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IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1160-65/1/1/10

Victoria House, Bloomsbury Place, London WC1A 2EB

26 September 2011

Before:

VIVIEN ROSE (Chairman) DR ADAM SCOTT OBE TD DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) IMPERIAL TOBACCO GROUP PLC (2) IMPERIAL TOBACCO LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

CO-OPERATIVE GROUP LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

WM MORRISON SUPERMARKET PLC

Appellant

-v

OFFICE OF FAIR TRADING

Respondent

(1) SAFEWAY STORES LIMITED (2) SAFEWAY LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) ASDA STORES LIMITED
(2) ASDA GROUP LIMITED
(3) WAL-MART STORES (UK) LIMITED
(4) BROADSTREET GREAT WILSON EUROPE LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) SHELL UK LIMITED (2) SHELL UK OIL PRODUCTS LIMITED (3) SHELL HOLDINGS (UK) LIMITED

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

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HEARING (DAY 5)

Note: Excisions in this transcript marked "[...][C]" relate to passages excluded.

APPEARANCES

Mr Mark Howard QC, Mr Mark Brealey QC and Mr Tony Singla (instructed by Ashurst LLP) appeared on behalf of the Appellants Imperial Tobacco Group Plc and Imperial Tobacco Ltd.

Mr Rhodri Thompson QC and Mr Christopher Brown (instructed by Burges Salmon LLP) appeared on behalf of the Appellant Co-operative Group Ltd.

Mr Pushpinder Saini QC and Mr Tristan Jones (instructed by Hogan Lovells International LLP) appeared on behalf of the Appellants WM Morrison Supermarkets Plc and Safeway Stores Ltd and Safeway Ltd.

Mr James Flynn QC and Mr Robert O'Donoghue (instructed by Norton Rose LLP) appeared on behalf of the Appellants Asda Stores Ltd, Asda Group Ltd, Wal-Mart Stores (UK) Ltd and Broadstreet Great Wilson Europe Ltd.

Ms Dinah Rose QC and Mr Brian Kennelly (instructed by Baker & McKenzie LLP) appeared on behalf of the Appellants Shell U.K. Ltd, Shell U.K. Oil Products Ltd and Shell Holdings (U.K.) Ltd.

Mr Paul Lasok QC, Ms Elisa Holmes, Mr Rob Williams, Ms Anneliese Blackwood and Ms Ligia Osepciu (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

1	Monday, 26 September 2011	1	where it may well be that you don't have existing
2	(10.00 am)	2	experience, object agreements are not limited to only
3	Opening submissions by MR BREALEY	3	certain types of agreement, but I would like to
4	THE CHAIRMAN: Yes, Mr Brealey, good morning, everybody,	4	emphasise the last sentence of paragraph 92:
5	thanks very much for your note which we have read over	5	"The difference compared with an examination of the
6	the weekend, and we have our copies here.	6	restrictive effects of the agreement lies in the fact
7	MR BREALEY: I know the Tribunal has read it. What I would	7	that, with a restriction of competition by object, the
8	do, probably, is if I can have just, say, an hour and	8	negative interference with market conditions is so clear
9	spend 45 minutes of that on object, and then 15 minutes	9	that the agreement can be presumed without any detailed
10	on the exclusion order, and then leave exemption for	10	market analysis to have a restrictive effect."
11	December, as it were. We have opened on exemption in	11	So she is saying there that the agreement has to be
12	writing, but given the time, we want to concentrate on	12	so clear to have a restricted effect before that
13	object and exclusion order.	13	restrictive effect, that presumption, can be presumed.
14	I won't obviously now go through the note in order,	14	So I emphasise 91 because the Advocate General is
15	but I would like to emphasise certain points. Could we	15	referring to "in all probability", you look at
16	then go to the bundle of authorities, I think there are	16	experience, can you say in all probability that the
17	only two bundles I will refer to, which is bundle 2 and	17	agreement is restricting the competition. Then in 92,
18	bundle 11, but if we can start with bundle 2. So that's	18	in an object case, you are looking to see whether the
19	the joint authorities bundle 2 tab 37 {A2/37} where we	19	agreement is so clear that it can lead to restrictive
20	find the opinion of the Advocate General in	20	effects. That is the Advocate General.
21	GlaxoSmithKline. We refer to this at paragraph 13 of	21	If we can go back and just emphasise paragraph 136
22	the speaking note. Just for completeness, it's at	22	of European Night Services, which is at tab 31 of the
23	13(a), it's not paragraph 80, it's paragraph 89.	23	same bundle. {A2/31}. We have really only one
24	If I can start off at paragraph 89 of the opinion,	24	paragraph in European Night Services at tab 31, and
25	where the Advocate General sets out the law on the	25	that's paragraph 136, which, on the top right-hand side
	1		3
1	notion of restriction of competition by object.	1	is page 22 of 38.
2	At paragraph 89, the Advocate General refers to the	2	It's two-thirds of the way down under "Findings of
3	two-stage examination. At paragraph 90, the	3	the Court". Here the general court is distinguishing
4	Advocate General recites the case law of the	4	between effects and object infringement:
5	European Court of Justice that agreements are by their	5	"Before any examination of the parties' arguments as
6	very nature liable to restrict competition, can be	6	to whether the Commission's analysis as regards
7	object cases.	7	restrictions of competition was correct, it must be
8	That is a reference to paragraph 31 of T-Mobile. So	8	borne in mind that in assessing an agreement under
9	paragraph 90 is referring to paragraph 31 of T-Mobile.	9	Article 85(1) of the Treaty, account should be taken of
10	But I would like to emphasise paragraphs 91 and 92,	10	the actual conditions in which it functions, in
11	because as the Tribunal will have seen, we are	11	particular the economic context in which the
12	submitting that the OFT has applied too low a threshold,	12	undertakings operate, the products or services covered
13	and we say there has to be a high degree of probability	13	by the agreement and the actual structure of the market
14	that the restriction will occur before you get an object	14	concerned"
15	case.	15	So that's your effects analysis, they are talking
16	So at paragraph 91, the Advocate General says:	16	about effects there, what you (inaudible) and then after
17	"In this connection, regard must be had in	17	the cites of the cases:
18	particular to existing experience according to which in	18	" unless it is an agreement containing obvious
19	all probability certain types of agreement have	19	restrictions of competition such as price-fixing, market
20	a negative impact in the market."	20	sharing or the control of the market."
21	So she says, first of all, "Well, let's have a look	21	So the general court is referring there to obvious
22	at the experience, because experience can tell us	22	restrictions on competition in the context of object
23	whether the agreement can in all probability" and	23	infringements. So we have the Advocate General in
	whether the agreement can in an probability and	20	miningements. 30 we have the Advocate deneral in
24	I emphasise the words "in all probability".	24	GlaxoSmithKline, is it so clear, the general court
24 25			

1	DR SCOTT: Just sticking with that paragraph, it does go on	1	We then go to Professor Richard Whish at tab 157.
2	then to explain what happens if there is	2	And at the same time if we could take out core bundle 4
3	a pro-competitive argument	3	of the OFT's defence. I am trying to take this as
4	MR BREALEY: Yes.	4	logically as I can. So the OFT's defence at core
5	DR SCOTT: in the next stage of analysis.	5	bundle 4, tab 46, paragraph 141. {C4/46 paragraph 141}
6	MR BREALEY: Yes. You will have seen from the note that	6	So the OFT's defence, paragraph 141. In my submission,
7	when you have an object case the restriction of	7	this is where one really starts to see where the OFT has
8	competition is presumed, and that is almost a conclusive	8	gone wrong, because we see at 141 in our notice of
9	presumption, because you can only argue whether there is	9	appeal, Imperial Tobacco referred to European Night
10	any efficiency benefits in the exemption stage. So it	10	Services, referred to the Advocate General In
11	is a very serious stage at the prohibition stage.	11	GlaxoSmithKline, referred to the Commissioner's
12	That's one of the points we make in the speaking note,	12	guidelines, and in this section a lot of it we set
13	which says: if you are going to have such a strong	13	out in the speaking note the OFT essentially deny
14	presumption that has such conclusive effects, then that	14	what we are saying. But they say here at 141:
15	presumption itself has to have strong foundations. It	15	"The CFI reference in (a) above is quoted out of
16	can't merely rely on speculation or flimsy evidence.	16	context [that's the European Night Services]. The
17	So we have the Advocate General in GlaxoSmithKline,	17	European Night Services case was argued out as an
18	the General Court in European Night Services.	18	effects case with it being contended that if the
19	Can we put bundle 2 away and go to bundle 11.	19	agreement in question had anticompetitive effects, they
20	Before we go to Professor Whish, can we go to the	20	were outweighed by the pro competitive effects. The
21	Commission's guidelines on exemption, which is at	21	passage in the judgment quoted by ITL, paragraph 136, is
22	tab 146. {A11/146} So these are the tab 146	22	directed at the latter point. It has no relevance to
23	guidelines from the European Commission on exemption	23	object analysis."
24	which, as you will have seen from the speaking note, the	24	In my submission, that is quite a startling
25	OFT says it has regard to, and there are two paragraphs	25	proposition, for the OFT to say in this appeal that
	5		7
1	I would like to emphasise, because we shall see, when we	1	European Night Services has no relevance to object
1 2	I would like to emphasise, because we shall see, when we	1	European Night Services has no relevance to object
2	get to the decision, the OFT only refers to one of them.	2	analysis. What the OFT is doing in its defence, as I've
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1	Then at the bottom of the page, the penultimate	1	if the agreement or concerted practice had other
2	paragraph:	2	objectives."
3	"The CFI did not refer in European Night Services to	3	One sees that the authority for the obvious
4	agreements to limit output when discussing 'obvious'	4	consequences of an agreement at footnote 2007 is exactly
5	restrictions of competition, but they must also be	5	paragraph 136 of European Night Services. So how the
6	allocated to the object box on the basis that they	6	OFT in the present appeal can say that Imperial Tobacco
7	clearly restrict competition."	7	has taken European Night Services out of context by
8	So you are always looking to see whether there are	8	relying on paragraph 136 when the OFT, in the
9	clear restrictions of competition such that you can	9	Construction Cartel, specifically referred to that
10	presume the restrictive effect.	10	paragraph is a mystery, and, with respect, needs some
11	If I could just hand up I've handed the documents	11	explaining.
12	to the OFT two more documents which are the	12	The Recruitment Cartel is exactly to the same
13	Construction Cartel decision and the Recruitment Cartel	13	effect. It kicks off at page 76 with a section:
14	decision. (Handed). We will find a place to put them,	14	"No need to prove anticompetitive effect where
15	but I imagine they will go into tab 12, we will make	15	anticompetitive object is established."
16	sure they are put into tab 12.	16	We agree. One goes over the pages to page 79,
17	THE CHAIRMAN: Do you mean bundle?	17	paragraph 374, and again if one just goes to page 81,
18	MR BREALEY: Yes, Joint Authorities Bundle 12, or we can put	18	3.78:
19	them in the Ashurst	19	"Therefore, in considering whether an agreement
20	DR SCOTT: Just to be clear for the transcript, this is the	20	and/or concerted practice has as its object the
21	decision of the OFT?	21	prevention, restriction or distortion of competition,
22	MR BREALEY: This is the decision of the OFT in	22	
23		23	the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it
23 24	Construction, decision of the OFT in Recruitment. DR SCOTT: I have Construction but not Recruitment.	24	
24 25			operates. In cases where the agreement or concerted
	THE CHAIRMAN: I have Recruitment.	25	practice contains 'obvious restrictions of competition'
25	0		4.4
20	9		11
	•	1	
1	(Pause)	1 2	it will be treated as having an anticompetitive
1 2	(Pause) MR BREALEY: We will insert these, but they will probably go	1 2 3	it will be treated as having an anticompetitive object and no account need be taken of the actual
1 2 3	(Pause) MR BREALEY: We will insert these, but they will probably go into joint authority bundle 12 at the end. This is in	2	it will be treated as having an anticompetitive object and no account need be taken of the actual conditions~"
1 2 3 4	(Pause) MR BREALEY: We will insert these, but they will probably go into joint authority bundle 12 at the end. This is in the context of the OFT submitting to this Tribunal that	2 3 4	it will be treated as having an anticompetitive object and no account need be taken of the actual conditions~" Again, we see authority for the proposition as
1 2 3 4 5	(Pause) MR BREALEY: We will insert these, but they will probably go into joint authority bundle 12 at the end. This is in the context of the OFT submitting to this Tribunal that we have taken paragraph 136 on European Night Services	2 3 4 5	it will be treated as having an anticompetitive object and no account need be taken of the actual conditions~" Again, we see authority for the proposition as paragraph 136 of European Night Services.
1 2 3 4 5 6	(Pause) MR BREALEY: We will insert these, but they will probably go into joint authority bundle 12 at the end. This is in the context of the OFT submitting to this Tribunal that we have taken paragraph 136 on European Night Services out of context and it has no relevance whatsoever to	2 3 4 5 6	it will be treated as having an anticompetitive object and no account need be taken of the actual conditions~" Again, we see authority for the proposition as paragraph 136 of European Night Services. It all goes to support Imperial's submission that
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1	to trump an article 6 presumption of innocence.	1	Generals, GlaxoSmithKline and T-Mobile where they say
2	Evidential rules, as we know, kick in in competition	2	object infringements do perform a policy function, that
3	matters in order and the Tribunal requires quite	3	is one of legal certainty, but again if the net of
4	strong evidence, and so does the European Court of	4	object infringements is cast too wide, then you are
5	Justice in Siemens, and I don't think Siemens is in the	5	going to get a legal uncertainty.
6	bundle, but we will insert that, that is referred to in	6	So that is a canter through what we say is the
7	paragraph 32.	7	correct approach of the law, and the policy reasons
8	THE CHAIRMAN: I think we had a copy on our desk this	8	underlying it.
9	morning.	9	Can I now go to the OFT's decision to show how the
10	MR BREALEY: Maybe so, we will insert that. The Siemens	10	OFT simply applied too low a threshold. It's the
11	case essentially just mirrors what the Tribunal has said	11	decision. If we could start at page 36. I am roughly
12	in previous cases.	12	at about paragraph 45 of the speaking note .
13	So the thrust of the first policy reason is that	13	At paragraphs 2.120 and 2.121, we see the OFT
14	there must be some strong foundation for the presumption	14	setting out what it is finding, what it has decided not
15	of restrictive effect in object cases.	15	to find. One of the things it has decided not to make
16	Then the second policy reason are the type 2 errors,	16	a finding of was that the agreements had the likely
17	which we set out at paragraph 35, because in an object	17	effect of restricting competition. As the Tribunal will
18	case, of course there is no finding of a distortion of	18	be aware, this cannot just be swept under the carpet as
19	competition. We pick this up at paragraph 36 of the	19	the OFT tries to do and says, well, you have an object
20	note. There is, therefore, a constant risk with	20	infringement, you have an effect infringement, it's
21	an object infringement that an agreement has been	21	alternative, everyone knows that, in circumstances
22	prohibited even though the market has not been distorted	22	where, on any view, the OFT accepted that these
23	and a possibly competitive agreement has been prohibited	23	differentials, these maximum differentials, with
24	because of the object.	24	opportunity to respond, are novel. So they have no
25	We say it seems common sense to demand a high degree	25	direct experience of this type of agreement. When they
	13		15
1	of certainty that the agreement would ordinarily	1	investigated the agreement for the best part of seven
1 2	of certainty that the agreement would ordinarily restrict competition in order to minimise the risk, what	1 2	investigated the agreement for the best part of seven years and have decided that they can't find any
	of certainty that the agreement would ordinarily restrict competition in order to minimise the risk, what are usually called type 2 errors.		
2	restrict competition in order to minimise the risk, what	2	years and have decided that they can't find any
2	restrict competition in order to minimise the risk, what are usually called type 2 errors.	2	years and have decided that they can't find any restrictive effect, and that is their only experience of
2 3 4	restrict competition in order to minimise the risk, what are usually called type 2 errors. So the greater the certainty you have of the	2 3 4	years and have decided that they can't find any restrictive effect, and that is their only experience of this type of agreement, one has to wonder why it is that
2 3 4 5	restrict competition in order to minimise the risk, what are usually called type 2 errors. So the greater the certainty you have of the restrictive effect, the less the risk. Whereas the less	2 3 4 5	years and have decided that they can't find any restrictive effect, and that is their only experience of this type of agreement, one has to wonder why it is that these trading agreements have as their object the
2 3 4 5 6	restrict competition in order to minimise the risk, what are usually called type 2 errors. So the greater the certainty you have of the restrictive effect, the less the risk. Whereas the less certain you are of the restriction, the greater the risk	2 3 4 5 6	years and have decided that they can't find any restrictive effect, and that is their only experience of this type of agreement, one has to wonder why it is that these trading agreements have as their object the distortion of competition.
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I	Just taking paragraph 346, the section beginning at	ı	general court said at 136, that you have to look at
2	3.46 first: yes, we know this is consistent with what it	2	obvious restrictions of competition?
3	said in Recruitment and Construction, applying T-Mobile,	3	So did they apply a capability test? We submit that
4	really applying the law, the well-established law, that	4	they clearly did, because if one goes to paragraph 54 of
5	if you have an object infringement, you don't have to	5	the speaking note, page 131 of the decision, in many
6	prove effect. So that is a given.	6	respects these are the most important paragraphs of the
7	But how, then, does the OFT approach the law on	7	decision, paragraph 6.212, basically page 131 to at
8	anticompetitive object? So we now go back to	8	least 147, these are the paragraphs where the OFT is
9	paragraph 3.38.	9	speculating on the theory of harm. And we see
10	So 3.38, well, we obviously agree with that, in the	10	continuous reference to the agreement simply being
11	sense that the OFT has to consider the precise purpose	11	capable of leading to a restriction of competition.
12	or objectives of the agreement. That is what an object	12	So, for example, paragraph 6.214:
13	infringement is about, the precise purpose or object and	13	"A parity or fixed differential is capable of giving
14	agreement.	14	rise"
15	Then we get to paragraph 3.39, and I would ask	15	Paragraph 6.216, this is talking about the ITL price
16	the Tribunal to note at paragraph 3.39 the OFT is	16	increase theory of harm:
17	referring to the exemption guidelines, but it only	17	"That requirement is capable"
18	refers to paragraph 22. It omits that critical	18	That's the third line down. If one looks at 217,
19	paragraph, paragraph 21, which, as we have seen, refers	19	halfway down, eight lines up, again "capable". We have
20	to restrictions having such a high potential of negative	20	set out, this is the section on the OFT's theory of
21	effects. Paragraph 21 is omitted.	21	harm, why are these trading agreements being prohibited?
22	Just to recap, paragraph 21 of the exemption	22	What is it about these trading agreements that is so
23	guidelines referred to restrictions having such a high	23	wrong? You don't just say, well, it relates to price
24	potential of negative effects, that has been omitted	24	and that is it. One is articulating what is it about
25	from 3.39.	25	these agreements that are wrong, and it is littered with
	17		19
1	Then we have 3.40, which talks about considering the	1	"capable".
2	objective aims, and then we have a very, very important	2	At paragraph 6.220 at page 133, where they talk
3	two paragraphs, 3.41 and 3.42, because the OFT at 3.41	3	about there is much analysis on the restriction on
4	refers to the well-established jurisprudence of the	4	intrabrand competition, the thrust, as Mr Howard said,
5	European Court, it talks about agreements by their very	5	of this decision is on interbrand competition.
6	nature being injurious to competition, but the big	6	Here we have one paragraph on intrabrand competition
7	question is: how does the OFT interpret those words?,	7	and all the OFT says is:
8	and in our submission, the OFT wrongly interprets those	8	"It is also possible that"
9	words, because it then goes on at 3.42 to emphasise	9	In our respectful submission, to say that something
10	paragraph 31 of T-Mobile, and it is sufficient that it	10	is possible, we are a far cry from an object
11	has the potential; in other words, the concerted	11	infringement case. Anything is possible, but what the
12	practice must simply be capable in an individual case.	12	OFT have to prove, in our submission, that it is highly
13	And it puts in bold the word "capable". We know that we	13	likely, highly probable; the mere possibility is
14	are not talking about the distinction between object	14	insufficient.
15	infringement and effects, because that is the next	15	We set out at paragraph 54 of the speaking note the
16	section. The OFT in its analysis on the law of	16	passages where the OFT refer to "capable". They are
17	anticompetitive object has gone from saying agreements	17	undoubtedly applying a capability test here. Quite
18	by their very nature can be regarded, to what does that	18	an important passage I would like to emphasise is at
19	mean, they are simply capable.	19	page 147. This concerns the opportunity to respond
20	There we see footnote 100, European Night Services,	20	clause. As the Tribunal will know, it is a large part
21	paragraph 136, that apparently we have taken out of	21	of Imperial's case and the other appellants', that these
22	context, but no reference to "obvious".	22	trading agreements had opportunity to respond clauses,
23	Wholly bizarre how the OFT, at paragraph 100, 136	23	so if the Gallaher price went down, Imperial would seek
24	so yes, paragraph 136 talks about the objective aims of	24	an opportunity to meet the price reduction and you have
25	the agreement, but why does the OFT now deny what the	25	the response and counter response, and at paragraph 271, $$
	18		20

1	so that's paragraph 6.271, (b), this is in the context	1	So we have the notice of appeal saying that
2	of Imperial arguing that the agreements had	2	capability is not good enough, the OFT in its defence,
3	a pro-competitive effect, they submit:	3	and one sees those paragraphs surrounding paragraph 141,
4	"The infringing agreements afforded the manufacturer	4	it is, "we misunderstood the law", then as we set out in
5	the opportunity to respond to competitors' pricing	5	the speaking note, we get the skeleton.
6	promotions, thereby stimulating interbrand competition."	6	I know you have gone through it, but the paragraph 6
7	So that is what Imperial are arguing, and they say	7	and 7 of the skeleton, complete shift, we say, of the
8	this attempt to throw more money at lower prices	8	OFT's case. Now, I remind the Tribunal, we have just
9	stimulates interbrand competition. How does the OFT	9	looked at paragraph 6.277 of this decision where it
10	reject that? It rejects it at page 151. Imperial are	10	rejected Imperial's arguments that the opportunity to
11	saying this response and counter response is	11	respond clause was pro-competitive and all it could say
12	pro-competitive.	12	was the long-term implementation was capable of
13	At page 151, paragraph 6.283:	13	restricting interbrand, so they expressly use the word
14	"The OFT considers that the submissions made as to	14	"capable" in 277.
15	the alleged pro-competitive nature of the infringing	15	Then we get at paragraph 6 of the skeleton:
16	agreements do not undermine or negate the OFT's finding	16	"It is not, and never has been, the OFT's case that
17	as to competitive object in law."	17	in order to constitute object infringements, the
18	Then if we could go back, dealing with that, at	18	infringing agreements need, without more, to be capable
19	paragraph 6.277, where actually it expressly deals with	19	of restricting competition in some general or
20	this:	20	ill-defined way."
21	"In response to the argument at paragraph 6.271(b),	21	Paragraph 7:
22	the OFT considers that even if the infringing agreements	22	"It is in this sense, in the light of the fact that
23	did on some occasions facilitate a price reduction by	23	the infringing agreements can be expected to be
24	one manufacturer in response to a retail price reduction	24	anticompetitive, that the OFT maintains that the
25	instigated by another manufacturer, the long-term	25	infringing agreements are object infringements."
	21		23
	= '		
1		1	
1	implementation of the parity and differential	1 2	So we don't have capability any more, we have now:
2	implementation of the parity and differential requirements was capable of restricting interbrand	2	So we don't have capability any more, we have now: can the agreement be expected?
2	implementation of the parity and differential requirements was capable of restricting interbrand competition and does not negate the anticompetitive	2	So we don't have capability any more, we have now: can the agreement be expected? So where does that now lead us? It leads me to
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1	short of the degree of plain and obviousness that you	1	Can we just go back to JAB 11, tab 148 {A11/148}
2	need in an object case.	2	which are the 2000 vertical guidelines. We have similar
3	Secondly, as a matter of fact and this is	3	provisions in 2010, but I would like to go to 2000.
4	something that Mr Howard was referring to last week	4	So these are the Commission guidelines on vertical
5	we say it is wholly unrealistic to say that the maxima	5	restraints, JAB 11, tab 148. I am now at paragraph 74
6	differentials could be expected to lead to the	6	of the speaking note.
7	competitive harm alleged by the OFT. We do emphasise	7	If we can go, first of all, to paragraph 100, where
8	the differentials are contained in the trading	8	the Commission repeats what it said in its 1998
9	agreements where Imperial is trying to get its products	9	communication vertical restraints are generally less
10	promoted and promoted at a competitive price. One looks	10	harmful than horizontal restraints.
11	at that, we look at the nature of the trading	11	"The main reason for treating a vertical restraint
12	agreements, and even in the way they have been	12	more leniently than a horizontal restraint lies in the
13	implemented, can you say that they can be expected to	13	fact that the latter may concern an agreement between
14	lead to the sort of competitive harm now advocated by	14	competitors producing identical or substituted goods or
15	the OFT? In other words, where Imperial seeks to	15	services.
16	respond to a Gallaher price cut, to fund a lower price,	16	"In vertical relationships, the product of the one
17	how can that be expected really to raise prices? It	17	is the input for the other. This means that the
18	may, as Mr Howard said, have as an effect if you can	18	exercise in market power behind the upstream or
19	prove that over seven years, the prices did go higher,	19	downstream company can normally hurt demand for the
20	then so be it. But to say, looking at the objects of	20	product of the other."
21	that trading agreement, can it be expected to lead to	21	So it is setting out its case, and the OFT in its
22	higher prices? Can it be expected that Gallaher will	22	guidance on the exclusion order says very much the same
23	ultimately disengage from competition? We say we are	23	thing, that vertical restraints are generally less
24	a far cry from the agreements expecting to lead to	24	harmful.
25	(inaudible) prices.	25	Then if we can go to paragraph 138, because
	25		27
1	Lordo Costo contra con del cato col de com	4	I would nice to be to a few time to be the first
1	Lastly, I just want to, on object, and then I'll	1	I emphasise two types of vertical restraint. The first
2	have to spend just five minutes, I think, on exclusion,	2	is the single branding. Again if one takes
3	but I would like just to emphasise the experience	3	paragraphs 11 and 12 of the OFT's skeleton, you have two
4	aspect, because one has the OFT's skeleton still to	4	competitors agree not to compete, well, you probably say
5	hand. There are two paragraphs that Mr Howard referred	5	there is a high likelihood that that would be an object
6	to last week, paragraphs 11 and 12, where the OFT sets	6	infringement to competitors to agree not to compete. If
7	out what it calls its fundamental proposition, and at	7	one competitor in a vertical agreement with its retailer
8	the last sentence of paragraph 11 he says:	8	says "I want you to sell only my products, I do not want
9	"Well, not even the appellants would surely dispute	9	you to sell my competitor's product", so you put in
10	the fact that an agreement between the two manufacturers	10	a vertical agreement a non-competition provision, the
11	always price their rival products at identical levels to	11	rival manufacturer is foreclosed, there is no price
12	each other is presumed to be anticompetitive."	12	competition in that retailer's business, and yet the
13	Then at 12:	13	European Commission is saying one has to look at the
14	"There is no reason in logic that principle,	14	effects of that vertical non-compete to determine
15	et cetera, et cetera, why the position should be any	15	whether it should be prohibited. It's not an object
16	different when manufacturers use retailers to provide	16	infringement case, that is quite clear from the
17	the same horizontal link."	17	guidelines, you can't say it would be expected to lead
18	This I would just like to pick up on, because	18	to a restriction of competition, it's certainly not
19	I think it is an important error of the OFT in being so	19	highly likely. So the single branding non-compete
20	simplistic in saying, well, if it's the same in	20	provision starts to eat away at paragraphs 11 and 12 of
21	a vertical arrangement, then you lead ultimately to the	21	the OFT's fundamental proposition.
22	same horizontal effects.	22	But then what about if you then put in the mix
23	I'm looking at paragraph 73 of the speaking note.	23	a link between the wholesale prices, and that's why we
24	We won't go to the 1998 Commission communication, but	24	referred to paragraph 152 of these guidelines, and the
25	that is a starting point.	25	so-called English clauses. Because the OFT may say,
	26		28

1	well, non-compete is non-compete. What about if you are	1	So we finish the speaking note on this experience,
2	linking one wholesale price to the other wholesale	2	because we saw the Advocate General in GlaxoSmithKline
3	price?	3	saying that regard must be had to experience to see
4	"A so-called English clause requiring the buyer to	4	whether in all probability the restrictions are
5	report any better offer and allowing him only to accept	5	injurious to competition. We saw experience being
6	such an offer when the supplier does not match it can be	6	referred to by the European Commission on its exemption
7	expected to have the same effect among compete	7	guidelines, and one takes a step back and says: well,
8	obligations, especially when the buyer has to reveal who	8	what is the experience of the sort of agreements that
9	makes the better offer. In addition, increasing the	9	are in issue on this appeal? This is 86. So we know,
10	transparency of the market may facilitate collusion	10	prior to this decision, the OFT had no direct experience
11	between the suppliers. An English clause may also work	11	of price maxima differentials, they are novel.
12	as quantity forcing."	12	Professor Shaffer says they are novel. It is the OFT's
13	Then four lines up from the bottom:	13	own evidence that these trading agreements are novel and
14	"The assessment of all these different forms will	14	have never been subjected to economic analysis.
15	depend on their effect on the market."	15	Secondly, the only experience the OFT has of these
16	So the European Commission is saying that English	16	is its investigation, and we saw at paragraph 2.121 that
17	clauses whereby I tell my retailer that he must report	17	it couldn't say on the basis of the seven year
18	a better offer to me from my rival, and then I have the	18	investigation, and looking at how they were operating
19	opportunity of matching my rival's price, and therefore	19	that they were likely to distort competition.
20	I get the sale, that that linking of the wholesale price	20	Third, if one looks at analogous clauses like the
21	in a vertical relationship depends on their effects on	21	English clause we have just seen at paragraph 152 of the
22	the market. It is not an object clause, one cannot say	22	guidelines, they don't have as their object the
23	it can be expected to lead to a serious restriction of	23	distortion of competition.
24	competition.	24	So on object we say that something seriously has
25	We have set out in the speaking note at paragraph 80	25	gone wrong with the OFT's analysis, and the answer is
	29	20	31
	20		
1	that Imperial's opportunity to respond clause, if it was	1	simple: they have applied too low a threshold to
2	a restriction, is far less of a restriction, because you	2	an object infringement. The net has been cast too wide.
3	are not foreclosing, Imperial is not foreclosing	3	That is all I have to say on object. I apologise
4	Sainsbury's from selling Gallaher products, it is saying	4	for going and to the transcript writers at speed,
5	"I want to have an opportunity to match a price	5	but we are a bit short of time. I will spend, if I can,
6	reduction".	6	just five or ten minutes on exclusion, because I think
7	So at paragraph 81, we again emphasise the very	7	again that's important, and then
8	cursory way that the OFT reject Imperial's submissions	8	I think I just need on the exclusion to set out
9	on the opportunity to respond clauses. Again, at	9	orally the arguments. The last document I am going to
10	paragraph 271(b) of the decision, Imperial submitted to	10	hand up until December, this is again the speaking note
11	the OFT that its opportunity to respond clauses were	11	on exclusion order, so it just helps everybody to know
12	pro-competitive, and all that the OFT could do at 6.277	12	where we are coming from (Handed).
13	was say well, they are capable in the long-term of	13	The exclusion order is at JAB 8, tab 138. It may
14	leading to a restriction of interbrand competition.	14	well be the decision refers to the exclusion order in
15	We say, well, if that is correct, one is essentially	15	only two paragraphs, and that's at page 537, at 7.44 and
16	rewriting these guidelines, because it would mean that	16	7.45.
17	the English clause would have an anticompetitive	17	I haven't got time to go through this in great
18	restriction in the long-term. One can say, well, the	18	detail, but if I can just give the Tribunal a sense of
19	effect of an English clause is that all the rival	19	where we are coming from on this.
20	suppliers are going to give up, they are never going to	20	If one looks at the exclusion order, the definition
21	try and put any price into the retailer, because they	21	section at the bottom, obviously the trading agreements
22	know it's not going to be worth it, because the	22	are vertical agreements, so on the face of it they are
23	incumbent supplier will always match it, and the rivals	23	excluded.
24	will disengage. One has to look at the effects, it is	24	Then section 3:
25	not an object infringement.	25	"The chapter 1 prohibition shall not apply to
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	••		02

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25	an absolute maximum resale price, it doesn't impose	25	MR BREALEY: Yes.
24	it doesn't fall in the third limb because it is not	24	DR SCOTT: Sorry, can we just stick with 4 for a moment?
23	So the OFT says it falls within the second limb, and	23	Our last submission, which
22	the retail price of competing brands."	22	effect.
21	nature of the infringing agreement involves a linking of	21	order does not catch what the OFT call the corollary
20	competing linked brands. This is because the restricted	20	So that is our second submission, that the exclusion
19	retailer, would determine its retail prices for	19	didn't have experience of that sort of agreement.
18	restricted the ability of the buyer, in this case the	18	about a minimum price for another product. It just
17	"The OFT considers an infringing agreement	17	a minimum price for that product. It is not talking
16	the exclusion order. Then at 7.45, page 537:	16	for the Imperial product would lead to or amount to
15	The OFT, at paragraph 7.44, sets out the terms of	15	experience of, it was looking at where the maximum price
14	doesn't get the benefit of an exclusion order.	14	was designed to do, what did the drafters have
13	the maximum price amounts to a minimum sale price, it	13	when one looks at the exclusion order and what really it
12	now with the benefit of an exclusion again, and then if	12	Our second submission is based on the argument that
11	prejudice to imposing a maximum sale price, so they are	11	differential, you have a minimum for the linked product.
10	restrict the sale price, now they are back in, without	10	this corollary effect. If you have a maximum price
9	agreement, so vertical agreements are out, unless they	9	resulted in a minimum for Benson & Hedges", so there is
8	a minimum saie price. We have article 3 shall not apply to the vertical	8	because the maxima for its product, for Embassy,
7	be taken out if the maximum sale price amounts to a minimum sale price.	6 7	"Well, Imperial don't benefit from the exclusion order
5 6	agreement falls within the exclusion again. Then it can	5 6	differentials, if they were fixed we are not into this territory, but if Imperial did set maxima, the OFT says
4	So now the trading agreement comes back in, or the	4	the reason is if indeed Imperial did set maximum
3	a sale price"	3	in the decision but it's mentioned in the defence, that
2	supplier imposing a maximum sale price or recommending	2	particularly in the defence, it's not really articulated
1	"Without prejudice to the possibility of the	1	speaking note, and the Tribunal will have seen that,
1	WAIth and annied in to the many letters of the	4	angeling note and the Tribert Leville and the
	33		35
25	That is then, subject to the first proviso:	25	The second submission begins at paragraph 16 of this
24	words "sale price".	24	That is the first submission.
23	because it restricts the sale price, and I emphasise the	23	2 has to be defined in the same way.
22	the exclusion, now it's gone back into the prohibition,	22	price is an absolute one, then surely sale price in limb
21	taken the vertical agreement, given it the benefit of	21	of "sale price", and it is saying that maximum sale
20	So that is what we called the second limb, so having	20	if the OFT are going to be consistent on its definition
19	price."	19	So that is our first submission, that is to say that
18	effect of the buyer's ability to determine its sale	18	there is no restriction on the absolute sale price.
17	agreement directly or indirectly has the object or	17	and we know from various passages in the decision that
16	"Article 3 shall not apply where the vertical	16	limb. So the second limb only catches absolute prices,
15	Let's see what section 4 does. So:	15	an absolute, it should also interpret that in the second
14	withdrawn the exclusion order under section 7.	14	the maximum sale price as an absolute, sale price being
13	something wrong with it, they could have formally	13	Our first submission is that if the OFT is defining
12	exclusion order, if the OFT had considered there was	12	above 3.99, it's an absolute sale price.
11	that Imperial's trading agreements benefitted from the	11	price, in the third limb, as an absolute. It can't go
10	exclusion. Really, essentially what we would say is	10	decision that the OFT have interpreted maximum sale
9	the exclusion, it can withdraw the benefit of the	9	relates to sale price. Now, we have just seen in the
8	think that certain agreements should not benefit from	8	to what is meant by "sale price", because the order only
7	analysis of the exclusion order, because if the OFT	7	The first reason starts at paragraph 6, and relates
6	Before we look at that, can I just emphasise section 7, because that is quite important for the	6	quickly set them out before we break.
4 5	agreement back in.	4 5	have set out three reasons why we submit the OFT have wrongly interpreted the order, and I will just very
3	Then section 4 brings certain types of vertical	3	What do we say to that? In the speaking note, we
2	excluded.	2	So it restricts, and it doesn't impose an absolute.
1	an agreement to extend (inaudible) agreement", so it's	1	an absolute.

1	DR SCOTT: 4 is interestingly worded when you begin to look	1	incentives or whatever.
2	at the documents which lie alongside the trading	2	We say on the evidence, and Mr Howard has touched on
3	agreements, because it contains this phrase "Provided	3	this, and obviously we are going to get more over the
4	these do not amount to a fixed or minimum sale price as	4	course of the next few months, we flag the point right
5	a result of pressure from or incentives offered by any	5	at the end of the speaking note, paragraphs 34 and 35,
6	of the parties", and no doubt in due course, when we	6	because you can have a maximum sale price, so we now
7	come to the evidence, we will look at some of those	7	interpret this as a maximum differential, so we can have
8	documents	8	a maximum differential, provided so we can have
9	MR BREALEY: Yes.	9	a maximum differential, this is now on the OFT's
10	DR SCOTT: which, as we have discussed already, point to	10	interpretation on the second limb, we have a maximum
11	actual numbers associated with what may or may not have	11	differential for Imperial, does that lead to a fixed
12	been pressure, but what was in some cases bonusing,	12	and I emphasise the word "fixed" minimum differential
13	which presumably is an incentive. So you have	13	for the Gallaher product? We say as a matter of fact
14	an interesting question about how the factual evidence	14	there was no fixed minimum differential for any Gallaher
15	actually relates to the very end of 4.	15	product.
16	MR BREALEY: That is the third submission. On the second	16	Again, we emphasise the passages in the decision on
17	submission, we just disregard the incentives for the	17	the theory of harm, particularly I am at paragraph 34
18	moment, the second submission is a pure point of	18	of the speaking note decision 6.223. This is in the
19	statutory interpretation	19	context of the OFT having to show that there was a fixed
20	DR SCOTT: In relation to the word "sale price".	20	minimum differential for the Gallaher product. At
21	MR BREALEY: Sale price but also whether, it's the	21	6.223, and 6.224 and 6.225, this is the OFT's treatment
22	correlation between maximum and minimum, because in	22	of the opportunity to respond. It's the first sentence
23	essence what we are submitting is that the intention	23	of 6.225 I would ask the Tribunal to note, because it
24	behind the exclusion order is that the we are only	24	sets out at 6.223 there was no automatic changing. At
25	talking about the supplier's own products, we are not	25	6.224 the OFT accepts that the retailer may not have
	37	20	39
	O1		00
1	talking about third parties' products. So we all know	1	automatically changed the retail price of a brand in
2	that we can set a maximum price from a product, so I am	2	response to a change in the price of a competing linked
3	the manufacturer, supplier, I set a maximum price at	3	brand. So it has conceded here, which it has to, that
4	which the retailer can sell my products, and because of	4	there is no automatic fixing. The retailer is not bound
5	incentives or coercion, that maximum becomes a minimum.	5	to lower the Imperial price when the Gallaher price goes
6	And where the maximum price for my product actually	6	down. There is no obligation. Professor Shaffer's
7	becomes a minimum, then the exclusion order wouldn't	7	theory of harm, and that we have seen, is that the
8	apply. But the second argument is simply based on	8	retailer is doing the dirty work for the supplier, so
9	a point of law, statutory interpretation, whether when	9	the Gallaher price goes down, the retailer has to reduce
10	the drafters were talking about a maximum sale price	10	that price without really any input from Imperial. It
11	amounting to a minimum sale price it was talking about	11	is being used as the intermediary.
12	maximum referring only to Imperial and minimum referring	12	Here, because of the opportunity to respond clauses,
13	to Gallaher. Because these are novel agreements, we all	13	Imperial is submitting, well, that's not right, there is
14	know, look at the vertical restraint guidelines, you	14	no automatic reduction in the Imperial product, and the
15	can't have RPM, you can set maximum prices, but if you	15	OFT is accepting that. Then it says:
16	coerce or grant incentives in such a way that it becomes	16	"The OFT considers that the evidence of contacts
17	a minimum, then you don't benefit from it.	17	between each manufacturer and the retailer shows there
18	So the second argument is all about whether maximum	18	was a clear expectation on the part of the manufacturers
19	and minimum apply to the supplier's own products, or it	19	that the prices would move in line."
20	can be parted, maximum Imperial and minimum Gallaher.	20	The simple question of fact, part fact and part law
21	The third argument essentially picks up what you	21	actually, is whether the OFT having accepted there is no
22	said, sir, which is then let's assume that the second	22	automatic changing but there is an expectation on the
23	limb sale price refers to differentials, maximum sale	23	part of Imperial that it would be given an opportunity
23 24	limb sale price refers to differentials, maximum sale price amounts to differentials, now does that maximum	23 24	part of Imperial that it would be given an opportunity to respond, whether that amounts to a fixed sale price,
	price amounts to differentials, now does that maximum	24	to respond, whether that amounts to a fixed sale price,
24			

 with its maximum and it does take the benefit of the exclusion order. I am sorry, it's there is quite a lot in this, but we will hopefully come back to it in closing. prices. Secondly, and this is a point that emerges more recently from the latest report of Professor Shaffer the effect that there is some question as to whether 	
4 I am sorry, it's there is quite a lot in this, but 4 recently from the latest report of Professor Shaffer	
5 we will hopefully come back to it in closing 5 the effect that there is some question as to whather	to,
5 we will hopefully come back to it in closing. 5 the effect that there is some question as to whether	r
6 THE CHAIRMAN: Yes. Those are your submissions? Thanks 6 manufacturers move their recommended resale processes of the chairman.	ices in
7 very much, Mr Brealey. It's probably wise to have our 7 parallel with their wholesale prices. CGL contends	that
8 mid-morning pause at that stage, then. Is it you, then, 8 in fact manufacturers invariably raised or lowered	their
9 after the break, Mr Thompson? 9 recommended resale prices in parallel with mover	nents in
10 MR THOMPSON: It is, Madam. It will give us a chance to 10 their wholesale prices, as such movements in who	lesale
move the papers about a bit. 11 prices invariably led to parallel variations in pariti	es
12 THE CHAIRMAN: Very well. We will come back at 11.30 then. 12 and differentials.	
13 (11.24 am) 13 The evidence is consistent on both these points.	
Opening submissions by MR THOMPSON 14 CGL never agreed to observe rigid parities or	
15 (11.35 am) 15 differentials, and manufacturers invariably moved	their
16 THE CHAIRMAN: Yes, Mr Thompson. 16 RRPs in parallel with their wholesale prices. The	
17 MR THOMPSON: Madam Chairman, gentlemen, I appear with 17 inevitable consequence is that the OFT's theoretic	al and
18 Mr Brown on behalf of the Co-op Group, CGL. In my 18 evidential case collapses. If anything, the theoretic	al
19 allotted two hours I will obviously have to move 19 model to which the OFT is wedded tends to indica	e
20 relatively quickly and I won't be able to go to every 20 a reduction in prices and a sharpening of competit	ion,
21 document but I will refer the Tribunal to a number of 21 a conclusion that's consistent with the documenta	ry
22 documents. 22 record.	
The opening speech for CGL will address two broad 23 Turning to the first of my two main points, the	
points: the place of the CGL appeal in the context of place of the CGL appeal in the context of the OFT's	
25 the OFT's wider case and CGL's case in summary on the 25 wider case. I have a number of headline propositi	ons
41 43	
4 which the control is the first control is the first control of the fir	
1 central issues in the case, issues of fact, economic 2 theory and law. 1 which I hope will make it easy for the Tribunal to 2 follow. They are not propositions of law but just so	
3	rt
5 the OFT's case against CGL must fail for two broad 5 its own merits. That's a first and obvious point. As 6 reasons. First, the OFT's case relies on 6 far as concerns CGL, the OFT claims to have identif	
7 a comprehensive misreading of the contemporary documents 7 two separate infringing vertical agreements, one be involving CGL. These documents are in fact quite 8 CGL and ITL and the other between CGL and Gallah	
9 inconsistent with the theory of harm to which the OFT 9 This is not a case where the OFT has suggested tha	
10 has harnessed itself. I note in this respect that after 10 there was any overarching agreement or other form	
two and now a little more days of this hearing, there 11 understanding at either retailer or manufacturer le	
has been no mention of any document involving CGL, in 12 The OFT has made some rather speculative comp	
particular paragraph 40 of the OFT's skeleton argument 13 between the present case and a manufacturer's car	
which Mr Howard went through as some detail as the high between the present case and a manufacturer's car but it's offered no evidence to support such a case,	
water mark of the OFT's case does not refer to a single 15 certainly none that involves CGL.	anu
16 CGL document. 16 Further, there is no evidence that CGL was aware	of
17 Secondly, the OFT's theoretical case must fall for 17 the terms of ITL's or Gallaher's arrangements with	
18 a broader reason in that it rests on two factual 18 retailers, or that either manufacturer was aware of	
19 hypotheses that clearly do not hold. 19 CGL's arrangements with the other manufacturer.	U
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hypotheses that clearly do not hold. 19 CGL's arrangements with the other manufacturer. 20 First, as least as far as CGL is concerned, the 21 manufacturers did not require CGL to observe rigid 22 parities and differentials between competing brands; 23 was with Gallaher. That's at core bundle 3, tab 40,	ı

1	information exchange immediate initiated by the	1	Shell, the individual retailers have in reality been
2	retailers, a case that never involved CGL in any event.	2	found guilty in a trial by word processor rather than by
3	Finally, the one undoubted point of relevance of the	3	any specific consideration of their individual facts and
4	decision of the OFT to abandon its case against Tesco is	4	agreements. All this is, in our submission, obviously
5	that the OFT itself accepts that it must prove its case	5	and highly unsatisfactory.
6	against the individual retailers on an individual basis.	6	The third point we would make is that CGL is
7	So the second point I would make is that the	7	a unique retailer and its arrangements with the tobacco
8	decision impermissibly seeks to use evidence in relation	8	manufacturers must be assessed individually for that
9	to other retailers as evidence against CGL. I would say	9	reason too.
10	that although the points I've just made are elementary	10	First of all, the documentary and witness evidence
11	and shouldn't be controversial, one cardinal and	11	of the trading agreements and the trading relationships
12	pervasive weakness of the decision is its tendency to	12	with ITL and Gallaher is specific to CGL. There are
13	make wholesale allegations in virtually identical terms	13	three witness statements from Mr Goodall, witness
14	against individual retailers whose relationships with	14	statements from Mr Messom, Mr Goulthorp and Mr Owen and
15	the major tobacco suppliers were in fact distinct. One	15	the terms of the individual agreements between Gallaher
16	tiresome and confusing aspect of the decision is the	16	and CGL and ITL and CGL are themselves distinct and vary
17	indiscriminate use of the term "infringing agreement" to	17	over time. The references are tabs 7 and 21 and 22 of
18	refer to all of the series of distinct bilateral	18	annex 5 for the Gallaher agreements, and tabs 4, 7, 16
19	relationships between individual suppliers and	19	and 24 of annex 15 for the ITL agreements. In relation
20	individual retailers.	20	to Gallaher, they had an agreement from 2000 to 2002,
21	More importantly, the structure of section 6(a)	21	and then it appears to have been a draft agreement in
22	headed "Overview" and (b) headed "Manufacturers' Retail	22	2003. In relation to ITL there were four annual
23	Pricing Strategies" and section C2, which specifically	23	agreements.
24	refers to CGL, has the unfortunate effect of muddling up	24	The second point about CGL's particular position is
25	the OFT's case against individual retailers with a wider	25	that the evidence of contact between CGL and the
	45		47
	· ·		
1	case based on a variety of references across the market	1	suppliers is quite particular to CGL. It's important to
2	as a whole. Section 6(a) and (b) as they stand at over	2	bear in mind that the Co-op was, unlike most customers
3	$100\ pages$ long, and in particular pages $80\ to\ 129\ where$	3	of the tobacco manufacturers, both a retailer in its own
3 4	100 pages long, and in particular pages 80 to 129 where most of the evidence on which the OFT relies is set out,	3 4	_
			of the tobacco manufacturers, both a retailer in its own
4	most of the evidence on which the OFT relies is set out,	4	of the tobacco manufacturers, both a retailer in its own right and a negotiator on behalf of a broader group,
4 5	most of the evidence on which the OFT relies is set out, really have no place in a decision concerning a series	4 5	of the tobacco manufacturers, both a retailer in its own right and a negotiator on behalf of a broader group, CRTG. That enabled all member societies of CGL and CRTG
4 5 6 7 8	most of the evidence on which the OFT relies is set out, really have no place in a decision concerning a series of distinct vertical agreements.	4 5 6	of the tobacco manufacturers, both a retailer in its own right and a negotiator on behalf of a broader group, CRTG. That enabled all member societies of CGL and CRTG to benefit from lower wholesale prices and promotions
4 5 6 7	most of the evidence on which the OFT relies is set out, really have no place in a decision concerning a series of distinct vertical agreements. So far as CGL is concerned, many of the generic	4 5 6 7	of the tobacco manufacturers, both a retailer in its own right and a negotiator on behalf of a broader group, CRTG. That enabled all member societies of CGL and CRTG to benefit from lower wholesale prices and promotions negotiated centrally by CGL.
4 5 6 7 8	most of the evidence on which the OFT relies is set out, really have no place in a decision concerning a series of distinct vertical agreements. So far as CGL is concerned, many of the generic points made in section 6(a) are not even alleged to	4 5 6 7 8	of the tobacco manufacturers, both a retailer in its own right and a negotiator on behalf of a broader group, CRTG. That enabled all member societies of CGL and CRTG to benefit from lower wholesale prices and promotions negotiated centrally by CGL. This became increasingly important during the period
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1	to bolster that case by selective citation from other	1	there is a D3 tab, I am told.
2	documents involving other retailers.	2	(Pause)
3	I'll turn now to the position of witnesses of fact.	3	There is a tab 3 and then a D3 behind it, I am told,
4	So far as witnesses of fact are concerned, there are	4	if it was an ITL bundle that was provided.
5	detailed witness statements both from Mr Goodall, times	5	DR SCOTT: We have D but we don't appear to have D3 and we
6	three, the main ITL point of contact with CGL, and from	6	don't appear to have an index to it.
7	three senior employees of CGL at the relevant time.	7	MR THOMPSON: I am sorry, I do not want to take up time
8	These experienced and knowledgeable witnesses, all of	8	here, would it help if I simply read it out?
9	whom are well aware of their obligations to the	9	THE CHAIRMAN: Quite of lot of it is in red boxes. I think
10	Tribunal, tell a clear and consistent story that	10	it's a letter of 23 June 2008. Is that right?
11	reflects their personal recollection of the contemporary	11	MR THOMPSON: Yes, that's right. Yes, I am grateful.
12	documents and their knowledge of the industry over many	12	I think the red boxes are probably ones that I can't see
13	years. Subject of course to the OFT's right to	13	either.
14	cross-examine them, there is every reason to think that	14	THE CHAIRMAN: No. I see.
15	they know what they are talking about.	15	MR THOMPSON: It's the second page of the letter,
16	By contrast, and striking contrast, for the OFT	16	Madam Chair.
17	there is nothing at all, not a single witness of fact	17	(Pause)
18	with any knowledge of the commercial relationships	18	Shall I go on?
19	between CGL and ITL or CGL and Gallaher. Instead, the	19	THE CHAIRMAN: Yes.
20	OFT seems to be content to rely on a number of highly	20	MR THOMPSON: It's simply paragraph 2 where it states that:
21	questionable inferences from a range of documents in	21	"Gallaher will maintain continuous and complete
22	sections 6(a) and (b) of the decision, the great	22	co-operation throughout the investigation."
23	majority of which were never seen by any employee of CGL	23	Then there is reference to the CAT proceedings. At
24	and have no connection with CGL at all, together with	24	the bottom, 3F:
25	bare citation from CGL documents in section 6(c)(ii).	25	"In relation to any CAT proceedings, Gallaher, using
	49		51
1	In assessing the significance of the total absence	1	reasonable endeavours to facilitate and secure the
2	of witness evidence in support of the OFT's theoretical	2	complete and truthful co-operation of its current and
3	case, the Tribunal will of course be aware that the OFT	3	former directors, officers, employees and agents, even
4	has entered into a series of leniency or early	4	if Gallaher is not party to those CAT proceedings; 2,
5	resolution arrangements with other addressees of the SO.	5	assisting OFT or its counsel with preparation and if
6	Under these arrangements, the companies were promised by	6	requested by the OFT or its counsel attending those CAT
7	the OFT a percentage reduction in the penalty to be	7	proceedings; and 3, speaking to any relevant witness
8	imposed upon them in return for which they were and	8	statements and being cross-examined on such witness
9	remain obliged among other things to maintain continuous	9	statements in those CAT proceedings."
10	and complete co-operation with the OFT, including in any	10	So that's the reference I was making.
11	appeal proceedings. The companies of course include	11	The point I make, it's not a very subtle one, but
12	Gallaher, the counterparty to one of the allegedly	12	it's a point I do rely on. You would have thought that
13	infringing agreements involving CGL, and I think that	13	these developments might be thought to put the OFT in
14	document is worth looking at, it's annex D5 to the	14	a good position to obtain trade witness evidence from
15	decision.	15	one or more of these companies, and in particular from
	DR SCOTT: Is this in the decision or in the annex?	16	Gallaher, one might have thought that Gallaher would be
	MR THOMPSON: It's in the annex to a decision, I have it in	17	in a good position to give evidence in support of the
18	a slightly separate form, I don't know how it's been	18	OFT's case if it were correct, but the Gallaher
19	presented to the Tribunal.	19	agreement with CGL at least provided for both fixed and
	DR SCOTT: Yes, it's in the back of our decision file, the	20	rigid differentials in the way that Professor Shaffer's
21	one that refers to early resolution agreements.	21	theory and the OFT's theory of harm depends.
	MR THOMPSON: Yes, it's in separate tabs but it's annex D	22	However, the OFT has not in fact obtained a single
23	and then there are six agreements subject to an index.	23	witness statement in support of its theoretical case, on
24	(Pause)	24	this or indeed any other appeal, from any individuals
25	I am told it could be in D3. In the decision bundle	25	connected with the leniency or early resolution
	50		52

1	companies. The only two witness statements in the OFT	1	documentary evidence on which the OFT relied as against
2	evidence bundle are from two retail competitors,	2	CGL, and there is nothing else, when read carefully and
3	Sainsbury and Somerfield, one of which is in draft and	3	in context as cases since the Societe Technique Miniere
4	not apparently relied on.	4	tell us they must be, tells a clear and persistent story
5	These statements, which are at CB6/69 and 70 date	5	that is in reality wholly incompatible with the factual
6	back to 2005 and 2006 respectively, when of course the	6	allegations said to sustain the OFT's novel theory of
7	OFT's case was primarily an effects case, they were	7	harm.
8	clearly not intended to support the OFT's current case	8	So our first broad submission in conclusion is that
9	on this appeal, and they do not and cannot shed any	9	whatever the overall legal or factual position may be in
10	light on the arrangements involving CGL.	10	relation to other retailers, and other trading
11	Certainly it would be impossible to accept that	11	agreements, matters of which CGL has no knowledge, CGL's
12	evidence contained in such statements as against the	12	appeal is in fact a straightforward one that must be
13	testimony of witnesses with direct knowledge of CGL's	13	assessed by reference to its own particular facts and
14	business, and as Mr Howard has explained in detail, the	14	merits.
15	OFT has now rationalised its arguments in so many	15	THE CHAIRMAN: So do you say we have to completely put out
16	different ways since any of these statements were made	16	of our minds, when looking at the CGL arrangements, the
17	that it's not clear what support they could actually	17	arrangements that may or may not exist between ITL and
18	offer to the case that's currently being argued.	18	other retailers?
19	Turning to the expert evidence, we would say that	19	MR THOMPSON: I think it's merely part of the context in the
20	the theoretical issues debated by the experts have to be	20	same way as Mr Howard made various observations about
21	applied to the specific facts of Co-op's case, and so	21	the tax regime and issues particular to the tobacco
22	much is perhaps self-evident, but we note in this regard	22	market, that there may be issues that are relevant in
23	that Professor Shaffer, the OFT's principal expert	23	terms of your findings as to how, for example, ITL's
24	witness, was only apparently involved at the	24	strategy or Gallaher's strategy that they could be
25	administrative stage to the extent that he was consulted	25	relevant to the interpretation of CGL documents. But
	53		55
1	in 2007 prior to the issuing of the statement of	1	merely because Shell may be found to have agreed one
2	objections, and of course prior to the adoption of	2	thing or have had an agreement in a particular form or
3	an object approach alone, in relation to the	3	Morrisons to have had a different one, in my submission,
4	plausibility of the OFT's effects case rather than its	4	without any evidence that CGL was aware of that, or that
5	object case. One finds that in paragraph 3 of his		('Cl took the came view in my cubmiccion that material
6		5	CGL took the same view, in my submission that material
_	report at CB6, tab 64. {CB/64}	6	is totally irrelevant to the OFT's case against CGL.
7	In addition, Professor Shaffer makes it clear in his	6 7	is totally irrelevant to the OFT's case against CGL. THE CHAIRMAN: The point that you made a moment ago about
8	In addition, Professor Shaffer makes it clear in his 2010 report I think it's been referred to before,	6 7 8	is totally irrelevant to the OFT's case against CGL. THE CHAIRMAN: The point that you made a moment ago about the relationship of CGL and GCLT, is that a point akin
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1	manufacturers, and that the OFT's suggestion that this	1	opening submissions of Mr Howard, in terms that
2	was some part of a ruse by the manufacturers to force us	2	I generally endorse and adopt. The reference to our
3	to do certain things is really just reading the whole	3	notice of appeal is CB7, tab 74, pages 38 to 39.
4	thing upside-down and back to front, and it's really in	4	$\{C7/74/38\}$ It seems to be missing in my copy but we will
5	that context that the point is of most importance,	5	obviously check whether that's true of yours and provide
6	I think, and obviously Mr Messom and the other Co-op	6	it if necessary.
7	witnesses can explain that in more detail.	7	So the first point under the facts, we would say
8	Turning to my second broad heading, the issues, we	8	that CGL's pricing of tobacco products and dealings with
9	say the Tribunal must determine three issues. None of	9	the major tobacco manufacturers offer no support to the
10	this is very controversial, I hope. Is the OFT's case	10	OFT's case if I set it out in positive terms, we would
11	against CGL sound, first of all on the facts, secondly	11	say the factual position in respect of CGL that emerges
12	in theory, and thirdly as a matter of law? These points	12	from the evidence can be summarised as follows: First
13	will be dealt with in turn in the course of this	13	of all, CGL had a tiered pricing policy, generally three
14	hearing. The facts will be considered in more detail in	14	tiers, although at some points it was more, based on
15	a week or so, and the consideration of the documents,	15	price comparisons with other retailers in each price
16	and the examination of the relevant ITL and CGL	16	band. The details of this policy were and remain
17	witnesses. The theoretical case will be addressed in	17	confidential to CGL, and this is a point that's dealt
18	the cross-examination of the economic experts at the	18	with first of all as an exhibit at annex 5, tab OB, this
19	start of November, and we will set out our legal case in	19	is annex to the statement of objections. I don't know
20	our closing submissions in December.	20	if the Tribunal has seen that but it might be worth
21	In summary, our bald submission is that the OFT's	21	looking at it brief. It's the first two tabs in annex 5
22	case is completely unsound on all three measures. First	22	to the SO.
23	of all, the factual position in relation to CGL bears no	23	I am not sure how secret this actually is, but
24	resemblance whatsoever to the extreme factual premises	24	especially ten years on, but I forebear from mentioning
25	needed to sustain Professor Shaffer's model or the OFT's	25	any names. The Tribunal see at the bottom of the table
	57		59
1	theory of harm.	1	at tab OB, if you have it, there is a table headed
2	Secondly, that theoretical model and the OFT's	2	"Pricing Policy, June 2001". Then there are various
3	analysis that is now said to be derived from that model	3	comparisons made under three headings
4	does not in fact support the OFT's case, even on its own	4	, and it's of some
5	terms given broader factual considerations that apply to	5	significance to see PBB, PBB and PBB, because that comes
6	the market generally.	6	up again in the price matrices, one frequently sees PE
7	Thirdly, and I suppose inevitably, there are	7	PB and PB and there is some correspondence reference
8	impossible difficulties, both as a matter of black	8	to it. You will see that
9	letter law and in relation to the OFT's overall object	9	
10	assessment.	10	
11	So I'll take the facts first. Although I'll address	11	
12	the theoretical and legal position briefly at the end of	12	
13	this speech, the case involving CGL turns on a proper	13	This is an exhibit to Mr Messom's statement, so that
14	appreciation of the facts reflected not only in the	14	sets out what the Co-op's basic pricing policy was in
15	terms of the agreements themselves but also in the	15	June 2001.
16	overall picture that emerges from all the evidence now	16	The significance of all this is explained in some
17	before the Tribunal in respect of the CGL appeal.	17	detail in the first witness statement of Mr Messom,
18	I'll focus on the facts specific to CGL rather than	18	which one finds in the seventh core bundle, tab 83.
19	the overall description of the tobacco market, but	19	{C7/83}
20	I note that this is fully described in the witness	20	THE CHAIRMAN: Can we put this away now?
21	statement of Mr Batty in particular on behalf of ITL,	21	MR THOMPSON: Yes. Sorry, it's rather a heavy bundle to
22	and more briefly in our witness evidence, the notice of	22	take out for one document, but it's a significant one.
23	appeal, section 2. Mr Batty is at core bundle 3,	23	In fact, I don't know if it would be convenient,
24	tab 33. {CB3/33}	24	I will be making some references to annexes 5 and 15,
25	These general issues have been covered in the	25	I don't know whether it would assist the Tribunal to

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1	have them out rather than to have to keep taking them	1	words, the matrices were primarily an internal tool to
2	out and putting them back. Then obviously our main	2	assist CRTG members in checking that agreed cost prices,
3	bundle is bundle 7.	3	whether or not in relation to promotions, were indeed
4	For present purposes I was going to go to	4	those invoiced to them by the manufacturers and in
5	Mr Messom's first witness statement, which is core	5	deciding upon their own pricing policies."
6	bundle 7, tab 83. First of all, Mr Messom describes his	6	So these points applied across CGL's product ranges
7	role at CGL, and the passage I was referring to was	7	generally. However, given the complexity of pricing in
8	paragraph 1.4, the last sentence:	8	the tobacco market, the regular changes in manufacturer
9	"In 2001, I was responsible for drawing up CGL's	9	promotions and the lack of retail margin, it was
10	retail pricing policy."	10	particularly important to ensure that the regularly
11	Then he describes it in some detail in the following	11	prepared price matrices were correct. For example,
12	section, and in particular paragraphs 2.3 and 2.4, he	12	a retailer could end up funding tax increases or
13	refers to the document we have just looked at, says:	13	promotions if it didn't shift retail prices in response
14	"There was a separate category for tobacco and	14	to changes in the tax regime or the ending of
15	cigarettes, this reflected the importance to CGL of	15	manufacturer promotional support. This could be
16	tobacco sales which were an important driver of footfall	16	an extremely expensive mistake to make, as Mr Messom
17	in the convenience sector."	17	explains at paragraph 5.4. So the last sentence:
18	Then at 2.4 he describes the comparison in narrative	18	"When one considers that CGL's and CRTG member's
19	terms.	19	purchases at the time were across all categories worth
20	So that was the first element, the tiered pricing	20	approximately £5 billion per year, even a penny out on
21	policy and the comparisons with other retailers.	21	cost prices could result in very substantial losses and
22	The second point is that CGL operated its pricing	22	cause substantial work for invoice clerks at both CGL
23	policy based on 17 and formerly 13 three or four week	23	and other CRTG members."
24	periods each year, and one finds that at Mr Messom,	24	There were therefore regular exchanges between CGL
25	paragraph 3.3 over the page. It's the first two	25	and individual suppliers such as ITL and Gallaher, to
	61		63
1	sentences and it's an important background fact in	1	confirm that there were no misunderstandings and that
1	sentences, and it's an important background fact in	1 2	confirm that there were no misunderstandings and that
2	terms of the various pricing matrices that you find in	2	promotional support was reflected in retail prices. As
2	terms of the various pricing matrices that you find in the documents, because all of them have numbers, and so	2	promotional support was reflected in retail prices. As part of such exchanges, CGL would sent to each of
2 3 4	terms of the various pricing matrices that you find in the documents, because all of them have numbers, and so the numbers on the pricing matrices refer to these	2 3 4	promotional support was reflected in retail prices. As part of such exchanges, CGL would sent to each of Gallaher and ITL prices matrices relating solely to the
2 3 4 5	terms of the various pricing matrices that you find in the documents, because all of them have numbers, and so the numbers on the pricing matrices refer to these promotional periods, so what they are doing is each	2 3 4 5	promotional support was reflected in retail prices. As part of such exchanges, CGL would sent to each of Gallaher and ITL prices matrices relating solely to the recipient manufacturer's own brands. Each matrix would
2 3 4 5 6	terms of the various pricing matrices that you find in the documents, because all of them have numbers, and so the numbers on the pricing matrices refer to these promotional periods, so what they are doing is each promotional period they are setting out the pricing	2 3 4 5 6	promotional support was reflected in retail prices. As part of such exchanges, CGL would sent to each of Gallaher and ITL prices matrices relating solely to the recipient manufacturer's own brands. Each matrix would enable the manufacturer in question to ensure that CGL
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1	ensure that CGL had accurately recorded wholesale	1	a series of products, then the sizes and cases involved,
2	prices, including off-invoice discounts and bonus	2	and then the MRP, which I think is sometimes called RRP,
3	payments for individual manufacturers. This checking	3	so it's the manufacturer's recommended price anyway.
4	was generally an administrative matter with responses	4	Then there is a list price given, which is for
5	identifying corrections or anomalies within a matter of	5	larger units which are supplied, if one sees under "Cost
6	hours. For example, one finds at tab 13 of SO annex 5	6	Structure" five columns, there is the list price, the
7	a reply by email approximately an hour after the CGL	7	O/I or off-invoice price, which you will see is not
8	price matrix had been sent to, in that case, Gallaher.	8	given in every column, and Mr Goodall explains that the
9	The price matrices sent to a manufacturer such as	9	off-invoice price depended on pricing below MRP, and so
10	ITL or Gallaher did not contain information about CGL's	10	you will see that where, for example, in the second
11	pricing of competing products and could not therefore	11	column, Embassy No 1 Kingsize, the MRP is given as 2.26,
12	have been used for the purpose of monitoring P&Ds,	12	then I believe that the other figures are said to be
13	parities and differentials. One sees that at	13	confidential, I am not sure why, but they are higher, so
14	paragraph 5.2 of Mr Messom as well.	14	there is no off-invoice discount given, whereas in the
15	I think at this point it may be helpful to actually	15	first column the RSPs are lower than the MRP, and then
16	look at one of these pricing matrices, and the one that	16	the off-invoice discount is given.
17	I think is most useful to look at is the one I referred	17	So that's
18	to, tab 19 of annex 15, which is explained in detail by	18	DR SCOTT: Just to be clear, you said earlier on that this
19	Mr Goodall in his witness statement. I am told that the	19	enabled the manufacturers to check the wholesale
20	number in the second line of page 159, as it appears, is	20	information in those columns, but presumably in doing
21	confidential. It's difficult to know what benefit	21	so and this is the example you are just giving
22	anyone could discover from this particular fact nine	22	they need to correlate the MRP with the three columns of
23	years after the event, but anyway, I won't mention it.	23	RSPs.
24	You will see, what it is, it's an email from	24	MR THOMPSON: Yes.
25	Mr Newton, who was the Co-op contact employee, he sends:	25	DR SCOTT: in order to see whether, for example, the
	65		67
1	"Please see attached price files for you to check	1	off-invoice payment is correctly stated.
2	and confirm. Please note the only change to period 15	2	MR THOMPSON: Yes, this is a complete document, as
3	are the lines featured with POS."	3	I understand it, that was sent to Imperial setting out
4	So this is fairly late in the year so we seem to be	4	the prices that the Co-op intended to charge at its
5	to period 15, and then the response comes from	5	different tiered outlets, we have seen RSP
6	Matthew Gamm, who I take it to be the ITL account	6	before, so those are the superstores, market towns
7	manager, and you will see that the email is sent from	7	THE CHAIRMAN: Is the fifth column under "Cost Structure"
8	Mr Newton at 11.30 on Monday, 30 September, and the	8	net, that is derived from deducting the $\ensuremath{\text{O/I}}$ and the $\ensuremath{\text{BDD}}$
9	response comes back at quarter past 1 on the same day.	9	from the list price?
10	"Peter, please find attached the period plans for 14	10	MR THOMPSON: That is correct.
11	and 15. Please note the concept bonus of [X]p is retro,	11	THE CHAIRMAN: So that is the
12	rather than off-invoice."	12	MR THOMPSON: That's what the Co-op was actually being
13	So the correction that's made is to the form of	13	charged, for example for Embassy Filter, they were being
14	bonus given for a single product concept. Then if you	14	charged I don't know if this is confidential, it
15	turn over the page, one will see one of these price	15	looks like it might be. I don't know why it's
16	matrices, and as I say, there is a detailed explanation	16	confidential.
17	of this particular document helpfully set out at	17	THE CHAIRMAN: So they charged the figure under "Net", but
18	paragraphs 46 to 54 of Mr Goodall's first statement, and	18	the MRP is not that's the manufacturer's recommended
19	in particular paragraph 49, which one finds at	19	retail price, so it's nothing to do with the wholesale
20	CB3/38/466 to 469, {C3/38/466} but I don't think it's	20	price; is that right?
21	necessary to turn that up now, I would simply commend it	21	MR THOMPSON: That's right. So that's part of the published
22	to the Tribunal in due course, if you want to get	22	price list.
23	chapter and verse on what all this means.	23	THE CHAIRMAN: Yes.
24	What you will see, it's in relatively small type so	24	MR THOMPSON: The MRP. So that's a published price. So
25	I'll put my glasses on, is in the left-hand column,	25	it's put in from information. But its significance is
	CC		CO

1	that if it is higher than the RSP prices that one finds	1	and notifying the manufacturer to make sure there were	
2	over on the right, then the Co-op gets the O/I discount,	2	no misunderstandings, so that suddenly they won't find	
3	whereas	3	themselves £10,000 out because they were selling	
4	THE CHAIRMAN: So that, looking at the top one, the	4	Richmond Kingsize at one price and in fact they were	
5	Embassy Filter, for a case of ten packs of 20, the list	5	receiving it at a different price, or rather	
6	price is that first figure, and then the net price is	6	THE CHAIRMAN: And the three different RSP columns, do those	
7	the figure that would take account of	7	relate to different tiers of	
8	MR THOMPSON: Exactly.	8	MR THOMPSON: Yes, if you remember we looked at the pricing	
9	THE CHAIRMAN: Yes. The deduction.	9	comparison box and there were three columns. RSP was,	
10	MR THOMPSON: Yes. So we are getting a significant discount	10	as far as I remember, the superstore, RSP was the	
11	on the list price, that's already below ten times the	11	market, and RSP was the convenience. So in general	enti
12	MRP, but then we get an additional discount for pricing	12	one will find RSP is the lowest, RSP is slightly	
13	below RRPs, and we get a further discount which is	13	higher and RSP is slightly higher than that.	
14	called a bulk drop discount just because of the amount	14	Yes, I think they are PB in the pricing boxes,	
15	of stuff we sell, so that's a further reduction which is	15	pricing policy.	
16	effectively a bulk discount. Then perhaps the most	16	DR SCOTT: When we looked at that we saw the policy in	
17	interesting column which is blank on this page is	17	relation to various comparator retailers. Remind me	
18	"Retro", but if you turn on, over the page, for example,	18	what is being said about who was checking that.	
19	you see in relation to Superkings on the second page	19	MR THOMPSON: That's something, as it were, on the Co-op's	
20	that there was a period 14 promotion for Superkings in	20	side of the fence, that we are watching what's going on	
21	various forms, and so that's reflected in a further	21	in competing retailers, and we have identified who they	
22	discount which actually appears on the right-hand side	22	were, and our policy was to match those.	
23	and leads to a lower net price. I think that's perhaps	23	DR SCOTT: So you are not looking to the manufacturers'	
24	not a good example.	24	representatives visiting the stores to feed back to you?	
25	THE CHAIRMAN: What does it say in that blacked out heading	25	MR THOMPSON: No, we couldn't care less about that, except	
	69		71	
1	of the columns? I can't see what that says. It may or	1	insofar as we got grief from the manufacturers. Our	
2	may not	2	policy was to be competitive with X and Y retailers.	
3	MR THOMPSON: I think "Normal Price", and	3	DR SCOTT: Yes. Sorry. But you are looking to the	
4	THE CHAIRMAN: "Normal Pricing".	4	manufacturers to check these figures for internal	
5	MR THOMPSON: Sorry, it's not clear. "POS support,	5	consistency rather than come back to you and say "Well,	
6	temporary pricing".	6	actually, Tescos are selling it at whatever, or somebody	
7	THE CHAIRMAN: So you are going to go on and tell us what	7	else is selling it at whatever"?	
8	the RPSs	8	MR THOMPSON: Yes, we were not relying on them for that, we	
9	MR THOMPSON: I think a better example perhaps is Richmond	9	were relying on them, and this 19 is quite a simple	
10	Kingsize where there is an additional temporary bonus,	10	little example, where they tell us that we put the bonus	
11	one sees on the next column, "Period 14 pricing: change	11	for concept in the wrong column, and in fact I think	
12	to temporary pricing", and there you will see	12	this is the matrix that came back, because when you find	
13	a difference between the right-hand column prices and	13	concept, if I can find concept, it's here somewhere,	
14		4.4		
15	the normal cost prices.	14	concept is on page 168 of the numbers that one finds.	
40	THE CHAIRMAN: I see.	15	THE CHAIRMAN: I see, they are saying that that figure,	
16	THE CHAIRMAN: I see. MR THOMPSON: Then if you look further down, Richmond	15 16	THE CHAIRMAN: I see, they are saying that that figure, which is all alone there, is in the wrong column.	
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17 18 19 20 21 22 23 24	THE CHAIRMAN: I see. MR THOMPSON: Then if you look further down, Richmond Kingsize multipack, you will see that there was a retro bonus within the normal pricing, and that's explained over on the right in terms of a price marked pack. DR SCOTT: Then the manufacturer would assume that the members of the CRTG would comply with the matrix? MR THOMPSON: Yes, and you will see some documents which we will come to in a moment about what happened when that didn't actually happen. But the idea was that the Co-op	15 16 17 18 19 20 21 22 23 24	THE CHAIRMAN: I see, they are saying that that figure, which is all alone there, is in the wrong column. MR THOMPSON: Yes, and they have moved it across, and I think Mr Goodall says this can be pretty important because if you start giving a discount in the wrong column, then the manufacturer can say "Well, you always give us that discount", and then there can be a dispute. So that's why they check. In this case, they said "You have put it in the wrong column" so they moved it across.	
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ı	development bulk discount	- 1	research and writes a somewhat testy fax or email to
2	MR THOMPSON: Bulk drop discount. It is essentially a bulk	2	a fax to Mr Newton, I think. Pricing, 29 April 2002,
3	discount. I am not sure what drop has to do with it,	3	I don't think we need to look at all of it, but perhaps
4	but it's a bulk discount.	4	we can look at the Richmond family, which I think was
5	MR SUMMERS: Could I just ask for information: when you say	5	the low priced sort of fighting brand for ITL.
6	we are looking at what our competitors do, is that the	6	Mr Goodall says:
7	Co-op's own staff or is that something which is	7	"Having looked at the CRTG pricing for yesterday's
8	subcontracted to an external agent?	8	calls, I am very concerned about the Richmond family
9	MR THOMPSON: I think this is the sort of thing that	9	pricing. The matrix [so this is the Co-op matrix]
10	Mr Messom would be excellent at answering, and I think	10	indicates that KS should be [redacted], and the
11	he may have dealt with it in his witness statement, but	11	Superkings should be [redacted]."
12	if he hasn't, I am sure he could answer that question	12	I don't know if this is confidential. It's so long
13	very eloquently.	13	ago.
14	MR SUMMERS: Thank you.	14	DR SCOTT: It's not red-boxed, but it does say
15	THE CHAIRMAN: Just one final question on this: in the RSP	15	"Confidential".
16	columns, there is for each item an absolute price and	16	MR THOMPSON: Perhaps I'll stop citing the figures.
17	then a percentage, and the percentage is, what, the net	17	"In the 82 calls covered yesterday, only 31 were at
18	wholesale, the RSP over the net wholesale?	18	the right prices. The other 51 calls were [and he gives
19	MR THOMPSON: I think it's the margin, I couldn't quite tell	19	two higher figures] which are prices on the left of the
20	you exactly how it is calculated.	20	matrix, not the promoted prices. As you are aware,
21	THE CHAIRMAN: It is the margin, but we are comparing what	21	there are currently price marked packs in the
22	with what?	22	independent trade at [another price] so these error
23	MR THOMPSON: We will find there are some documents which	23	prices are above the normal market price."
24	refer to margins, and it may be that I can be told.	24	So it's pretty clear what's going on here,
25	Again, we maybe could tell you at 2 o'clock how we work	25	Mr Goodall has made phone calls and found the prices to
	73		75
4	and the horizontal distriction in the standard section is	4	ha tao kisha and dan kamaka ada sinii kanatari
1	out that margin. It may be simply a margin as against	1 2	be too high, and then he makes the similar point in
3	some form of calculation from the list price, or from	3	relation to Lambert & Butler Kingsize, Superkings
4	the net price. THE CHAIRMAN: From the net price, that's what I wanted to	4	family. Then he concludes: "I am very concerned about the situation as
5	•	5	I continued our levels of investment over this post
6	know, yes. MR THOMPSON: Anyway, our short, but in my submission	6	Budget period at your request but still the pricing is
7	somewhat devastating, submission is that the OFT has	7	confused. I would welcome your urgent help with the
8	completely misunderstood the significance of these	8	situation. I'll ring to discuss asap."
9	pricing matrices, but obviously this is a matter that	9	Now, in my submission, it's perfectly obvious what
10	can be explored in evidence.	10	this is. This is ITL complaining that their promotional
11	The second point on the facts I would like to make	11	support is not being reflected in reduced retail prices
12	is that the OFT makes it hasn't really got anything	12	in a large chunk of CGL's stores. I would submit that
13	else, the only other evidence it has is contacts between	13	this exchange obviously has nothing to do with parities
14	CGL and the tobacco manufacturers, and in particular in	14	and differentials, but it's cited without explanation in
15	the context of price promotions, we would say were	15	the decision at paragraph 5.60 of section 6.
16	entirely convention supplier/retailer contacts.	16	THE CHAIRMAN: The relevance of the matrix there is that he
17	The first point I would make is that Mr Howard has	17	assumes from the matrix that the intention of CGL was
18	emphasised the extent to which ITL in particular was	18	that it, the promotion, should be reflected in the shelf
19	concerned to ensure that it obtained full value from its	19	prices?
20	promotional pricing. That's not a matter within our	20	MR THOMPSON: Yes.
21	direct knowledge, but there are certainly documents in	21	THE CHAIRMAN: That's what the information in the matrix
22	the CGL files that are consistent with that submission,	22	gives him, but they were at least purporting to ITL to
23	and I think tab 13 of annex 15 is probably the best	23	tell their constituents "This is how you should be
24	example. So this isn't a price matrix exchange, this is	24	reflecting the promotion".
25	a case where Mr Goodall has obviously done some market	25	MR THOMPSON: Yes, and I think the complaint is that ITL is
	74		76

'	giving a chank of money to CGL on the understanding that		whether you are wishing to follow with Maylan as we
2	it's being used to push down CGL retail prices and so	2	will have to agree an appropriate level of bonus that
3	it's getting a competitive advantage from that price	3	will not adversely affect the current margin in each
4	reduction, but in fact	4	price band."
5	THE CHAIRMAN: Yes, but that they could do without this	5	Royals was actually a Rothmans brand, and obviously
6	matrix business, they could have themselves compared the	6	what's happening here is that they are on promotion and
7	prices pre-promotion with the prices that they see post	7	the question has arisen as to whether or not Gallaher
8	promotion and have seen that there has been no reduction	8	wish to respond. So it's a response clause case, as
9	in the shelf prices. I am just trying to see what it is	9	Mr Howard has called it.
10	that the passing of the information in the matrix would	10	Then over the page, you see that in fact
11	add to the situation.	11	Mr McGuinness does want to respond. So:
12	MR THOMPSON: I think they are saying that the promotional	12	"You agree to review current Mayfair retails and
13	support is granted centrally and is reflected in these	13	reduce prices as soon as possible from 3.45, which is in
14	detailed matrices which, as you have seen in the	14	line with our main competitors."
15	right-hand column, sometimes sets out particular	15	So there you see Gallaher competing on price in that
16	financial support and the prices that the Co-op is	16	case with Rothmans. We set that out in some detail in
17	recommending because of that promotional support, and	17	a document which, in due course I will place some
18	then they come along and they find that they are giving	18	reliance on, which is annex 4 to our reply, where we go
19	the promotional support but in fact the pricing is	19	through all the contacts material that the OFT relies
20	exactly the same as it was before, and then ITL says	20	on, and it's paragraphs 50 to 60 of annex 4 to our reply
21	"What are we giving you this money for? We have given	21	where we deal with this in considerable detail.
22	you money specifically to drop your prices in a way that	22	But for present purposes it's simply evidence of
23	you have set out carefully in your matrix, so we thought	23	Gallaher responding to a price promotion by Rothmans,
24	effectively we had a sort of deal between us that we	24	and we would say it has nothing to do with parities and
25	were giving you this money for you to lower your prices,	25	differentials, it's simply competitive discount.
	77		79
1	then we find two-thirds of your stores aren't doing	1	Nonetheless, it appears in the decision.
2	anything, so we are basically just shovelling cash into	2	Then at tab 10 there is a letter dated 12 July 2001,
3	the Co-op and getting no benefit". I think that's the	3	again from Mr McGuinness to Mr Newton. This concerns
4	gist of the complaint here.	4	two discount initiatives. First of all in relation to
5	In my submission, that's entirely consistent with	5	Mayfair, there is an agreed discount bonus for
6	the account I have given of the matrices, and has	6	multipacks and a price indicated there which Gallaher
7	nothing to do with parities or differentials.	7	wishes to achieve. But, for my purposes, the more
8	THE CHAIRMAN: Yes.	8	important point is the second product. There seems to
9	MR THOMPSON: Then I would say similarly there are various	9	be a mistake in the letter that a reference to
10 11	documents in the Gallaher files that evidence a concern	10	Amber Leaf, whereas in fact I think it's Samson,
12	by Gallaher to stimulate sales by promotional discounts	11 12	Mr McGuinness says:
13	or to respond to pricing initiatives by other		"In addition, I have amended the Samson bonus [it
13 14	manufacturers. Again, one can find examples of various	13	says Amber Leaf but I think it should be Samson] and you
1 4 15	kinds, but if one looks at annex 5, tabs 1 and 2, {D5/1}	14 15	will note a more generous contribution, swings and roundabouts. I am sure at £1.99 and £3.88 for the
16	this relates to period 6, so a bit earlier in the year, and you will see that this is Mr Newton sending either	16	
17	a fax or an email, to somebody called Tony, who	17	12 gram and 25 gram respectively, we should observe some encouraging offtake and demand."
18	I believe is Mr McGuinness, you will see that from the	18	I think that may be a misprint, it should be
19	next tab. There is some social chit-chat and then he	19	"offtake in demand".
20		20	
20 21	Says:	21	Again, that's just a straightforward case of
21	"Please see attached period 6 pricing." And here this does at least get the OFT's case	22	Gallaher offering a discount with the view to reduced retail prices generating additional demand for going
23	slightly off the ground, in that he says:	23	
23 24	"I can confirm that Royals 20s will be at 3.39 in	23 24	products. THE CHAIRMAN: So those figures, the 1.99 and the 3.88,
2 4 25	all price bands during this period. Please advise as to	25	those are retail price, or are those the wholesale
	an price bands during this period. Please advise as to	20	uiose are retair price, or are triose the wholesale

1	price?	1	So what I should perhaps explain, what these little
2	MR THOMPSON: I am pretty sure they are retail figures.	2	coloured tables show, where they are green you see the
3	Again we deal with this in considerable detail at	3	brands are aligned, and where they are my colour
4	paragraphs 102 yes, I am told that the retail figures	4	scheme is
5	are on the next page, in the right-hand column. This is	5	DR SCOTT: Yes, there is a green one on table 15, if you
6	part of a promotional plan and the retail prices are set	6	turn back a page.
7	out in the bottom right-hand column.	7	\boldsymbol{MR} $\boldsymbol{THOMPSON:}\ I$ think where they are dark green they are out
8	This is paragraphs 102 to 118 of annex 4 to our	8	of line. So I think what's being said is that they were
9	reply. It might be worth looking at that just for	9	aligned but they were pushed out of line. I may have
10	a second.	10	that the wrong way around. But the gist of it is that
11	DR SCOTT: Sorry, just looking at the chart for a moment, Q6	11	the work has been done to see how the correlation worked
12	as I recall was the has the bulk discounts in it.	12	and whether or not brands were or weren't in line at
13	MR THOMPSON: Yes, I think that's right. The retro bonus is	13	particular times, and the point we make is at some point
14	in the previous column. That's what leads to the	14	promotions actually pushed parities out of line, and the
15	discounted price in the right-hand column.	15	other point we make is that on numerous occasions, the
16	THE CHAIRMAN: Yes. You were taking us to	16	prices were out of line but there was no complaint made
17	MR THOMPSON: Yes, I think if we look just briefly at	17	by the manufacturers, despite the fact that they pick up
18	core bundle 7, tab 77, {C7/77} I certainly don't have	18	a variety of quite precise points but they repeatedly
19	time to go through all of this material in this speech,	19	failed to pick up numerous cases where we were out of
20	but it may assist just to show the Tribunal what this	20	line.
21	is. It's a very detailed analysis of all the contacts	21	So that's a detailed document, and as I say, I do
22	evidence that exists for CGL, and the way it's been done	22	not have time to go through it today, but in that
23	is incident by incident, and so in relation to this	23	particular instance it's particularly revealing.
24	particular incident, one finds it towards the back of	24	So we say that although some of this sort of
25	the tab. It starts at page 283 or 36 of the document	25	material finds its way into the decision as part of the
	81		83
			0.77
1	itself, towards the bottom of page 36 of the document	1	OFT's unexplained citations, the administrative file for
2	itself you see it's a letter from Mr McGuinness to	2	CGL, it is in fact obvious that these sort of contacts
3	Mr Newton on 12 July 2001. Then it goes right through	3	were standard manufacturer/retailer interactions, it had
4	to 118 on page 42, and it goes through all the evidence	4	nothing to do with the OFT's concerns over parities and
5	and also the price relativities at the time.	5	differentials. On the contrary, they evidence price
6	This is a particularly striking instance, for the	6	competition of a particularly obvious and direct kind,
7	reasons set out at 116, because my diligent junior and	7	ie competitive discounting.
8	solicitors have looked at the pricing matrices that we	8	I now turn to parities and differentials themselves
9	actually have and looked at the evidence as to what's	9	insofar as they feature as a part of the Co-op case. We
10	actually happened, and in parentheses one of our	10	say that incentives to observe P&Ds formed a legitimate
11	complaints is that the OFT never appears to have done	11	part of a wider commercial relationship and had no
12	this sort of homework. At 116 we find:	12	impact on CGL's pricing policy to maintain its
13	"Before the promotion, both Samson and Drum [which	13	competitiveness against rival retailers.
14	is the competing product] were priced at the same level,	14	Although one element of the various trading
15	but following the promotion Samson was priced at between	15	arrangements between ITL and CGL and Gallaher and CGL
16	8p and 12p and 16p and 21p out of line with Gallaher's	16	respectively did refer to parities and differentials
17	desired parity and differentials. The OFT's suggestion	17	until the end of 2002, it's apparent that these
18	that Gallaher's promotional activity in this respect was	18	provisions formed part of a much wider commercial
19	to match a reduction in the price of the paired ITL	19	relationship and had no material impact on CGL's pricing
20	brand is therefore simply wrong. To the contrary, it	20	strategy, which was based on maintaining retail price
21	appears to be an instance of Gallaher using promotional	21	competitiveness with specified retail competitors.
22	pricing as a way of gaining market share as against ITL,	22	Again, both the contemporary and the witness
23	hence the letter writer's comment that we should observe	23	evidence on behalf of CGL is entirely consistent on this
24	some encouraging offtake in demand. It's a clear case	24	point. I've shown you the pricing policy itself and
25	of price competition funded by the manufacturer."	25	I refer also to the statements of Mr Messom and
	82		84

there is no evidence at all of CGI, being considered by either manufacturer to be under any obligation to by either manufacturer to be under any obligation to by either manufacturer to be under any obligation to between the production of differences. On the contrary, there is abundant evidence that is inconsistent with CGI, being subject to any such obligation to either manufacturer, given the express terms of the Gallaber gerement in particular, the widespread non-compliance gerement in particular the subject of the Gallaber of the	1	Mr Goulthorp, which are at tabs 81 and 83 of core	1	MR THOMPSON: I think one needs to distinguish a number of
There is no evidence at all of CGL being considered by either manufacturer to be under any obligation to besteve rigid partities or differences. On the contrary, being subject to any such displayment of the contrary, being subject to any such obligation to either manufacturer, given the express terms of the Gallaher manufacturer, given the express terms of the Gallaher gareement in particular, the widespread non-compilance by CGL and the lack of any reproach in any contemporary control of the compilance by CGL and the lack of any reproach in any contemporary control of the compilance that's exclusive supered between Dr Irokins and Dr Walker, that's exclusive supered between Dr Iro	2		2	
by either manufacturer to he under any obligation to boserve rigid partities or differences to the contrary, bere is abundant evidence that is inconsistent with CCL being subject to any such obligation to either manufacturer; given the express terms of the Gallaher agreement in particular; the widespread non-compliance green agreement in particular; the widespread non-compliance document. I fione looks first or fall at the compliance document. I fione looks first or fall at the compliance that is section 5 of Dr Jenkins' sacond report, document. I fione looks first or fall at the compliance that section 5 of Dr Jenkins' sacond report, document. To en looks first of all at the compliance that section 5 of Dr Jenkins' sacond report, document. To en looks first of all at the compliance that section 5 of Dr Jenkins' sacond report, document. To en looks first of all at the compliance that section 5 of Dr Jenkins' sacond report, document. I may be a section of the found a whole look of the section of the Jenkins' sacond report, document. I may be a section of the Jenkins' sacond report, document. I may be a section of the found a whole look of shops didn't seem to be reflecting that deal. THE CHAIRMAN: That point is a separate point. It's a common eases point, a dog that didn't bark point, dealer of TIL and houses were paid as a matter of chairmant of the section of the found a whole of course. THE CHAIRMAN: So just to try and work out what you are either Gallaher or TIL and houses were paid as a matter of course. THE CHAIRMAN: So just to try and work out what you are saying, then, is the relationship between the price saying, then, is the relationship between the price saying, then, is the relationship between the price and think the RSPs or certical or adapted in some way to reflect the different, particularly the temporary form of course. THE CHAIRMAN: So just to try and work out what you are saying, then, is the relationship between the price and the the RSPs or certical or adapted in some way to say that the	3		3	
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1	of competition for promotional support and interaction	1	are out of line with your competitors, I think it's the
2	you may or may not say, "Well, Asda is getting	2	Alldays level, so there are a variety of different
3	a particular promotion, so we must also have one", or	3	things going on. As I understand it, the manufacturers
4	else you may say, "Asda has a promotion but it is	4	from CGL's perspective were expected to try to tie their
5	finishing on 1 October so we will not worry about that	5	promotional period into the promotional periods that CGL
6	and we will look at the underlying price comparison".	6	had, and then that turned up on the right-hand side of
7	So I doubt if there is a clear cut answer. I think	7	the matrix.
8	it's part of competition in the market. But sometimes	8	MR THOMPSON: Yes, and CGL as a big retailer quite liked
9	there will be price marked packs which go across the	9	receiving promotional money that it could use for its
10	whole industry; sometimes there will be a CGL specific	10	own targeted promotions, so it may be that I can see
11	promotion, which isn't being offered to Asda or Tesco,	11	the time, I have lost a little time here I will be
12	but the comparisons will go on nonetheless.	12	better employed for me to get told by somebody who knows
13	THE CHAIRMAN: Okay. Perhaps it's a slightly different	13	the answer rather than for me to just make it up.
14	point, the first point, then, which is when you are	14	THE CHAIRMAN: Yes. To be clear, what I am looking for is
15	talking about compliance, are you talking about not	15	not whether the shops abided by the matrix or not, but
16	making any reductions in the RSPs in the price matrix,	16	whether the shops abuted by the matrix of not, but
17	even though you are accepting a temporary promotional	17	response to the acceptance of the promotional, temporary
18	discount to bring the price down from ITL, or when you	18	promotional discount from one of the manufacturers.
19	talk about compliance are you just looking at what the	19	MR THOMPSON: Yes. I think the answer is yes, but I'll take
20	shelf price in the actual shops was?	20	instructions.
21	MR THOMPSON: There is compliance with our policy, and	21	THE CHAIRMAN: Let's come back, then, at 2 o'clock.
22	I have just had a note handed that in fact our policy	22	(1.00 pm)
23	didn't apply, it was a non-promotional policy so it was	23	(The short adjournment)
24	sort of the standard price, that was what we were	24	(2.00 pm)
25	comparing, so if you notice that Tesco had a month price	25	MR THOMPSON: Madam Chairman, if I can pick up and hopefully
25	89	20	91
	00		31
1	or Asda had a month price you wouldn't necessarily seek	1	draw together some points that arose from the discussion
1	or Asda had a month price you wouldn't necessarily seek to match that, although obviously it would be nice to	1 2	draw together some points that arose from the discussion before lunch, I could give a short answer, which is that
2	to match that, although obviously it would be nice to	2	before lunch, I could give a short answer, which is that
2	to match that, although obviously it would be nice to have that promotional support. In terms of how one	2	before lunch, I could give a short answer, which is that Mr Messom will be before the Tribunal and will be
2 3 4	to match that, although obviously it would be nice to have that promotional support. In terms of how one dealt with promotional money, I think that compliance	2 3 4	before lunch, I could give a short answer, which is that Mr Messom will be before the Tribunal and will be an expert on all these questions, but I will do my best
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1	column that we have looked at were normally retailer	1	What wasn't clear to us is where CGL price in accordance
2	selling prices which were effectively conditional on the	2	with parities and differentials or intended so to do,
3	promotions, so they would operate as a sort of effective	3	where does that bonus show up? Does it show up on that
4	maxima to receive the promotional support.	4	matrix or does it show up somewhere else?
5	Mr Goodall gives evidence on this at paragraph 54 of	5	MR THOMPSON: No, not at all, it wouldn't be on the matrix,
6	his statement, and he says when a matrix came in he	6	it was under the trading agreements there were simply
7	would not normally concern himself much with the RSPs,	7	payments made by reference to the trading agreements,
8	he would only protest if he saw an obvious error, so	8	and they would have nothing to do with the matrices.
9	something that was inconsistent, or if they were too	9	DR SCOTT: So paid into a central support
10	high, presumably either they were above RRP, if there	10	MR THOMPSON: Yes, and some of them were made by reference
11	was off-invoice discount being given or claimed, or if,	11	to particular periods but I think particularly towards
12	more normally, if they were outside of the scope of what	12	the end they tended to be paid quarterly and so they had
13	he would understand as the basis for the promotional	13	correlation.
14	payment.	14	THE CHAIRMAN: So they weren't treated as bringing down the
15	Then in the field, manufacturers might protest, as	15	wholesale price in the way that the bulk drop discount
16	we have seen, if a proportion of CGL or independents	16	or the other bonuses were treated?
17	were either pricing above RRP when the off-invoice	17	MR THOMPSON: They weren't included on that basis, although,
18	discount was being paid, or if promotions were not being	18	as we will come to in a moment, the Gallaher agreement
19	reflected in retail prices.	19	in particular, it was expressly as effectively
20	DR SCOTT: Sorry, is what you are saying that independents	20	a percentage discount per stick.
21	in the correspondence refers to independent Co-ops	21	I had been proposing to go to a little bit more
22	rather than non-grouped retailers?	22	detail on the contacts, but I think probably we have
23	MR THOMPSON: I would have to look on an individual	23	gone through quite a few issues in discussion, and it
24	document, but when I was using independent, I think	24	would be more helpful to return to that at the
25	I was meaning non-CGL members of the CRTG. So in	25	designated time.
20	93	20	95
	93		93
1	relation to whom these were price recommendations.	1	What I think I should do is briefly show
2	DR SCOTT: Understood.	2	the Tribunal the trading agreements themselves, and in
3	MR THOMPSON: But the key point of all this is that these	3	particular the Gallaher agreement, which is the only
4	matrices were CRTG documents, in other sectors they	4	complete agreement we have for CGL. One finds that at
5	might not normally be shown to suppliers at all. For	5	tab 7 of annex 5 {D5/7} to the statement of objection.
6	example, if it was a straightforward and simple product,	6	The Tribunal will see it's all in bold capitals, for
7	possibly baked beans might be an example. They were	7	some reason, and it's expressed as being a trading
8	only shown to suppliers in this case because of the	8	agreement for 2000/2001/2002, signed by Mr Newton, by
9	complexity of the pricing structure, and to make sure	9	Mr McGuinness, in September and October 2000.
10	that there were no mistakes. The other key point is	10	The first point I think, if you would turn over the
11	that the Tribunal will find in the documents a number of	11	page, you will see that it's based on a meeting in
12	these matrices headed "Imperial" or "Gallaher" or	12	January 2000, and sets out a structure for three years
13	"Rothmans", but at least in relation to CGL, it's	13	including various regions, and mine is blanked out but
14	absolutely fundamental to understand that there was no	14	they have agreed to pay a certain number of pence per
15	question whatsoever of CGL sending the Rothmans schedule	15	thousand on all cigarettes from January to December. So
16	to Gallaher or to ITL. We would only send the ITL one	16	that's how it worked. The payment was split in
17	to ITL for the purposes that I've described, and there	17	percentage terms with the largest percentage for
18	was no question of sending somebody else's schedule so	18	advertising, then distribution, pricing the third, and
19	that Gallaher would know what ITL pricing was; they were	19	merchandising at [redacted] per cent.
20	entirely separate documents.	20	I am sorry, those figures are confidential as well,
21	DR SCOTT: We had a question which relates to that, and that	21	apparently. Sorry about that.
22	was this: looking at the matrix, we could see the	22	Anyway, they are break-out percentages, and one will
23	bonuses which we understand to be related to pricing	23	see that pricing is a relatively modest proportion, Confidential
24	below RRPs, the bulk discount ones on the right-hand	24	. Then the second, the
25	side, those that were special to promotional activity.	25	next page, page 3, one sees that there is a market share

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1	multiplier set out, and the way that that worked, one	- 1	THE CHAIRMAN: What is a nouse variant, remind me?
2	sees in the box in the middle, is that the Co-op got	2	MR THOMPSON: I think that's things like menthol cigarettes,
3	a significant increase if it achieved a market share for	3	so within John Player there may be a menthol brand, so
4	Gallaher higher than that for the country as a whole.	4	it's a question whether the relative price of the
5	So effectively that was an incentive to the Co-op to	5	menthol brand should be the same as that for the
6	improve its relative performance.	6	non-menthol, for example.
7	Interestingly as well, one sees on page 3 that the	7	Just as there are different tiers of retailer, there
8	[redacted] range that may be confidential as well,	8	are also different tiers of cigarette, so one of the
9	I will be careful. There is a brand I should not	9	things that was important was to maintain those
10	mention, but there we are was excluded from the scope	10	differentials between upmarket, medium and low price,
11	of the agreement. So apologies if that is another	11	that was important to the manufacturers, and likewise
12	breach of confidentiality, again it's a long time ago.	12	there was some importance between variants within
13	One then turns in and you find the different	13	a brand. So that's all, sort of, in-house, as it were.
14	disciplines identified. First of all, advertising,	14	Then over the page is a very important document, and
15	which one sees is a large proportion of the total, and	15	it's the only document, and virtually the only reference
16	I don't think there is any criticism made of the effects	16	in the OFT's case to differentials in the context of
17	on competition of the provision for payment in relation	17	CGL. What one finds under the heading "Pricing" is:
18	to advertising.	18	"Market (RRP) parity/differential brand range
19	Then at page 7 one finds, again in relation to	19	include including packings", and then a selection of
20	distribution, and I don't think any criticism is made of	20	Gallaher brands in the left-hand column and then ITL and
21	that. Then page 8, you find the provisions in relation	21	in some cases Rothman or BAT brands in the right-hand
22	to pricing. The first one is that:	22	column.
23	"Gallaher will continue to offer bonuses."	23	Then at the bottom:
24	Then:	24	"Range of products to be updated and agreed each
25	"Gallaher reserves the right to alter bonuses as the	25	year."
	97		99
1	market dictates."	1	But we have no evidence that anything was actually
2	Then the third one is what we have called the	2	done in relation to this. It's quite notable that
3	response clause:	3	Dorchester doesn't feature in the left-hand column
4	"If Gallaher competitors offer additional bonuses or	4	there, even though I think it forms part of the OFT's
5	support, CRTG should also allow the opportunity for	5	case that there was pairing between Dorchester and
6	Gallaher to compete equally."	6	Richmond over the period.
7	So so far so good, as I understand it, from the	7	DR SCOTT: Are we right in saying that the pairings are
8	OFT's point of view, even in relation to price.	8	similar between the manufacturers but not identical to
9	But then the next provision is:	9	the manufacturers?
10	"Pre-agreed brand price list parities and	10	MR THOMPSON: There are quite significant differences. For
11	differentials of Gallaher brands packings versus	11	example, one finds here Mayfair is paired with Richmond
12	competitors for all market sectors must at least be	12	rather than Dorchester, whereas I think one of the core
13	maintained (they may be less expensive)."	13	areas of battlegrounds was Dorchester and Richmond,
14	Obviously we rely on that wording as being notably	14	I think. That's an example.
15	inconsistent with the OFT's case that this was all about	15	When it comes to ITL, we are completely in the dark,
16	fixed differentials. We would say there was not	16	because there are no ITL/CGL schedules, and the best
17	a single shred of evidence or any document that	17	evidence we have is Mr Goodall, who says he can't
18	derogated from that express wording.	18	remember that there ever were any, which of course casts
19	Then there is reference to price sectors and house	19	the idea of binding and fixed enforcement rather into
20	variants. Then D:	20	a particular light, because we have no other evidence,
21	"Gallaher pricing support bonuses must be passed on	21	so the best evidence is there never were any ITL
22	to shoppers."	22	schedules at all.
23	And we would say that that was consistent with the	23	So that's how it is, and the importance of this from
24	type of submission that was being made by Mr Howard on	24	our point of view, it's a point that Dr Jenkins makes
25	before of ITL on the first and second days.	25	with some force in her various reports, is that at least
	98		100

1	as far as Gallaher is concerned, the parities and	1	thrust of the OFT's case.
2	differentials, as we call it, floated on MRPs, so the	2	We say, no, it's quite clear on its face what
3	significance is if ITL or Gallaher put up their price by	3	happens there is that the differential becomes, having
4	5p, the MRP would also go up by 5p, and so the	4	been at parity, 5p. So what, if anything, you are
5	differential would open, and that has quite a striking	5	required to do is not raise the price of Hamlet. You
6	effect, and I think is agreed by Professor Shaffer to	6	must maintain the 5p differential that's opened up
7	have quite a striking effect on the operation of his	7	between the MRPs.
8	model.	8	THE CHAIRMAN: But this table at page 9 is different from
9	So it basically blows a hole in the basic mechanism,	9	other schedules that we have seen, because this doesn't
10	in that one price goes up by 5p, there is no requirement	10	say "equal with" or "not less than 3p less than", it
11	to move the other brand up by 5p; on the contrary, the	11	just sort of indicates that there needs to be some
12	differential must be maintained at 5p, so it's really	12	relationship rather than saying whether it is a parity
13	quite the opposite of Professor Shaffer's model.	13	or a differential.
14	THE CHAIRMAN: Don't you mean the differential isn't	14	Are you saying this these were all regarded as
15	maintained at 5p, it widens?	15	parities rather than differentials, except for this
16	MR THOMPSON: The relevant differential becomes supposing	16	floating point that you
17	the two products are a parity, and Gallaher puts up its	17	MR THOMPSON: It doesn't matter what it is. You find it in
18	price by 5p or perhaps, given we are in the Gallaher	18	the papers, sometimes there will be a differential of
19	agreement, it's more appropriate to say ITL puts up its	19	say 3p pre-existing, say Benson & Hedges may be 3p above
20	price by 5p, the differential widens to 5p and if one	20	Embassy No 1, supposing that's the starting position,
21	takes this as face value, what it required at that point	21	but nonetheless we then say supposing Embassy No 1 goes
22	is for the lower priced brand to be 5p lower than the	22	up by 3p, so the recommended resale price is then at
23	price that's gone up.	23	parity, what we are saying is this agreement then says
24	So whereas Professor Shaffer says, ah, well, in that	24	at that point Gallaher must be at parity, having
25	situation the operation of this agreement was to force	25	previously been 3p above, now the MRPs are the same, the
	101		103
4		4	
1	the lower priced brand to go up we say, no, on the	1	Gallaher product must be at parity or lower, and so at
2	contrary, insofar as this operated at all, the	2	that point the mechanism, as it were, goes into reverse,
3	obligation was to keep the lower price brand down. We	3	and what it does is preclude the retailer from putting
4	say that makes perfect sense with the Gallaher agreement	4	Callabara and transport to the control of the case of the control of the case
		4	up Gallaher prices. It precisely doesn't force you to
5	which says you must maintain the differential but you	5	put up Gallaher prices, it forces you to keep them down.
6	which says you must maintain the differential but you may price lower, whereas we say that the OFT's machine	5 6	put up Gallaher prices, it forces you to keep them down. DR SCOTT: So in order to understand the agreement, we have
6 7	which says you must maintain the differential but you may price lower, whereas we say that the OFT's machine is really a complete nonsense, it makes no sense, there	5 6 7	put up Gallaher prices, it forces you to keep them down. DR SCOTT: So in order to understand the agreement, we have to understand that there was an existing pricing
6 7 8	which says you must maintain the differential but you may price lower, whereas we say that the OFT's machine is really a complete nonsense, it makes no sense, there is no evidence to support it, and it effectively forces	5 6 7 8	put up Gallaher prices, it forces you to keep them down. DR SCOTT: So in order to understand the agreement, we have to understand that there was an existing pricing structure which was either being maintained or where
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6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	which says you must maintain the differential but you may price lower, whereas we say that the OFT's machine is really a complete nonsense, it makes no sense, there is no evidence to support it, and it effectively forces the Co-op to put up its prices of another brand when the brand in question may deliberately have held its price down in response to a price increase by a competitor. So it's a very fundamental part of our case, and we say this document THE CHAIRMAN: That's what you mean or that's what the expert means by saying that the what is it that floats over what, this floating term? MR THOMPSON: Well, floating on MRPs, you start with a differential of say it's easiest if you just say nought, and you find it in the papers. If we take a concrete example, Hamlet and Classic, I suspect they were normally priced pretty much the same, or Hamlet and Cafe Creme, then you anticipate, for example, Cafe Creme goes up by 5p, on the Shaffer machine, the effect is	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	put up Gallaher prices, it forces you to keep them down. DR SCOTT: So in order to understand the agreement, we have to understand that there was an existing pricing structure which was either being maintained or where there was a differential manufacturer's price had changed MR THOMPSON: Well, there was a relationship. There was a price. I haven't gone into the detail, but supposing that Hamlet and Classic were both at £4, then if THE CHAIRMAN: That's a different point. The floating point is a different point. The point that we are now trying to understand is: are we to read this as meaning that, apart from when there is a disparity between the manufacturer's wholesale prices, arising from an MPI or whatever, that Old Holborn should be priced the same as Golden Virginia, and that Sovereign should be the same as Lambert & Butler, that these are all parities rather than differentials, or is there somewhere preceding this table that sets out that it's actually there should be,

1	by this, the floating point apart?	1	in practice they were bound to go up and down together.
2	MR THOMPSON: I think this is the difference between this	2	DR SCOTT: The advantage for the manufacturers is that they
3	agreement and the majority, at least, of the ITL	3	have certainly got visibility of the recommended retail
4	agreements which have had schedules with specific	4	prices, because that's all public.
5	differentials where the evidence is of Mr Batty, that	5	MR THOMPSON: Yes.
6	the purpose of those schedules was to reflect relative	6	DR SCOTT: So that it is obvious to them what the
7	MRP levels, but because it was done in schedules with	7	differentials between recommended retail prices are.
8	specific financial differentials those schedules had to	8	MR THOMPSON: I think the difference between Gallaher and
9	be changed, whereas the way this agreement worked was	9	ITL is that ITL say that was their policy, but they had
10	that whatever the MRP differences were, so they might be	10	this schedule system so they had to keep sending out new
11	plus 3, minus 3, parity, those were intended to be	11	schedules, whereas this arrangement rather neatly just
12	reflected in the retail price differences.	12	is self-regulating, as the MRPs vary, so the
13	You could price the Gallaher brand lower, but you	13	differentials vary, and then all that you have to do is
14	shouldn't price the Gallaher brand any worse off than	14	keep your Gallaher price below the shifting
15	the differential between the MRPs. So supposing the	15	differential.
16	Gallaher brand was at parity with the ITL brand, then	16	So that's obviously a very important part of our
17	the idea was that Gallaher could only be priced at	17	case, but I think I also should say that the Gallaher
18	parity or lower. So if the ITL	18	agreement is also notable for the fact that
19	THE CHAIRMAN: If there was a pre-existing differential	19	a substantial percentage of the incentive payment
20	between the manufacturer's recommended price, this is	20	provided for under the agreement had nothing to do with
21	not intended to sort of iron that out by saying "Well,	21	pricing at all, and even in relation to pricing the
22	now actually these are parities, not differentials".	22	provisions in relation to P&Ds only form one part of the
23	MR THOMPSON: No, it was like a sort of magic bullet, so	23	pricing incentive section, which is largely concerned
24	whatever the differential was, between MRPs, then the	24	with discounting and the right of Gallaher to respond to
25	CGL retail price for the Gallaher product had to be at	25	discounts by competitors, all of which we would say was
	105	20	107
1	least as good as that differential. So you couldn't	1	notably pro-competitive.
2	price Gallaher products above, say, parity of the MRPs	2	I have already made the point that the details of
3	at parity or above 5p below if Gallaher ran 5p below and	3	the ITL parities and differentials have been either lost
4	that would change as the relative MRPs changed.	4	or never existed, and the best evidence is Mr Goodall's
5	DR SCOTT: So it was related to the wholesale price?	5	first witness statement, paragraph 59, and that's
6	MR THOMPSON: No, the MRP.	6	
7	DR SCOTT: Yes, but that brings us back to the point of	_	CB3/38, {C3/38} which is that he doesn't think there
		7	ever were any schedules, and I don't really see how we
8	what's moving, that's why I raised the point of the	8	ever were any schedules, and I don't really see how we can go behind that, because nobody else knows anything
9	wholesale price, that what you are saying is were the	8 9	ever were any schedules, and I don't really see how we can go behind that, because nobody else knows anything about it, as far as I am aware.
9 10	wholesale price, that what you are saying is were the manufacturer to move their retail price rather than	8 9 10	ever were any schedules, and I don't really see how we can go behind that, because nobody else knows anything about it, as far as I am aware. The third point on the agreements is the incentives
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1	from London to Edinburgh, but if you do do it then you	1	brands agreed between CGL and manufacturer A, and it's
2	are entitled to your sponsorship money. There is no	2	the two I think central planks that Mr Howard discussed.
3	grounds for reproach if you don't do it.	3	First of all, whenever CGL decided to raise its
4	We say, as I think was raised in argument, that the	4	retail prices for manufacturer A's product, in response
5	relatively low level of incentives is relevant to	5	to a wholesale price rise by manufacturer A, it would
6	whether or not we ever bound ourselves to do anything,	6	also raise the retail price of manufacturer B's
7	and the contacts documents are also relevant to that,	7	competing brand, and it would do that despite the fact
8	given the notable absence of any reproach to the Co-op	8	that there had been no wholesale price rise for that
9	for its repeated failure to comply with these parities	9	competing product, product B.
10	and differentials, and more generally the fact that the	10	The second obligation, whenever CGL decided to
11	language of "obligation" is notably absent from any of	11	reduce its retail price for manufacturer B's brand, it
12	the documents passing between CGL and either of the	12	would also reduce the retail price for manufacturer A's
13	manufacturers.	13	competing brand at its own cost. We would say as
14	So I think I have probably said enough about the	14	a matter of impression those are implausible obligations
15	facts, but I'll just summarise. I would submit that our	15	for a major retailer to accept, and that there is no
16	position on the facts can be summarised as being that	16	evidence that CGL at least ever accepted either of they
17	this is not what one might call a woodpulp case, and by	17	were. I have already noted that the references to
18	that I mean where there are two plausible explanations	18	section 40 of the OFT's skeleton, or rather in
19	of the facts, and I on behalf of CGL would have to rely	19	section 40, don't contain a single reference to a CGL
20	on the burden of proof to say my plausible explanation	20	document.
21	is as good as the OFT's plausible explanation.	21	So far as price rises go, as Mr Howard has pointed
22	We would say this is not a case where there are two	22	out, even the OFT's sole factual witness, Fiona Bayley,
23	plausible accounts of the facts. This is the case where	23	denies any such obligation existed. That's paragraph 55
24	the appellant is advancing a straightforward case on the	24	of her statement.
25	facts, while the regulator has based its decision and	25	So far as CGL is concerned, there is no other
	109		111
4		4	
1	its theory of harm on an account of the facts that is	1	witness evidence, not a single document, that suggests
2	divorced from reality.	2	that CGL ever accepted any such obligation or was even
3	To take the wording of Mr Justice Rimer in the	3	alleged to have accepted such an obligation by either
4	Racecourse Association, the OFT's case is an account of	4	manufacturer. Moreover, it's commercially incredible to
5	events that never happened in a world that never was,	5	suggest that in the highly competitive retail market in
6	a triumph of theory over commercial reality,	6	which it operated, CGL would voluntarily have bound
7	paragraph 170 of Racecourse Association.	7	itself to increase its prices in respect of
8	I think in the first minutes of the first day,	8	manufacturer B's brands and risk losing sales of those
9	the Tribunal asked if there was any pre-reading that	9	brands to its rivals. Such an approach would have been
10	might be helpful, and I might as well deal with it now.	10	completely inconsistent with CGL's pricing policy,
11	I think it would be helpful in relation to our case on	11	discussed by Mr Messom at part 2 of his statement, which
12	the facts to review annex 4 to our reply in some detail,	12	was to ensure that CGL was competitive as against
13	which deals with both the contacts and also the more	13	certain named retailers.
14	general documentary evidence in addition to the CGL	14	So far as price reductions are concerned, the
15	witnesses and also of course the witness statements of	15	Gallaher agreement itself makes it clear that no such
16	Mr Goodall.	16	obligation existed. The obligation, such as it was, was
17	If I can turn briefly to the issues of theory,	17	to allow Gallaher to match competitive price reductions
18	I think some of them we have already touched on so	18	which on the face of it would increase competition.
19	I think I can take it reasonably quickly.	19	That notification requirement, if one can put it so
20	We say that the OFT's theoretical case depends on	20	high, obviously negates any purported obligation on CGL
21	the establishing very strong findings of fact that are	21	to do so at its own cost. Again there is not a single
22	clearly not supported by the evidence. The OFT must	22	document that suggests anything inconsistent with the
.).5			t Ctl C-11-1
23	maintain that CGL and other major retailers accepted	23	terms of the Gallaher agreement, either in relation to
24	a rigid obligation to one manufacturer, say manufacturer	24	Gallaher or ITL.

1	The second point, which I have just adverted to	1	promotions, but the same strategic considerations would
2	a moment ago in answering a question, is that on	2	have applied in such cases, and there are numerous
3	realistic assumptions, the OFT's theoretical model	3	examples in the papers of such price competition in the
4	actually generates pro-competitive outcomes. The OFT	4	context of promotions.
5	has now somewhat grudgingly accepted CGL's case that the	5	I should just say why we take the view that P&Ds
6	incentives provided for under the trading agreements	6	didn't apply in the context of promotions. That's
7	were offered in order to persuade CGL to observe	7	because Gallaher itself said that in response to
8	differentials in line with differences in retail price	8	questions from the OFT. One finds that at SO annex 3,
9	levels. That's clearly correct, and set out in the	9	tab 17. I think it's worth looking at this. Annex 3 to
10	first Jenkins report, which is CB7/78/2.7 to 2.17,	10	the SO.
11	{C7/78 paragraph 2.7} and in the terms of the Gallaher	11	This is a point Ms Rose made, but given that the OFT
12	agreement itself.	12	hasn't called any Gallaher witnesses, there is no reason
13	Then, as Dr Jenkins shows in her second and third	13	not to take their answers at face value, at least as
14	reports, that would suggest on the OFT's own theoretical	14	against the OFT.
15	case that Professor Shaffer's 2007 model has a tendency	15	SO annex 3, tab 17, and you should see a letter from
16	to reduce consumer prices.	16	Mr Gilbert to the OFT dated 17 March 2005.
17	Those points would be explained in greater detail by	17	The relevant passage as far as I am concerned is
18	Dr Jenkins in due course, but they can be explained in	18	page 2 of the document that's inside, which you will see
19	intuitive as well as theoretical terms.	19	is called "Response of Gallaher group to section 26
20	So taking the same two examples, the price rise and	20	notice of 27 January 2005", and then there is
21	the price reduction, as I said, in response to Mr Scott,	21	a description of how parities and differentials were
22	the effect would be in the case of a price rise to	22	supposed to work.
23	constrain CGL from increasing a relative retail price of	23	Then on page 2 there is a specific question:
24	manufacturer B's product unless and until B chose to	24	"How was the clause supposed to work?"
25	follow manufacturer A's wholesale and recommended retail	25	Then there is a two paragraph answer:
	113		115
1	price rise for a competing brand, and it would thus be	1	"Under a parities and differentials clause,
2	consistent with a policy of manufacturer B holding down	2	a retailer would be required to maintain the
2	consistent with a policy of manufacturer B holding down its wholesale and recommended retail prices in response	2	a retailer would be required to maintain the differential between a Gallaher brand and competitor
2 3 4	consistent with a policy of manufacturer B holding down its wholesale and recommended retail prices in response to a price rise by manufacturer A, and at least in	2 3 4	a retailer would be required to maintain the differential between a Gallaher brand and competitor brands in the same price segment, ie premium or economy,
2 3 4 5	consistent with a policy of manufacturer B holding down its wholesale and recommended retail prices in response to a price rise by manufacturer A, and at least in relation to ITL, Mr Howard suggested that was exactly	2 3 4 5	a retailer would be required to maintain the differential between a Gallaher brand and competitor brands in the same price segment, ie premium or economy, as set out in the published list of RRPs (again see
2 3 4 5 6	consistent with a policy of manufacturer B holding down its wholesale and recommended retail prices in response to a price rise by manufacturer A, and at least in relation to ITL, Mr Howard suggested that was exactly what they were trying to do or would on occasion do.	2 3 4 5 6	a retailer would be required to maintain the differential between a Gallaher brand and competitor brands in the same price segment, ie premium or economy, as set out in the published list of RRPs (again see section 4 below). For example, if the RRP for
2 3 4 5 6 7	consistent with a policy of manufacturer B holding down its wholesale and recommended retail prices in response to a price rise by manufacturer A, and at least in relation to ITL, Mr Howard suggested that was exactly what they were trying to do or would on occasion do. In relation to price reductions, the effect would be	2 3 4 5 6 7	a retailer would be required to maintain the differential between a Gallaher brand and competitor brands in the same price segment, ie premium or economy, as set out in the published list of RRPs (again see section 4 below). For example, if the RRP for Dorchester was 2p lower than the RRP for Richmond, the
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7 characterise Dr Jenkins as a potential ally to the OFT's 8 RS COTT: That's what I meant by the fact that the retail 8 prices could move up and down heneath that. 10 Professor Shaffer is forced to ague that the OFT's 10 could move up and down heneath that. 10 Professor Shaffer is forced to ague that the OFT's 11 theory of harm. With respect, we would say this is an 12 absolutely hopeless form of last ditch defence. 13 RR THOMPSON: You mean the recommended retail price would 14 stay the same? 12 really quite incredible situation. If we go back to 15 manufacturer A again, manufacturer A raises or lowers 16 wholesale price thanged. 15 RRPs, so the relevant parity or differential is 17 manufacturer A again, manufacturer A raises or lowers 18 wholesale price thanged. 15 RRPs, so the relevant parity or differential is 18 mR THOMPSON: Keif you gut it in those terms, taking into 19 acount the one-off promotional payments, if that is 19 rested as part of the wholesale price then that would 19 go down and their ewould be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their ewould be an issue about whether, 19 go down and their ewould be an issue about whether, 19 go down and their ewould be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an issue about whether, 19 go down and their would be an intervention to the organization of the price is for its price about 19 go down and their would be to seem the price about 19 go down and their would be to seem the late	5	response, which was quite independent of the parities	5	Professor Shaffer argues that his original modelling
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MR THOMPSON: You mean the recommended retail price would 11	9	prices could stay stable, the effective wholesale price	9	absolutely hopeless form of last ditch defence.
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DR SCOTT: The recommended retail price would stay the same, lab but behind the scenes, as it were, the effective	12	stay the same?	12	really quite incredible situation. If we go back to
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9 Increase in the retail price to be applied for single and multipacks together with the new RRPs for each brand. In some cases, Mrd Letails were communicated more briefly with a communication such as an email increase being applied and an attachment providing of the decision in blaces are applied at a bout this and is simply taking the facts as stated in the decision, bis latest suggestion is strikingly in the decision. In late of the decision is a stands up at all, and we would say that it is crude and interest and the decision of the decision of the decision are accordingly insufficient OTTs legal case under four headings. 10 part of the decision of the decision of the decision are accordingly insufficient OTTs legal case under four headings. 11 part of the decision of the decision of the according to the decision of a stands up at all, and we would say that it is crude and insufficient of the decision on one of the decision on one tone of the decision on one of the decision on one to the fina	8		8	-
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brand. In some cases, MPI details were communicated more briefly with a communication such as an email information briefly with a communication such as an email information between the communication in the communication such as a manual information between the communication in the decision, his latest suggestion is strikingly in the third brief in the decision, his latest suggestion is strikingly in the communication in the decision, his latest suggestion is strikingly inconsistent with this paragraph, notwithstanding that the communication is supported by inconsistent with this paragraph, notwithstanding that the communication is an exertion. 21 assertion. 22 Secondly, it's inconsistent with the witness evidence, and I'll just give the references, Mr Batty, evidence, and I'll just give the references, Mr Batty, inconsistent with the witness statement, CB7/81, inconsistent with the communication in the communication			10	
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25 wholesale price changes, thereby sharpening the 25 section 3.	23	rises by competitors and to make price reductions of	23	to CGL to reduce its prices in order to sustain price
	24	their own. They tend to increase the pass-through of	24	rises. That's the point at Dr Jenkins' second report,
122 124	25	wholesale price changes, thereby sharpening the	25	
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1	Thirdly, we would say that it makes no sense in that	1	Mr Saini. Would the parties please bear in mind that
2	there is no point in paying promotions to the retailers	2	these are opening submissions and we are going to hear
3	to do something that they are allegedly required to do	3	the evidence from all the witnesses, so to ask you at
4	under the agreements themselves. Had there been	4	the moment to draw conclusions from their witness
5	obligations to maintain parities and differentials,	5	statements is a little premature, it remains to be seen
6	contrary to the facts, the obvious step would have been	6	what their evidence actually is, and the time to draw
7	to remind CGL of those obligations, not to make	7	conclusions or invite us to draw conclusions from their
8	additional promotional payments on an ad hoc basis. We	8	evidence is after we have heard what they say under
9	say the obvious explanation for the so-called	9	cross-examination, so people may wish to bear that in
10	micromanagement that we have seen is repeated	10	mind, those who have yet to make their opening
11	promotional competition on price of a perfectly	11	submissions.
12	conventional kind and that that's the best explanation.	12	But thank you very much, Mr Thompson, and we will
13	So far as the law is concerned, I can be very brief.	13	come back at ten past 3.
14	We would say that the exclusion order, construction	14	(3.00 pm)
15	points are strongly in our favour, that the OFT's case	15	(A short break)
16	is incoherent and obviously self-serving, and we have	16	(3.10 pm)
17	set out the points in some detail at part 5 of our	17	Opening submissions by MR SAINI
18	notice of appeal, page 72 of CB7/74 {C7/74}.	18	THE CHAIRMAN: Yes, Mr Saini.
19	And in relation to object, we would adopt many of	19	MR SAINI: Madam, in our submission this is a one issue
20	the points made by Mr Brealey this morning, and what we	20	case. The single issue is as follows: is the use of
21	have said is that there must be either an obvious or	21	bonuses by a manufacturer to increase or decrease the
22	a necessary consequence for an object infringement to be	22	wholesale prices of his products lawful? That's all
23	demonstrated. We would say there was no such obvious or	23	this case is about. You will hear a lot about bonuses
24	necessary presumption here, even on the OFT's best case	24	and a lot about incentive payments, but this is a case
25	far too much depends on the facts and we refer to	25	solely about ITL and Gallaher seeking to alter the
	125		127
	,,		· -
1	Dr Jenkins' first report for a general analysis of the	1	prices of their own products within retail outlets,
2	effects of this type of agreement, section 4 of her	2	because, as you will see, hopefully before we get to
3	second report for a discussion of the oversimplified	3	Christmas, what happened is that the OFT have
4	approach taken by Professor Shaffer, and her third	4	fundamentally misunderstood the facts in each of these
5	report for analysis of the sensitivity of the OFT's	5	appeals, and they seem to believe to this day that ITL
6	theoretical analysis to the facts even on its own terms.	6	had the ability to require my clients or indeed the
7	Perhaps I'll end by reference to paragraph 44 of our	7	other retailer appellants to change the prices of
8	skeleton argument where we say that if the effect is	8	Gallaher products, and that simply is not the case on
9	ambivalent, and we say at least it's ambivalent, given	9	the facts.
10	the points I've made about floating on MRPs and	10	What's particularly important to note at the outset
11	wholesale and recommended resale price rises, then	11	is what the OFT do not allege. They do not allege that
12	that's a hopeless basis for an object infringement,	12	there was a price-fixing agreement between ITL and
13	because it precisely requires one to look at the facts	13	Gallaher under which they would use the retailers to
14	to see whether or not the hypothesis that	14	achieve overall increases in prices. That's not their
15	Professor Shaffer and the OFT put forward factually	15	case. That would have been an obvious case to make, to
16	obtains, or whether the facts which we say much more	16	suggest a simple agreement between ITL and Gallaher or
17	credibly obtain, but in any event it's a factual inquiry	17	a concerted practice to achieve price rises, but they
18	and so the agreement can't possibly be an infringement	18	haven't done that. Instead, they have a rather
19	by object.	19	convoluted case that through the use of bonuses, the
20	I think that's the points I wanted to make in rather	20	same net result was achieved.
21	a rapid form. Can I see if anyone wants me to say	21	So it's effectively a highly indirect allegation of
22	anything else? Blank faces behind, so I think those are	22	a price-fixing agreement between ITL and Gallaher when
23	my submissions at this stage.	23	the OFT are not willing to make the allegation through
24	THE CHAIRMAN: Thank you very much, Mr Thompson, I think we	24	the front door and charge both ITL and Gallaher with
25	will take our short break there before we hear from	25	price-fixing.
	126		128

1 1 With that introduction, I want to set out a map of "After referring to the infringing agreement, the 2 2 what I am going to say, and there are going to be three following words appear in the last three lines: 3 3 main parts to my submissions, and I am going to be "In that way the infringing agreement between each 4 4 conscious to avoid repeating what others have said. manufacturer and each retailer restricted the retailer's 5 5 The three main parts will be, first of all, I want ability to determine its retail prices for competing 6 6 to identify what the core difference is between each of linked brands." 7 7 the appellants and the OFT on the facts. That will be One sees that repeated as a mantra again and again, 8 8 by a brief reference to the decision. I will not give you the references because you have been 9 Secondly, I want to look in some detail at the issue 9 given far too many references already today, but that's 10 10 of bonuses, or incentive payments as some of the the essential case. 11 11 appellants call them. I want to show some documents to Now, there is a very simple factual answer to that 12 12 the Tribunal in relation to the provision and withdrawal case, which is it just didn't happen. On no occasion 13 13 of bonuses to explain how what's happening here is can the OFT point to a document or communication where, 14 14 perfectly benign. It is simply alterations in wholesale for example, ITL had the ability to dictate the price of 15 15 prices. Thirdly and finally I want to touch briefly on a Gallaher product. It just did not happen. What did 16 16 the trading agreements, and you will appreciate that happen is that both ITL and Gallaher, in relation to 17 I am making submissions both on behalf of Morrisons and 17 each of the appellant retailers, modified its wholesale 18 18 Safeway, therefore I need to address the position of price from time to time, and the way it modified its 19 19 each appellant separately. You will have already seen wholesale price from time to time was by providing 20 20 from your pre-reading that there is not identicality of a bonus or withdrawing a bonus, and that led to, as 21 21 night follows day, a change in the retail price, because position as far as Morrisons and Safeway are concerned, 22 22 as you are aware, the margins in this industry are very, because in particular, in respect of certain of the 23 23 very slim and you would have to be pretty stupid as appellants, there aren't any agreements or there are 24 24 agreements only with certain manufacturers. a retailer not to reflect a change in wholesale price in 25 25 With that introduction I want to go straight to the your retail price. That's all that was happening. On 129 131 1 core factual dispute which divides the parties, and if 1 no occasion was ITL able to dictate the price of 2 2 I could ask the Tribunal to please take up the decision a Gallaher product. 3 and if I can ask the Tribunal to go yet again --3 Now, it's clearly shown in the communications that 4 4 I apologise for this -- to page 77, section 6 of the ITL hoped that there might be a change in the price of 5 5 decision, where the OFT sets out its essential case as a Gallaher product. One sees in the case of Safeway 6 6 to the infringing agreements. there are some suggestions. But it cannot be 7 Now, although Mr Thompson has rightly said that 7 demonstrated in the evidence that either ITL or Gallaher 8 the Tribunal has to approach the facts as regards each 8 had the ability to dictate the price of a competing 9 9 retailer separately, as far as the OFT is concerned, product. 10 10 the Tribunal will have seen this is a one size fits all Now, submissions have already been made that the 11 11 case, because section 6 and in particular section A1, OFT's case in relation to rigidity appears to have been 12 12 that section is adopted and repeated verbatim for each dropped. They appear to accept that there was no rigid 13 separate agreement. So one goes on and looks later on 13 linkage between price changes. The case has been 14 at the sections on Morrisons and Safeway, and they say 14 modified now, and while we are in this decision I'll ask 15 refer back to section 6, the OFT, as being our analysis 15 you please to turn forward to what appears to be the 16 of the infringing agreement. They do that for all of 16 current case that's being run, but we will hear from 17 the retailers. Therefore there is a one size fits all 17 Mr Lasok as to whether or not this is still the case 18 case. 18 that's being run, and if you would go a few pages ahead 19 19 THE CHAIRMAN: You need to slow down a little bit in order to page 134, at paragraph 6.225. I won't read 6.223 or 20 for the transcript writers to follow you. 20 6.224 but what happened was in response to the SOs, ITL 21 MR SAINI: I am sorry. 21 and the retailer submitted there was no automatic price 22 22 changing. So the new theory came out at 6.225 that The essential allegation which appears again and 23 23 again, one can pick it up at various places, but I would rather than there being a rigidity, there was clearly 24 24 like to pick it up on page 77 at 6.2, and it's the last an expectation according to the OFT that retail prices 25 three lines of 6.2: 25 will be moved in line with parity and differential 130 132

1	requirements.	1	answer to them. It is not an answer based in
2	But this is still a case, you will bear in mind,	2	competition law, it is not an answer based in the
3	where they are alleging that ITL price changes would	3	reports of many learned professors of economics, it's
4	lead on their own to changes in the prices of Gallaher	4	a much more prosaic answer which is that the OFT just
5	products. First, it's put in terms of a rigid movement;	5	has the facts wrong.
6	now it's put in terms of an expectation of movement.	6	Now, you may ask: well, we wouldn't be here in
7	But again, this alternative case on the facts just	7	a case that's going to last until Christmas if it was as
8	doesn't work, it just never happened. What in fact	8	simple as that. But unfortunately it is as simple as
9	would happen and we will see some examples of this	9	that, and what's happened here and various of the
10	is that if Gallaher reduces price of a product, Gallaher	10	economic experts identify this problem but again you
11	had no expectation that ITL would reduce its price, but	11	don't need to be an economist to say this is that the
12	ITL would see that, ITL would go to the retailer and say	12	OFT have seen a few documents which they think fit the
13	"Well, we want to compete with Gallaher, we want to	13	theory that they gave to Professor Shaffer in 2007 and
14	reduce our price as well, how do we do it? We do it by	14	then they have approached every other communication with
15	offering you a bonus to reduce the retail price".	15	a confirmation bias. Anything they look at is said to
16	That's what would happen. It wouldn't happen	16	fall within that theory. That's what I wanted to say in
17	automatically. So there was the decision-making process	17	relation to the core factual dispute.
18	on the part of each manufacturer as and when they saw	18	I should also just say right at the outset that
19	a price change, and in particular, a price decrease by	19	although Mr Thompson suggested rightly that one has to
20	the opposing manufacturer, they would enter into	20	again look at the case of each retailer separately, what
21	a bargaining process with the retailer and say "We would	21	the Tribunal will see is that there is a striking
22	also like to reduce our price, can we offer you	22	similarity between the way both Gallaher and ITL dealt
23	a bonus?" and then it was for the retailer to decide	23	with each of the retailers. So there are certain things
24	whether or not he would take the bonus.	24	you will see again and again. You will see what one can
25	Of course 99 times out of 100 the retailer would	25	call a matrix, or in the case of Safeway it's called the
	133		135
	1 7 7		
1	take the bonus because it's in his interests to reduce	1	price file. So ITL would prepare or the retailer would
1 2	take the bonus because it's in his interests to reduce prices, to keep his margin, but as you will see from the	2	prepare an equivalent document, and we will see one of
	prices, to keep his margin, but as you will see from the evidence of Mr Eastwood in relation to Morrisons in	2	prepare an equivalent document, and we will see one of those certainly as far as Morrisons is concerned. You
2	prices, to keep his margin, but as you will see from the	2 3 4	prepare an equivalent document, and we will see one of
2 3 4 5	prices, to keep his margin, but as you will see from the evidence of Mr Eastwood in relation to Morrisons in	2 3 4 5	prepare an equivalent document, and we will see one of those certainly as far as Morrisons is concerned. You will also see very similar communications between each of the retailers and the manufacturers where the
2 3 4	prices, to keep his margin, but as you will see from the evidence of Mr Eastwood in relation to Morrisons in particular, on some occasions they might decide not to, because there might be some other commercial imperative for them.	2 3 4	prepare an equivalent document, and we will see one of those certainly as far as Morrisons is concerned. You will also see very similar communications between each
2 3 4 5 6 7	prices, to keep his margin, but as you will see from the evidence of Mr Eastwood in relation to Morrisons in particular, on some occasions they might decide not to, because there might be some other commercial imperative for them. So all that's going on in these many exchanges which	2 3 4 5 6 7	prepare an equivalent document, and we will see one of those certainly as far as Morrisons is concerned. You will also see very similar communications between each of the retailers and the manufacturers where the
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(Pause)

in the evidence, the footfall factor, which is sales of

2	tobacco drive the sales of other products. Tobacco in	2	DR SCOTT: And this approach, as is rehearsed in
3	itself earns very little money for the supermarkets, but	3	paragraph 5, was largely predicated on inter retailer
4	competing aggressively on price will bring customers	4	competition?
5	into the supermarkets and they will do their weekly shop	5	MR SAINI: Absolutely. There is a similar paragraph in
6	there.	6	relation to Safeway in the evidence of Mr Culham for
7	When one bears in mind that the margins are so slim,	7	ITL. I won't ask you to turn it up, I'll just provide
8	the Tribunal will appreciate that price changes of 1p or	8	a reference for the transcript, it's core bundle 3,
9	2p, so if a manufacturer offers a bonus which is going	9	tab 35, page 426, paragraph 158. {C3/35/426 paragraph
10	to lead to a 1p or 2p price change, which in the general	10	158}.
11	world may not seem like a huge amount of money, those	11	The general proposition one gains from this is that
12	price changes are to be magnified in their importance	12	of the sub RRP price, a significant proportion of it is
13	when one looks at the margin of a retailer. Therefore	13	being funded by the retailer himself.
14	it's highly likely that if a manufacturer wants to	14	THE CHAIRMAN: I don't quite understand what you mean by it
15	reduce his price, so ITL wants to undercut Gallaher,	15	being funded. There is the wholesale price, which is
16	it's highly likely that the retailer will jump on the	16	a certain number of pence less than the manufacturer's
17	ability to reduce the price of the product by accepting	17	recommended price, and that is the margin I suppose
18	the bonus payment, because it will drive more people	18	which you could say if you price at the recommended
19	into that supermarket.	19	price, then all of that margin is, you would say, funded
20	If I can then turn to my second main subject which	20	by the manufacturer.
21	is the issue of bonuses. As I said at the outset,	21	MR SAINI: I accept your point, Madam, it's a notional
22	understanding the use of bonuses is crucial to this	22	THE CHAIRMAN: But necessarily if you are as a retailer
23	case, because the misunderstanding on the part of the	23	priced below the RRP, then you are just accepting having
24	OFT in relation to the use of bonuses is largely why we	24	a lower margin than is posited by the manufacturer's
25	are in this position now.	25	retail price.
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1	I am going to use some terminology which again	1	MR SAINI: I accept that. It's potentially a question of
2	appears throughout the case as far as each retailer	2	how much of the margin you are foregoing.
3	appellant is concerned, applying both to ITL and to	3	THE CHAIRMAN: Yes.
4	Gallaher. The Tribunal will appreciate there are two	4	MR SAINI: I think one needs to bear in mind part of the
5	kinds of bonuses: ongoing bonuses and tactical bonuses.	5	context here, which is supermarkets are a small part of
6	That language is used by the Co-op witness, it's used by	6	the universe of retail entities. There are many other
7	Mr Eastwood on behalf of Morrisons, it's also used by	7	retail entities selling cigarettes. Most of them will
8	the Sainsbury's witness, Ms Bayley.	8	sell at retail price or above.
9	The Tribunal will appreciate that ongoing bonuses	9	THE CHAIRMAN: The recommended
10	are provided for pricing below RRP. Both Morrisons and	10	MR SAINI: Recommended retail price or above and one will
11	Safeway, and it seems all of the other appellant	11	see when one looks at the Safeway documents it becomes
12	retailers, consistently received ongoing bonuses for	12	very controversial when Safeway in their petrol stations
13	pricing below RRP.	13	start selling RRP or sometimes above RRP. So notionally
14	You will also see from the evidence that those	14	a supermarket could be selling at RRP. What's happening
15	bonuses only made up a proportion and in the case of	15	is both the supermarket wants to sell below that because
16	Morrisons, a pretty small proportion of the price	16	it wants to drive people into its stores
17	below RRP. In other words, the retailers themselves had	17	THE CHAIRMAN: Yes, I understand that, I am just trying to
18	to fund a large part of the sub RRP price, only part of	18	understand what you mean by "funded" in that case.
19	that was made up through the bonuses.	19	MR SAINI: I agree with you, I suppose it is funded in
20	Perhaps I should ask the Tribunal just to look at	20	a notional sense, which is your point, Madam, which
21	Mr Eastwood's statement where he describes that. It's	21	I think, with respect, is correct, which is they are not
22	in core bundle 8, tab 94, page 433. {C8/94 paragraph	22	actually
23	433}. If the Tribunal could please read paragraph 8,	23	THE CHAIRMAN: There is no money changing hands.
24	I will not read it out because there are some	24	MR SAINI: losing money in a sense because the wholesale
25	confidential figures in there at page 433	25	price is going to be a wholesale price which gives them

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- 1	a separate margin anyway. Tagree with that. Twas	1	a 10p price reduction, the next week 11L may say "We no
2	only showing you this, Madam, for the purposes of	2	longer need to compete with the opposing Gallaher
3	identifying principally (a) the very low margins and	3	product or there is some other reason why we don't want
4	secondly the fact that some percentage of the sub RRP	4	to give you that bonus, we will withdraw it". That will
5	price, only some percentage of it is funded by the	5	lead naturally to an increase in the price of the
6	manufacturer.	6	product in the store because it's just simply
7	I gave you a reference	7	an increase in wholesale price.
8	MR SUMMERS: Sorry, with regard to that, are you saying that	8	THE CHAIRMAN: Well, that's the question, isn't it? What
9	that is common to all retailers? Because I think there	9	the OFT say is that ITL and Gallaher weren't prepared to
10	is evidence that not all retailers did seek to fund part	10	take that chance and they write to the retailer saying
11	of the reduction and so on.	11	"We have withdrawn this so this is the price that you
12	MR SAINI: Again I can only talk for Morrisons.	12	now need to price at".
13	MR SUMMERS: Yes, you are being quite specific about	13	MR SAINI: Absolutely, and as you will hear from the
14	Morrisons in this case.	14	witnesses, they will say: on nine occasions out of ten
15	MR SAINI: Yes, that's Morrisons, I don't know what the	15	of course we will do that because this is simply
16	position is so far as others are concerned.	16	effectively an increase in wholesale price, but there
17	MR SUMMERS: Thank you.	17	may have been other reasons why in a particular case
18	MR SAINI: I can say in general terms we don't have direct	18	they may not have wanted to increase their price.
19	evidence from Safeway but we have evidence from	19	Even if one takes the example you give me, madam, we
20	Mr Culham on behalf of ITL who describes in his witness	20	ask: what's unlawful in that? Which is at any point in
21	statement in core bundle 3 at tab 35 $\{C3/35\}$ the extent	21	time a manufacturer can increase his wholesale price,
22	to which Safeway priced below RRP, make a similar point	22	and one would expect a rational retailer would increase
23	there.	23	the retail price unless he is willing to have his margin
24	So that's the issue of RRP and the issue of ongoing	24	wiped out. But there is nothing in itself unlawful
25	bonuses for pricing below RRP.	25	about that, unless which is what the OFT do not
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1	However, there is a completely separate type of	1	allege this is part of a price-fixing agreement
2	bonus which again, common across all the appellant	2	between ITL and Gallaher. Having not made that
3	retailers and common across both manufacturers is called	3	allegation, they can't make it by the back door and say
4	a tactical bonus or a promotional bonus.	4	that the effect of these arrangements is that. Because
5	Now, those bonuses were paid to fund reductions	5	all that's happening as far as the retailer is concerned
6	below the price the retailer would otherwise charge	6	is that bonuses are coming in and going out, the
7	already taking into account the ongoing bonus. So to	7	retailer will modify his prices accordingly. There is
8	give you an example, if Morrisons is selling Embassy	8	nothing unlawful in that activity; in fact its normal
9	cigarettes for £4, and that £4 already has built into it	9	commercial behaviour.
10	an ongoing bonus, bear that in mind, ITL wants to reduce	10	DR SCOTT: You characterise the bonuses as being of two
11	the price to £3.90 in Morrisons supermarket, ITL would	11	types and I am conscious that you are coming to trading
12	offer a 10p tactical bonus which will be conditional on	12	agreements in a moment.
13	Morrisons passing the 10p along to consumers. That's	13	MR SAINI: Absolutely.
14	one of the typical examples of the use of a tactical	14	DR SCOTT: But you have not mentioned the concept of any
15	bonus.	15	sort of payment for maintaining parities and
16	Equally, it may be the case that a tactical bonus is	16	differentials.
17	withdrawn, so there is a tactical bonus been going on	17	MR SAINI: I am coming to that in the very next section of
18	for a while and one of the manufacturers decides: I am	18	my submission. I am going to show the Tribunal that in
19	going to withdraw that bonus or withdraw that retro, as	19	the OFT's one-dimensional view of the world, they view
20	it's sometimes called.	20	every communication which leads to a bonus being
21	Now, the OFT with their sinister spectacles on	21	provided or withdrawn as being no more than the
22	think, "Ah, that's a price increase", but that's just	22	retailers and the manufacturers giving effect to the
23	simply another way of describing the withdrawal of a	23	desired parity and differential arrangements.
24 25	bonus.	24	In fact the position is much more complicated. On
25	So on day one there was a tactical bonus, it led to	25	some occasions manufacturers are providing or
	142		144

2	withdrawing bonuses because they would like to see their	1	an administrative convenience for both the retailers and
2	prices compete in a particular way with an opposing	2	manufacturers to have these forms of documents. Again,
3	product by way of a parity or a differential, but on	3	nothing sinister in this.
4	many other occasions, the withdrawal and provision of	4	If you could please also open core bundle 3, I want
5	bonuses have nothing to do with that, they are simply	5	to show you what's said in relation to Safeway. This is
6	ad hoc commercial decisions.	6	a Morrisons document, but a very similar thing happened
7	The OFT would have it that every single one of the	7	in relation to Safeway. If you would please go to
8	documents one sees in these many files is about parities	8	Mr Culham's statement at tab 35, page 426, {C3/35/426}
9	and differentials but in fact on many occasions, it's	9	please. Again, I don't believe this part is
10	nothing to do with parities and differentials, it is	10	confidential, but one sees at page 426 above
11	simply one manufacturer deciding he wants to undercut	11	paragraph 152 the heading "Price file", and then there
12	the other manufacturer or later on he no longer needs to	12	Mr Culham says:
13	undercut him and therefore he will change the price.	13	"When I was in charge of the account ITL compiled
14	But I am going to come to that in a moment.	14	and maintained a price file for the Safeway account.
15	Before I do, can I show you what I call a price file	15	The purpose of this document, which was prepared at the
16	or a matrix or a very common document, and Mr Thompson	16	behest of the retailer, was to record the cost prices in
17	has shown you one in relation to CGL, I would like to	17	the various elements and margins support in respect of
18	show you an equivalent for ITL and Morrisons. If you	18	each ITL product sold at the Safeway account."
19	would please go to annex 17, which is the annex of the	19	At 163 he describes the headings on the file which
20	ITL, would you please go to document 6. I know this is	20	are again very similar to both the Morrisons document we
21	marked "confidential", I'll avoid reading any figures	21	are looking at and the document Mr Thompson showed you
22	from it. You will see this is a fax sent on 3 July 2000	22	in relation to the Co-op.
23	from Mr Wragg of ITL to Mr Addison of Morrisons, and he	23	I would ask the Tribunal to note in particular
24	says:	24	without me reading it paragraph 164 in relation to the
25	"Promotional Schedule. Please note the attached	25	retail price specified.
23	145	25	147
	143		147
1	schedule. This supersedes the previous schedule.	1	(Pause)
2	Please note bonuses and price changes in the right	2	So these are not documents created by ITL in order
3	column, Morrison codes are on the left."	3	to force prices on the retailers, these are documents
4	What I want to focus on, I am not at this stage		
7	What I want to locus on, I am not at this stage	4	which are requested by the retailers and which record
5	interested in the text on 33, but if one goes over the	4 5	which are requested by the retailers and which record the price at which the retailer will sell the products.
			•
5	interested in the text on 33, but if one goes over the	5	the price at which the retailer will sell the products.
5 6	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the	5 6	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal
5 6 7	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates."	5 6 7	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to
5 6 7 8	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left:	5 6 7 8	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the
5 6 7 8 9	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the	5 6 7 8 9	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94}
5 6 7 8 9	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the document you were looking at, the top column is very	5 6 7 8 9	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94} This is a passage which explains the use of tactical
5 6 7 8 9 10 11	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the document you were looking at, the top column is very similar to the document Mr Thompson showed you:	5 6 7 8 9 10 11	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94} This is a passage which explains the use of tactical bonuses. It's page 450, paragraph 10 going over to
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5 6 7 8 9 10 11 12 13 14 15 16 17	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the document you were looking at, the top column is very similar to the document Mr Thompson showed you: "BDD rate per outer. Off-invoice bonus per outer." That's what I called earlier the ongoing bonus. A net figure then a retro, and retro is the tactical bonus. It's called a retro, as you may have seen from the evidence, because it was paid retrospectively, in other words after a retailer had bought a product he	5 6 7 8 9 10 11 12 13 14 15 16	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94} This is a passage which explains the use of tactical bonuses. It's page 450, paragraph 10 going over to page 434, paragraph 11, and the substance of what he says there is that: "If a promotional bonus was withdrawn or reduced [this is paragraph 11], it would be up to Morrisons to decide whether the price would be increased, but generally they would increase the price but not always."
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5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the document you were looking at, the top column is very similar to the document Mr Thompson showed you: "BDD rate per outer. Off-invoice bonus per outer." That's what I called earlier the ongoing bonus. A net figure then a retro, and retro is the tactical bonus. It's called a retro, as you may have seen from the evidence, because it was paid retrospectively, in other words after a retailer had bought a product he would be provided with this bonus. Then one sees a selling price. This is a document that's been created by ITL, one	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94} This is a passage which explains the use of tactical bonuses. It's page 450, paragraph 10 going over to page 434, paragraph 11, and the substance of what he says there is that: "If a promotional bonus was withdrawn or reduced [this is paragraph 11], it would be up to Morrisons to decide whether the price would be increased, but generally they would increase the price but not always." What's of particular note is that, in paragraph 11, Mr Eastwood stresses that in some cases there may be a good independent commercial reason for Morrisons to
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5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	interested in the text on 33, but if one goes over the page, please, to the table, you will see going from the left: "Bulk box discount rates." You will see again that's very similar to the document you were looking at, the top column is very similar to the document Mr Thompson showed you: "BDD rate per outer. Off-invoice bonus per outer." That's what I called earlier the ongoing bonus. A net figure then a retro, and retro is the tactical bonus. It's called a retro, as you may have seen from the evidence, because it was paid retrospectively, in other words after a retailer had bought a product he would be provided with this bonus. Then one sees a selling price. This is a document that's been created by ITL, one saw a similar document created by CGL earlier this afternoon, and the evidence you will hear both from	5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	the price at which the retailer will sell the products. Would you please put that away and, if the Tribunal still has Mr Eastwood's statement open, I would like to show you one further passage in that which explains the use of which is in core bundle 8, tab 94. {C8/94} This is a passage which explains the use of tactical bonuses. It's page 450, paragraph 10 going over to page 434, paragraph 11, and the substance of what he says there is that: "If a promotional bonus was withdrawn or reduced [this is paragraph 11], it would be up to Morrisons to decide whether the price would be increased, but generally they would increase the price but not always." What's of particular note is that, in paragraph 11, Mr Eastwood stresses that in some cases there may be a good independent commercial reason for Morrisons to maintain the low price. (Pause)

1	tactical bollus of all oligoning bollus. It's the of a scase	'	last page of tab 9, it has a mark 47 in the bottom
2	that both types of bonus, both ongoing bonuses and	2	right-hand corner. I am sorry, it's the last page but
3	tactical bonuses, were paid in order to achieve	3	one, it's 45. You will see under "Multipack Support":
4	manufacturers' parity and differential requirements.	4	"I understand that you wish to give your customers
5	I said earlier that was far too simplistic a view of	5	better pro-rated discounts on cigarette multipacks."
6	what was going on here. What I am going to show	6	This is a reference back to that earlier discussion
7	the Tribunal is that tactical bonuses were provided or	7	at tab 7. What's happening there is that Morrisons
8	withdrawn for many different reasons. It wasn't always	8	itself wants a tactical bonus, and for a certain quid
9	about parity and differentials. We will come back in	9	pro quo, ITL are agreeing to that.
10	due course to look at the trading agreements and the	10	DR SCOTT: What you are saying is this is normal supermarket
11	reason for provision of the ongoing bonuses, but just	11	behaviour with suppliers.
12	sticking with tactical bonuses from a moment, there were	12	MR SAINI: Absolutely.
13	a variety of reasons.	13	DR SCOTT: Tobacco or otherwise.
14	One example and I am going to take this very	14	MR SAINI: Nothing to do with parity and differentials, this
15	speedily if one could please go back to annex 17,	15	is just: could you please give us a reduction in
16	which is the Morrisons documents, and if you could	16	wholesale price so we can pass it on to our customers.
17	please go to tab 38, the bottom of the page, you will	17	That's the second example I've given you.
18	see this is a letter from ITL to Mr Giles, tobacco buyer	18	A third example is sometimes bonuses were given to
19	at Morrisons.	19	avoid or lessen the impact of a manufacturer's price
20	At the bottom of the page under "Richmond".	20	increase. Again, nothing to do with parities and
21	"[redacted] PMPs [that's price marked packs, he	21	differentials, but there might be a manufacturer's price
22	says] have been ordered, thank you, I agreed to pay the	22	increase. The manufacturer realises it's going to lead
23	total bonus ie [redacted] [well, I won't read that]	23	to an immediate rise in the price of his products in
24	off-invoice for the duration of this PMP".	24	a supermarket, and we see some examples of a bonus being
25	This is an example, one amongst many, of a tactical	25	given to soften the impact of that, and if you would
	149		151
1	bonus being paid which has nothing to do with parity and	1	please go to annex 7, which is a Gallaher document, it's
2	differentials, it is simply a decision to promote	2	document 4, please, there are some confidential figures
3	a specific product on an ad hoc basis.	3	in here in relation to bonuses, I won't read them, but
4	Another example, sometimes Morrisons itself sought	4	what's happened here is there has been a manufacturer's
5	bonuses, nothing to do with the manufacturer, Morrisons	5	price increase by Gallaher, we see from the fax
6	said "We want to run a promotion on a particular product	6	reference line that:
7	in our stores. Can you please pay us the tactical	7	"Post MPI prices from 15 August."
8	bonus". One sees in this same bundle, I am just going	8	And we see the new prices. What's going on in the
9	to give you the references, at 5.714 we see Morrisons	9	far right column is that because there is a promotion
10	seeking a bonus for 100, and 200 multipacks, which has	10	they are going to lessen the impact of that MPI by
11	nothing to do with the manufacturer, Morrisons itself	11	providing certain bonuses per 100 or 200 units, and the
12	wants that bonus. I am sorry, I gave you the wrong	12	particular bonuses are blanked out in my copy.
13	reference. If one can please go to if you have the	13	(Pause)
14	file open I will show you very quickly it's most	14	Now, similarly, that's an example of an MPI.
15	easily demonstrated if one goes to document 7, one sees	15	Similarly, one might see a Budget increase. What
16	at the top of the page, these are minutes of a meeting	16	happens, Mr Howard I think referred to this last week,
17	between Imperial and Morrisons:	17	is sometimes there was a Budget increase and
18	"Multipack pricing. JA [that's Justin Addison] gave	18	manufacturers would provide a tactical bonus to lessen
19	the two individuals from ITL a deadline of next Friday	19	the impact of a Budget increase. I can show you
20	to respond to" again this seems to be in a square, so	20	a document but I won't at this stage show you another
21	I assume it's confidential and I won't read the rest of	21	document establishing that as far as Morrison is
22	that out.	22	concerned, but that's another reason why a tactical
23	What's going on there, one can pick up if you go	23	bonus might be provided.
24	please ahead, and it's confidential again, at tab 9 and	24	A yet further reason is there might be a special
25	if you would please go to what in my bundle is the very	25	Christmas promotion. There are examples of documents in
	150		152

the mast to promote a particular product. So I've given you four or five examples of circumstances in which tactical bonuses would be used or where there is no parity and differential in issue, but the word is no parity and differential in issue, but the three your one consistence bonuses provided to achieve what the manufacturer destreat in terms of parity and differentials. That did happen sometimes but not all of the time. I just want to show you one example of that since it factores do heavily in the OFTs case. If you would please go loaks to ames 17, which is document is useful for two purposes. I was gaining to the play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as a neample of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play, but it's also useful as an example of function play as a subject to be but as an example of function play as a subject increase. 17	1	the bundles where at Christmas time, one manufacturer	1	goods are sold.
So I've given you four or five examples of croumstances in which tactical binouses would be used where there is no parkly and differentials in issue, but there were on some occasions binouses provided to achieve what the manufactured resistent in terms of partly and differentials. That did happen sometimes but not all of the time. I just want to show you one example of that since it Farmer dos heavily in the OFT's case. 11 If you would please go back to annex 17, which is the ITL/Morrisons documents, it's document 26, and this document is useful for two purposes. I vwas going to the bow you it as an example of partly and differentials in play, but it's also useful as an example of Imperior you will see that the first paragraph says: 18 You will see that the first paragraph says: 19 "Dear Grant, find attached a new schedule of costs, 20 bonuses and margins. This document is effective from Monday 19 March, the date you have decided to implement the Chancellor's Budget, the Budget increase, 7 March, 21 One sees a titems at nat 12 band despite a Budget 10 One sees a titems at nat 12 band despite a Budget 11 therefore they are going to be paying an additional 22 confidential boms mothing to do with parity and 23 and supersectes the last schedule." 24 documents, one sees that there is no conflor on the part the Chancellor's Budget, the Budget increase, 7 March, 25 days one what sign to be appring an additional 26 confidential boms mothing to do with parity and 27 reduction and this is with an additional boms of "- 28 sorry, again I read that in error." 28 a well in passing that when we come to look at the 11 threafore they are going to be paying an additional 29 confidential boms mothing to do with parity and 20 confidential boms mothing to do with parity and 21 deferentials, but the part I was interested in for 22 product tool be at parity with Amber Leaf, You will note 23 and parity of the part I was interested in for 24 present purposes it at (iii), this is rolling tobacco: 25 The Tun 12.5 grams to be at parity wi	2	may decide, nothing to do with parity and differential,	2	MR SUMMERS: So if I use the word "discount"
context. Section Context Cont	3	he wants to promote a particular product.	3	MR SAINI: That's another way of describing it.
by where there is no parity and differential in issue, but the rewer on some occasions homuses provided to achieve what the manufacturer desired in terms of parity and differentials. That did happen sometimes but not all of the time. I just want to show you one example of that first featured so heavily in the OFT's case. If you would please go back to annex 17, which is the ITI, Morrisons documents, it's document 27, which is decument is useful for two purposes. I was going to document is useful for two purposes. I was going to document is useful for two purposes. I was going to document is useful for two purposes. I was going to show you it as an example of parity and differentials in play, but it's also useful as an example of fineprial play, but it's also useful as an example of fineprial play, but it's also useful as an example of fineprial play, but it's also useful as an example of fineprial play, but it's also useful as an example of fineprial play, but it's also useful as an example of former and the start for exclusing the price of the product, and it's a matter of the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have seen, the OFT's case, hecause, as you will have s	4	So I've given you four or five examples of	4	MR SUMMERS: A bonus is in effect a discount in this
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the ITL/Morrisons documents, it's document 26, and this document is useful for two purposes. I was going to 14 Before I finish on the question of bonuses, I aced 5 show you it as an example of partyly and differentials in 15 to go back to what I showed the Tribunal at the start 16 play, but it's also useful as an example of Imperial 16 about the OFT's case, because, as you will have seen, 17 seeking to keep down prices despite a Budget increase. 17 the OFT's case is that the manufacturers had a comfort 18 you will see that the first paragraph says: 18 that when they increased their price, the price of 20 bonuses and margins. This document is effective from 20 bonuses and margins. This document is effective from 20 documents, one sees that there is no comfort on the part 21 documents, one sees that there is no comfort on the part 22 the Chancellor's Budget, the Budget increase, 7 March, 22 of a manufacturer that the price of the competting 23 and supersedes the last schedule." 23 product would increase. But if one just looks at a few 24 doesn't know what's going to happen to the price of the 26 increase, they want to hold their prices down and 25 competing product. 153 155 1 therefore they are going to be paying an additional 21 Now, I am going to show you just two documents to establish that proposition, and we can put away the 3 differentials, but the part I was interested in for 3 annex 17, and could you please take out annex 26. Present purposes is at (iii), this is rolling tobacco: 4 I am going to hand up a document which is of general 25 use but may be of use particularly in relation to these 3 shelf price fredatedel. This represents a fredatedl 4 for reduction and this is with an additional bonus of " - 5 sure if there is a file that is going of documents to establish the facts in this document, and if a reduction and this is with an additional bonus of " - 5 sure if there is a file that is going of documents to 19 trading agreements tase two products, Drum and 19 are reduction and this is with an addit	11	since it featured so heavily in the OFT's case.	11	regard it as a bonus and retailers just regard it as
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Monday 19 March, the date you have decided to implement the Chancellor's Budget, the Budget increase, 7 March, 22 of a manufacturer that the price of the competing product would increase. He is desperate because he doesn't know what's going to happen to the price of the competing product. 153 155 1 therefore they are going to be paying an additional confidential bonus nothing to do with parity and 2 establish that proposition, and we can put away the annual differentials, but the part I was interested in for 3 annual 17, and could you please take out annex 26. 4 present purposes is at (iii), this is rolling tobacco: 4 I am going to hand up a document which is of general use but may be of use particularly in relation to these documents, which is a schedule we prepared, and I am not sure if there is a file that is going of documents that a sorry, again I read that in error. 8 are provided to the Tribunal during the course of the sorry, again I read that in error. 8 are provided to the Tribunal during the course of the parity with Amber Leaf. You will note 10 those than the parties where there is a parity or 14 to provide them, but this is ment and additional on the part that the price of the competing product. 155 1 when the part I was interested in for 3 annual 17, and could you please take out annex 26. 4 present purposes is at (iii), this is rolling tobacco: 4 I am going to hand up a document which is of general use but may be of use particularly in relation to these documents, which is a schedule we prepared, and I am not sure if there is a file that is going of documents that a sorry, again I read that in error. 8 are provided to the Tribunal during the course of the product to be at parity with Amber Leaf. You will note 10 (Handed). 1 as well in passing that when we come to look at the 11 This in John and unity in the parties want the underlying documents to establish the facts in this document, we would be happy to a page-10 this passing that when we come to look at the 11 This is I hope an uncontrove	19	"Dear Grant, find attached a new schedule of costs,	19	a competing product would also increase. That's the
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and supersedes the last schedule." One sees at items 1 and 12 that despite a Budget increase, they want to hold their prices down and 153 155 Therefore they are going to be paying an additional confidential bonus nothing to do with parity and confidential bonus nothing to do with parity and confidential bonus nothing to do with parity and differentials, but the part I was interested in for differentials, but the part I was interested in for more and price in the price of the stabilish that proposition, and we can put away the annex 17, and could you please take out annex 26. present purposes is at (iii), this is rolling tobacco: promum 12.5 grams to be at parity with Amber Leaf at shelf price [redacted]. This represents a [redacted] reduction and this is with an additional bonus of*— reduction and t	21	Monday 19 March, the date you have decided to implement	21	documents, one sees that there is no comfort on the part
One sees at items 1 and 12 that despite a Budget 153	22	the Chancellor's Budget, the Budget increase, 7 March,	22	of a manufacturer that the price of the competing
153 155 1 therefore they are going to be paying an additional 2 establish that proposition, and we can put away the 2 confidential bonus nothing to do with parity and 2 establish that proposition, and we can put away the 3 differentials, but the part I was interested in for 3 annex 17, and could you please take out annex 26. 4 present purposes is at (iii), this is rolling tobacco: 4 I am going to hand up a document which is of general 2 use but may be of use particularly in relation to these 3 documents, which is a schedule we prepared, and I am not 2 reduction and this is with an additional bonus of* 7 sure if there is a file that is going of documents that 2 sorry, again I read that in error. 8 are provided to the Tribunal during the course of the 2 product to be at parity with Amber Leaf. You will note 10 (Handed). 11 This is I hope an uncontroversial document, and if 2 trading agreements these two products, Drum and 12 any of the parties want the underlying documents to 3 amber Leaf, are not mentioned at all in those trading 13 establish the facts in this document, we would be happy 14 agreements as being products where there is a parity or 14 to provide them, but this is meant to be a useful differential aspiration. This is just an example of 15 document identifying in the three-year period between 16 a bonus being paid. You will see from the balance of 16 March 2000 and July 2003 each occasion on which there 17 this document that the tactical bonuses are there being 17 was a Budget and the manufacturers' price increase as 18 paid principally in respect of the other brands to 18 If I could ask the Tribunal please to go to page 5 protect customers from this Budget increase. 19 of that, you will see in the second entry on 2000 and July 2003 each occasion on which there 19 protect customers from this Budget increase. 19 of that, you will see in the second entry on 2 absolutely certain that I understand the meaning of 21 regards most products, and in particulary you will note 19 that second entry under "In	23	and supersedes the last schedule."	23	product would increase. He is desperate because he
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	24	have been sold?	24	second entry:
154	25		25	
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1	So ITL were going to put up their prices.	1	simple point which flows from it which completely
2	THE CHAIRMAN: Do you mean their wholesale prices or do you	2	contradicts the OFT's case. Gallaher clearly does not
3	mean their MRP, or both?	3	think that an increase in the price of Berkeley and
4	MR SAINI: Both.	4	Benson & Hedges will lead to an increase in the price of
5	DR SCOTT: So just to clarify what happens, the RRPs get	5	Richmond and Superkings. Otherwise Gallaher would
6	published and the wholesale price lists, as we	6	simply put those up as planned in its MPI. Instead it
7	understand it, are distributed to a multiplicity of	7	knows it has to hold them down if it wants parity. The
8	retailers, but not automatically to the other	8	point which flows from this exchange and many others is
9	manufacturer.	9	that one manufacturer has no assurance that its prices
10	MR SAINI: Yes.	10	will go up or down or remain the same according to the
11	DR SCOTT: So the other manufacturer sees the change in	11	price of the other manufacturer. He has no assurance.
12	retail prices?	12	They have to make their own commercial decisions. If
13	MR SAINI: It's public knowledge that there is going to be	13	the OFT's case is right, both Gallaher and ITL can sit
14	an MPI. What's important, though, to bear in mind is	14	back and relax because they know that each of them can
15	that let's put ourselves in the shoes of Gallaher on	15	cause a price increase and the other will follow.
16	3 September 2001. They know, if you look at the second	16	That's just not happening here.
17	entry, that they are going to have their own MPI,	17	THE CHAIRMAN: It's not that the other will follow, it's
18	a little bit later, on 11 September 2001, and they are	18	that the retailer will
19	going to be putting up Superkings and B&H:	19	MR SAINI: The retailer himself, absolutely, I suppose I am
20	"For B&H, Superkings, Dickens and Berkeley, 5p for	20	doing it in shorthand. The retailer will himself
21	20."	21	because he is giving effect to an agreement,
22	If we go back, please, to the document I asked you	22	automatically or by way of expectation move the prices
23	to turn up in annex 26, tab 30, I want us to bear in	23	of a competing product. One sees throughout these
24	mind these MPIs when looking at this document, this is	24	bundles many examples of ITL and Gallaher having no idea
25	an internal document within Gallaher, and it's marked	25	what the retailer will do.
	157		159
1	"Confidential" so I won't read it out, it's not clear to	1	One can see the same, if one stays in this bundle,
2	me which part is confidential. The bit that appears to	2	if one goes back a few tabs to tab 21, please, and again
3	be confidential is the mobile number of the individual	3	bearing in mind where we are chronologically, this is
4	rather than the body of this email.	4	12 February 2001, and according to our schedule, on
5	If I can then perhaps read the body of the email,	5	13 February 2001 there is going to be a Gallaher MPI.
6	because that doesn't seem to be confidential. Who is	6	It's page 4 of our schedule. If you would please look
7	Trevor, you may ask? Trevor is Trevor Thomas of	7	at point 5, in relation to Dorchester and Richmond, and
8	Safeway.	8	the second entry says, I don't think this is
9	" Safeway has confirmed that Imperial will be	9	confidential, I'll read it:
10	holding Richmond and Superkings 5p"	10	"Dorchester. Further to our discussion, we now
11	The 5p is a reference to the 5p price rise you have	11	understand that Richmond is to stay down in price until
12 13	seen on 3 September:	12	the Budget. Would you please ensure Dorchester brands
	" until advised. As you are aware, Safeway are also running 15p off next purchase of 20 Superkings" and	13	and packs will be in line?"
14 15		14 15	You will see that underneath that, after the
16	I won't read the rest of that other than the he comments by saying that this will hit sales of Berkeley and B&H	16	brackets "20": "We will fund the MPI increase to achieve this."
17	DV SAVING CHALCINS WIII HIL SAIES OF DEFREIEV AND DOCT	10	we will fully the MPI filtrease to achieve this.
18			Co those is going to be an MDL one knows from
	Superkings.	17	So there is going to be an MPI, one knows, from
	Superkings. "Based on this, I have agreed to hold B&H Superkings	17 18	page 4. They want to prevent the actual retail price
19	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October."	17 18 19	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for
19 20	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October." So within Gallaher, they are saying that ITL,	17 18 19 20	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for this. Stepping back, the simple point is that Gallaher
19 20 21	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October." So within Gallaher, they are saying that ITL, despite what it's published I am sorry, have I given	17 18 19 20 21	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for this. Stepping back, the simple point is that Gallaher is not going to increase Dorchester because it knows
19 20 21 22	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October." So within Gallaher, they are saying that ITL, despite what it's published I am sorry, have I given you the wrong reference?	17 18 19 20 21 22	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for this. Stepping back, the simple point is that Gallaher is not going to increase Dorchester because it knows Richmond will not follow. Richmond is going to stay
19 20 21 22 23	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October." So within Gallaher, they are saying that ITL, despite what it's published I am sorry, have I given you the wrong reference? THE CHAIRMAN: No, but I nonetheless have the wrong	17 18 19 20 21 22 23	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for this. Stepping back, the simple point is that Gallaher is not going to increase Dorchester because it knows Richmond will not follow. Richmond is going to stay down until the Budget, that's what they believe is going
19 20 21 22	Superkings. "Based on this, I have agreed to hold B&H Superkings and Berkeley Superkings until 1 October." So within Gallaher, they are saying that ITL, despite what it's published I am sorry, have I given you the wrong reference?	17 18 19 20 21 22	page 4. They want to prevent the actual retail price from going up so they are going to provide funding for this. Stepping back, the simple point is that Gallaher is not going to increase Dorchester because it knows Richmond will not follow. Richmond is going to stay

1	put up the price of Kichmonu, together with Dorchester,	ı	provided that Morrisons Tetan prices were in line with
2	they would be delighted, but it's not going to happen.	2	ITL's maximum parity and differential aspirations.
3	DR SCOTT: Sorry, just to clarify, ITL had had an MPI on	3	Crucially this is an incentive on Morrisons not to
4	29 January, and they had raised cigarettes by 5p across	4	increase the price of ITL products. That's what it's
5	the board, that's followed by Gallaher raise cigarettes	5	about.
6	by 5p across the board. But what you are suggesting is	6	Now, there is nothing in this agreement or indeed
7	that Imperial were already funding not implementing that	7	the other agreement which prevents or discourages
8	in relation to some of their cigarettes.	8	Morrisons from reducing the retail prices for Gallaher
9	MR SAINI: Correct. Imperial are not putting their price	9	products, it doesn't touch on that. All that this
10	up, and Dorchester what Gallaher want to do is ensure	10	agreement provides for, and indeed the other agreement,
11	that Dorchester remains in line with Richmond.	11	is that in the event that there is a promotion on
12	DR SCOTT: So they know that one might ask how do they	12	a Gallaher product, ITL will continue either paying
13	know, but the letter doesn't answer that. So the	13	bonuses in the normal way, that is that it will not
14	published wholesale prices have gone up, and presumably	14	penalise Morrisons despite the fact that Morrisons'
15	the RRPs have gone up.	15	retail prices are not in line with ITL's parity and
16	MR SAINI: Yes.	16	differential aspirations, or it will offer Morrisons
17	DR SCOTT: But in fact ITL	17	a taxable bonus to fund a reduction in the ITL product
18	MR SAINI: ITL are maintaining one of their products at	18	price.
19	a lower price, and Gallaher are concerned not to	19	You will have noticed the point, I believe Mr Howard
20	increase their price, but if the OFT's case were right,	20	emphasised under the "Pricing" wording, that if one goes
21	they would have no worry about that, because once	21	halfway down that:
22	Gallaher increased its price, no doubt ITL would	22	"William Morrison confirm instore promotional
23	increase their price. The retailer would increase the	23	activities which may affect pricing strategy. ITL agree
24	price of the ITL product, to be completely precise.	24	to maintain bonus levels in line with appendix 1, should
25	But these are just a few examples of where there is	25	we elect not to respond to other manufacturers' pricing
	161		163
1	no confidence on the part of one manufactures that the	1	initiatives."
1	no confidence on the part of one manufacturer that the	1	
2	retailer will change the price of a competing product.	2	So we are always going to get those bonuses. So we are going to get those bonuses, whatever happens, and we
4	The Tribunal can put that one away. I was going to turn now to the third area I wanted to cover, which is	4	are going to get those bonuses, whatever happens, and we are going to provide an opportunity to respond.
5	the question of the trading agreements. What I hope	5	To the same effect, staying in the same bundle,
6	I've shown there, but in rather a rapid fashion, is two	6	going ahead to tab 17
7	points: number one, that bonuses are paid for many	7	DR SCOTT: Just staying with that agreement, this doesn't
8	reasons, sometimes to achieve parity and differential	8	have an ongoing bonus for the pricing below RRP.
9	aspirations but on many occasions for other purposes,	9	MR SAINI: Well, if you go to page 4, it has 0/I bonus per
10	and that's part of the normal commercial interplay	10	outer off-invoice, you will see that on the schedule.
11	between manufacturer and retailer; and secondly,	11	DR SCOTT: So that's paid on the RRP basis rather than the
12	contrary to the OFT's case there is no comfort on the	12	P&Ds basis.
13	part of one manufacturer that a retailer will increase	13	MR SAINI: That's going to be paid whatever happens, that's
14	or in any way modify the prices of the competing	14	always going to be provided, and that no doubt reflects
15	product.	15	whatever pricing aspiration the manufacturer has,
16	The written trading agreements, I can deal first of	16	provision of that bonus.
17	all with the question of Morrisons, and you have already	17	DR SCOTT: What it says is:
18	been shown by Mr Howard the agreements, and they are in	18	"In line with our current strategy, see appendix 2."
19	annex 17, perhaps I'll ask you to please turn them up,	19	And appendix 2 is about relativities between brands,
20	there are two. The first one is at tab 4. If you would	20	not about relativity with the RRP.
21	please go to the second page under "Pricing", I want to	21	MR SAINI: I think I understand the question now, sir. The
22	make two points that flow from the section on pricing	22	off-invoice bonus is paid both for pricing below RRP and
23	and the appendix.	23	for maintaining the parity and differentials that the
24	The first point that flows is that ITL is going to	24	manufacturer desires.
25	pay Morrisons ongoing bonuses, the first type of bonus,	25	THE CHAIRMAN: So your price matrix, then, is different from
	162		164

1	Mr Thompson's in that your one does include the parity	1	its products and Gallaher products in tandem. What ITL
2	and differential?	2	will do is punish Morrisons if it increases ITL product
3	MR SAINI: Absolutely, absolutely. What they are	3	prices whatever happens to Gallaher prices.
4	recognising is that there may be price changes which put	4	Mr Howard has already made submissions in relation
5	the parity and differential aspirations out of kilter,	5	to the particular wording of the differentials, the
6	but we are going to continue receiving these ongoing	6	parity and differential angle, page 464, and I won't
7	bonuses or there may be a further tactical bonus	7	repeat that. I just wanted to address the position of
8	offered.	8	Safeway in relation to which agreements existed.
9	I was going to go to tab 17, the second trading	9	Now, as between we can put away annex 17
10	agreement.	10	Safeway and ITL, there appears to be no agreement, no
11	THE CHAIRMAN: Is it tabs 45 and 85?	11	written trading agreement. As between Safeway and
12	MR SAINI: I am grateful. That's right, 85. Again, the	12	Gallaher, there is an agreement, which we can look at,
13	point that we made later in TA1, the first trading	13	which is in annex 26.
14	agreement, applies here, which is that there is nothing	14	DR SCOTT: Sorry, just to clarify, was there a suggestion
15	in this agreement which inhibits Morrisons from reducing	15	that there was an agreement that hadn't been found, or
16	the retail price of Gallaher products. All it's doing	16	that
17	is it's incentivising Morrisons not to increase the	17	MR SAINI: It's a matter for evidence ultimately, but
18	price of ITL products.	18	I would say this: one can see references to well,
19	You will see, if one goes to the body of the pricing	19	I think I can put it no higher than saying that neither
20	section, which is on page 463, using the numbering in	20	we nor ITL have found an agreement.
21	the bottom right-hand corner, and there one sees in the	21	DR SCOTT: Yes, that's my understanding, I just seem to
22	second paragraph:	22	remember that there were some references to
23	"Based on the continued achievement of those	23	an agreement, but nobody had actually found one.
24	differentials and the shelf prices highlighted in the	24	MR SAINI: Well, I think it's probably safest for me, prior
25	ongoing schedule of bonuses and margins, Imperial will	25	to any evidence being given by ITL, I would say that our
	165		167
1	pay all of these bonuses off-invoice."	1	position is there isn't any agreement in place,
2	So returning to Dr Scott's question, one sees there	2	certainly not an agreement of the type that the OFT rely
3	what is implicit in the first trading agreement but	3	upon, because the OFT are saying there are P&D
4	express here, which is that the ongoing bonuses are	4	agreements, I don't think there is any evidence of that
5	motivated by the desire to achieve differentials.	5	as between Safeway and ITL.
6	THE CHAIRMAN: So where is the bonus related to pricing	6	As between Safeway and Gallaher, I ask the Tribunal
1	below RRP?	7	please to go to annex 26, and at 54A I am told that
8	MR SAINI: Again we say it's part and parcel of that.	8	all of 54A is confidential. I'll perhaps just point up
9	THE CHAIRMAN: This may or may not become clear once we hear	9	the document and the particular paragraph.
10	the evidence about it.	10	This is a signed trading agreement, and if you would
11	MR SAINI: We don't have a similar schedule to the one we	11	please go to page 259, I will not read it, and read
12	have in relation to the first trading agreement, the	12	paragraph 3, please.
13	table, but no doubt Mr Eastwood will answer this, but	13	(Pause)
14	I anticipate that he will say that pricing below the RRP	14	Without giving too much away as to what's said
15	is built into the provision of these bonuses.	15	there, this is clearly a million miles away from the
16	What's interesting to note in relation to this	16	type of agreement which the OFT alleges was in place
17	particular agreement is that it also makes explicit	17	between Safeway and Gallaher.
18	another point which we say was implicit in the first	18	Perhaps I could put it neutrally by saying that at
19	trading agreement, that is that funding is going to be	19	most there is an opportunity, it's an opportunity to
20	withdrawn if Morrisons increases the price of an ITL	20	respond provision. In particular, nothing in this,
21	product, even if it maintained ITL's parity and	21	nothing appears here in relation to parity and
22	differential aspirations by simultaneously increasing	22	differentials.
23	the retail price of a competing Gallaher product.	23	So that's the sum total of the written agreements
24	So there can't be any suggestion that ITL is going	24	between Safeway and Gallaher. But you will have noted,
25			
	to reward Morrisons for increasing the retail prices of	25	and I'll provide the reference and read it out, but

2 Showed your a short white ago, that was the document in So amens 2 at be 17, which was defectively the 4 evidential position of Gallaher. At page 17 of that 5 document, they are asked a question in relation to their 6 agreement with Safeway, and lequore—this 7 is confidential? I don't know. I am told it's not 7 confidential to spart. It is a surface of the same	1	Gallaher's own position in the document that Mr Thompson	1	the OFT will have these errors as meaning really, the
decidential position of Gallaher. At page 17 of that decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their decomment, they are asked a question in relation to their own policy, and by that I mean, and we will see examples of this when the evidence begins, that Safeway were very disorganisated and they would often be pricing the same product in different stores differently, by mistake. We see persistent monitoring by both ITL and Gallaher both of Safeway prices and indeed of Co-op prices, and they go back to the retailers and say "You are making errors. They are not errors because we want the same product in different to give us an advantage as understanding, it appears to the Gallaher's position that the prices corrected to give us an advantage as understanding, it appears to Gallaher's position that the prices corrected to give us an advantage as manufacturers, but you are certaing errors according to your own pricing policy. These are simple cock-ups. The CHAIRMAN: If you would be prepared to go on and finish this afternoon that would be convenient for everyone. Machine the prices feat and the would were a second to the service of mistin of an issue in relation to decomment. The short you will be price feat	2	showed you a short while ago, that was the document in	2	ITL or Gallaher are dictating prices to retailers. The
document, they are asked a question in relation to their a greenest with Safeway, and they say and I quote – this is confidential? I don't know, I and told it's not 1 their own policy, and by that I mean, and we will see examples of this when the evidence begins, that Safeway is confidential, this part, but I'll read it. It says: "Safeway never had [this is Gallaher's position] a 'parties and differentials clause, nor was there any of the same product in different stores differently, by midstake and differentials clause, nor was there any of the same product in different stores differently, by midstake. We see persistent monitoring by both ITL and Gallaher both of Safeway prices and indeed of Oo-op prices, and they go back to the retailers and say "You are reading, between parties and differentials. However, 1 are making errors. They are not errors because we want to be a say an agreement is concerned. or 1 are making errors. They are not errors because we want the prices corrected to give as an advantage as an agreement is concerned. or 1 are making errors. They are not errors because we want the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices corrected to give as an advantage as the prices and they give the price give and the prices and they give the price give and the price give and advantage and the price give and the price give and the price give and advantage and the price give and the price give and advantage and the price give and	3	SO annex 3 at tab 17, which was effectively the	3	reality is that these are errors in a different sense.
6 Mr Culham is dealing with, were pricing contrary to the confidential. It is part, but If Ir call, it says: 6 confidential, this part, but If Ir call, it says: 8 "Sateway never had fifths is Gallaher's position!" 9 a "partites and differentials' clause, nor was there any 10 a "partites and differentials' clause, nor was there any 11 understanding between Sateway and Gallaher that Sateway 11 mistake. We see persistent monitoring by both ITI. and Gallaher would observe partities and differentials. However, 12 Gallaher both of Sateway prices and indeed of Co-op 13 Sateway in the sea that see a convenient of the same product in differentials clause, or was there any 11 mistake. We see persistent monitoring by both ITI. and Gallaher both of Sateway prices and indeed of Co-op 14 mistake. We see persistent the see a convenient mount of the same product in differential that is a same product in differential that same product in differential that the same product in differential that the same product in differential that is a same product in differential that the same product in differential that a same product in differential that and the same product i	4	evidential position of Gallaher. At page 17 of that	4	They are errors in the sense that the retailers
genement with Safeway, and they say and 1 quote – this confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know. I am told it's not confidential; 1 don't know the decidential; 1 don't	5	document, they are asked a question in relation to their	5	themselves, and in this particular context Safeway,
their own policy, and by that I mean, and we will see confidential; this part, but I'll read it. It says: or "Safeway news had this is Gallaher's position" of a partition and differentials' clause, nor was there any to destroy and Gallaher that Safeway in understanding between Safeway and Gallaher that Safeway in the same product in different stores differently. In understanding between Safeway and Gallaher that Safeway in the same product in different stores differently. In understanding between Safeway and Gallaher that Safeway in the same product in different stores differently. In understanding between Safeway and Gallaher hat Safeway in the same product in different stores differently in understanding it appears to be Gallaher's objective and would observe partities and differentials. However, in the prices corrected to give us an advantage as understanding, it appears to be Gallaher's position that there was never any such agreement with Safeway. If there was never any such agreement with Safeway. Madam, would that be a convenient moment? I think the venture in the prices corrected to give us an advantage as understanding, it appears to be Gallaher's position that there was never any such agreement with Safeway. Madam, would that be a convenient moment? I think the venture in the prices corrected to give us an advantage as understanding, it appears to be Gallaher's position that there is evidence that, as far as Safeway is concerned in now. 20 particular, individuals at both ITL and Gallaher didn't think much of Mr. Trevor Thomas' organisational abilities this aftenoon that would be convenient for everyone. 21 the EUAIRMAN: I just need to finish off an issue in relation to 23 occasions. Incompetent in a very specific sense which the agreements, which is that I've shown you what the same in relation to 23 occasions. Incompetent in a very specific sense which was a situated to make user. I'll give you the sum total of the evidence that exists in relation to that, and its addressed in the evidence of M	6		6	
8 confidential, this part, but l'II read it. It says: 9 "Safeway new had jithis is Gallaher's position] 9 "Were very disorganised and they would often be pricing a parties and differentials clause, nor was there any 10 the same product in different stores differently, by mistake. We see persistent monitoring by both ITL and 12 would observe parties and differentials. However, 12 Gallaher both of Safeway prices and indeed of Co-9 and 13 Safeway knew this to be Gallaher's objective and would 13 prices, and they go back to the retailers and say "You are making crors. They are not certors because we want 14 not have wanted to price differently in any event." 14 are maintaining the prices and they go back to the retailers and say "You are making crors. They are not certors because we want 15 Sos of ar as an agreement is concerned, or 15 the prices corrected to give us an advantage as a understanding, it appears to be Gallaher's opisition that 16 manufacturers, but you are erasting errors according to your own pricing policy. These are simple cock-ups. 18 Madam, would that he a converient moment? I think 18 You are very disorganised, and you will see that there 19 I have only ten minutes left. I am happy to continue 19 is evidence that, as far as Safeway is concerned in now. 20 price and they would be prepared to go on and finish 21 think much of Mr Trevor-Thomas' organisal abilities and the safet promote that would be convenient for everyone. 22 and they uncharitably call him 'incompetent' on certain 23 MR SAINE. I just need to finish off an issue in relation to 23 occasions. Incompetent in a very specific sense which the agreements, which is that 'Ive shown you what the 2 is that he is not doing his own job for his own employer 2 but the agreements, which is that 'Ive shown you what he 2 is that he is not doing his own job for his own employer 2 but the evidence which Ibroadly call administration, and 2 when we get to the context that the misspricing is to the 4 the evidence which Ibroadly call administration, and	7	is confidential? I don't know. I am told it's not	7	
9 "Safeway never had (this is Gallaher's position) a partition and differentials' clause, nor was there any understanding between Safeway and Gallaher that Safeway would observe partities and differentials. However, 12 Gallaher both of Safeway prices and indeed of Co-op prices, and they go back to the retailers and say "You not have wanted to price differently in any event." 14 are making errors. They are not errors because we want not price differently in any event." 15 So so far as an agreement is concerned, or 15 the prices corrected to give us an advantage as understanding, it appears to be Gallaher's position that 16 there was never any such agreement with Safeway. 17 you own pricing policy. These are simple cock-ups. 18 Madam, would that be a convenient moment? I think 18 You are very disorganised," and you will see that there 19 I have only ten minutes left. I am happy to continue 19 I have only ten minute	8	confidential, this part, but I'll read it. It says:	8	
a partites and differentials' clause, nor was there any understanding between Safeway and Gallaher that Safeway understanding between Safeway and Gallaher that Safeway would observe partities and differentials. However, a continued of Co-op prices, and they go back to the retailers and say "You and have wanted to price differently in any event." 5	9	"Safeway never had [this is Gallaher's position]		
11 understanding between Safeway and Gallaher that Safeway 12 would observe partities and differentials. However, 13 Safeway knew this to be Gallaher's objective and would 14 not have wanted to price differently in any event. 15 Sa so a far as an agreement is concerned. or 16 understanding, it appears to be Gallaher's position that 17 there was never any such agreement with Safeway. 18 Madam, would that be a convenient moment? I think 19 Inave only ten minutes left. I am happy to continue 19 now. 20 particular, individuals at both ITI, and Gallaher didn't 21 THE CHAIRMAN: If you would be prepared to go on and finish 22 this afternoon that would be convenient for everyone. 23 MR SAINI: I just need to finish off an issue in relation to 24 the agreements, which is that I've shown you what the 25 sum total of the evidence that exists in relation to 26 sufficiency with the source of Mr Culham on behalf of 27 If the CHAIRMAN: If you would be convenient for everyone. 28 the agreements, which is that I've shown you what the 29 sum total of the evidence that exists in relation to 20 files 21 the ECHAIRMAN: I just need to finish off an issue in relation to 22 sum total of the evidence that exists in relation to 23 defense which I broadly call administration, and 24 the evidence which I broadly call administration, and 25 the ECHAIRMAN: I just wanted to make sure, I'll give you the 26 MR SAINE: I just wanted to make sure, I'll give you the 27 neference, and this is actually a specific Safeway 28 related point. I've shown you the part, it is at 39 related point. I've shown you the part, it is at 40 mR SAINE: I just wanted to make sure, I'll give you the 41 far Culham's evidence 42 feet that Safeway is additive and the fact that as a master of convenience 43 mR safe you have a subject, which is also called 44 certain work in terms of producing spreadsheets. There 45 is a slightly different subject, which is also called 46 administrative assistance, which is at so called 47 the CHAIRMAN: It is not just a matter of shortening	10			
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