
22 long time. MMC reports had occurred. It had its own internal deregulation review. There was  
23 no evidence, over many years, that markets in which there were three operators gave rise to a  
24 problem. That is what it said in the decision. So, there was a deafening silence, if you like.

25 There was also the point made by Mr. Pritchard in para. 101 of his statement. Not only was  
26 there a deafening silence about there being a problem, but there was positive evidence that  
27 threes were not a problem. He makes the point explicitly. It cannot be said that this is not  
28 reflected in the decision, because the decision refers to the absence of evidence. It refers to  
29 internal UniChem documents. It refers to the OFT's study. This talks about positive evidence,  
30 suggesting ---- He says in the second sentence, "For example, there was no statistical support  
31 for a proposition that prices were higher, or service levels lower, in an area with three  
32 pharmacies than in areas with four. This was the conclusion of the OFT study which tended to  
33 be supported by UniChem's internal econometric analysis provided in this case". My clients  
34 had provided evidence - and it is referred to at IB1, at Tabs 14 and 21 - and the documents are  
35 there.

1 So, the OFT had, on the one hand, as they say in para. 46 no evidence, and they also had  
2 some evidence suggesting the contrary.

3 Now, Celesio's evidence and explanation in para. 73 of their skeleton as to why they failed to  
4 adduce full evidence is that they did not want to over-burden the OFT, which is jolly nice of  
5 them, but, frankly, is an embarrassing explanation. That is Issue 1. That is the four to three.

6 But, there is an important point for merging parties, which is my client's perspective -  
7 namely, that it has rights in the OFT procedure, and if complainants do not put their full case  
8 forward in the course of that procedure, my client's rights are trampled upon. Merging parties,  
9 as a matter of policy, have to have the opportunity to address the complaints made about their  
10 merger, and it is quite wrong for them to surface for the first time on appeal.

11 Issue 2 - the counter-factual. It is apparent from my friend's submissions this morning that  
12 their entire case turns on a misunderstanding of the law about the relevant counter-factual. Mr.  
13 Hoskins says that if there is a merger where there is absolutely no competition in the market -  
14 for example, because they are statutory monopolies, then there cannot be an SLC if two  
15 statutory monopolists merge. There was no competition before, and there is no competition  
16 afterwards. There is therefore no SLC. That is absolutely right. There is not. We have cited a  
17 recent Judgment of the court of first instance, called **EDP**, in our skeleton, which makes that  
18 point specifically. But, he then says that if there is a little bit of residual competition, then the  
19 opposite rule applies, and a merger which has no impact on the key parameters of competition,  
20 but has a small impact on the residual competition does create an SLC.

21 Well, this is simply not the law. Under Section 33 of the Act, the OFT's task is to determine  
22 what element of competition is taken away by the merger. You must compare the before with  
23 the after. If it just so happens that the 'before' involves a highly regulated market, and the  
24 market will remain highly regulated afterwards, then that is highly relevant to whether there is  
25 both a lessening of competition, and, more particularly, whether it is substantial.. So, the  
26 wording of the Act has two ingredients to it - lessening and substantial. They are deliberately  
27 included as different creatures. My learned friend's submission would involve the proposition  
28 that even a **de minimis** miniscule lessening of a piece of residual competition would become  
29 substantial, even though the merger had virtually no impact upon the market in any real  
30 common-sense perspective.

31 What I would like to do, just to demonstrate the falsity of their proposition, and to provide  
32 you with a bit of jurisprudential context, is to show you the OFT's guidelines, and the CC's  
33 guidelines, and very briefly identify the relevant paragraphs in the CFI's recent judgment in  
34 **EDP** which makes the same point. Again, I can do this quite briefly. The joint authorities  
35 bundle, Bundle 5, Tab 2 is the starting point. I think I pick up a few points first of all in the

1 OFT's document at Tab 2, starting at para. 3.6 on p.15. You will see that in relation to four to  
2 three the OFT has said in its decision that theoretically there could be an LC, but it cannot be  
3 S. I think the important point is that that is not at all, in the OFT's experience, uncommon  
4 because in para. 3.6 the OFT says, "Not all mergers give rise to the competition issues. First,  
5 some mergers are either pro-competitive because they positively enhance levels of rivalry, or  
6 are competitively neutral; secondly, many mergers may lessen competition, but not  
7 substantially because sufficient post-merger competitive constraints will remain to ensure that  
8 competition, or the process of rivalry continues to discipline the commercial behaviour of the  
9 merged firm". So, the OFT is recognising that in many cases there may well be a theoretical  
10 LC, but the LC is quite different to the substantiality, and what you have got to examine is  
11 whether, post merger, there are sufficient constraints. In the present case, we have many  
12 constraints, as the Office of Fair Trading recognise in the decision, through regulation. Mr.  
13 Roth has gone into it, and I will not go back over it. But, for example, in relation to POM(?)  
14 medicines, they were on the NHS contracts which govern quality. Well, POM medicines are  
15 sold side-by-side with P medicines. So, there is almost complete control over quality by  
16 reference to the POM contracts. 40 percent of P medicines are subject to constraints from  
17 unregulated medicines - again as Mr. Roth has explained. There are whole host of other  
18 regulatory constraints which apply.

19 Paragraph 3.7 of the document: "A merger may be expected to lead to a substantial lessening  
20 of competition when it is expected to weaken rivalry to such an extent that customers would be  
21 harmed". In the present case no-one is suggesting customers would be harmed as a result of  
22 the merger either before or after - not again because of the proper analysis of the counter-  
23 factual; that regulation largely governs substantial swathes of the supply of drugs through  
24 pharmacies and it is exactly the same before as afterwards.

25 The Competition Commission guidance is in similar vein. For your reference really, rather  
26 than anything else, that is to be found at para. 1.22. There is an illustrative example in 3.61  
27 about failing firms, which is quite helpful. At 1.22 - this is Tab 3 of the same bundle - "In  
28 applying the SLC test the Commission will evaluate the competitive constraints on firms with  
29 the merger compared to the situation that would have been expected to prevail without the  
30 merger, sometimes referred to as the counter-factual. The counter-factual will be that situation  
31 which the Commission expects to arise in the absence of the merger under consideration and  
32 will, in many cases, relate to the existing pre-merger competitive conditions. However, in  
33 certain circumstances the Commission may need to take account of other factors such as  
34 expected changes in the structure of the market, or, alternative developments that ma be



1 expected in the absence of the merger. This is in order to reflect as accurately as possible the  
2 Commission's expectation of the rivalry which will occur in the absence of the merger".

3 Now, regulatory context pre. and post plainly plays a part in the test within the scope of that  
4 definition. I have referred to para. 3.61 because it is simply an illustration - the failing firm  
5 example - of where there is no difference before and after. It really is just an illustration of the  
6 point. I do not think I need to take you to it in any detail.

7 Briefly at Tab 5 we have referred to the **EDP** case - the Judgment of the court of first instance  
8 on 21 September of last year. I think it suffices if I simply give you the references rather than  
9 read you the relevant paragraphs. The relevant references are paras. 116 through 120 where the  
10 court of first instance makes essentially the same points - that regulation can be a critical  
11 context.

12 That is all I want to say about the counter-factual. The third issue is the essence of the  
13 decision and how it relates to evidence submitted by Boots and Alliance UniChem. We have  
14 provided you with witness statements from Mr. Oliver and Mr. Duncan, which deal with all the  
15 evidence which was put to the OFT. We have done that to demonstrate that this was an  
16 extremely exhaustive analysis. One would put it in the top 5 percent of analyses conducted by  
17 the OFT in terms of its detail, number of information requests, and so on. We have provided a  
18 detailed chronology to make that point good. You will see that the parties put in evidence on  
19 all relevant matters relating to competitiveness at the retail level - levels of regulation, prices,  
20 scope of competition, etc. I do not propose to go into that evidence simply to take you through  
21 it. It is there to be read.

22 What I would simply like to do - and I will do this, if I may, by cross-referencing rather than  
23 taking you to the documents, and so you will have it in your note - is to show to you that the  
24 information put to the OFT was reflected in the decision. One has to remember in this regard  
25 that the merging parties are subject to statutory sanctions if they provide inadequate  
26 information, and they are subject to the Section 34B procedure in the Act (which came into  
27 force a couple of years ago) under which any submission you make can be road-tested by the  
28 OFT demanding internal documents. So, there is no point in over-egging the pudding  
29 because the OFT will simply say, "Well, let's see how the board thought about it", or, "Let's see  
30 your strategy documents". That is precisely what happened in this case.

31 When those arguments are reflected in the decision, you know they have been thoroughly  
32 reviewed, and the OFT's process with a merging party, or merging parties, is far more vigorous  
33 than it would be with the twenty-eight-odd third parties, or complainants. But, what I would  
34 like to do is just give you a structure ---- the structure that one finds in the decision, because

1 we say that this actually is reflective of the submissions we made. It is actually reflective of the  
2 submissions that Celesio made in their own merger.

3 First of all, Point 1 - the OFT applies the standard counter-factual test. You will find this in  
4 the following paragraphs of the decision: para. 18, in which the OFT says that the merger has  
5 to be assessed within the framework of the regulatory reference for the NHS. We will find it  
6 also in para. 36, where the OFT makes the point that the existence of NHS contracts which  
7 govern the quality of the service provision (and I am quoting from para. 36) 'serve to limit the  
8 parameters of competition'. Then one finds it again in para. 39 where the OFT refers to the  
9 limited nature of competition in an area, meaning that there is no realistic prospect of an SLC.  
10 That was an argument put by the parties, but apparently with approval, at least in principle.  
11 The OFT went on to examine the scope of residual competition.

12 So, the starting point is that the OFT examine the counter-factual, the before and after. The  
13 second point is that the OFT examine the dynamics of competition. This takes one straight  
14 back to para. 46 and the reference to evidence. What was the evidence? Well, the OFT say that  
15 the only competition that matters is P competition. One finds that in paras. 10, 36, and 38. In  
16 relation to P competition the OFT refers to the fact that 40 percent of P is directly competitive  
17 with GSL in relation to price. That is para. 11 (and, for your reference, Pritchard at para.  
18 29(1)). The OFT in the decision also says that price competition, pre-merger, in Ps is limited.  
19 That is para. 31. The explanation for that given by Mr. Pritchard is para. 47. In relation to  
20 service quality, in the decision one finds a reference to the fact that quality is largely governed  
21 by POM and NHS contracts. At para. 11 the decision refers to the fact that some 99 percent of  
22 pharmacists are on PCT contracts (Pritchard, para. 31).

23 The OFT refers to Boots' internal documents which show that the most vibrant of competition  
24 comes from supermarkets. You will find this in paras. 15, 29 and 32. Road-tested against  
25 internal documentation - Mr. Pritchard addresses that in para. 29. You will find reference to  
26 the fact in the decision that Boots and Alliance UniChem are substantially complimentary -  
27 one is High Street based; the other is more surgery-based in terms of their proximity and their  
28 focus. We find that in paras. 29, 31, and 33.

29 So, one finds all the evidence concerning the structure of the market, which would apply to  
30 two to ones, three to twos, and four to threes, and so on, in the decision. I will not go into the  
31 analysis of the decision that Mr. Roth has taken you to - the OFT's analysis of two to ones,  
32 three to twos, and four to threes in paras. 46 and 82 - but those are dealt with in Mr. Pritchard's  
33 statement at paras. 107 and 117 in particular. I would add to that para. 101.

34 So, conclusions: that the OFT addressed the right evidence. It addressed the structure of the  
35 local retail market. It did so on the basis of extremely detailed evidence from the merging

1 parties and no contrary evidence from the likes of Celesio. No-one suggested to the OFT that  
2 they should conduct a fascia review on four to three, but the OFT did, however, conduct a  
3 fascia analysis on two to one and three to two. Common-sense, as Mr. Roth submitted,  
4 dictates that when you have got three competing companies in a one mile radius, and evidence  
5 that consumers are prepared to walk up to a mile, that you are not going to have a severe  
6 problem within a single one mile radius, but you have all the other factors which mean that  
7 service quality cannot seriously deteriorate, and price competition is either irrelevant for POMs  
8 and GCLs, or is largely unaffected by the merger for Ps.

9 So, that is the decision. It certainly reflects the evidence my clients have put in, and as I will  
10 show in a moment it reflects the evidence which Celesio put in in respect of their own merger.

11 Issue 4. National market. I will deal with this very briefly because Mr. Roth has  
12 comprehensively made the point, which is really the central point, which is that Boots has  
13 1,350 pharmacies nationally; Alliance UniChem has 958. So, approximately 2,300. Celesio's  
14 argument, whether we are dealing with forty-one stores or forty-eight stores rests upon the  
15 proposition that those forty-one to forty-eight stores will be sufficient to affect materially the  
16 analysis and the strategy of the merged company in respect of the totality of its national estate.

17 Now, that is so remote and so improbable a consequence that for Celesio to substantiate it  
18 would require a very great deal of evidence. It is not a self-evident proposition or a truism. It  
19 will require evidence because otherwise it is simply barmy. As you know, Celesio did not  
20 address this in evidence, and the evidence submitted now does no more than skirt around the  
21 edges. Mr. Hoskins has abandoned reliance upon his expert's reports as evidence of fact, but  
22 LECG did address this in paras. 5.56 to 5.63 of their report, and this was comprehensively  
23 challenged by RBB in Chapter 5 of their report. Celesio has nothing to say about this class of  
24 evidence. Plainly the Tribunal cannot resolve it. If it was an issue, it was an issue which had  
25 to be resolved by the OFT long before the decision was taken. So, Celesio simply does not  
26 engage with this issue.

27 You have seen the decision - and I will not take you back to the decision on that. I want to  
28 just take you to one point in the LECG report, which is in the Notice of Application at Tab 5.  
29 In paras. 5.57 and 5.58, Dr. Pedilia - who has skipped the country and gone to Spain apparently  
30 - says as follows in the latter half of para. 5.57: "However, some elements of competition, such  
31 as an individual store's opening hours, might be affected by local competition. In addition,  
32 when chains such as Boots, UniChem and Lloyds determine their national policies, they will  
33 take account of the extent of competition they face at a local level across the country as a  
34 whole. In this way, there is an indirect link between the extent of local competition and  
35 national policies, such as pricing policies. I should also note that even when firms have

1 national policies, at present they may change their strategies and adopt more local variation in  
2 prices and quality of service in the future. This provides a further reason for assessing the  
3 potential impact of the merger at both national and local levels".

4 So, the highest it is put is that there may be some influence from local to national and the  
5 impact is indirect. What does this really mean? It means it is a question of fact and degree. If  
6 you are not willing to put forward evidence to demonstrate the fact and the degree of that  
7 indirect influence, then you are never going to get home, and certainly not in a judicial review  
8 when the matter is not raised before the decision-maker in any material sense.

9 Mr. Roth dealt with the decision and the relevant paragraphs. He pointed out that the  
10 decision analysed the national market, its fragmented level, and so on. I will not go back to  
11 that.

12 The final matter I wish to address, and take just a few moments on, is the fact that there are  
13 three parties who agree on the proper analysis of this case: there is Boots UniChem (which I  
14 count as one party), there is the OFT, and there is in fact Celesio. If you go to Bundle 4, Tab  
15 3, you will see that in the course of its own case Celesio made very much the same points as  
16 the OFT makes now, and my clients made to the OFT. Mr. Roth has taken you to one  
17 document which I shall not take you back to. But, there are one or two other documents I  
18 would like to alert you to. I am starting at Tab C of 3, which is a document entitled 'Merger  
19 Notice'. If you go to p.11 of that document, after the declaration, there is a statement about the  
20 characteristics of the retail pharmacy sector. It is appended to the merger notice - Nature of  
21 Competition and Relevant Market. It is one page after the declaration. It is 1.2. If you would  
22 just scan your eye down that list of characteristics of the UK market, you will see that they  
23 bear a strong resemblance to the submissions which my client made, and which the OFT  
24 accepted. I do not know if this is a confidential document. I rather doubt it, but ----

25 So, all the points which are made there are points which my clients had been making. There  
26 is no suggestion that there is a big problem in relation to the retail market. They accept that  
27 regulation governs a very large number of facets of competition. They accept that there is no  
28 suggestion that P medicines are in fact substantially problematic, or at all. You may want to  
29 just cast your eye over Section 3 of this same document - 'Market Shares - Local Levels'  
30 (p.17). If you turn over, there is various factual information given. Then, in Section 4, which  
31 follows on from that factual information, you will see that they submit that there is no material  
32 problem at the local level. Indeed, local retail competition is sufficiently strong so that two to  
33 ones, five to fours, etc. are simply unproblematic. If you look at the conclusion in 4.6,  
34 "Lloyds does not consider that any of these levels of local concentration will lead to a

1 reduction in price or non-price competition. There are more than enough competing  
2 pharmacies in each location and surrounding areas to maintain competition".

3 Then there was the document which Mr. Roth took you to at Section D - another briefing  
4 paper. He asked you to look at para. 18.

5 So, three parties making the same submissions, but I believe Mr. Roth made the point about  
6 Celesio's position being inconsistent between the two cases. What is the relevance to this  
7 case? Well, it is highly relevant to the weight to be attached ---- the probative value to be  
8 attached to evidence, particularly the evidence submitted to the OFT. The OFT had all these  
9 submissions before it from Celesio at the time, and it had Celesio's submissions in this case  
10 which did nothing to contradict those points. How can it possibly be suggested that the OFT  
11 was not mainstream when it arrived at a reasonable conclusion to accept the submissions of all  
12 of these parties, all of whom are subject to strict statutory sanctions. They know the rules.  
13 There are criminal sanctions for misleading the OFT. Submissions can be road-tested by  
14 demands for documents under Section 34B. It emphasises the importance of third party  
15 complainants putting in all of their evidence to the OFT before the decision is made, and it  
16 emphasises the importance of this Tribunal not permitting parties to use its procedures to play  
17 games.

18 It is clearly correct, as Mr Hoskins says, that most if not all merger appeals will be by  
19 competitors – against OFT decisions that is. That seems to be inevitable and the Act  
20 contemplates that possibility; indeed, complainant's appeals, one would imagine, are going to  
21 be the means by which this Tribunal exercises supervisory control over the laws and  
22 procedures which govern mergers in future years. However, that being said, certain standards  
23 have to be maintained and the Tribunal is pivotal in enforcing those standards; the Tribunal  
24 should decry parties who play fast and loose between sets of submissions, or play fast and  
25 loose in the same proceedings. Merging parties – my client is entitled to expect this because  
26 otherwise are procedural rights are not protected. The OFT is entitled to expect this because  
27 otherwise the integrity of the system is undermined and the market, as a whole – and that is an  
28 incredibly important point – is entitled to expect that the system operates smoothly because  
29 mergers are obviously of such critical importance generally.

30 That is the fifth point, raised finally simply by way of conclusion. This is a judicial review;  
31 what the Tribunal has to ask itself is whether it has power or jurisdiction to intervene. The  
32 Tribunal only has power or jurisdiction to intervene in certain limited circumstances. This case  
33 is very unlike either the *IBA* case or the *EAP Phoenix* case which turned on very narrow factual  
34 circumstances.

1 The final point I wish to make is that there is a strong policy element in cases such as this.  
2 This is a clear case where, simply, a third party complainant wishes to disagree with the OFT  
3 on merits and, as has been made clear in the jurisprudence, there is room for two views, but  
4 that does not make those two views judiciable by way of judicial review, and in those  
5 circumstances we invite you to reject this application. Unless I can assist further, those are my  
6 submissions.

7 MR HOSKINS: Madam, we are due for a break and it is probably wise just to see where we are on  
8 timing. There is a certain irony in the fact that of course my clients have been accused of non-  
9 disclosure when substantial parts of Mr Green's at least three submissions were not trailed in  
10 the skeleton, but that is for me to deal with. Could we have a break for 20 minutes because  
11 that will give me a chance to gather my thoughts, and then I imagine this will finish, hopefully,  
12 around five o'clock, quarter past five?

13 THE CHAIRMAN: Do you think you will be 20 minutes?

14 MR HOSKINS: Can we have a pause of 20 minutes and then I imagine I will finish by about five  
15 o'clock.

16 THE CHAIRMAN: Twenty past, is that all right?

17 MR HOSKINS: I would be very grateful for that, yes.

18 (Short adjournment).

19 MR HOSKINS: I am simply going to deal with the points as they arose, first in Mr Roth's  
20 submissions and then in Mr Green's submissions, though obviously I will not try and deal with  
21 every point and I will try and avoid repeating myself.

22 The first point I want to pick up in relation to Mr Roth's submissions is that he accepted that  
23 on the law it is not open to the OFT to put forward inconsistent reasoning; he clearly made that  
24 statement. I made detailed submissions as to why there is an inconsistency, as to why there are  
25 inconsistencies between Mr Pritchard's witness statement and the decision, and I do not need  
26 to repeat them. It is noticeable and it is important that Mr Roth did not descend to that level of  
27 detail in trying to defend the alleged inconsistency, according to him, and I will deal with the  
28 one point that he did make in relation to consistency, but what he did not deal with is telling in  
29 this case.

30 If we turn to the question of the analysis of local markets, again it is very telling the way Mr  
31 Roth approached the decision. I took you through it in a great deal of detail, I showed you how  
32 paragraphs 43, 44 and 45 in relation to 221 and 322 reached conclusions on the basis of what  
33 had gone before, and I showed you what those conclusions were. Mr Roth did not attempt to  
34 disagree with that analysis, what he did was he approached it at a very high level and he

1 glossed it; he referred to paragraphs but he did not actually give an explanation as to why the  
2 submissions that I had made were incorrect. He did no more than gloss the decision.

3 Mr Green was the same, again there was no attempt to deal with the substance of our case,  
4 which had been fully set out, at the very least in the skeleton argument, before an application.  
5 I am tempted to ask the rhetorical question why, but that is probably too much.

6 Mr Roth's defence was that our approach was logical, and he made five points. He said to an  
7 extent a fascia test is a starting point; that is right, that was always our position, and that is why  
8 we dropped the first ground when it became clear that that in fact was the OFT's position, that  
9 is not what we had understood from the decision. That does not take us anywhere in terms of  
10 analysis of the decision, we all agree that fascia is a relevant starting point. He then said we  
11 are looking at a small geographical area, full stop. So what? We are looking at a small  
12 geographical area in relation to two to one and three to two, yet real problems were found.  
13 There is no logical reason, there is no reason in principle, why a four to three area could not  
14 also be a problem because it is the same geographical area as three to two and two to one.

15 The third point was that he said it is a regulated market, there is limited scope for  
16 competition, but that does not help him because I showed you how the structure of the decision  
17 makes that point, but then reaches specific conclusions in relation to two to one and three to  
18 two in paragraphs 43 to 45, and those conclusions take account of the fact that the market is  
19 regulated, and yet still finds there is a clearly a problem in relation to two to one and a large  
20 proportion of customers affected, high switching etc, in relation to three to two. That simple  
21 reference to a regulated market does not help them, because it is already taken care of in the  
22 decision.

23 The fourth point he made was that when looking at three to twos not all three to twos were  
24 candidates for SLC and we were trying to segregate them, and he could not find a sufficiently  
25 robust methodology to do so. There are two points in relation to that: that is not what the  
26 decision says, I have made that point, the problem there was identified in relation to all three to  
27 two areas, and the other point is that just because certain three to two areas may have had a  
28 problem does not mean that all four to three areas did not have a problem. The logic simply  
29 does not follow.

30 His fifth reason of the five was that on that basis the OFT could readily conclude that four to  
31 three was not a concern, and this is the only time that he referred to consistency. He referred to  
32 Pritchard's witness statement, paragraph 117, and said is that inconsistent with the decision?  
33 Not in the least. It is all very well for the OFT to say not in the least, but they have not actually  
34 explained why they say they are consistent. The first sentence of para 46 is abstract, it is glib.  
35 It is not a reason, it simply does not stack up when one compares the section in Mr Pritchard's

1 witness statement on four to threes to relevant parts of the decision. That is what I attempted  
2 to do and that is what my learned friends have not even attempted to deal with.

3 There was reliance on paragraph 82 of the decision. Throughout the decision what one has is  
4 a number of issues dealt with and a number of conclusions reached about the decision. For  
5 example, in relation to local markets I have shown you the conclusion paragraphs – paragraphs  
6 43, 4, 45 and 46 – and then at 82 everything is drawn together, and this is a summary of the  
7 conclusion that has gone before. Mr Roth very fairly said you have to read the decision as a  
8 whole, you have to read paragraph 42 with paragraphs 43 to 46; that is absolutely right, of  
9 course you do, and when one does that 82 is not a get out jail card. In relation to three to twos,  
10 what paragraph 82 says is: “The evidence on whether an SLC would arise in the case of three  
11 to two overlaps is less conclusive.”

12 It is less conclusive than two to one, but it does not mean it is not based on high levels of  
13 switching a large number of consumers affected, but on balance the OFT takes the view that “it  
14 may be the case” – and that is so imply the statutory language – “that the merger may be  
15 expected to result in an SLC within these three to two overlap areas”, not within “some” three  
16 to two overlap areas, but with “these three to two overlap areas”, i.e. all three to two overlap  
17 areas. So 82 cannot detract from the detailed conclusions in 43 to 46, they have to be read  
18 together, as Mr Roth accepts, and 82 in any event shows that there was a general concern in  
19 relation to three to two overlap areas, and it does not say that the concern was limited or  
20 marginal.

21 Mr Roth said that the judgment on where to draw the line in the iterative process is exactly  
22 what falls within the margin of assessment the OFT has, but the OFT is not immune from  
23 judicial reviews and at the outset of my submissions I showed the Tribunal the particular  
24 passages we rely upon as to the nature of review. I stick with them, there is no immunity and,  
25 again, it is simply not good enough to say it is within our margin of assessment. The OFT has  
26 to justify that and it has not.

27 There is a point that has kept coming up which is our contention that where there is reduced  
28 competition you have to be at least as careful as where there is a lot of competition – we  
29 actually say you have to be more careful, and I have made that point. We say that SLC has to  
30 be contextual, and I have explained why logically that must be the case.

31 Mr Roth also made the point that we initially said that the fascia test should not be applied in  
32 this case, that we should market shares, or the OFT should use market shares to resolve the  
33 problem. He referred to the colour bar charts we have produced and I think he was suggesting  
34 that we were saying that the OFT had acted unlawfully because it did not use an outlets test  
35 instead of a fascia test. But that is certainly not what our case is, our case is that a fascia test is



1 a suitable starting point, but in relation to four to three areas in this case on the OFT's own  
2 approach, the iterative approach, and given the conclusions of the decision in relation to two ti  
3 one and three to two, it is not good enough then simply to stop in the context of the fascia test  
4 and say we do not have to look at four to threes.

5 MR ROTH: If I may interrupt, I think what I said was perhaps not quite clear. I said originally the  
6 first ground of challenge had been that we should not have used a fascia test, we should have  
7 used an outlet test; that has been abandoned, but now it is being said that having used a fascia  
8 test we should then also use an outlet market share test. That is how the bar chart comes in.

9 MR HOSKINS: The evidence about the outlet test, appendix B, is not put in to say "this was the  
10 right way to do it, this was the way the OFT must have done". The reason we put it in was to  
11 show that the OFT had failed properly to investigate four to three areas, and that is an example  
12 of why there is a concern in relation to that, but it was not intended to be didactic: we must win  
13 this case because the OFT failed to do this. I hope that clarifies the position.

14 Mr Roth actually said – and this may have been a slip – that once one accepts that the fascia  
15 test is the starting point, one must then look at the local areas in more detail. Exactly: that is  
16 our case. He adopts the fascia test as a starting point, you look at the local areas in detail and  
17 the OFT failed to do that at all for four to three areas. That is all I need to say in relation to  
18 what Mr Roth submitted about the local market analysis.

19 If I could turn to the national analysis, both he and Mr Green took a very short point. They  
20 said there are only 48 areas affected so you can discount it. With respect, that is precisely what  
21 the Tribunal is not supposed to do, it is not the Tribunal's function. If the OFT has made a  
22 material error in local areas and that may have an impact on national areas, it has to go back to  
23 the OFT for them to consider the question. We have seen all the skeleton arguments from the  
24 OFT and the interveners because they want a narrow judicial review: the Tribunal must not get  
25 involved in the merits. That is precisely right and that is why, if we are right on this question it  
26 goes back and the OFT considers the point.

27 I should say, just a small point of detail, Mr Roth said on our list of 48, seven of them were  
28 three to two areas in the OFT analysis, and I explained that was because we do not have access  
29 to all their evidence. We do not know whether the final number is going to be more or less  
30 than 48; it may well be more, it may well be less, we simply do not know, but that is not a  
31 reason why the Tribunal cannot assume it is in a position to take a decision on this matter, it  
32 has to go back to the Office.

33 There is another aspect though in relation to the national market. It is not just simply the  
34 failure to look at the four to three areas because I also made submissions on the other aspects  
35 of paragraph 31 of the decision, which is the suggestion that Boots and Alliance/UniChem

1 stores do not tend to be located close to each other. I made my submission as to why the  
2 evidence relied upon by the OFT is not sufficient for them simply to rely on Boots and  
3 UniChem say-so and I do not need to repeat that point, but it is important in terms of the  
4 national market. There are two elements to it: it is the failure to look at four to three areas and  
5 also insufficient evidence when assuming there is a degree of competition between Boots and  
6 Alliance/UniChem in local markets.

7 Again, I think this probably deals with the question I dealt with at the end of my submissions:  
8 Mr Roth said that the approach that was adopted was that overall there was no national  
9 concern, and once a remedy had been adopted into those local areas where there was a concern,  
10 that remedies the national issues – i.e. the local divestments are necessary to address the  
11 national issues, and that is exactly what Mr Pritchard said in his witness statement and I have  
12 also explained the logic of our argument, how that must follow also from the decision.

13 If I can come then to the miscellaneous points at the end, the first one was that relief is  
14 discretionary. With respect, the denial of relief when an applicant has proved its case is  
15 exceptional. Mr Roth identified this as an authority he wanted to rely on last night; I was not  
16 entirely sure how he was going to rely upon it and it may be I would like to reserve our  
17 position to put in a very short note later today if there is anything else that occurs to us  
18 immediately after the hearing, but we can certainly do it today or first thing tomorrow.

19 There are three points that spring to mind, as well as my opening point that this is a highly  
20 exceptional that this is highly exception. First of all, it is important to understand that in this  
21 particular statutory context the decision of the OFT sets a precedent. One can see that from the  
22 OFT's own approach to this case, because it went back, for example, to the 1996 MMC report.  
23 Mr Pritchard referred back and said the reason we approached this case in the way we did was  
24 because of our experience in other cases. That is not just for the OFT but for everyone, for the  
25 world at large there is a publicly stated view of the market by the OFT, it is published.  
26 Mr Pritchard's witness statement is not publicly available, so it is not good enough to say if  
27 you find the decision is defective but you think Mr Pritchard is actually all right you do not  
28 have to do anything, because that will leave the public record defective and that, we submit, is  
29 not attractive.

30 The other point – and this is a statutory judicial review point – is that one simply does not  
31 know what will happen on a remittal. Mr Roth cannot and fairly did not say that necessarily if  
32 the matter went back to the OFT the result would be the same; we do not know that. The OFT  
33 may feel it needs to look again at four to threes if the matter is remitted to it, it may feel that its  
34 own iterative process was not actually followed properly in this case, it may not, it may turn  
35 round and it may rewrite the decision on the basis of Mr Pritchard's witness statement. The

1 point is we cannot know. That is the point of judicial review, it always has to go back to the  
2 decision maker. If we are correct in our arguments, we should not be denied relief on that  
3 basis.

4 The third point – and again, I apologise, I have not had time to look at the *Argyll* case in any  
5 detail, but there the timescale is incredibly short, it looked like five days was going to be very  
6 significant. That is not the case here as I understand it. I am not clear as to when exactly this  
7 merger has to be concluded on the terms of its documents, but it is certainly not in five days  
8 time and there has been no suggestion that if there was issue that would necessarily derail the  
9 merger. If that is an issue then obviously we can investigate the matter further; I simply draw  
10 the contrast between *Argyll* where five days were crucial and here, where there is certainly no  
11 suggestion that five days is crucial.

12 Can I come then to the material non-disclosure point which both Mr Roth and Mr Green  
13 made a lot of noise about? There is nothing in it. Mr Roth took you to the Notice of  
14 Application, paragraph 67(b) and even Mr Roth had to accept that it was technically correct. It  
15 is correct because we describe the decision in the Notice of Application and paragraph 67(b)  
16 describes what the decision was about. By the time the decision was adopted, Mexborough  
17 had dropped out of the picture because when the OFT said they had a concern about it we said,  
18 fine, we will drop it out of the deal. It is important because it has been suggested somehow  
19 that we have behaved – improperly may be too strong a word, but it is a strong allegation,  
20 material non-disclosure, that what we have submitted here is different from what we submitted  
21 to the OFT, and Mr Green also made great play of this. It is simply not correct. I will tell you  
22 why it is not correct and then I will take you to the documents very quickly.

23 In this case the merging parties' case as put to the OFT was that competition was so limited  
24 that there was no problem with the merger. The OFT's case – not in the decision but in  
25 Mr Pritchard's witness statement – was competition is so limited that there is not a problem.  
26 Celesio's position before this Tribunal, and indeed in the Cohen/Scholl merger, was the  
27 opposite of that. We were saying that there was sufficient competition to mean that the merger  
28 between Lloyds and Cohen/Scholl would not have a sufficiently significant effect on  
29 competition is the opposite; it is not there is so much competition because that is going so far,  
30 but there is a sufficient degree of competition for there not to be a competition concern.

31 I can show you that by taking you quickly to the documents. They are in the OFT bundle,  
32 which is bundle 4 and they are behind tab 3. The first document we need to look at is tab C,  
33 the merger notice. If I can ask you to turn to page 12 of that document – Mr Green can turn to  
34 page 11, or not, as the case may be – paragraph 1.2: “The retail pharmacy market in the UK  
35 has the following characteristics”, and it sets out certain of the characteristics. 1.2(d) is very

1 important, one of the characteristics is “non-price competition in terms of quality of service”,  
2 so it is not saying a lack of competition, it is saying the existence of competition, and in 1.3 it  
3 explains that in more detail. Broadly, non-price competition takes place around quality of  
4 advice provided, range of services offered, convenience and then some more details in 1.4.  
5 “Typical services which are offered include various diagnostic services, testing services ...”  
6 etc etc. Then: “Pharmacies therefore compete in terms of the availability and quality of their  
7 consulting rooms. Other services that are offered include the direct delivery of prescriptions  
8 and repeat prescription services.” So it is not that there is so little competition, do not worry  
9 about it, but because there is competition do not worry about this merger.

10 At page 14, paragraph 1.15, the second sentence:

11 “A number of factors influence the consumer’s choice of retail pharmacy. These factors  
12 depend on the nature of the product or service required as well as the degree of urgency with  
13 which a consumer requires a product or service.”

14 Then (a) and (b) deal with proximity and then (c):

15 “Where an OTC medicine or service is required the quality of the service offered by the  
16 pharmacist may be more important than the location of a pharmacy.”

17 Again, there is emphasis on quality of service as being a factor which influences a  
18 consumer’s choice of retail pharmacy and, again, the emphasis is on the existence of  
19 competition.

20 Turning over to the bottom of page 16, “Control of entry” you will see the heading at the  
21 bottom and then on to page 17, it deals with the change in the control of entry regulations and  
22 at paragraph 1.30 Celesio concludes:

23 “It is too early to determine the effect these changes will have on the market, but the  
24 exemption for wholly mail order or internet-based services may provide additional competition  
25 beyond the traditional local markets.”

26 Then over to page 20, this is where Lloyds deals with its conclusions on the impact of the  
27 transaction on competition in retail pharmacy. At 4.1 it says it does not believe it will lead to a  
28 substantial lessening of competition. 4.2. to 4.5 deal with Mexborough; I have dealt with that  
29 already, it is a very particular point, it was dropped, it does not appear in the decision. Then  
30 4.6:

31 “Lloyds does not consider that any of these levels of local concentration will lead to a  
32 reduction in price or non-price competition. There are more than enough competing  
33 pharmacies in each location and surrounding areas to maintain competition. Non-price  
34 competition can cover a number of factors, with two of the key drivers being location and

1 convenience. In its report on the control of entry regulations, the OFT nevertheless identified  
2 three indicators that would allow them to measure the level of service provided ...”

3 At 4.7 I have to be careful because part of it is confidential, but the first sentence is not:

4 “Measured against these indicators, the proposed merger will in turn increase the level of  
5 service received by the consumer.”

6 I am afraid both Mr Roth and Mr Green have simply got this wrong. It is simply glib to  
7 suggest either that what we are saying now is inconsistent with what we said then, or to  
8 suggest somehow that what we said then is consistent with what the OFT and the merging  
9 parties are saying now. They simply have not read the documents.

10 They also referred to the document behind tab D, the briefing paper. If I can look first of all  
11 at paragraph 50, local level:

12 “Previous inquiries into the retail pharmacy market have concluded that competition occurs at  
13 a local level ...” so again reliance on the existence of competition.

14 Then over the page paragraph 18 is the one that both Mr Roth and Mr Green particularly  
15 relied upon, and again it sets out certain details about the nature of competition in retail  
16 pharmacy. It is important to note what 18(b) says about price competition.

17 “Other P medicines can be sold only under the supervision of pharmacist and may be subject  
18 to price competition. In relation to these medicines, however, local pharmacies are not the  
19 only other alternative suppliers. As these are not prescription medicines Lloyds find that  
20 pharmacies outside the immediate neighbourhood location could exert price pressure on a local  
21 pharmacy.”

22 Again, therefore, what is being said is that there is competition and this time it is in relation to  
23 the pricing of P medicines. Then 19:

24 “Accordingly, what conclusion is drawn from the above? Lloyds does not consider that the  
25 acquisition of Sabre will lead to any lessening of competition in the supply of retail pharmacy  
26 products or services in any of the locations where the parties overlap. There are sufficient  
27 pharmacy and/or non-pharmacy outlets in close proximity to the overlapping Sabre or Lloyds  
28 pharmacies and regulate incentives to maintain service quality so as to ensure competition  
29 affects local markets.”

30 They have simply got the wrong end of the stick, they have not read the documents carefully.

31 The final point made by Mr Roth comes back to you have a commercial interest in this so  
32 what are you doing here? We did make specific competition concerns clear to the OFT during  
33 the process. For example, we raised a concern that the merger might give rise to a degree of  
34 market power on the part of Boots that would affect us, but really this is a smokescreen. Yes,  
35 we have a commercial interest, but if the OFT has got this wrong, given that we are a major

1 player in the market we are fully entitled to come before the Tribunal and say they have got it  
2 wrong and we are entitled to relief if the Tribunal agrees with us.

3 If I can move on to deal with Mr Green's submissions, he began with what he called an  
4 analysis of the four to three areas, but in our submission this was really, again, just an attempt  
5 to deflect attention from the real issue in the case which is the legality of the decision. His  
6 thesis was that all third parties should submit all the evidence they might want to delay on  
7 before the decision is adopted, because if you do not it affects his clients procedural rights.  
8 But our case has to be a challenge to the decision. Our case challenges the reasoning and logic  
9 of the decision which, by definition, we cannot have raised before because it is only once one  
10 gets the decision that one knows what the reasoning is and the logic is. We are not running a  
11 substantive challenge on the merits; I hope that was clear in my submissions this morning.  
12 This is a red herring on the part of Mr Green; when one is challenging the logic and reasoning  
13 of the decision you are allowed to raise arguments after the event which go to that. Where  
14 does this take us? He says that we failed to raise matters relating to four to three before the  
15 OFT, but that is simply not correct. Mr Green showed you the relevant document, it is our first  
16 bundle, tab 6. At 3.2:

17 We believe that many competitors would be sufficiently weakened by the proposed merger so  
18 as to be significantly less effective in constraining Alliance/Boots. We have not yet had the  
19 opportunity to carry out a full local analysis across the UK, but are concerned that there may  
20 be areas where, even if there were four or more competitors remaining after the merger, some  
21 of these would provide a very weak constraint on AB. We also believe there are a number of  
22 areas with fewer than four competitors where, as indicated above, we believe there would be a  
23 risk of market exit in a number of cases.”

24 The paragraph Mr Green did not read:

25 “Given the step change that the proposed merger would bring about at the retail level as  
26 described above, Celesio submits that it is incumbent upon the OFT to undertake a detailed  
27 appraisal of the impact of competition at a local level.”

28 That is what we asked the OFT to do and that is our case that we are putting forward now. It  
29 is not the job of a third party in a merger procedure to do the whole analysis the OFT would do  
30 and say here you are. It is for the OFT to investigate where concerns are raised, and our case is  
31 a simple one, the OFT has not sufficiently investigated the local areas in relation to four to  
32 three.

33 In relation to the next document at tab 7, which a questionnaire that was sent out generally to  
34 pharmacies, Mr Green referred to question 11 on the last page, the question “How many  
35 competitors might you expect to face within a one mile radius?” He suggests that that was an

1 invitation to us to put in detail economist evidence. Imagine the OFT's face – it is not a  
2 rubbish point as Mr Green suggests – if every response to this question which was sent out to a  
3 number of pharmacies, we do not know how many, produced detailed economist evidence in  
4 relation to every point? The approach that Mr Green is suggesting is simply not realistic.

5 Tab 8. He then, in relation to section 2.1 drew attention to the fact that “In this specific case  
6 we do not believe that the number of fascia tests could capture or cure the merger's effects on  
7 competition in the retail market because there are a number of specific features in the case that  
8 also have to be considered.” Mr Green says there is an inconsistency between what we were  
9 saying then and what we are saying now. Of course there is an inconsistency, because we  
10 made the submission and the OFT rejected it, but the idea that when you put forward a  
11 submission and the OFT rejects it you cannot say anything then about what the OFT does  
12 instead, again is unrealistic.

13 2.1.3 at page 7, Mr Green's point, the first sentence: “The OFT has indicated it has concerns  
14 that risks we have raised are speculative only.” This is in relation to a particular point about  
15 possible behaviour on the part of Boots and using its retail strength in P medicines to influence  
16 customer choice to the detriment of its competitors, but one cannot read from that that there  
17 was a continuous complete dialogue between us and the OFT. All the documents that we have  
18 received from the OFT are attached to our Notice of Application, it was pretty much a one-way  
19 process – if you want to call it 99% fine, but one cannot read from that sentence that somehow  
20 we were fully aware of what the OFT was considering. That is simply not the reality.

21 Finally, he referred to a note of a telephone conference in bundle 4 at tab 3(b). It was a  
22 telephone call from the OFT to my instructing solicitor. “Called Paula Readle and said that if  
23 there was anything else which they wanted to submit they were quite welcome to.” That does  
24 not mean that we were involved in an integrated process with the OFT, it is saying if you want  
25 to tell us something else you can, but it is not saying we are particularly concerned about these  
26 issues, we would like you to add to this issue. It really does not take us very much further.

27 In relation to Mr Green's first point he says that our analysis of the four to three areas is after  
28 the event and trumped-up. It was not; we raised it with the OFT and I make the point that we  
29 are now challenging the decision and our challenge is based on the reasoning, the logic, the  
30 rationality of the decision. It is Mr Green's approach which is illogical and unrealistic. He  
31 also made the point that what we are saying now is inconsistent with the arguments we  
32 advanced to the OFT; i.e. you should rely solely on fascia tests. I have explained that that was  
33 rejected and we are where we are, we are now challenging the decision.

34 The second point that Mr Green raised related to the counterfactual and, again, it is the same  
35 point, we however come back to this point of principle which is what is the position where the

1 starting point is that there is allegedly limited competition in the market? I have made my  
2 point about the logic of that, that it means that there should be at least as rigorous a review  
3 as where there is a lot of competition because otherwise mergers that really stripped out  
4 anything that was left would get through, and that does not make sense.

5 What does Mr Green rely on to support his counter-argument? He said on the logic of my  
6 submission that even if competition is minuscule that will mean there is going to be an SLC.  
7 With respect, that is not right, my submission was that it was contextual and what one has to  
8 do is look at the level of competition, look at the effect the merger will have and decide  
9 whether it is an SLC. It is too simplistic to put it as Mr Green seeks to do.

10 He referred to the OFT guidance, this is bundle 5 tab 2 and he referred to paragraph 3.6, page  
11 15. It certainly does not help him and it is actually probably against him because what it says  
12 is “Not all mergers may give rise to competition issues. First, some mergers are pro-  
13 competitive or completely neutral; secondly, many mergers may lessen competition but not  
14 substantially because sufficient post-merger competitive constraints will remain to ensure that  
15 competition or the process of rivalry continues to discipline the commercial behaviour of the  
16 merged firm.”

17 The focus, therefore, is on the constraints that are left, and our submission is that if the  
18 constraints are limited to start with and become more limited, certainly this guidance does not  
19 suggest that that is not an appropriate consideration. In 3.7:

20 “A merger may be expected to lead to a substantial lessening of competition when it is  
21 expected to weaken rivalry to such an extent that customers would be harmed. This may come  
22 about, for example, through reduced product choice, because prices could be raised profitably,  
23 output could be reduced and/or product quality or innovation could be reduced.”

24 Mr Green suggests there is no danger here of harm to consumers because we have  
25 regulations, but with respect this is an argument that was put to the OFT. The OFT that the  
26 merging parties put to the OFT initially was there are no competition concerns at all because  
27 competition in this market is so limited, and one of the reasons is because there is regulation.  
28 The decision rejected that. The decision takes account of the fact that there is regulation and  
29 comes to the conclusion that nonetheless there is a problem with two to ones and a problem  
30 with three to twos, so Mr Green here is simply rehearsing an argument that is put to the OFT  
31 and rejected in the decision, there is not really any merit in trying to go back on that, that battle  
32 has been fought and lost by his findings.

33 He referred to the Competition Commission guidance, that is at tab 3, and he referred in  
34 particular to paragraph 1.22: “In applying the SLC test the Commission will  
35 evaluate the competitive constraints on firms with the merger compared to the situation that



1 would have been expected to prevail without the merger.” That is perfectly consistent with my  
2 submission, it is certainly not counter to my submissions what Mr Green suggests, and again  
3 he says that it goes on to indicate that regulatory context plays a part: absolutely, but the mere  
4 fact that there is regulation does not mean there cannot be a competition concern, and the  
5 decision comes to that conclusion.

6 He then referred to the *EDP* case but he did not take you to it. When you do come to look at  
7 it, if you look carefully at particularly paragraph 180 *EDP* is about a situation where regulation  
8 means that there is no competition. It is not this case and it does not take us anywhere.

9 Mr Green’s third point was what he called the essence of the decision, in which he gave you  
10 references to the submissions put forward by his clients to the OFT and made some references  
11 to the decision. As I have just explained, the merging parties’ initial submission to the OFT  
12 was that there are no competition concerns at all and that was rejected by the OFT, so I am not  
13 sure how it helps us to go back and trawl through what Mr Green’s clients may have said. The  
14 end point for this particular judicial review is the decision.

15 In relation to the national market, Mr Green’s fourth point, I do not think he added anything  
16 to what Mr Roth says and therefore I do not need to deal with that. Finally, in relation to the  
17 Scholl/Cohen point, Mr Green made the same point but for a different end as Mr Roth made.  
18 He said we all agree on the proper analysis that there is limited competition; I have taken you  
19 through the documents, that is simply not factually correct.

20 Unless there are any further questions, those are our submissions.

21 THE CHAIRMAN: Nobody wants to say anything else?

22 MR GREEN: If I may say something about timing, if this is an appropriate moment.

23 THE CHAIRMAN: Yes.

24 MR GREEN: We have made you aware of the timing of the transaction. If I can just update you  
25 slightly, without being presumptuous, we would be exceedingly grateful for a judgment before  
26 the end of the first week of May, we would be quite grateful for one before the end of the  
27 second week and we would begin sweating in the third week. If it is at all possible the 5<sup>th</sup>  
28 would be wonderful; if that became problematic for you the 12<sup>th</sup> would be not quite a good but  
29 okay, but we do get nervous after that. We understand, obviously, that you need time to think  
30 about it.

31 THE CHAIRMAN: We will do our best to meet your best deadline.

32 MR GREEN: That is very kind of you, thank you.

33 THE CHAIRMAN: We are grateful for your understanding about it. Can I thank everyone for  
34 managing to deal with it in a day and giving us very full submissions in a very succinct way?

1 We appreciate that and we will do our best to meet your earliest deadline, but I do not promise  
2 that we will do. Thank you very much.

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