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**IN THE COMPETITION**

Case No. 1251/1/12/16-1255/1/12/16

**APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14 March 2017

Before:

**THE HON. MR. JUSTICE ROTH**  
(President)  
**MR HODGE MALEK QC**  
**DERMOT GLYNN**

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**GENERICS (UK) LIMITED**  
**GLAXOSMITHKLINE PLC**  
**(1) XELLIA PHARMACEUTICALS ApS**  
**(2) ALPHARMA LLC**  
**ACTAVIS UK LIMITED**  
**MERCK KGaA**

Appellants

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

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*(a trading name of Opus 2 International Limited)*  
*Official Court Reporters and Audio Transcribers*  
*5 Chancery Lane, London EC4A 1BL*  
*Tel: 020 7831 5627 Fax: 020 7831 7737*  
*info@beverleynunnery.com*

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**HEARING**

## **A P P E A R A N C E S**

Stephen Kon and Christopher Humpe (instructed by MacFarlanes) appeared on behalf of the Appellant (Generics UK Limited).

James Flynn QC (Brick Court), David Scannell (Brick Court) and Charlotte Thomas (Brick Court) (instructed by Nabarro) appeared on behalf of the Appellant (Glaxosmithkline PLC).

Robert O'Donoghue QC (Brick Court), (instructed by Clifford Chance) appeared on behalf of the Appellant (Xellia Pharmaceuticals APS (1) Alharma LLC (2)).

Sarah Ford QC (instructed by MacFarlanes) appeared on behalf of the Appellant (Actavis UK Limited).

Ronit Kreisberger (instructed by DLA Piper) appeared on behalf of the Appellant (Merck KGaA).

Jon Turner QC (Monckton), Marie Demetriou QC (Brick Court) David Bailey (Brick Court), Thomas Sebastian (Monckton), Ravi Mehta (Blackstone) and Elizabeth Kelsey (Monckton) appeared on behalf of the Respondent

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1 THE PRESIDENT: Yes, Mr. Scannell.

2 MR. SCANNELL: Thank you, Mr. President.

3 Good morning, Ms. Webster. Yesterday we saw how you dealt with the missing GSK  
4 wholesaler mark-up and the agreed 3.3% adjustment that gets made for that. Can we begin  
5 today by looking at how you have adjusted for the £7 million discrepancy that we discussed  
6 yesterday.

7 As I understand it, you have looked at two documents in deciding how to deal with the  
8 reconciliation. The first of these is document 3874, according to your witness statement,  
9 and that is the flash sales file that we referred to yesterday, if you remember that?

10 A. I do.

11 Q. Yes. That dates to 2001. The second document you looked at according to your report was  
12 document 3941 and that is the response by GSK to a Section 26 notice, dated 30th March  
13 2015, which we also looked at.

14 Can we look at the first of these. It is the flash sales file, that is in bundle {G1/13B/1}.  
15 This is an electronic document only. Just for the benefit of the Tribunal, and to remind the  
16 Tribunal, what we are talking about here is a file which GSK discovered dating from 2001  
17 which GSK felt might assist the CMA in reconciling the CIMS 2001 data with the Unison  
18 system.

19 Now, to be fair, Ms. Webster, you have described this spreadsheet as far from clear in your  
20 evidence?

21 A. I have.

22 Q. One is inclined to agree with you. Actually, this is looking slightly different to the way it  
23 normally looks. Down at the bottom of this page we should have lots of tabs. For the  
24 moment I just want to make one point about this document, which is that this document has  
25 lots and lots of references, does it not, to rebates?

26 A. It has a number, yes.

27 Q. Just so that the Tribunal can get some sort of idea of what we are talking about, down at the  
28 bottom there should be a tab called the "download data" tab. Already we can see two at the  
29 very bottom of the revised rebates rate tab. Perhaps you could click on that, please.  
30 Then there is a rebates tab; if you could click on that, please. Then the download data tab.  
31 The highlighted mauve lines there are referring to rebates as well. So, really I am not  
32 showing these for your benefit, Ms. Webster, I know you have seen these, but it is really  
33 just to make the point that there are lots and lots of references in this document, and there  
34 are lots more to rebates. They are not all entirely clear; would you agree with that?

1 A. So I agree there are multiple references in here to rebates, so I have looked at this document  
2 in conjunction with the second document mentioned just now, which is GSK's response to  
3 the CMA's Section 26 notice of 30th March. I believe it is paragraph 14 in there where  
4 GSK makes some sense of this spreadsheet. As I say, it is an interpretation of it.  
5 It highlights three different numbers, different components that it believes explains the £7  
6 million discrepancy between CIMS and Unison. The first of --

7 Q. Sorry, we will be going to that document, Ms. Webster, if that helps. We will be going  
8 there in just a moment.

9 A. I think that it is important, if one is looking at this spreadsheet and saying there are lots of  
10 references in here. There are lots of references, but GSK has done a good job of articulating  
11 what it sees are the relevant references within this document. So there are points A, B and  
12 C in that paragraph, the first of which refers to a fixed rebate, and it is 6.5%. The second  
13 refers to something which are called returns and allowances, which also appears to be early  
14 settlement and reconciles to a tab in here called "early settlement rebates", and the third is  
15 then an adjustment to the fixed rebate adjustment. GSK then goes through a process of  
16 saying: let me see if those three factors explain the difference between Unison and CIMS,  
17 and they do.

18 Then the CMA had asked GSK to go through a process of doing that for another five  
19 products to see if there is the same answer, same reconciliation, and GSK confirmed in that  
20 response that you do get the same answer.

21 THE PRESIDENT: So we really have to look at this in the light of the explanation GSK has  
22 given for it, and that is what you did.

23 A. That is my view.

24 THE PRESIDENT: So we need the two together.

25 MR. SCANNELL: Yes, and at the moment I am only asking one question on this document,  
26 which is just about the fact that there are multiple references to rebates. That is all I am  
27 asking.

28 THE PRESIDENT: Well, Ms. Webster has acknowledged that.

29 MR. MALEK: For my note can you just tell me what do I call this document?

30 MR. SCANNELL: You might call it the flash sales file.

31 MR. MALEK: Thank you.

32 THE PRESIDENT: The other document, the GSK response, is where?

33 MR. SCANNELL: That is in bundle {G4/114/1}, and I will be going there in a moment.

34 THE PRESIDENT: Yes.

1 MR. SCANNELL: I should speedily add the flash sales file is not my description. I am not sure  
2 why it is called that.  
3 So that we are clear, as I say, in just a moment we will turn up the document, the 94%  
4 rebate allocation which you make which you called the base case; is that right?  
5 A. That is right.  
6 Q. That is explained by a single adjustment which you make in respect of early settlement  
7 adjustments?  
8 A. That is right.  
9 Q. Could we then turn up the other document. {G4/114/3} Again, this is a document dated 1st  
10 May 2005. It is a response to a Section 26 notice, from GSK and the Section 26 notice was  
11 dated 30th March 2015.  
12 THE PRESIDENT: We have not got it at the moment.  
13 MR. SCANNELL: I do apologise.  
14 A. That is that page (Pause).  
15 THE PRESIDENT: We have a problem with our laptops at the moment. They are not  
16 synchronising.  
17 MR. GLYNN: It is the same problem we had the other day; these machines are not picking up.  
18 MR. MALEK: And mine is not picking up either.  
19 MR. GLYNN: We have the green eye on. (Pause)  
20 MR. SCANNELL: In this document the CMA is asking a series of questions of GSK and  
21 specifically about the flash sales files, and one of the questions is on page 3 at the top of the  
22 page:  
23 "Please state whether or not relevant GSK staff have any recall as to what the '10%  
24 fixed rebate provision' relates to ... On the 'actual data' worksheet). Please outline  
25 their views as to what it was and how it was calculated."  
26 So just pausing there, this is a question they are asking about one of the tabs we saw which  
27 is the actual data tab?  
28 A. Yes, it is.  
29 Q. They are not asking in this question about all of the other references to rebates, are they?  
30 A. It appears they are asking about a very specific rebate, which is a reference to a 10% fixed  
31 rebate which they then cannot find within the spreadsheet.  
32 Q. Correct, yes. Then down at the bottom of the page -- this is the paragraph you were  
33 referring to -- paragraph 2.14, this is GSK's response to that question:

1 " ... GSK believes that the data shown in the 'ActualData' tab are sourced from the  
2 JDE database ..."

3 As I understand it, the JDE database is like a successor of the Unison system. Is that your  
4 understanding as well?

5 A. I am not an expert on what the JDE system is.

6 Q. "... and it appears that the difference," reading on, "between the product-level sales in  
7 'ActualData' and the product-level sales shown in Unison equals the sum of three  
8 adjustments indicated in the flash sales file. This holds for each of the six products GSK has  
9 looked at."

10 And the three adjustments are A, B and C. The first is a fixed rebate; 6.5% in the case of  
11 Seroxat. The second one is an adjustment for returns and allowances, and this appears to be  
12 a constant 2.778% across the six products. (c) is an adjustment to the fixed rebate  
13 adjustment.

14 Now, the adjustment that you have made to make sense of the £7 million adjustment, on  
15 your base case, is an adjustment which falls under category (b) here; is that right?

16 A. That is correct. What I have -- the assumption that I have made is that where GSK gave a  
17 discount to a customer on the basis of early payment, that there would not necessarily be a  
18 reason to assume that that was only given with respect to sales of 20mg Seroxat. So I have  
19 taken -- I have calculated what the value of the rebate was across all of Seroxat sales and  
20 then I have identified the proportion of the rebate which is specific to 20mg based on the  
21 proportion of sales, which is 20mg. Then I have said that part of the discount is appropriate  
22 for me to allocate 20mg and the rest is not.

23 As a result of that, that gives me a figure of 94% of the total missing rebates that I then  
24 allocate to 20mg.

25 Q. Just to be clear, the adjustment that you have made to the CIMS 2001 data in respect of  
26 early settlements involves the assumption that the £7 million needs to be adjusted to take  
27 account only of the fact that GSK may have given rebates to those customers who paid early  
28 for their paroxetine?

29 A. Yes.

30 Q. But you have not made on this base case any other adjustment in respect of any other of the  
31 rebates referred to in the flash sales file?

32 A. That is correct.

33 Q. Can I put it to you, Ms. Webster, that that is a rather selective adjustment based on the fact  
34 that there are multiple references to rebates in the flash sales file and, indeed, multiple

1 references to rebates even in this paragraph 2.14, which is referring to just one tab in that  
2 file?

3 A. So my view is that I do not believe that it is overly selective. When I have looked at this  
4 rebate data, I have -- we start from a presumption that discounts were given, rebates were  
5 given by GSK in order to compete against parallel imports. We know that there were not  
6 parallel imports of the other forms of Seroxat; there were parallel imports of 20mg. So my  
7 starting point is -- and I think this is consistent with where the other experts have been --  
8 that the rebates are more likely to be on 20mg.

9 Now, Dr. Stillman has questioned whether it is appropriate to allocate all 100% of the  
10 missing rebates of 20mg Seroxat, and that has caused me to question it and to have a look. I  
11 have had a look, and on the basis of these -- paragraph 2.14(a), (b) and (c), I believe that it  
12 is reasonable to make an adjustment with respect to the early settlement rebate.

13 With respect to the other two types of rebate, it is not clear the basis on which those rebates  
14 were given, except -- I go back to the starting point, which is that we expect the rebates to  
15 be given in order to compete against parallel imports. So I believe that it is a reasonable  
16 assumption to say those rebates would have been associated with competing against parallel  
17 imports, and that means that they should in their entirety be allocated to 20mg. That is the  
18 assumption that I have made.

19 I have made -- tested that and said what if one took an alternative view, and then when I do  
20 that, because if I allocate less of the missing rebate to 20mg Seroxat it means that by  
21 definition I allocate more to 30mg, when I then follow that assumption through I find that I  
22 create an oddity in the price series for 30mg where there is a jump up between the 2001  
23 level and the 2002 level. That causes me to question whether actually it is the right thing to  
24 do to allocate more rebates at 30mg because it depresses the price in 2001 and creates that  
25 step change.

26 So I believe that the likely position on the right level of rebates to allocate to 20mg is closer  
27 to my base case of 94%.

28 Q. We will get to the further adjustments that you make in a moment. For the moment, can I  
29 put it to you that you cannot possibly say with any degree of confidence, can you, that in  
30 this exercise of plucking one adjustment out of one tab in the flash sales file deals  
31 conclusively with the issue of missing rebates? There could well be other areas in the  
32 spreadsheet which require adjustments to be made, or it may be the flash file is just not  
33 helpful at all. Would you accept that?

1 A. So I have looked at the flash sales file in conjunction with GSK's response. GSK has been  
2 through it, GSK has done a filtering exercise, GSK has found three steps necessary for the  
3 adjustment --

4 Q. Sorry, Ms. Webster, that is only in respect of one tab, as we have seen.

5 A. The whole set of questions here are about the difference between CIMS and Unison, and  
6 there is reference in paragraph 2.14 to understanding:

7 "... the ... sales shown in Unison equals the sum of the three adjustments indicated in  
8 the flash sales file."

9 So I am not sure that it is necessary to look beyond those. That was my interpretation of  
10 this response.

11 Q. To be clear, you have not looked beyond these, have you?

12 A. So I have looked broadly around this file to understand what is in it. I have looked at this  
13 response. I have looked at the fact that this provides the same result when GSK has applied  
14 these three adjustments to a set of six products in total. For me, that was sufficient for me  
15 to reach a view.

16 Q. It might be said that given that there is a £7 million discrepancy in the 2001 CIMS data and  
17 that seeking to fish out simply one possible explanation from the many on offer in the flash  
18 file is like applying lipstick to a pig?

19 A. So I would not agree with that analogy. I think if we take a step back, what else have we  
20 got that gives us some confidence in the numbers that we have been looking at? The  
21 spreadsheet from Mr. Sellick, although is imperfect for the reasons that I have described, is  
22 broadly consistent. It tells us that we are in the right ballpark.  
23 The difference that you get whether you use the CIMS data adjusted on the basis that I have  
24 used or Mr. Sellick's spreadsheet, I think is a difference that is less than 1%.

25 THE PRESIDENT: What does the actual data tell us? What are the actual figures in the data tab?  
26 What do they show? Can we go back to that?

27 MR. SCANNELL: If the flash file is still available on the system, once again the reference to that  
28 was bundle {G1/13B/1}. Down at the bottom we need to click into the actual data tab.  
29 That is what one is presented with within the actual data tab.

30 THE PRESIDENT: Does it just show those seven weeks, or is that just the way it is coming up  
31 on screen? It seems to show week 52 to week 58.

32 A. I think if one goes to the left on the spreadsheet there will be a lot of other entries.

33 THE PRESIDENT: Yes, it does go. So it goes right through the year and I see it shows figures  
34 for each week by each product in each quantity, each dosage.



1 MR. GLYNN: With very different fixed rebate provisions by product.

2 THE PRESIDENT: Yes.

3 MR. SCANNELL: Now, in your report --

4 THE PRESIDENT: I am just trying to understand it.

5 MR. SCANNELL: Sorry.

6 THE PRESIDENT: What GSK is saying is seeking to reconcile the figures under actual data here  
7 with the sales figures in Unison. Is that your understanding of what they are explaining?  
8 You do not have it anymore now, the 2.14.

9 A. I think that is probably right.

10 THE PRESIDENT: The product-level sales in actual and the product-level sales in Unison.

11 A. The question is prompted by the need to understand the difference between CIMS and  
12 between Unison, and then just the question is whether there is anything in this file that has  
13 allowed GSK to have insight into that.

14 THE PRESIDENT: Can we possibly scroll down to get Seroxat on this spreadsheet? It is not  
15 alphabetical, but somewhere there will be Seroxat.

16 MR. SCANNELL: It will appear in red.

17 THE PRESIDENT: There it is. We have got it.

18 MR. SCANNELL: Yes.

19 THE PRESIDENT: We have the 20mg.

20 MR. SCANNELL: There is a reference to a 10% fixed rebate provision.

21 THE PRESIDENT: Yes.

22 MR. GLYNN: Do you have any idea why the fixed rebate provisions would vary so much  
23 between products?

24 MR. SCANNELL: I am afraid I do not.

25 THE PRESIDENT: Yes. Thank you.

26 MR. SCANNELL: In your report, Ms. Webster, you make a further adjustment to the data which  
27 you call a sensitivity. Do you recall that?

28 A. I do.

29 Q. Can I just be clear about what you mean by "sensitivity". It does not actually make your  
30 base case any better, does it? It is not actually an adjustment that you make to your base  
31 case, is it?

32 A. So it takes a different assumption on the rebate compared to my base case. It includes the  
33 assumption on rebates that I make on my base case and it adds an additional adjustment to  
34 that. I call it a sensitivity because I have less confidence that it is right compared to the base

1 case, for the reason that I explained earlier with the oddity that it creates in the 30mg price  
2 series.

3 Q. So is the oddity only that it creates a result that does not sit comfortably with the rest of  
4 your analysis?

5 A. It is not to do with how it sits with the rest of my analysis, it is if one were then looking at  
6 the 30mg price series, if you do it in isolation the assumption that is made in my sensitivity  
7 in relation to 20mg depresses the price of 30mg Seroxat in 2001 and creates a step change.  
8 That step change in the price of 30mg looks odd, it is unexplained, it is not what would be  
9 expected given what we know is happening at the time.

10 Q. Can we see how the sensitivity works? I can take this shortly. Within the flash file again,  
11 {G1/13B/1} can we click please on the "download data" tab.

12 We have seen this before. Now, as I understand, at least a part of the adjustment that you  
13 make here, you focus in on the highlighted hospital rebate provisions; is that correct?

14 A. I do not focus on these provisions. What I have done is to ask myself the question: could it  
15 be that any of the rebates that were awarded in 2001 were awarded to hospital customers?  
16 The reason that I ask that question is that I understand that when rebates were offered to  
17 hospital customers, they were not only offered on 20mg Seroxat, they would also have been  
18 offered on 20mg Seroxat.

19 So one possibility is that those rebates were already included in the pricing data that was  
20 recorded in CIMS. So we know that that is the case in respect of Boots. It is possible also  
21 that it was the case in relation to hospitals, we do not know.

22 So then I said, okay, what do I know about the rebates that were given to hospitals? There  
23 are these three entries that are referred to here. Dr. Stillman and I agree that the figures here  
24 do not make much sense, and the reason for that is that the discounts that appeared to be  
25 recorded here are actually greater than the value of sales that were made to hospitals in 2002  
26 where we had accurate CIMS data.

27 So Dr. Stillman and I agree that not a great deal can be read into these numbers. I have put  
28 these numbers to one side and I have said, all right, what would be an alternative way to get  
29 at a best estimate of what rebates to hospitals could have been, assuming they were not  
30 already included in the 2001 CIMS data?

31 The approach that I have taken is to work out what the discounts were to hospitals over and  
32 above the standard 12.5% of list price that everybody got, and I look at what the additional  
33 discount is in 2002, I work out the proportion of those discounts that would have been  
34 attributable to 20mg sales to hospitals and then I use that value as an estimate of what the

1 discount could have been, the rebate would have been in 2001. That is the additional  
2 adjustment that I make over and above my base case.

3 Q. Well, that was quite a long response. I was simply asking the question whether or not you  
4 take as a starting point for your sensitivity these three highlighted entries in the file. We can  
5 go to your evidence on that, if you like?

6 A. No, my answer is no, I have looked at this. I have thought about whether these numbers are  
7 informative and I have decided that they are not, and Dr. Stillman agrees.

8 Q. Can we go to your evidence, then. Bundle {H/4/39}. At (b) at the top of the page, you say:

9 "As a sensitivity, I assume that that, after accounting for the proportion of any early  
10 settlement discount [which is the discount we just looked at] that is allocated to  
11 formulations of Seroxat other than 20mg, the remaining difference between the 2001  
12 CIMS data and unison will partly reflect brand equalisation rebates that are entirely  
13 attributable to 20mg Seroxat and partly reflect rebates on hospital sales that will in  
14 part be attributable to 20mg Seroxat."

15 You then go on:

16 "I note that the level of rebates listed against the 'SEROXAT HOSP REBATE  
17 PROVISION' and 'SEROXAT HOSPITAL REBATE' entries is £3,889,782."

18 I am simply asking whether that was your starting point. It is clear from this paragraph that  
19 it was.

20 A. That is a fairly narrow interpretation. I sought to look at the evidence that is available and  
21 considered how I move forward.

22 Q. Okay. Can we go back, then, to the three highlights?

23 THE PRESIDENT: You have to read the next sentence.

24 MR. SCANNELL: Yes.

25 THE PRESIDENT: Where it is therefore said it cannot be attributable, and then the next  
26 paragraph:

27 "Therefore ... I have used 2002 sales volumes ..."

28 MR. SCANNELL: Yes.

29 THE PRESIDENT: So it is not being used, is it?

30 A. No.

31 THE PRESIDENT: That is what it says. That was Ms. Webster's evidence.

32 MR. SCANNELL: Can we look at the three highlights again please. {G1/13B/1}

33 I just have two questions here. First, each of these lines that are highlighted refers to a  
34 Seroxat rebate; that is right, is it not?

1 A. It appears to be.

2 Q. Now, you have looked at the first one, Seroxat hospital rebate provision, and you have  
3 looked at the second one, Seroxat hospital rebate, according to your report. Why have you  
4 not addressed the third one?

5 A. So I have looked at these three sales in order to identify whether there is anything in here  
6 that helps me think about the question whether additional rebates -- sorry, whether there  
7 were rebates that were given to hospitals and that need to be taken into account.  
8 Because I am specifically thinking about the rebate to hospitals, I have written in paragraph  
9 4.38(b) about those two entries.

10 Q. Why do you say that these references to Seroxat rebates for hospitals are any less certain  
11 than the rebate that you deal with in your base case?

12 A. Sorry, could you repeat that question?

13 Q. Yes. In your base case, the adjustment that you make is an adjustment in respect of early  
14 settlements. Here in the flash file, there are references to Seroxat rebates and there are  
15 figures which are put against those rebates. Why is this adjustment any less certain than the  
16 early settlements adjustment?

17 A. So the reason that I have focused on -- in the way that I have -- is because of GSK's  
18 response to the CMA on 30th March in paragraph 2.14(a), (b) and (c) where that appears to  
19 be GSK's best understanding of the difference between the CIMS and Unison data.

20 Q. It goes back to that response?

21 A. Also the response that I gave a moment ago, which is when I look at these figures that are  
22 here in relation to the hospital sales, it is hard to make sense of them within total sales to  
23 hospitals.

24 Q. Okay. Do you accept, Ms. Webster, that the adjustments that you have made in respect of  
25 the £7 million rebates may be wrong?

26 A. Of course it is plausible that that is the case. Do I think it is likely? No. I think that the two  
27 figures that I have given, base case and the alternative case, provide a reasonable estimate  
28 of what would be the upper bound of rebates that should be allocated to 20mg and a lower  
29 bound, and I believe that the true value lies probably closer towards the 94% of the base  
30 case.

31 Q. Okay, perhaps we could leave that there. Can we then move on to the so-called Sellick  
32 spreadsheet, please. I know you have been looking forward to it.

33 A. Absolutely.

34 THE PRESIDENT: Have we finished with the flash file?

1 MR. SCANNELL: Yes, we have. Bundle {E2/36/1}. Thank you.

2 It may be useful, with the indulgence of the Tribunal, to filter this so we just have Seroxat  
3 information. I believe if you go to column O across the top, I think you need to remove the  
4 tool bar and scroll right up to the top of the grey. So if you go to column O and if you then  
5 click on that, or right click on it, you should be able to confine this data just to Seroxat  
6 20mg.

7 (Pause)

8 Thank you. Are you happy with that adjustment, Ms. Webster?

9 A. I am.

10 Q. Mr. Sellick has already been through this with the Tribunal. I know you know how it  
11 works.

12 Now, you say that Dr. Haydock used the CIMS data and Dr. Stillman prefers to use the  
13 Sellick spreadsheet. You say in your evidence that you prefer Dr. Haydock's approach. Just  
14 to be clear about Dr. Haydock's approach first, she has not actually expressed a preference  
15 for the Sellick data or the CIMS data, has she?

16 A. That is correct.

17 Q. I will get straight to the point on this, Ms. Webster. Surely as a conscientious economist you  
18 would accept that it is better to use a contemporaneous empirical document like this one to  
19 show you what the prices of Seroxat were in 2001?

20 A. Had this been a data set that was complete in terms of factoring all customer sales, and had  
21 it been one that captured the relevant period, and had it been one that was based on actual  
22 volumes and not expected volumes, then I would agree that those three factors do not apply  
23 to this spreadsheet and, in my view, therefore limit its applicability in this case.

24 Q. Do you say that those limitations in the Sellick spreadsheet outweigh all of the limitations  
25 that we have seen in the CIMS 2001 data and all of the adjustments that have to be made to  
26 that data?

27 A. That is my view.

28 Q. Now, I think we have seen that the CMA in its decision, it did not adjust the CIMS 2001  
29 data for rebates in the way that you did, did it?

30 A. That is my understanding.

31 Q. Dr. Haydock, the CMA's expert before you became the CMA's expert, she did not adjust the  
32 £7 million figure in the way that you did either, did she?

33 A. That is also my understanding.

1 Q. Neither Dr. Majumdar nor Dr. Stillman have proposed to adjust the 2001 data in the way  
2 that you have either, have they?

3 A. So what is clear -- sorry, this is my understanding -- is that the CMA made an adjustment  
4 for rebates where they attributed 100% of the rebates to 20mg Seroxat. That was not  
5 challenged by Dr. Stillman in his first report. Dr. Haydock then proceeded on the same  
6 basis that Dr. Stillman had proceeded and did not challenge that. Dr. Stillman in his second  
7 report made certain comments that he was not comfortable with the adjustments -- sorry,  
8 with that assumption that 100% of rebates should be allocated to 20mg Seroxat, and so  
9 when I looked at this I believe that it was relevant to dig a little deeper and to see whether  
10 one could do better from making the assumption that 100% of the rebate should be allocated  
11 to 20mg.

12 Q. Does it strike you as slightly odd that in a joint report designed to capture areas of  
13 agreement between experts as well as outstanding areas of disagreement, the joint report  
14 that you have contributed to in this case runs to some 70 pages and a large part of it is taken  
15 up with the battle about how to make sense of the CIMS 2001 data?

16 A. So I think it is not necessarily odd in this circumstance. Because I came relatively late to  
17 this process, I delivered my expert report at the beginning of December. Dr. Stillman then  
18 asked for permission to submit a further report, which he did only, I think, part way through  
19 the process of us compiling our joint report. So the joint report necessarily was going to  
20 involve quite a lot of detail that involved picking up on the points that Dr. Stillman was  
21 making in response to my report.

22 Q. Within the Sellick spreadsheet, if we look at the pharmacies which appear on this  
23 spreadsheet which were directly supplied by GSK -- so not via wholesalers; they had a  
24 direct deal -- would you accept that one can see from this spreadsheet what they paid for  
25 Seroxat at the time of their agreements with GSK in 2001?

26 A. I think that that statement needs qualifying.

27 So there could be some national customers that are within here. So Lloyds would be an  
28 example, Moss I think would be an example, and what we heard from Mr. Sellick -- I think  
29 it was Tuesday last week, was that as a result of the merger and the bringing together of the  
30 two companies, then there was a process whereby the national customers were taken out of  
31 the contract management system that Mr. Sellick was involved in and were dealt with  
32 centrally.

33 My interpretation of what he said on Tuesday was that even though there may be an entry in  
34 Mr. Sellick's data set for those customers, because the process of negotiating that contract

1 had been taken out of the contract management system, it may well be that a new price had  
2 been negotiated with that customer, but it would not then have been updated in these  
3 records.

4 Now, he described it in the context of there are some customers who are national customers  
5 and they may only record a deal here that runs up until April, say, and he said the reason  
6 why it is not updated is because they were taken out of the process.

7 His comments caused me to be somewhat alarmed about the prices that I do see in here for  
8 Moss and for Lloyds and for NCC. All three of those national customers have contracts that  
9 run in theory beyond the end of July 2001.

10 Previously, in my report and in the joint report, I had been assuming that those prices for  
11 those customers could be relied upon. On the basis of what Mr. Sellick said last week, I am  
12 now not sure that those prices themselves can be relied upon, and as a result of that I am  
13 getting to the point where I have got 41% by volume of these contracts which had a price  
14 which did not run beyond July 2001; I have a further 35% associated with the contract for  
15 Moss, Lloyds and NCC which could have been taken out of this system and new prices  
16 renegotiated. That means 75% of the volumes in here may have prices attached to them  
17 which were not the prices that were paid at least for all of 2001.

18 Q. So the answer that you have just given, Ms. Webster, that was based exclusively, if I  
19 understand it correctly, on the evidence that Mr. Sellick gave live in these proceedings; is  
20 that right?

21 A. So my comments specific to the national customers and specific to -- so Moss, Lloyds and  
22 NCC -- that was based on what I heard last Tuesday.

23 Q. Can I ask you the question again in another way, then. Was it your position before these  
24 proceedings, the live proceedings, began that you can rely on the Sellick spreadsheet to  
25 determine what pharmacies were paying under direct deals under their contract in 2001?

26 A. No, that is not my position, because as I mentioned there are 41% of volumes in this  
27 spreadsheet where the contract ended prior to July 2001. So for a large part of 2001, that  
28 means that those customers and the prices on those volumes could have been different from  
29 what was in the spreadsheet.

30 THE PRESIDENT: As I understood your evidence, you were saying that was your position  
31 before the proceedings started, and therefore you did not feel that this was a sound basis.  
32 When you heard Mr. Sellick's evidence affecting, potentially, depending how one  
33 interpreted it, a further 38% by volume, that reinforced the view, gave you an additional  
34 reason. Is that so?

1 A. Yes, and it was an additional 35% by volume.

2 THE PRESIDENT: 35%?

3 A. Yes. Yes.

4 MR. SCANNELL: But Ms. Webster, I am not asking about the period after the contracts that  
5 appear on this spreadsheet come to an end. I am asking whether you accept that at the time  
6 of the agreements that are recorded in the Sellick spreadsheet, where the deal is a direct deal  
7 you accept that the prices that appear on the spreadsheet are the prices that were paid by  
8 those pharmacies under their contracts?

9 A. So I perhaps would have been more confident of that prior to last Tuesday. Having heard  
10 the evidence from Mr. Sellick last Tuesday I am now not certain of that either.

11 Q. Why have you not incorporated your acceptance that the prices that are shown in this  
12 spreadsheet for those pharmacies are correct in the written evidence that you have submitted  
13 in these proceedings?

14 A. So, partly because it does not matter to me. If the prices were correct between January and  
15 July or January and April, then that is one thing, but that only tells me about those months  
16 and I am interested in understanding what the price of Seroxat was prior to the agreements  
17 being entered into, and that is at the end of 2001.  
18 So if I am missing six months of price information at a certain volume of sales, then that  
19 matters to me, and I do not believe that it helps that I know that the price before then was  
20 correct or not.

21 Q. Do you accept that under the Sellick spreadsheet many of the contracts lasted throughout  
22 2001?

23 A. On the basis of the spreadsheet and as I interpreted it prior to last Tuesday, I accept that  
24 59% of the volumes set out here would have had prices that would have lasted for the  
25 majority of 2001. Some did end, I think, in September possibly, so they did not apply for  
26 the whole of 2001.  
27 But having heard the evidence last Tuesday, I think that the majority of volumes here I  
28 could not be confident had a price that was in existence for most of 2001.

29 Q. Were you impressed by Mr. Sellick's evidence, which he gave live in these proceedings  
30 also, that the price for Seroxat did not change much after the prices reflected in his  
31 spreadsheet?

32 A. I did not -- perhaps I missed that part of Mr. Sellick's evidence.

33 Q. Okay.



1 A. I mean, I would note on that point that where we have a direct comparison between Mr.  
2 Sellick's spreadsheet and the CIMS data, which is Boots, we know that the price of the  
3 contract that Boots entered into -- actually, it was in July; it is not captured in the  
4 spreadsheet, but it started paying this price in July -- was lower than the price that it had  
5 been paying and was recorded in Mr. Sellick's spreadsheet, and I believe the figure is  
6 something like 1.3% lower.

7 Q. That is according to the CIMS 2001 data again?

8 A. That is correct. But with respect to Boots, we do not have such cause to be concerned about  
9 the Boots price that is in there. It does include the rebate, as I mentioned earlier. The only  
10 part of the rebate that it appears to be missing is the rebate for prompt payment.

11 Q. We can turn to that rebate in a moment, but for the moment can I just ask you whether it is  
12 correct to say that one of the reasons that you choose not to rely at all on the Sellick sheet is  
13 that if you look at the 2001 CIMS data, it suggests that in late 2001 GSK may have been  
14 selling Seroxat at prices 2.5% lower than it was in 2001?

15 A. So I would think I did put that in my report, and Dr. Stillman has pointed out that actually  
16 that decline appears to be created by these unknown customer entries that we talked about  
17 yesterday, and that if one is to remove those particular entries, then there is no longer a  
18 decline in the prices as captured in the CIMS data, with the exception --

19 Q. I do not think that is his evidence, Ms. Webster. What he actually says is that if you strip  
20 out the so-called dummy entries and the unknown customers which affect the 2001 prices in  
21 the CIMS data, you do not see a 2.5% fall, but he does accept that you see a 0.9% fall.

22 A. Yes, I was going on to say that, because Dr. Stillman and I agree that there is a decline for  
23 Boots and that is the 0.9% fall. The remainder of the fall appears to be created by the  
24 unknown customers.

25 To my mind that does not necessarily mean that one needs to remove the unknown  
26 customer entries. It simply means, I think, that one should not read too much into the price  
27 decline in the CIMS database, the CIMS pricing data overall, because if you have got  
28 reconciliations in volumes that come with a delay, you will inevitably then create this  
29 downward trajectory in the CIMS data where it is not necessarily real.

30 So to inform the extent to which prices fell in the second half of 2001, I am relying on two  
31 pieces of evidence. The first is in relation to Boots, and the second is that we see a small  
32 decline, I think it is in the region of 2.3 or 2.4%, in the parallel import prices. Given that  
33 we think that there is a relationship between GSK's price and the price of parallel imports,

1 then if we do see that decline in the parallel import prices, it would not be surprising to also  
2 see it in GSK's prices.

3 Q. To be fair to Dr. Stillman, I do not believe him to say that the reason why unknown  
4 customers should be stripped out of the 2001 data is because of this point. His evidence is  
5 that the unknown customer data should be stripped out of the 2001 CIMS data because they  
6 make no sense. What he is saying is that once one has done that, the change that one sees in  
7 the price is not 2.5%, it is 0.9%.

8 A. Yes, I was making a slightly different point.

9 Q. Pardon me, sorry.

10 A. I was just saying I was making a slightly different point, which is one should not take the  
11 view that because the unknown customer entries, when they are included, create a decline  
12 that looks slightly odd, that that would be evidence that unknown customer entries should  
13 be removed.

14 Q. Dr. Stillman suggests that consistent with the CIMS 2001 data generally, the CIMS 2001  
15 data for Boots is quite difficult to understand. For example, according to the CIMS 2001  
16 data, the price that Boots was paying in the period from January 2001 to July 2001 was  
17 £12.96.

18 Now, that is significantly higher, is it not, than the price shown in the Sellick spreadsheet  
19 that Boots was paying for the period from October 2000 to March 2001, which was only  
20 £12.55? That is right, is it not?

21 A. So once you take out an early payment discount of 2.778, the price at 12.96 falls to a price  
22 of 12.58, which is comparable.

23 Q. But this 2.778 further adjustment, that is just the paragraph 2.14(b) adjustment that we saw  
24 before, is it not?

25 A. Yes, it is.

26 Q. So you have simply applied a 2.778 adjustment to what CIMS tells you the 2001 Boots  
27 price is to get back down to £12.55, which is what the Sellick spreadsheet tells you the  
28 Boots price was?

29 THE PRESIDENT: I thought it comes to 12.58, does it not?

30 A. Yes.

31 THE PRESIDENT: In the Sellick spreadsheet it is 12.55, so it is not quite the same.

32 MR. SCANNELL: Not quite the same.

33 THE PRESIDENT: But it produces a figure that is consistent.

34 MR. SCANNELL: Yes.

1 THE PRESIDENT: Is that right?

2 A. That is correct.

3 THE PRESIDENT: That was reassuring to you, presumably?

4 A. Exactly so.

5 MR. SCANNELL: There is no suggestion at all, is there, Ms. Webster, that any particular

6 customer received a 2.778 rebate for early payment, is there?

7 A. So in the spreadsheet there is identified under "returns and allowances" a figure -- a value

8 attributed to rebates that are given for returns and allowances, and that same figure appears

9 in a sheet which is labelled "early settlement". That figure appears to be calculated on the

10 basis of it being 2.778 times the value of sales.

11 Q. Would you at least accept that it would be a rather odd figure to apply for early settlement

12 for any individual customer, to say, "Thanks very much for paying early, here is a 2.778%

13 rebate"?

14 A. I am not sure I can comment on that. It depends how GSK ran its business.

15 Q. Can we see, then, what happened, moving away from the Sellick spreadsheet to the generic

16 wholesaler mark-ups.

17 Now, the decision proceeded on the basis that there was an 11.25% mark-up for IVAX and

18 20% for each of GUK and Alpharma. That is right, is it not?

19 A. That is correct.

20 Q. What you have done is you have changed those mark-ups, have you not?

21 A. I have.

22 Q. Is that yet another error in the decision?

23 A. So I do not believe I would call it an error. In relation to Alpharma, I believe there is a

24 footnote -- it could be 611 -- that deals with this.

25 The CMA says in that footnote that it has taken a conservative approach to the mark-up that

26 it has applied. I think it acknowledges in there that the 20% mark-up for Alpharma is

27 actually a 25% mark-up -- sorry, the 20% margin to which Andrew Collier refers equals a

28 25% mark-up, but the CMA, for whatever reason, has chosen something which it views as

29 more conservative and has gone with the 20% mark-up.

30 Q. So as I understand the position, the CMA asked Teva, which is the same as IVAX, what its

31 mark-up was. They did that in a Section 26 notice, and Teva responded and they said that

32 their mark-ups ranged from 5% to 17.5%.

1 The CMA, at least, in the decision took Teva at its word and applied a mid-point between  
2 those two. Is that a fair summary of what the decision says in that footnote that you are  
3 referring to?

4 A. That is correct.

5 Q. Could we have a look, please, at what you have done with that. If we can go to the joint  
6 report, which is in bundle {I/2/34}. Thank you.

7 So this is, I believe, consistent with what you have just said. If we can take it from the  
8 paragraph beginning "When expressed", you say:

9 "When expressed as a mark-up on the [price to wholesaler], which is necessary for our  
10 analysis, this would equate to a mark-up of between 20% and 25%."

11 Then:

12 "The range of margins given by Teva that were specific to paroxetine were 5% to  
13 17.5%, giving a range for mark-ups of 5% to 22%."

14 So, again, consistent with what you have said, you have translated what Teva said from  
15 margin to mark-up and you have looked at the range for mark-ups?

16 A. That is correct.

17 Q. But whereas the CMA was content to apply a mid-point between the two percentages that it  
18 came up with based on what Teva told it, your approach is not to take the mid-point but  
19 instead to apply a 20% mark-up to IVAX; is that not right?

20 A. That is correct.

21 Q. The mid-point between 5% and 22%, just so that we have it in mind, is 13.5%. Is that  
22 right? Why is it that you have not taken a mid-point like the CMA did?

23 A. So --

24 Q. Sorry, I should say, Ms. Webster, to be clearer about this, let us assume that you are right in  
25 translating the margins into the mark-ups, why have you not taken a mid-point off the mark-  
26 ups?

27 A. So, I mean, I believe that it is helpful to place a bit of context around this.

28 So my understanding of the ex post analysis that was done in the decision was that not a lot  
29 of weight was put on it. So I believe it is paragraph 7.42 of the decision states that  
30 something along the lines, and I have quoted it, I think, in the joint statement, of it is not  
31 necessary to look at this ex post analysis, but perhaps it is instructive just to see and then see  
32 what that shows.

1 In the light of that, I think it is fair that the CMA itself, when it put the decision together,  
2 did not do the in-depth analysis on ex post prices that has subsequently been done by Dr.  
3 Stillman and myself. So we have taken the analysis further as part of these proceedings.  
4 My review of the evidence, and taking a different position to the one that was taken in the  
5 decision, is based on, I think, the challenge that Dr. Majumdar made in his report where he  
6 said he thought it was inappropriate for GUK's mark-up to be 20%. So he sort of reopened  
7 that debate.

8 So when I looked at this, I thought, okay, I will now make an assessment on the basis of the  
9 evidence that is before me. I started with what I felt to be the strongest piece of evidence,  
10 which was the evidence in relation to Alparma's mark-up. So we know that the majority of  
11 sales that Alparma made were to its scheme customers where Alparma was in direct  
12 contact with the pharmacy clients. They were agreeing the price to the pharmacy and  
13 Alparma tells us that the mark-up that is applied was 25%, and that was the cut that went  
14 to the wholesaler that it used as its business partner to get that product to the pharmacies.  
15 We also know from paragraph 21 of Andrew Collier's witness statement in these  
16 proceedings that in setting that price he had no intention of setting a price that was  
17 particularly different from the other generics or market price at the time.

18 So that gives me a further piece of information in terms of locking down actually the price  
19 to pharmacy for IVAX and for GUK, because they would have been -- at the time when  
20 Alparma was entering the market, there were very, very few parallel imports. So to the  
21 extent that there was a market price to meet, it would have been IVAX and GUK's price.  
22 Then I have said, okay, what would be the mark-up that I would need to apply to the IVAX  
23 and to the GUK price to wholesalers that would get me to a position where I have got the  
24 same, or roughly equivalent price to pharmacy between the three entrants? When I go  
25 through that process, I get to a mark-up for 15% for GUK and a mark-up of 20% for IVAX.  
26 So that feels to me to be a more robust way of thinking about the relevant mark-ups and one  
27 that is consistent with the evidence, and more robust than the approach that the CMA took,  
28 to saying: I will choose the mid-point of the range that was provided in the Teva response to  
29 the CMA's Section 26 notice.

30 Q. Thank you, Ms. Webster. Can we just break that down into its component parts.

31 First, is it your position that Mr. Collier's evidence relating to the Alparma wholesale  
32 mark-up is stronger evidence about what IVAX's wholesale mark-up was than Teva's direct  
33 evidence saying what its mark-up was?

1 A. Yes. Thank you for that question because that introduces the final piece of the analysis  
2 which I did, which was to look at the consistency between the mark-ups that were coming  
3 out of my approach, based on the Alharma evidence, with the evidence that we had  
4 directly in relation to IVAX and GUK.  
5 So for IVAX I ended up with a mark-up of 20%. So I then looked at the range of 5% to  
6 22%. 20% is within that range, albeit towards the top end, but it is within that range. In  
7 Teva's response they gave no indication, as I noted in my report, of where in that range the  
8 mark-up -- the true mark-up would lay. But that seemed to be consistent to me. Also  
9 consistent with the fact that in general terms when Teva was making sales to its scheme  
10 customers, the wholesalers were making a margin of 17 to 20%, which is a mark-up of 20 to  
11 25%. So that seemed inconsistent to me. Equally, in relation to GUK when I did that  
12 check, we have got a much bigger range of margins to be consistent with for GUK of 5 to  
13 100%.

14 Q. Again, Ms. Webster, can I repeat the same question. Is it your position that Mr. Collier's  
15 evidence about what the Alharma wholesale mark-up was is stronger evidence of IVAX's  
16 wholesale mark-up than IVAX's own direct evidence about what its mark-up was?

17 THE PRESIDENT: As I understood the previous answers, Ms. Webster was not relying on Mr.  
18 Collier's evidence of the GUK or IVAX mark-up. She was relying on Mr. Collier's  
19 evidence of the GUK and Alharma price to pharmacies that wholesalers charge for their  
20 products, and she was working back to calculate the mark-up that would produce that price.  
21 Have I misunderstood you?

22 A. No, that is exactly right. Then I note there is consistency with the Teva response.

23 THE PRESIDENT: So it is based on Mr. Collier's evidence of the prices that were charged to  
24 pharmacies, which I do not think, or at least I have not seen, IVAX gave evidence on their  
25 prices to pharmacies.

26 MR. MALEK: From my perspective, the question has been asked and answered so you are  
27 asking it for a second time.

28 MR. SCANNELL: Very well, Mr. Malek. I am grateful.

29 MR. MALEK: Thank you.

30 MR. SCANNELL: Can we then look at what Mr. Collier actually said about what was going on  
31 with IVAX's wholesaler mark-up. His witness statement is at bundle {F/1/1}.

32 So this is Mr. Collier's evidence in these proceedings. Could we turn, please, to paragraph  
33 20 of this {F/1/7}, and at paragraph 20 this is what Mr. Collier says:

1 "In relation to GUK's argument that '[t]here is no basis to assume that [my evidence]  
2 applies across the board and/or indeed bears any relevance to GUK's position' ... my  
3 recollection is that, unlike Alparma, GUK did not have a scheme in place at the time  
4 and therefore its prices to wholesalers may have been individually negotiated. I recall  
5 that GUK principally sold to short-line wholesalers but I do not know if it sold  
6 paroxetine to short-line wholesalers. For that reason, I think that it is difficult to say  
7 what GUK's average discount would have been."

8 He goes on to say {F/1/8}:

9 "It is likely to have varied from customer to customer."

10 Then he goes on to say:

11 "I am also unable to say for sure what IVAX's wholesale discount was at the time,  
12 because I recall that it, too, had a different customer base to Alparma."

13 Now, he is not saying there that he knows what IVAX's wholesale mark-up is; that is right,  
14 is it not?

15 A. That is right.

16 Q. If we could just take that much. I believe that where you are coming from with this is that  
17 you rely on paragraph 21, where he says, in the middle of the paragraph:

18 "As the person who was responsible for setting prices for Alparma's paroxetine  
19 product, I can also say that it was never my intention to sell paroxetine at prices that  
20 were much different from the prices charged by IVAX and GUK."

21 So you take that as him saying, "It was never my intention that the prices that we actually  
22 ended up charging to pharmacies were different"; is that right?

23 A. That is correct.

24 Q. But he is not, again, there saying anything about IVAX's wholesaler mark-up, is he? He is  
25 just talking about the pharmacy price?

26 A. That is right.

27 Q. Okay.

28 A. So it is -- sorry, if I might add. It is my view that we can then infer from paragraph 21 a  
29 knowledge of Alparma's price to pharmacy, what the mark-up would have been for GUK  
30 and IVAX, and its not -- we do not need for Mr. Collier to have a view on what IVAX or  
31 GUK's mark-up would have been.

32 Q. Ms. Webster, is Mr. Collier not being very careful in how he expresses himself in this  
33 paragraph? He is simply saying that he was locked in to the Alparma scheme for his  
34 paroxetine products. So he did not have much room for manoeuvring no matter what IVAX

1 was doing. He does not know what IVAX's wholesaler mark-up is, but it was not his  
2 intention that the final price charged to a pharmacy would be that much different. He is not  
3 saying that he ended up charging the same price as IVAX did, is he?

4 A. So I think there is a missing step in that description. So what Andrew Collier clearly also  
5 had was visibility of the prices that were charged for the generic at the pharmacy level. We  
6 know that from his email to Torben Laursen of 14th October 2002 where he says that  
7 market price is £13.15 and therefore, working back from that and knowing my wholesalers  
8 will take a 25% mark-up, I will then -- we will have an average selling price of £10.50.

9 Q. Do you accept in principle that an expectation or an intention that something might end up  
10 being the case is not the same thing as saying that it did happen?

11 A. In general terms.

12 Q. So is it not fair to say that just because Mr. Collier said that he would not intend to sell to  
13 pharmacies at prices very different from IVAX, that does not mean that you can simply  
14 align IVAX's wholesaler mark-up to Alpharma's? That is obviously right, is it not?

15 A. So I think that this is a fair challenge. What I -- I mean, I hesitate somewhat with this  
16 example because it is using a single data point and one thing that we have learnt from this  
17 data is that that can be somewhat dangerous.

18 In that email of 14th October 2002, he references the price -- the market price at that point  
19 of £13.15. If I look at the price that GUK was charging, or that I had estimated that GUK  
20 was pricing, based on a 15% mark-up, its price in that month was £13.07. So it seems to me  
21 that, on that basis, Andrew Collier had good knowledge of what the price was and then that  
22 was the price that was being charged by GUK. I do not look at the IVAX figures because of  
23 the volatility in the figures that Dr. Stillman and I have agreed makes them difficult to  
24 interpret.

25 Q. But he is not saying that he knows what the IVAX wholesaler mark-up was. I think we  
26 have agreed to that much at least.

27 Back to the joint report, then, page {I/2/34}. Having refreshed your memory of what Mr.  
28 Collier has said in his report, do you accept that the sensible thing for you to do as an  
29 economist, even if you feel that there was an error in the decision and that we should not be  
30 talking about margins, we should be talking about mark-ups, was to take a mid-point of the  
31 range of mark-ups that appeared from Teva's direct evidence of what its mark-ups were?

32 A. No, I do not --

33 Q. You do not accept that?



1 A. I do not accept that. I think it makes more sense to work with the evidence that we know,  
2 starting with the Andrew Collier evidence on his mark-up, on his price to pharmacies, and  
3 then to back out something which is consistent with that for the other suppliers and the other  
4 generics, and then to check consistency of those figures with their own stated responses.

5 Q. Are you sure, Ms. Webster, that you are not overreaching on this point given that Teva has  
6 said directly to the CMA in a Section 26 response, which is like saying it under oath, what  
7 its margins were? Do you not think that it should be a mid-point that you take once you  
8 have decided what the mark-up was?

9 A. So Teva has not said in its response that in most likelihood the mid-point would have been  
10 appropriate. Had they said that, I think that would be a different thing. But they have not  
11 said that. They have said there is a range, and that range encompasses the point which -- the  
12 20% mark-up that I have identified using the alternate method.

13 THE PRESIDENT: When you take a single percentage like that, does one infer that is an  
14 average?

15 A. Yes.

16 THE PRESIDENT: You are saying that is the average mark-up across the product?

17 A. Exactly so.

18 MR. SCANNELL: Mr. President, in the interests of the shorthand writers that might be a  
19 convenient place to take a break.

20 THE PRESIDENT: Yes, thank you very much. We will take 5 minutes.

21 ( 11.50 am) (A short break)  
22 (11.58 am)

23 THE PRESIDENT: Yes, Mr. Scannell.

24 MR. SCANNELL: Parallel import prices next.  
25 It has been explained to you presumably, Ms. Webster, that nobody in this case is appealing  
26 against any finding in the decision relating to PI prices. Are you aware of that?

27 A. I was not particularly, but thank you.

28 Q. Okay. None of the appellants are saying that the PI price in the decision is wrong. That is  
29 the position. You have, however, suggested that they may be wrong too; is that right?

30 A. So I have noted -- I forget which footnote it is in the CMA decision. Is it 616?

31 Q. 616.

32 A. Thank you -- that the CMA has provided an estimate of parallel import prices and that the  
33 CMA notes that those parallel import prices may be overstated.

1 Because it is of relevance to understanding how the overall weighted average price of  
2 paroxetine evolved over time following the supply agreements, I believe that it is necessary  
3 to take a view on whether parallel import prices were overstated in the decision or not.

4 Q. Yes. Just so that the Tribunal can understand where you are coming from on that point, is it  
5 right to say that if the 2001 parallel import price used in the decision were to be adjusted  
6 downwards, the effect would be that the average 2001 prices would also go down?

7 A. That is correct.

8 Q. That would then make it less likely that a price reduction could be seen between 2001 and  
9 2003?

10 A. That is correct.

11 Q. Shall we have a look, then, at the footnote. It is in the decision, as you say, at page 168,  
12 bundle {V/1/168}. The footnote as you say -- very impressive -- is 616.

13 I think we can take it from just after mid-way through. There are some parentheses and  
14 then the words:

15 "... it appears unlikely that the price data supplied by parallel importers was adjusted  
16 for rebates. In this regard, the CMA considers that [PI] prices recorded in this section  
17 appear to be higher than they would have been in practice, because it is unrealistic for  
18 parallel import prices to exceed GSK's Seroxat prices ..."

19 So just to be clear, the CMA in the decision did not actually amend their PI prices because  
20 of this point, it is just an observation they made; is that right?

21 A. That is correct.

22 Q. Over the page {V/1/169}, this is figure 3.1 that Professor Shapiro likes to refer to. There,  
23 one can see the observation that the CMA is making.

24 The parallel import price, if I understand it correctly, is the dotted line and the black line is  
25 the average paroxetine 20mg price, and the observation that is being made by the CMA is  
26 that the dotted line in 2001 should not be above the black line.

27 Sorry, you will have to say yes --

28 A. Yes.

29 Q. Thank you, Ms. Webster.

30 Just as a preliminary remark on this graph, it is wrong, is it not, this figure, because of the  
31 GSK wholesaler mark-up issue in 2001?

32 A. So the Seroxat price in 2001 will be somewhat too low because it does not include the  
33 wholesaler mark-up.

1 Q. Yes. So all things being equal, you would expect the black line to be fractionally higher  
2 than it is in this graph --

3 A. In 2001.

4 Q. In 2001, yes. Thank you.

5 THE PRESIDENT: The PI price goes above the Seroxat price here in 2002 on quite a number of  
6 occasions, does it not? Is that right?

7 A. Yes, that is correct. It was those -- in Dr. Haydock's report, she refers specifically to those  
8 periods during 2002 when the parallel import price was above the price of Seroxat, and she  
9 does that because she does not then need to rely on assumptions regarding 2001 Seroxat  
10 prices.

11 Q. Just to supplement what you said there, Ms. Webster, as you go forward in time the PI data  
12 is actually getting thinner and thinner, is it not, because the PIs are disappearing over time?  
13 That is also correct, is it not?

14 A. So the price information that is provided is relevant to a smaller number of sales.

15 Q. Dr. Stillman has commented on the footnote that we have just looked at, footnote 616. He  
16 has said, and he is right, is he not, that there's nothing in the documentation that was given  
17 to the CMA by the parallel importers themselves to suggest that their data had not been  
18 adjusted for rebates?

19 A. So on that, I believe that the CMA asked Sandoz specifically -- sorry, the CMA asked for  
20 data that was net of rebates, and I believe that that was the case across the board for all  
21 suppliers that were providing their evidence.  
22 The evidence that came back, my understanding is often that it was not net of rebates, and  
23 as a result of that there was a series of exchanges between the suppliers and the CMA to  
24 seek to become more confident about what the level of rebates would have been. So there is  
25 a long exchange, I believe, in relation to Teva in order to try to get at the level of rebates  
26 that would have applied to sales of paroxetine, and therefore to get to that net of rebates  
27 figure.

28 I take from that that it is quite difficult for suppliers to deliver figures which are net of  
29 rebates, and part of the reason for that is that I understand that these rebates are paid across  
30 a set of sales, different products, not just specific to paroxetine.

31 Now, I believe in relation to Sandoz that Sandoz did explicitly tell the CMA that it was not  
32 aware of whether the figure that it had provided was net of rebates or not. So the CMA had  
33 asked the question and Sandoz had not been able to confirm whether the figure was net of  
34 rebates or not. So it is possible that it was not net of rebates. Similarly, given -- I do not

1 know the position in relation to Waymade, but given that it was difficult for the suppliers to  
2 work out rebates and then identify them specific to paroxetine and apply them, I think it is  
3 conceivable that the Waymade figure may also not be net of rebates although factually it is  
4 not known.

5 Q. Okay. I think that we can leave it at that, that factually we do not know, but they are not  
6 saying in terms that they have not adjusted their figures for rebates?

7 A. Sorry, is that a question?

8 Q. Yes, it is a question. Is that your understanding, that none of the PI importers actually told  
9 the CMA, "Here is our data, it has not been adjusted to take account of rebates"?

10 A. So they have not said it in that explicit terms. Sandoz, in answering the question "Is it  
11 adjusted for rebates?", is unable to confirm one way or the other.

12 THE PRESIDENT: How many PI suppliers did provide data to the CMA?

13 A. Only two, Waymade and Sandoz. That is my understanding.

14 MR. SCANNELL: There was also some information from the British Association of European  
15 Pharmaceutical Distributors; is that not right?

16 A. I am not sure whether that was actual price information. That is the trade body, is it not, the  
17 BAEPD?

18 Q. It is.

19 A. They answered some general questions which the CMA asked, but I am not sure they were  
20 in a position to provide pricing data.

21 MR. GLYNN: How many parallel importers were there at this time?

22 A. I do not know the answer to that. I think there were quite a lot, of which Waymade and  
23 Sandoz were two of the more important ones. But in relation to the sales of parallel imports  
24 of paroxetine, collectively they did not sell more than 20% of the PI volumes.

25 MR. SCANNELL: Now, Ms. Webster, you make a number of points in relation to PI prices.

26 They are not all very easy to follow, but that is not a criticism at all. It is just complicated  
27 stuff.

28 Your first is that the PI prices used in the decision are higher than Seroxat prices for the  
29 period May 2002 to November 2003. Is that not right?

30 A. I do make that point, yes.

31 Q. If you would like me to turn up anything, do let me know, but I think that is pretty  
32 uncontroversial.

33 Now, Dr. Stillman has responded to that point in the joint report, and the point that he  
34 makes is this. He says that because the PI price that is used in the decision for this period is

1 distorted effectively by the fact that Waymade's prices, which is one of the PI importers,  
2 went way above £14 for four of the months in question, and those months were June, July,  
3 September and November 2002, and they were months where Waymade's volumes were  
4 vanishingly low -- 0.4%, 4.7%, 9.4% and 0.04% of total PI volumes -- I think the point that  
5 he is really making is that Waymade's volume of total PI sales was usually much higher  
6 than that, was it not?

7 A. So it had been higher in previous months. I think on average over the period January 2001  
8 through to sort of when parallel imports started to decline hugely, I think it was on average  
9 something like 15% of total market volumes. I think there may be a reference in the joint  
10 statement on that if we want the exact detail.

11 To my mind, of those four months that Dr. Stillman draws attention to where he says the  
12 sales were very low, in two of those months they were supplying 4.7% and 9.4% of total  
13 parallel import volumes that were coming into the UK. That is not de minimis. If they  
14 were only supplying on average 15% and now we are down at 9.4 and 4.7, then it is not  
15 clear to me that those two months, the price data for those two months can be disregarded.

16 Q. What about the 0.04% month and the 0.4% month?

17 A. I would have more difficulty saying that those months should be taken as representative  
18 prices.

19 Q. Yes, that seems fair.

20 Dr. Stillman makes the point -- I think this is consistent with what you said -- that in August  
21 2002, for example, when Waymade accounted for 37.7% of total PI volumes, the price to  
22 pharmacy that Waymade was charging then was £13.22. Is that your understanding as well  
23 of the position?

24 A. I do not remember the figures offhand, but they do not strike me -- I am sure that that is  
25 what it is in the data. I do believe that was an outlier as a month, though. I am not sure that  
26 -- if it helps we can go to the data, but I am not sure that Waymade made sales that were  
27 quite that high in most months.

28 Q. Okay. Now, by December 2002, just to continue the timeline a little bit, Waymade's  
29 volumes had reached zero; is that not right?

30 A. Again, I do not recall the precise details, but that would not surprise me. Parallel imports  
31 had sort of pretty much vanished by the end of 2002.

32 Q. Yes. They were being cannibalised by other suppliers.

1 Is it not right that if the CMA had stopped using Waymade's data to determine PI prices  
2 when Waymade's volumes had declined to such low levels around June 2002 and had  
3 instead, for example, used adjusted IMS prices --

4 THE PRESIDENT: You say June 2002?

5 MR. SCANNELL: Correct.

6 THE PRESIDENT: In September 2002 they were 9.4%?

7 MR. SCANNELL: Yes.

8 THE PRESIDENT: I think Ms. Webster was saying that is not such a low volume, if I understood  
9 her evidence.

10 MR. SCANNELL: If I can put it this way, if they had transitioned to using adjusted IMS data  
11 before December 2002 instead of waiting for the volumes to reach zero, this point, that the  
12 PI prices used in the decision are higher than the Seroxat prices between May 2002 and  
13 November 2003, would not arise. Is that not the case?

14 A. Factually speaking, if I ignored those data points then I would no longer see a problem, but  
15 I am not sure that it is right to ignore those data points.

16 Q. So you say that the 9.4% outlier and, I think, to be fair to you, the 4.7% are the wrinkles that  
17 prevent you from accepting my point; is that right?

18 A. I am not sure that -- it seems an odd point to make, slightly. I have got some price  
19 information. That price information runs up until sort of October. I can't remember the  
20 exact details. Those prices carry information which are relevant to the issue that we are  
21 trying to establish. I think it is right that they should be taken into account.

22 Q. Do you accept that even if, for the sake of argument, the 2002 and 2003 PI prices used in  
23 the decision were too high, let us just take that for the sake of argument, that would not  
24 mean that Waymade's prices in 2001 were too high?

25 A. It depends whether you thought there was something systematic about the price information  
26 that had been provided by Waymade and Sandoz. So, for example, missing rebates, the  
27 figures not being net of rebates, would be something that would be systematic and would  
28 affect 2001, 2002, 2003 data.

29 Equally, the other explanation that the CMA puts forward about possibly being -- Waymade  
30 and Sandoz being suppliers that had average prices to their customer base above the average  
31 of the rest of parallel imports, again, one might think that that is something systematic and  
32 applies across all years.

33 Q. Do you accept that the PI prices that really count in this case are the 2001 PI prices, on the  
34 basis that by 2002, by the end of 2002, PI had disappeared completely?

1 A. Yes, I do agree with that, and also for another reason, which is in 2001 approximately 30%  
2 of market volumes were supplied by parallel imports, and then a much smaller proportion  
3 in 2002, virtually non-existent in 2003.

4 If you include within your weighted average price in 2001 a price which you know to be  
5 inflated, and that later disappears, you would be overstating systematically the price decline  
6 between 2001 and later years.

7 Q. Well, with respect, you do not know that the 2001 price is overstated, do you? You simply  
8 make an observation that they might be?

9 A. So in the joint report, I also produce -- this is at statement 21 -- a chart which shows my -- a  
10 comparison of the parallel imports prices that were used in the decision with my estimate of  
11 the price of Seroxat in 2001.

12 THE PRESIDENT: Sorry, just a moment.

13 MR. TURNER: I/2/36.

14 THE PRESIDENT: You are taking us to point 21 on page --

15 A. 41.

16 THE PRESIDENT: Page 41, and it is that chart there {I/2/41}.

17 A. That is right. So Dr. Haydock chose not to look at the comparison of parallel import prices  
18 with the price of Seroxat in 2001 because at the time when she was writing and the work  
19 that had been done between her and Dr. Stillman, there was some uncertainty about the  
20 price of Seroxat in 2001.

21 In my view, and given the discussion that we have had earlier today and yesterday, the level  
22 of uncertainty in relation to the price of Seroxat in 2001 has greatly reduced. So we are  
23 comfortable in relation to the mark-up and there is common ground between Dr. Stillman  
24 and myself that a 3.3% mark-up should be applied, and we have talked a lot this morning  
25 about the range of reasonable assumptions in relation to rebates.

26 There is then a separate issue which we have not yet talked about, which is quite what price  
27 we should be looking at for Seroxat: should it be an open price which might be otherwise  
28 the price on uncontested sales, or whether it should be the blended price.

29 THE PRESIDENT: Can we park that one?

30 A. We can. The top line allows us to park that one and we are just looking at blended price  
31 there.

32 It is clear that in some months the price of parallel imports that was used in the decision is  
33 marginally above that blue line. In other months it is below, but it is very close. Again,  
34 with the nature of the data in this case, I have tried not to take one piece of evidence, one

1 piece of data and to reach a conclusion on the back of it. I have tried to look at where there  
2 are different pieces of evidence that will point in one direction.

3 So when I look at this chart and I also think about the contemporaneous evidence,  
4 particularly around -- there are two parts to that evidence. One is an expectation that the  
5 parallel imports would be displaced by generics at a similar price. Sorry, the generics did  
6 not need to undercut the price of parallel imports. This does not -- this picture here does not  
7 look consistent with it. If the parallel import price had been lower that would be consistent  
8 with that contemporaneous evidence.

9 The other element of the contemporaneous evidence is evidence from Mark Reilly and from  
10 Helen Toogood reporting what they thought the market price of parallel imports was at the  
11 time. Again, that is placing it at a discount, more marked discount than appears in this  
12 chart, the discount of Seroxat. So that is the other piece of evidence.

13 Then I have also looked at Mr. Sellick's data set and heard what he says about the likelihood  
14 that Seroxat would have been sold at a premium to parallel imports and the reasons for that.  
15 So taking that evidence in the round and looking at 2001 again, this chart that is here to me  
16 looks inconsistent. It looks like the parallel import price was overstated in the CMA's  
17 decision.

18 MR. SCANNELL: Thank you, Ms. Webster.

19 Well, let us look, then, at the point that you make about PI prices in the decision and  
20 comparing those with the 2001 Seroxat prices. Can I just be clear that what you are relying  
21 on to make that point is, again, the CIMS 2001 data?

22 A. That is correct.

23 Q. Now, can we just see how you have actually put it in the joint statement. {I/2/40} at the  
24 bottom of the page.

25 You say there:

26 "I have looked at the data for 2001 and I find that, using my base case rebate  
27 assumptions ..."

28 Just pausing there: not the sensitivity, just your base case?

29 A. That is correct.

30 Q. "... the [price to pharmacy] of [PIs] were higher than GSK's average [price to pharmacy] of  
31 Seroxat in four of the 12 months of 2001 ..."

32 If you just pause there.



1 So looking, then, at page 41 across the page {I/2/41}, this is where you insert your graph.  
2 Your parallel import prices is the dotted black line and the GSK price with the Webster  
3 base, as you call it, is the light blue line.

4 So the observation that you are making is that this dotted black line should not be above the  
5 blue line at all, but you observe that it is for four months of 2001. Just so that the issue is  
6 framed. Is that right?

7 A. Yes, I think that is possibly slightly narrow framing.

8 So I make two points: firstly, that point about the parallel import price being above the blue  
9 line in four months, but a second point, which is that in four of the remaining eight months,  
10 the parallel import price is within 1% of the blue line.

11 Q. Can we agree to this much: that if you do not use your base case assumption and you  
12 instead use, for example, the sensitivity, that is to say the 86% rebate allocation, this point  
13 does not actually arise?

14 A. So I have not created this chart using the 86% rebate assumption. The reason for that is that  
15 I have more faith in the 96% base case assumption for the reasons that I explained earlier.  
16 I do not know to what extent when you plot this that actually the point disappears  
17 completely. These prices are at very similar levels, as can be seen. The difference between  
18 my base case and my sensitivity is not very big.

19 MR. GLYNN: May I just --

20 MR. SCANNELL: Sorry.

21 MR. GLYNN: Why was there the dip in February 2001 in the blue and the brown line?

22 MR. SCANNELL: Mr. Glynn, I will be getting to that --

23 MR. GLYNN: Forgive me.

24 MR. SCANNELL: -- in less than five minutes.

25 Obviously something odd is going on in February. That is fair, is it not?

26 A. Yes.

27 Q. Have you plotted out the graph taking out the customer unknowns that we spoke about?

28 A. I have not plotted this graph taking those out, but I can tell you now which months they  
29 would affect, which is August and November.

30 Q. 2001?

31 A. Yes. That there would not be any material changes to the other months.

32 Q. Yes. We might be able to go some way towards seeing what the position would be had the  
33 graph been plotted on these alternative bases if we go back to page 36 of the joint report  
34 {I/2/36}.

1 These are two figures which were inserted into the joint report by Dr. Stillman. Now, they  
2 are dealing with a completely different question. They are dealing with the question of  
3 what the right generic wholesaler mark-up to apply should be. But we can look at them for  
4 this point because we are looking at the 2001 position here, and the generic wholesaler  
5 mark-up point is a point that arises further down the graph.

6 Now, the red line here represents the Seroxat price. Do you see from the bottom of the table  
7 -- this has been taken from your report -- your table 5, column 2; do you see that?

8 A. I do. So that is using my alternative case, so the sensitivity in relation to --

9 Q. That is precisely the point, actually. That is precisely the point, that if you do not use the  
10 base case but if you use the sensitivity, this is more what the graph is likely to look like.  
11 Here, we see that the Seroxat price is always higher than the PI price except for this odd  
12 month of February. Do you see that?

13 A. I do.

14 Q. Now, as for February 2001 the CIMS 2001 data for February 2001, insofar as it relates to  
15 Boots, which is by far the biggest customer, is obviously wrong, is it not?

16 A. I have to dredge my memory back to this February account. I believe there is a -- I cannot  
17 now remember whether it was volumes or whether there was a rebate payment associated  
18 with Boots. I think it could be a rebate payment that may have been applicable to sales that  
19 took place over the preceding three months and that would have artificially depressed the  
20 February 2001 entry. Also, the February -- the January 2001 entry for Boots was probably a  
21 bit too high because it did not include that rebate.

22 Q. Yes. That is my understanding as well, that what actually happened was that -- well, we  
23 know that the price that Boots was paying up to March 2001 was £12.55 according to the  
24 Sellick spreadsheet, and according to CIMS 2001, in January of that year, which is during  
25 the Boots contract, Boots was actually paying £16, which is way, way above the right price.  
26 So we know that that is wrong, the January 2001 prices are wrong, and what seems to have  
27 happened in the CIMS system is that a reconciliation has been made for February with an  
28 artificially low price in February to cancel out the artificially high price in January. When  
29 you average them out they are all right.

30 A. Yes, I would not disagree with that.

31 Q. In fact, the February 2001 price, Mr. Glynn, is actually a negative price it is so low.

32 MR. GLYNN: Yes.

1 MR. SCANNELL: So what we are looking at here for February 2001, and it is perhaps worth  
2 dwelling on this, is yet another presentation issue with the CIMS 2001 data set. So is it not  
3 really the case that you should not be relying on this February 2001 data as if it is right?

4 A. So I think that if one looks -- I do not think that the data is wrong. I think if you look at the  
5 price in any one month and you were just relying on that single observation, then I would  
6 have some caution over doing that.

7 I think when we look at the year as a whole, then I am less worried about it. I think because  
8 there is the potential for the entry in February 2001 to relate to sales that were made at the  
9 very back end of 2000, then that might mean that the January and February entries in  
10 relation to the CIMS data might be treated with some caution with respect to Boots.

11 So I would suggest then that the solution there would be to -- one could possibly just take  
12 the last six months running up to the entry of IVAX and then one has got a nice period over  
13 which to observe prices in the run-up to the agreements.

14 I note that when you calculate the weighted average price of Seroxat over that period,  
15 actually you get the same as you do when you calculate the simple average of Seroxat  
16 prices over that period. That would suggest possibly that there are not some of these  
17 outliers that are creating noise in the data and that could be an alternative base.

18 Now, I have chosen for consistency with the work that has been done previously to start at  
19 the beginning of January, in 2001. But, you know, one could start slightly later and avoid  
20 that problem.

21 Q. With respect, Ms. Webster, the point that you make on page 40 of the joint statement, which  
22 we looked at, relies directly on this obviously wrong February data, because you say that for  
23 four months of the year the parallel import price is higher than the Seroxat price.

24 You are not averaging it out over the year, you are making a point specifically in relation to  
25 February?

26 A. I am making a point in relation to eight months of 2001, four of which I find that the price  
27 of parallel imports is above the price of Seroxat, and one of those months is February but  
28 the others are not. Then I make a point that in another four months you get a price of  
29 parallel imports that is within 1%.

30 THE PRESIDENT: I think you accept the February price is probably not one one should rely on?

31 A. I think that is correct.

32 THE PRESIDENT: To emphasise the four is a bit strong if one of them is a questionable and,  
33 indeed, seemingly wrong price.

1 MR. SCANNELL: Would you accept, then, that where we come out on all of this is that this  
2 point about the PI price being higher than the 2001 Seroxat price, it only actually works if  
3 you either repeat the error in the statement about wholesaler mark-ups which are missing  
4 from the figure 3.1 that we looked at, or if you use your adjustment to the CIMS 2001 data,  
5 which is your base case, with the adjustments that you like for the CIMS 2001 data?

6 A. So I am comfortable that the point still stands on the basis of the base case estimate that I  
7 have made and the price of Seroxat, which I believe to be more reliable than the alternative  
8 case. I also believe that that is consistent with the other evidence that I mentioned earlier,  
9 so the contemporaneous evidence and the evidence in Mr. Sellick's spreadsheet.

10 Q. Thank you, Ms. Webster.

11 My apologies, Ms. Webster. Now, Dr. Stillman has compared the PI prices in the decision  
12 with the PI prices shown in the CMS export spreadsheet, that is the Sellick spreadsheet, and  
13 he has found that the decision's PI price is consistent with both the mean and the median PI  
14 prices in that spreadsheet.

15 Now, as I understand it, your response to that is that you should apply weights according to  
16 the estimates of how much each pharmacy would buy because bigger pharmacies are likely  
17 to get the best PI deals; is that right?

18 A. So I think I agree with the way that Dr. Stillman characterised it yesterday. So: in the ideal,  
19 what do we want to know? We want to calculate the average weighted price of parallel  
20 imports where we know what volumes were sold to which customers at what price. That  
21 would be the ideal.

22 I agree with Dr. Stillman that we do not know which customers were purchasing what  
23 volumes and what price they would pay. Sorry, we know the prices that they were quoted  
24 in that they -- that were used to populate Mr. Sellick's spreadsheet, but we do not know  
25 quite how much parallel imports was bought by each of those customers. Nor do we know,  
26 for the customers that are not included in Mr. Sellick's spreadsheet, what price they would  
27 have been able to procure parallel imports at or the volumes that they would have  
28 purchased.

29 My view, though, is that that does not necessarily imply that using a simple average is the  
30 safest way to interpret the data. So I believe that one cannot get away from attaching  
31 weights, some weights. Either you give all of those customers in Mr. Sellick's spreadsheet  
32 an equal weight, that is the simple average, or you seek to do something which gives a  
33 slightly greater weight to the larger customers and you would do that if you had a belief that  
34 the larger customers probably did buy more.

1 So then I think about, well, what is the evidence around customers that were purchasing  
2 parallel imports? The evidence is not as complete as we would want it to be. What I see  
3 from Mr. Sellick's spreadsheet is that it is quite clear that parallel imports were trying to  
4 chase down volumes or sell volumes to all of those customers that were in the spreadsheet,  
5 and there seemed to be some confidence from the parallel importers of the volumes that  
6 could be sold, and that can be seen by looking at the brand purchasing share, where I think  
7 Mr. Sellick described the brand purchasing share as that proportion of the pharmacist's  
8 purchases of paroxetine that GSK would make absent any deal. For example, in the case of  
9 Boots, I think the brand purchasing share was 12.5%.

10 Now, that means that if there was no GSK deal, 87.5% of Boots' purchases would have had  
11 to have been met by parallel imports because there were no generics at this time. So it is  
12 clear to me that the parallel importers were trying to make sales to the larger customers and,  
13 in fact, all of those customers across the board.

14 In terms of whether they did or not, there is two pieces of potentially relevant evidence.  
15 One is in relation to the fact that Mr. Sellick said that there are some customers in that  
16 spreadsheet, in the CMS export data, where there had not previously been a deal in place,  
17 and then they looked -- they then -- there had not previously been a deal in place, so it was  
18 then possible for GSK staff to go along and to look at the stocks that they had of parallel  
19 imports versus the branded product, Seroxat, and that then allowed them to get an accurate  
20 read on the brand purchasing share.

21 So we know that in some cases, because there was not a deal in place, that these customers  
22 had been purchasing parallel imports. The other thing we know, and I think it was in Mr.  
23 Sellick's witness statement, I believe it is paragraph 8, in the first and second line he says  
24 that: we believe that -- I think it is most customers would have purchased parallel imports  
25 when they were available.

26 So I think on the basis of those three pieces of evidence, it is not clear to me that the parallel  
27 importers were just selling to the smallest customers, the smallest pharmacy customers. I  
28 think that they were likely to have been making some sales to the larger customers. The  
29 larger customers were selling more paroxetine, therefore it is likely that they would have  
30 been -- possibly accounted for a larger portion of parallel imports that were coming into the  
31 country.

32 On that basis, it seems reasonable to move away from assuming equal weight to all  
33 customers in that spreadsheet.

1 Q. Ms. Webster, you have referred there extensively to the evidence that you say is relevant to  
2 this. Could I draw your attention to other evidence that the Tribunal has heard in relation to  
3 this.

4 Mr. Sellick has given evidence that the bigger pharmacies were in fact far more likely to  
5 attract the best deals from GSK to ensure that they did not buy parallel imports. In his  
6 words, an awful lot of focus was placed by GSK on ensuring that that happened, that they  
7 got a good deal, and so they did not buy parallel imports. Do you accept that?

8 A. I do accept that, and that was part of the reason for the weighting.

9 I took two approaches to weighting. One was to work out a weighted average price of  
10 parallel imports based on the expected volumes of each of the customers in the  
11 spreadsheets. That would give far greater weight to customers like Boots, whose volumes  
12 were dwarfing the other customers in the data set. Then, given this point that has just been  
13 referred to, I thought, well, I will remove from that weighting exercise the top five largest  
14 customers.

15 At this point, I am then removing two-thirds of the volume from Mr. Sellick's data set, and  
16 then I calculate the weighted average price for parallel imports based on the expected  
17 volumes of all other customers that remain in that data set. That gives me an estimate that  
18 the CMA's parallel import price was potentially overstated by in the region of 2.5%.

19 THE PRESIDENT: That is in the second approach.

20 A. That is right.

21 THE PRESIDENT: You said in the first approach, when you did it for everyone, what was the  
22 overstatement?

23 A. 5.4%, and I used that for the basis of my 5% sensitivity in my report. I tried not to be too  
24 precise about it given the nature of the data.

25 MR. SCANNELL: Ms. Webster, what the Sellick spreadsheet actually does is it records the  
26 contract which GSK has struck with pharmacies where a deal has been put in place. Is that  
27 your understanding of what is going on there?

28 A. Yes.

29 Q. The reason why GSK was striking those deals at all was to ensure that they did not buy  
30 parallel imports and they instead bought GSK's products. That is also right, is it not?

31 A. I believe that that was their intention, yes.

32 Q. Could I take you to a further document at bundle {H3/20/5}. Perhaps we could go back to  
33 page {H3/20/1} to see what we were looking at. Thank you.

1 This is a 9th November 2016 response by GSK to a request for further information made by  
2 the CMA about the Sellick spreadsheet, which was dated 24th October 2012.

3 Then going forward to page {H3/20/5} within this document, at number 6 the CMA asked:

4 "If it is known, please indicate whether each of the customers listed in [the Sellick  
5 spreadsheet] would have purchased paroxetine solely from GSK as a result of deals  
6 recorded in the [spreadsheet]."

7 The response came back:

8 "It is not possible for GSK to know this. While deals were calculated on the  
9 assumption that each pharmacy would purchase their paroxetine in the UK solely  
10 from GSK, GSK was not always able to detect instances where a pharmacy continued  
11 to purchase ... Pl. Having said that, GSK considers that it priced the deals attractively  
12 such that pharmacies would not consider it necessary to purchase Pl product. GSK  
13 therefore considers it a reasonable assumption that most pharmacies who entered into  
14 a deal with GSK as detailed in [the spreadsheet] would have purchased paroxetine  
15 solely from GSK in the UK and would have continued to do so for the duration of that  
16 contract."

17 Turning over to tab {H3/21/1} of the same bundle, this is a 16th November 2016 GSK  
18 response to a yet further request for further information from the CMA about the Sellick  
19 spreadsheet, which was dated 14th November 2016.

20 You see there from the paragraph beginning "the questionnaire", that GSK was relying on  
21 Mr. Sellick to make the point that we have just seen. That is right, is it not?

22 A. Yes.

23 Q. The evidence that Mr. Sellick himself has given -- if we could just turn up his witness  
24 statement in bundle {E/6/5}. He says there that the contracts put in place by the telesales  
25 team would not have been covered by the database. The database would also not have  
26 covered sales of products where GSK did not have product-specific discounts --

27 THE PRESIDENT: Sorry, which paragraph are you?

28 MR. SCANNELL: I am sorry, Mr. President. It is at the top of the page, (c).

29 THE PRESIDENT: Yes, thank you.

30 MR. SCANNELL: Second sentence:

31 "The contracts put in place by the telesales team would not have been covered by this  
32 database. The database would also not have covered sales of products where GSK did  
33 not give product-specific discounts for example because the relevant pharmacy had  
34 not entered into a deal with GSK."

1 So it is reasonably clear, is it not, that there was a cohort of pharmacies, they are smaller  
2 pharmacies, they are not on the spreadsheets, and they are the ones who are buying most of  
3 the PI because they are not getting any deals from GSK?

4 A. If I may, I would like to make two points in response to that.

5 Would it be possible, please, to go back to the first of the three documents that you showed  
6 me where you referred, I think, to a paragraph at the bottom of the page?

7 THE PRESIDENT: It is {H3/20/1}, is it?

8 MR. SCANNELL: Yes, certainly. {H3/20/5} Is that the paragraph you have in mind?

9 A. Yes, it is, thank you. So the paragraph that I just wanted to draw attention to is paragraph  
10 5.1, which talks about the eligibility criteria for there to be a deal. This says -- the initials  
11 KAM stand for account manager, I think.

12 Q. It is the key account manager.

13 A. "... would need to be satisfied that they were already purchasing," they being the customers,  
14 "a non-negligible quantity of parallel imported paroxetine."

15 So my reading of that statement was to the extent that there are customers in Mr. Sellick's  
16 spreadsheet where they have entered into a deal with GSK, they would have been, previous  
17 to that, buying parallel imported paroxetine.

18 Q. That is prior to the deal that is struck with GSK, right?

19 A. That would have been prior to the deal.

20 Now, I have not gone through the exact dates in Mr. Sellick's spreadsheet, but to the extent  
21 that there were customers that are in that spreadsheet with a deal date that starts only part  
22 way through 2001, then previous to that they would have been buying parallel imported  
23 paroxetine.

24 It is also true to say that it is unclear that GSK's deals would have reached right across the  
25 market. If there are still deals that are being entered into by GSK with customers that have  
26 been previously buying parallel imports, then there is a population of customers out there  
27 that GSK still seems to be trying to reach who previously would have been buying parallel  
28 imported paroxetine.

29 The second point that I wanted to make is in relation to the two supermarket customers that  
30 are missing from, or apparently missing from Mr. Sellick's spreadsheets. Now, I do not  
31 know whether GSK had a deal with those customers and it is just that that was not recorded  
32 in the spreadsheet, and that may be because those supermarkets were -- the deals were  
33 entered into by the telesales team, I do not know. It could be that they were not included in



1 the spreadsheet because GSK did not have a deal with them and they were purchasing  
2 parallel imported paroxetine.

3 Q. Do you have any knowledge at all, Ms. Webster, about the volumes of paroxetine that were  
4 being bought by supermarkets in 2001?

5 A. Well, again, I have not checked, but there would be information in Mr. Sellick's spreadsheet  
6 in relation to the supermarkets that were supplied.

7 Q. They were actually paying quite a high price because their volumes were low?

8 A. Of paroxetine.

9 Q. Yes. People were not going to supermarkets in 2001 to buy their antidepressant medication.  
10 One moment, sir.

11 One final point, Ms. Webster. The point was made by Mr. Sellick in his evidence, that the  
12 parallel import prices that appear on his spreadsheet are, if anything, likely to have been  
13 understated on the basis that on one side of the equation you have hardcore -- his word --  
14 commercial negotiators who want to make sure that there is a big gap between the PI price  
15 and the deal price, and on the other side of the negotiating bargain, you have got a  
16 pharmacy which does not want to give the game away and will say, "Actually, I am getting  
17 a super deal from France on my PI, you are going to have to do better than that".

18 Do you accept that his evidence is fair and reasonable to accept?

19 A. So I listened to Mr. Sellick's evidence in relation to this point on Tuesday last week. My  
20 understanding was that his conclusion in relation to that is that there was no systematic  
21 overstatement. He did not expect there to be systematic overstatement of parallel import  
22 prices in his spreadsheet, that he himself had not entered into the practice of allowing for a  
23 low price of parallel imports to be recorded in that spreadsheet, nor any member of his  
24 team.

25 Q. Yes. I think his evidence was simply that the PI prices recorded in the Sellick spreadsheet  
26 may well be understated. That is his evidence.  
27 He was asked questions about whether or not there was a systematic problem and he  
28 answered those questions. But I am just asking you about his basic proposition that they are  
29 likely to be understated.

30 THE PRESIDENT: We can go to his answer on that point because he was asked about paragraph  
31 -- you are on paragraph 10 of his witness statement, the questioning on that.

32 MR. SCANNELL: Yes, it is probably worth looking first at paragraph 10 of his witness  
33 statement.

1 THE PRESIDENT: Because he was asked a number of questions about it, and I think certainly  
2 on the last sentence there, he, I think, if I remember correctly, said that would be a  
3 disciplinary offence, if somebody agrees to use a low PI price. That is my recollection.  
4 MR. SCANNELL: I am not sure if he was going that far, but I know the reference that you are  
5 addressing --  
6 THE PRESIDENT: I may have misremembered it.  
7 MR. SCANNELL: I can return to it.  
8 THE PRESIDENT: We can find it over lunch.  
9 MR. SCANNELL: Yes.  
10 THE PRESIDENT: I think it is fair to show Ms. Webster the actual answer if you wanted to  
11 comment on the implications for the PI price, which is quite fair that you can ask about.  
12 MR. SCANNELL: That is perfectly fair.  
13 Just before the lunch break, then, could we open up bundle {E/8/1}. This is Mr. Sellick's  
14 second witness statement. Within it could we turn, please, to {E/8/4} and this is really just  
15 for your benefit, Ms. Webster.  
16 This is the part I was referring to, where he says:  
17 "The PI price agreed upon is unlikely to have been higher than the price at which PIs  
18 were actually available to the pharmacy ... it may sometimes have been lower than the  
19 real price. The reason for this is that securing a deal was typically more important to  
20 the sales representative ... and I recall that measures of sales representatives'  
21 performance included how far the deal price was above the match price and the  
22 overall sales value of all of the deals the representative had. This meant that a sales  
23 person might have agreed to use a low PI price for a benchmark in order to secure an  
24 actual deal price higher than the match price. Equally pharmacies would have had an  
25 incentive to quote low PI prices to the GSK sales person to drive a better deal."  
26 That is what I was driving at rather than anything else, but we can return to that reference  
27 after lunch.  
28 THE PRESIDENT: Would you like to break at this point?  
29 MR. SCANNELL: Yes, I would indeed.  
30 THE PRESIDENT: Can I ask about how much longer?  
31 MR. SCANNELL: I have two small final points.  
32 THE PRESIDENT: Mr. Turner, will there be some re-examination?  
33 MR. TURNER: Very limited, if any.  
34 MR. KON: Sir, I will have --

1 THE PRESIDENT: Some questions as well. So you will come after Mr. Scannell, obviously,  
2 Mr. Kon.  
3 It looks as though we are on track to finish comfortably this afternoon.  
4 MR. SCANNELL: We are well on track, Mr. President.  
5 THE PRESIDENT: Thank you very much.  
6 So 1.55 pm.  
7 ( 12.57 pm) (The short adjournment)  
8 (1.55 pm)  
9 THE PRESIDENT: Is Mr. Kon not returning?  
10 MR. TURNER: He is returning.  
11 THE PRESIDENT: Because he said he wanted to ask some questions.  
12 MR. TURNER: He may not have remembered it was 1.55 that we were starting rather than 2  
13 o'clock.  
14 THE PRESIDENT: Has anyone seen him outside?  
15 MR. TURNER: I saw him outside.  
16 MR. SCANNELL: He is coming. (Pause)  
17 THE PRESIDENT: Let us just wait a moment.  
18 MR. KON: Apologies.  
19 THE PRESIDENT: Yes, Mr. Scannell.  
20 MR. TURNER: While people are settling, just for your reference in case it is still of interest, the  
21 cross-examination of Mr. Sellick on that paragraph 10 is at Transcript 7 at 28 and 29.  
22 {TR/7/28}  
23 THE PRESIDENT: Are you going to ask questions about it?  
24 MR. SCANNELL: I am not, Mr. President. I am happy to go there.  
25 THE PRESIDENT: Then we can leave it. Thank you. We do not need to bring it up.  
26 MR. SCANNELL: Just for your own note, Mr. President, the reference that I have to this is  
27 {TR/7/50}, line 7, and it goes on until page 53, line 22.  
28 It is probably worth opening page { TR/7/53}.  
29 THE PRESIDENT: Mr. Turner, you were referring to page 28, were you?  
30 MR. TURNER: I was referring to the part where there is the cross-examination on the paragraph  
31 that we were talking about, paragraph 10.  
32 THE PRESIDENT: This is something else, is it?

1 MR. SCANNELL: I am referring to the part of the transcript where there was a question on  
2 paragraph 10. There was then a discussion about whether or not the practice of understating  
3 the PI price was widespread or systematic.

4 THE PRESIDENT: But this is not Mr. Sellick's evidence.

5 MR. SCANNELL: Sorry, have I given you the wrong reference?

6 THE PRESIDENT: Yes, this is part of the hot tub.

7 MR. SCANNELL: Let me just look at Mr. Turner's reference. I am sure you are right, Mr.  
8 Turner.

9 MR. TURNER: I think what may have happened, sir, just to be helpful, is that there is the  
10 realtime transcript reference you can find on the system and then there is the consolidated  
11 transcript reference which I was referring to, and it may be Mr. Scannell is referring to the  
12 realtime transcript.

13 MR. SCANNELL: That is exactly what happened.

14 MR. TURNER: The two have different page numbers.

15 THE PRESIDENT: I had not appreciated that. {TR/7/28}

16 MR. MALEK: When it comes to doing your final written submissions, can everyone be  
17 consistent as to what they are referring to.

18 MR. TURNER: Yes, we will go by the official transcript, as it were.

19 THE PRESIDENT: Yes.

20 MR. SCANNELL: Exactly. We will indeed.

21 I am tempted to throw my solicitor under a bus for that one, but I will not.

22 Open versus closed, Ms. Webster. You know what I am talking about here?

23 A. I do.

24 Q. Just for the Tribunal's benefit, can I begin by asking a very basic question.

25 You are not suggesting, are you, that there is one price for open and one price for closed;  
26 this is a different point?

27 A. So what I am referring to is there is a different price for sales that were non-contestable and  
28 sales that were contestable.

29 To my mind, and certainly when I wrote my report, my understanding was that prescriptions  
30 that had been written for the brand, so for Seroxat, could be described as non-contestable,  
31 the reason for that being that my understanding was that unless the parallel import came  
32 into the UK with the brand name Seroxat, it would not have been possible to dispense those  
33 parallel imports against prescriptions written for the brand.

1 What I have subsequently learned is that -- sorry, to complete the steps. I understand that  
2 the majority of parallel imports came in from France and were under the brand name  
3 Deroxat, which would mean that they, under my interpretation, could not have been  
4 dispensed against Seroxat prescriptions.

5 What I have subsequently learned is something of a process called overstickering of the  
6 parallel imports, and if the Deroxat had been overstickered I understand that that means that  
7 they could then have been dispensed against the branded prescriptions, the prescriptions for  
8 Seroxat.

9 What I also understand from the evidence is -- and this bit is unclear -- it is clear from the  
10 evidence that I have looked at, so I am thinking of Mark Reilly's witness statement in the  
11 GUK litigation, that is October 2001 or 2002 -- apologies for not remembering exactly. He  
12 says that the parallel imports brought in were either overstickered or reboxed as generic  
13 paroxetine. So to the extent that the parallel imports were reboxed as generic paroxetine,  
14 then it would mean that those could not be dispensed against the prescriptions written for  
15 Seroxat.

16 MR. GLYNN: Sorry, do we have any idea of how many of the parallel imports were labelled as  
17 Seroxat through overstickering?

18 A. I do not know.

19 MR. SCANNELL: That is useful, Ms. Webster.

20 Could I just take now the questions that I was going to ask on this. This point about open  
21 and closed prescriptions, that is not made in the CMA's decision either, is it?

22 A. No, that is right.

23 Q. It is not in Dr. Haydock's report, is it?

24 A. That is right.

25 Q. Or in the CMA's defence?

26 A. That is right.

27 Might I add a point to that, which is my motivation for looking at it. Part of the motivation  
28 for looking at it was the pairwise comparisons of prices that Dr. Majumdar made between  
29 the price of the generics' product and the price of Seroxat.

30 Now, to the extent that the price of Seroxat is influenced by the existence of non-contestable  
31 sales which attract a larger price, a higher price, it is not appropriate to be comparing the  
32 price of the generics with a price which includes the price on non-contestable sales.

33 The generics could only ever compete with the contestable part of paroxetine demand, and  
34 we know through the existence of brand equalisation deals that those contestable sales

1 attracted the lower price. So the motivation for looking at it partly was for that reason, to  
2 try to get at a more accurate comparison between the price of Seroxat and the price of the  
3 generic, to understand -- because at that time Dr. Majumdar was not seeking to bring  
4 together his evidence in a single measure of the overall price of paroxetine and how that  
5 evolved over time. He was using these pairwise comparisons to say: look at the benefit to  
6 the pharmacist.

7 But of course that benefit, as measured between a blended Seroxat price and a price of the  
8 generics, is not appropriate. So that was motivation number one.

9 Motivation number two was to the extent that there was a change in -- a decline in the  
10 number of scripts that were written for Seroxat, as opposed to the generic over time, and to  
11 the extent that there is a relationship between the proportion of branded scripts and the  
12 proportion of contestable sales -- non-contestable sales, I should say, that would tend --  
13 when we see the decline in the branded scripts over time, that would suggest that there  
14 would have been a fall in the price of Seroxat over time absent the agreements.

15 Thank you.

16 Q. As I understand it, this new theory that you have put forward, it depends in part at least in  
17 what you say at paragraph 3.30 of your reports.

18 Can we turn that up, please, at {H/4/18}. You referred there in footnote 53 to paragraphs  
19 3.101 and 3.102 of the decision.

20 Then you write:

21 "When faced with a closed prescription pharmacies have no choice over the drug to  
22 dispense: if the prescription says Seroxat, they must dispense Seroxat."

23 Could I just pause there.

24 Insofar as that could be read as meaning that where the prescription says Seroxat, it must be  
25 GSK's Seroxat that gets dispensed, that is wrong, is it not?

26 A. I am not sure who else has Seroxat. It could be parallel imported Seroxat.

27 Q. Yes. Parallel imports marketed as Seroxat can be dispensed against Seroxat prescriptions,  
28 can they not?

29 A. That is correct.

30 Q. Reading on:

31 "For open prescriptions pharmacists have a choice. They can dispense the branded  
32 version of the drug, or they can dispense a parallel import or generic version of the  
33 drug."

1 Now, in your joint statement, bundle {I/2/24}, you say that you have looked at a document  
2 which suggests that the majority of parallel imported paroxetine brought into the UK, just  
3 prior to the agreement, came from France and was sold under the name Deroxat. That is  
4 right, is it not? You see in the second paragraph there, Ms. Webster?

5 A. Yes, I see that statement.

6 Q. You add that pharmacies in the UK would not have been able to dispense this against closed  
7 scripts. The document that you have identified here is document 3874. Do you see that?  
8 That is five lines down.

9 A. Yes.

10 Q. Could we take a look at that document. It is at {G1/13B/1}. This is the famous flash file  
11 again.

12 Now, if I understand this correctly, what one has to look at within this document to make  
13 sense of this point is to go down to the very bottom and to click on the PI tab, which is third  
14 from the left, and within that tab I believe we have to scroll to the left.

15 In line 47 we see a reference there to Seroxat above "Ireland". Do you see that?

16 A. Yes.

17 Q. A few lines down, line 54, we see a reference to Seroxat above "France". Do you see that?

18 A. Yes.

19 Q. Now, there is nothing in here, is there, that suggests that parallel imports coming from  
20 France were sold as Deroxat or Seroxat, is there?

21 A. Not in this spreadsheet. There is separately witness evidence that I have read which  
22 confirms the view that parallel imports were coming from France, and I believe that that has  
23 reference to the brand name used in France, which was Deroxat.

24 Q. Have you identified that evidence in your report?

25 A. I have not quoted it in the joint report.

26 THE PRESIDENT: Can you remember?

27 A. I am trying to remember. I think it was one of Dr. Reilly's pieces of evidence.

28 MR. SCANNELL: Do you recall Mr. Sellick's evidence on this point? On the extent of --

29 A. Not off the top of my head.

30 Q. -- overstickering?

31 A. No, not off the top of my head.

32 Q. Can we look at what he said about it. That is bundle {E/6/3}.

33 He takes up the point at paragraph 8. I think we can take it from the line about five or six  
34 lines from the bottom:

1 "SB's," that is SmithKline Beecham's, "packaging featured writing in English rather  
2 than, as was often the case with PIs, English text on stickers concealing foreign text."  
3 He is saying it is often the case with PIs that they were overstickered rather than going  
4 under their foreign names.  
5 If it was overstickered, this parallel import from France, it could have been dispensed  
6 against Seroxat prescriptions, could it not?  
7 A. Yes, I agree with that.  
8 Q. Could we go back to the page that we were looking at in the flash file, please {G1/13B/1}.  
9 Looking at Ireland, the figures there look very substantial. Indeed, by my calculation 70%  
10 of all of the PI Seroxat coming into this country was coming from Ireland. Have you done  
11 the maths on that?  
12 A. I did do the maths on that some time ago. I did not get to 70%.  
13 Q. To 70%. Sorry, 40%?  
14 A. Yes, sorry. That is --  
15 THE PRESIDENT: You said 70%.  
16 MR. SCANNELL: I do apologise. I meant to say 40%.  
17 THE PRESIDENT: 40%, yes.  
18 MR. SCANNELL: My mistake, I do apologise. 40%. Is that what it came out for you as well?  
19 A. Yes.  
20 Q. Have you enquired what the brand name of Seroxat was in Ireland in 2001?  
21 A. I understand that was Seroxat.  
22 Q. Okay. So there is no need for overstickering?  
23 A. Correct.  
24 Q. All of that PI could be marketed as Seroxat and dispensed against what you call a closed  
25 prescription; that is right, is it not?  
26 A. Correct.  
27 Q. You have not factored Irish parallel imports into your analysis, have you? You make a  
28 point about France, but you do not make any point about Ireland.  
29 A. I have not factored it in explicitly. What I have noted is based on my understanding at the  
30 time, an expectation that the majority of the parallel imports that were coming into the UK  
31 would not have been able to have been dispensed against branded prescriptions.  
32 THE PRESIDENT: That is based on what? We have got 60% from France, it would seem, and a  
33 proportion of that overstickered and we do not know what proportion.



1 A. So I am happy to -- now that I understand the overstickering point, I think that there is less -  
2 - so I think two things: one, that to the extent that there was a change in branded scripts over  
3 the period 2001 to 2003, the implication of the overstickering point is that one would no  
4 longer think that that change in the way prescriptions were written would have a marked  
5 implication for the brand purchasing share, and as a result one would not expect there to be  
6 a particularly marked decline in the overall price of Seroxat absent the agreements.  
7 I think that the overstickering point does not have a bearing on whether one needs to --  
8 when doing pairwise comparisons of the price of Seroxat, compared to the price of the  
9 generic entrant's product. I think it is still relevant there to be separating out a price for  
10 contestable sales versus a price for non-contestable sales, and it should be the price for  
11 contestable sales which are compared against the price for the generic's products.

12 Q. Ms. Webster, what you have said is that you have not factored in any PI from Ireland  
13 explicitly, and you say that you have noted an expectation that the majority of the parallel  
14 imports that are coming into the UK would not have been able to have been dispensed  
15 against branded prescriptions. There is no evidence whatsoever for that, is there?

16 A. Sorry, that was based on my reading of the evidence prior to understanding the  
17 overstickering point.  
18 So what I am now saying is I now understand that to be the case, and on that basis, I do not  
19 think that there is strong -- I do not believe that absent the agreements, that the change in  
20 the proportion of scripts written for the brand would have had a material impact on the price  
21 --

22 Q. I am not asking about that point at all, Ms. Webster. I am simply asking about whether or  
23 not the PIs that were coming into this country could be dispensed against Seroxat  
24 prescriptions.  
25 What you have said is that you understand that the majority of the PI coming in could not be  
26 dispensed against closed prescription?

27 A. Yes, and I have clarified that was because I did not understand that there was the option to  
28 oversticker.

29 Q. Now that you do understand the point --

30 A. Yes.

31 Q. -- do you want to revise your evidence that the majority of the PI coming into the country  
32 could not be dispensed against closed prescription?

33 A. Yes, I am happy to do that.

1 THE PRESIDENT: Yes, I think Ms. Webster has just done that. She says she accepts that was  
2 based on a misapprehension.

3 MR. SCANNELL: Thank you.

4 Given that position, does this not suggest that the open versus closed prescription point  
5 might not be very helpful?

6 A. So if I go back to the two reasons why I was considering that point. The first reason is to  
7 make sure that we have got a pairwise comparison of the price of Seroxat compared to the  
8 entrant product and the PI -- sorry, the entrant's product on an appropriate basis. That point  
9 still stands. It may be that the definition of contestable -- non-contestable sales rather is  
10 somewhat different from how I had characterised it as those being associated with closed  
11 prescriptions. But the point still stands. The point about what we would expect to have  
12 happened to the Seroxat price over time absent the agreements I believe is of much less  
13 significance.

14 It was not very significant to start off with, having seen the effect that it has on the Seroxat  
15 price in the tables at the back of the joint report. But I think it is fair to say that one could  
16 not say now that that is material.

17 Q. Thank you.

18 Finally on this point, could I take you to Mr. Sellick's evidence again, his second witness  
19 statement, which is in bundle {E/8/5}, paragraphs 13 and 14.

20 Here, Mr. Sellick is commenting on the brand purchasing share versus brand prescribing  
21 share point. He says that:

22 "This approach assumes that the process by which GSK negotiated prices and rebates  
23 with pharmacies was more mechanical than it actually was. I recall that at the time a  
24 typical pharmacy shop would dispense something in the order of around 30 packs of  
25 ... paroxetine ... per month. To put this in perspective, this would have been out of  
26 approximately 3,800 items dispensed per shop per month (I recall that figure being  
27 generally known in GSK at the time) — ... paroxetine was less than 1% of what a  
28 typical pharmacy shop dispensed."

29 He says:

30 "A 3-4 percentage point fall in the brand prescribing share would account for around  
31 one pack per month for a pharmacy shop with that typical paroxetine dispensing  
32 volume. Pharmacies were generally concerned about footfall, and ensuring that they  
33 did not miss sales opportunities, so I do not think that such a small fall in the Seroxat  
34 brand prescribing share would have had any effect on the brand purchasing share. It

1 is not realistic to expect that a pharmacy would adjust its purchases in this way. As a  
2 result, I do not believe that a fall in the Seroxat brand prescribing share of around 3 to  
3 4 percentage points would have had any effect on the prices and rebates that GSK  
4 negotiated with pharmacies."

5 Then, in his conclusion, he says:

6 "In summary:

7 "(a) The deal price was a negotiated price which could vary based on a number of  
8 factors, and it was generally higher than the match price. It was not determined in a  
9 mechanical way."

10 He says:

11 "(b) For a typical pharmacy, a fall in the brand prescribing share of the magnitude I  
12 understand Ms. Webster is referring to would not in my view affect the brand  
13 purchasing share of that pharmacy."

14 He concludes:

15 "(c) Therefore I do not believe that the reduction in brand prescribing share mentioned  
16 above would have led to a reduction in deal prices for 20mg Seroxat."

17 Now, that is Mr. Sellick's clear evidence.

18 Would you accept that you are not in a better position than he is to assess how brand  
19 prescribing share related to brand purchasing share in the real world?

20 A. I would accept that. Perhaps may I add a comment on Mr. Sellick's witness statement?

21 THE PRESIDENT: Yes.

22 A. Raising it reminds me of two points within it which is not to contradict what I have just said  
23 about the materiality of this point about open prices versus closed prices, but my reading of  
24 Mr. Sellick's evidence is that there is something in the point in that when he talks about the  
25 approach that I have taken in my description. He describes it as incomplete, which was  
26 interesting to me that it was not wrong.

27 When he talks about the relationship between the brand purchasing share and the brand  
28 prescribing share, he says there is no direct relationship as opposed to saying no  
29 relationship. Then he goes on to say because the change in the brand prescribing share is  
30 small, one therefore would not expect it to be picked up in a change in the deal price that  
31 pharmacies obtain.

32 So my reading of Mr. Sellick's evidence is that it is supportive that there could be something  
33 of this logic going on. It is just that actually he thinks that this is very small. He

1 demonstrates how small the effect is by focusing on a typical shop which orders 30 packs a  
2 month.

3 We know from Mr. Sellick's data that there are many of the shops that GSK was selling to  
4 where actually they had multiple shops, and presumably purchases were made for the group  
5 as a whole. So I do not think we would be quite talking about sort of one pack per month  
6 difference necessarily.

7 Q. I am happy to leave it on the basis that you accept the general proposition I put to you, and  
8 we can make submissions about what that evidence means.

9 Could I move on, then, to one last point: the decline in volumes point that you make. This  
10 is yet another adjustment in respect of the fact that the overall demand for paroxetine  
11 declined over the period with which we are concerned from the pre-agreement period to the  
12 post-agreement period. That is right, as I understand it?

13 A. Correct.

14 Q. Again, this is an adjustment which, if it commended itself to the Tribunal, would have the  
15 result of favouring the CMA's case. Is that fair?

16 A. If by that you mean that when I look at the effect that the agreements may have had on the  
17 price of paroxetine, when I remove the actual total market decline, I end up with a smaller  
18 expected effect on the price of paroxetine, then yes.

19 Q. So you say that the reduction in market share caused by the overall decline in volume  
20 should be stripped out of the equation, that we are considering the price falls from the pre-  
21 agreement period to the post-agreement period; is that right?

22 A. So if the question that we are trying to answer is: let us look at the ex post evolution of  
23 prices and use that to inform what the expectation was of prices -- sorry, how prices would  
24 have evolved, then I think that that is right to do if it is agreed that the decline in total  
25 market volumes was not anticipated at the point at which the agreements were entered into.

26 Q. Do you accept that what caused the generic companies to be supplying paroxetine in the  
27 first place was the supply agreement?

28 A. Yes.

29 Q. You accept that the entry of the generic supplies resulted in a reduction in GSK's share of  
30 total sales of paroxetine even before the decline in demand that we are talking about in  
31 August 2002?

32 A. It looks like there was a decline of about 10 percentage points in GSK's share prior to the  
33 start of the decline.

34 THE PRESIDENT: When did the market decline you refer to start?

1 A. It looks about August 2002. It might be helpful to look at figure 1 in my report, which is on  
2 page 23 {H/4/23}.

3 The top line, pale blue, is the total market demand for paroxetine. The red line is Seroxat  
4 and the dark blue, the generics; yellow, PI.

5 MR. GLYNN: Forgive me, I did not catch the page.

6 A. 23.

7 MR. SCANNELL: Can we then look also at the joint statement, {I/2/56}.

8 At the bottom of the page, looking at your comments on statement 30, statement 30 was:

9 "It is not the case that Seroxat only lost share to the entrants once the total sales of  
10 paroxetine began to decline."

11 You said:

12 "I agree with this statement, although I note that Seroxat primarily lost share to  
13 parallel imports prior to the decline in total market volumes."

14 A. Apologies, I think there is something of a typo in that.

15 Q. Where is the typographical error?

16 A. I think what I meant to say there is that Seroxat lost share to the entrants and -- but -- sorry -  
17 - and the share that the entrants took primarily came from parallel imports.

18 Q. Okay.

19 A. So some came from Seroxat, equal to approximately 10 percentage point decline in the  
20 Seroxat share, and the remainder was about 60% and came from parallel imports.

21 Q. That all affects the first sentence; is that correct?

22 A. That is correct.

23 Q. So looking then at the second sentence:

24 "Seroxat had a market share of volumes on average over January to November 2001  
25 of 70.5%. In the three months leading up to August 2002 (when the experts agree that  
26 total market sales start to decline), Seroxat's share had fallen to 57.9%. In  
27 comparison, the volume share taken by parallel imports fell from 29.2% to 10% over  
28 the same period."

29 A. That is right.

30 Q. "As a result, 60% of the entrants' sales appear to have been taken from parallel imports."

31 Looking at those numbers, the GSK share dropped by over 12 points in the period up to  
32 August 2002 and the PI share dropped by 19 points. So this means, does it not, that the  
33 generics took more from parallel imports than from GSK, but it does not mean that the  
34 generics merely cannibalised the parallel imports. That is right, is it not, on those figures?

1 A. Sorry, what was your final sentence?

2 Q. It does not mean that the generics merely cannibalised the parallel imports?

3 A. That is correct. In making the point that I do about the importance of the overall market  
4 decline, that is not quite the point that I am making.

5 Q. No, I am not suggesting that it is. I am simply asking about the figures in that paragraph.

6 A. So what I -- I would quite like to -- it might be helpful to turn to paragraph 3.49 of my  
7 report, which is on page {H/4/24}, because we know that the volume restrictions that were  
8 part of the agreements put a limit on the volumes that could be sold by the entrants.  
9 If one assumes that the market size had stayed constant at the level of 2001, the entrants  
10 would at most have been able to take a share of 39%, which is the figure at the bottom of  
11 paragraph 3.49. So we know also that parallel imports in the run-up to generic entry had a  
12 share of approximately 30%. So really what we are saying is that that 10% share impact on  
13 GSK is as large as it could be.  
14 Those were the volumes that were made available to the entrants that the entrants were  
15 expected to sell. That volume was larger than parallel imports, so some of it must come  
16 from the Seroxat sales, and there is a limit on the extent to which that is possible in a world  
17 where we assume there is no market decline.  
18 As soon as you have a market decline, the impact on share that can be taken from the  
19 entrants is much larger.

20 MR. GLYNN: And the 9% went up to how much when you had the actual decline?

21 A. I believe it is -- sorry, the 39 goes up to -- I think it is around 50, something like that. I  
22 might be able to read it off the -- with difficulty. (Pause)  
23 Sorry, I do not have that figure to hand. Sorry, I do. It is 47%. It is four lines up in  
24 paragraph 3.49.

25 MR. SCANNELL: Now, Ms. Webster, you have accepted that the generics, when they entered  
26 the market, they took more from the parallel importers than from GSK but that they also  
27 took some of GSK's share. Because the pharmacies were paying higher prices for Seroxat  
28 than they were for parallel imports or generic supplies, you presumably accept that the  
29 supply agreements caused some decline in pharmacy prices even without the overall decline  
30 in demand; that is right, is it not?

31 A. There would be some effect.

32 Q. Could we look at Dr. Stillman's third report. That is in bundle {G/7/26}. Within it, could  
33 we look at figure 1. That is just to make good this point. In hard copy this is unhelpfully in

1 black and white; it is in colour on the screen. The red line shows GSK's total shares of  
2 20mg paroxetine beginning in January 1998. Do you see that?

3 A. Sorry, figure 1?

4 Q. Figure 1, page 23 of the report.

5 A. Yes.

6 Q. If you are looking at it in hard copy, Ms. Webster, it may be in black and white.

7 A. No, it is fine actually. It is in colour.

8 Q. Good. So the red line shows GSK's share of total sales of 20mg paroxetine beginning in  
9 January 1998. Do you see that?

10 A. Mm.

11 Q. We see that by November 2001, which is prior to the authorised generic entry, GSK's share  
12 is in the low 70s, even while the total demand for paroxetine is increasing. That is right, is  
13 it not?

14 A. Yes.

15 Q. Now, you can see from this figure that GSK's share actually declined over the period from  
16 December 2001 to November 2003 from around 70% to around 45%?

17 A. Yes.

18 Q. This is a decline in share which would not have happened but for the supply agreements.  
19 That is right also, is it not?

20 A. It results from two things that go on in the market: one, the supply agreements; and two, the  
21 market decline in total volumes.

22 Q. Well, it would not have happened, the decline that we are looking at, but for the supply  
23 agreement?

24 A. I am not sure that we know that.

25 Q. You do not accept that that decline is due to the supply agreement?

26 A. No.

27 Q. The decline in volume?

28 A. No, I do not agree with that.

29 So what I know is that after the first supply agreements were entered into, there was quite a  
30 big change in the market for paroxetine. So total market volumes declined by around about  
31 18.5% from August 2002 to the end of 2003. That is a big change in the market.

32 Now, what I do not know and I do not believe, my view, that Dr. Stillman's analysis informs  
33 in this third report, we do not know what proportion of GSK's decline in share happened  
34 due to that big structural change in the market for paroxetine versus the supply agreements.

1 Now, one could say, well, why do we not assume that the share that GSK took in the prior  
2 period was stable, we just expect that to carry on? GSK has always had a share around  
3 70%, so we can assume that it would have continued to do so despite the fact that the  
4 market declined by such a large amount.

5 Now, we can make that assumption but we should recognise that it is an assumption.

6 Q. Ms. Webster, is the position not that if we had not had the supply agreements GSK's share  
7 would have stayed at or around 70%?

8 A. I thought that I had just answered that question.

9 I think one -- if one wants to make that assumption one can, but one should recognise that it  
10 is an assumption. We do not have the data to be able to identify that.

11 Q. Now, we know that the overall demand declined beginning in or around August 2002. That  
12 decline in demand would have happened with or without the agreements, would it not?

13 A. I believe so, yes.

14 Q. So the position is that on a counterfactual without the agreements, you still have the demand  
15 fall. That is right, is it not?

16 A. Yes.

17 Q. With the agreements, you have the demand fall as well, do you not?

18 A. Yes.

19 Q. The difference is that a mix effect has been brought about by the agreements, right?

20 A. There is a mix effect that results from the agreements. The question is could you have had a  
21 mix effect absent the agreements, because GSK ended up with a lower share of paroxetine  
22 sales absent the agreements?

23 Now, that could be because -- So if we were to assume that it would be because parallel  
24 imports were taking a larger share, and on my view parallel imports were priced at a  
25 discount, and therefore that would have been a mix effect which created downward  
26 movement in the overall price of paroxetine.

27 THE PRESIDENT: Can I just make sure I have understood it. What you are saying is we do not  
28 know, absent the agreements, whether the volume of parallel imports in absolute terms that  
29 existed before the agreements would have continued. If it had, given that the total market  
30 demand declined, GSK's share would have declined?

31 A. That is right.

32 MR. SCANNELL: Ms. Webster, if we have a market decline with the agreements and we have a  
33 market decline without the agreements, then we should not be stripping out the market  
34 decline, should we, when we are analysing the effect of the agreement?



1 THE PRESIDENT: She is not stripping it out. It is a question of what would have happened to  
2 the parallel import volume, absent the agreement.

3 MR. GLYNN: Following what has been said, if I could put the question this way. Supposing that  
4 the volume of parallel imports had been constrained as it was before, so that gives you that,  
5 and we had had the decline in the overall market, would we have then seen a similar shift in  
6 the market share of the branded product?

7 A. Exactly.

8 MR. GLYNN: That is a fair question. What is the answer to that?

9 A. Sorry, I do not know the answer. Sorry, if I have understood the question. What would be  
10 the price impact if we assumed parallel imports --

11 MR. GLYNN: No. Well, yes, we will go to the price impact afterwards. We get to the price  
12 impact via a change in the share from the higher price Seroxat to the price-matched other  
13 supplies from GSK.that is what this is about.

14 A. I see.

15 MR. GLYNN: The question is, if I may add: since we had the agreement, with the agreements we  
16 see that there was a significant volume shift which reduced the average price, the amount  
17 which it cost.

18 A. Yes.

19 MR. GLYNN: If we had not had the agreements but had had continuing parallel imports, then  
20 would we have had a similar change in the mix of supply -- would GSK have lost a similar  
21 share of the overall market?

22 A. So, I understand the question and I do not know the answer.

23 What we have got is we have got two market events that are going on at exactly the same  
24 time, approximately the same time. We have got the supply agreements and we have also  
25 got the market decline. We cannot, therefore, use the data and econometrics to try to isolate  
26 what would have happened with the market decline but without the supply agreements.

27 So we are in a world of having to make assumptions. One assumption is that, no, we would  
28 have continued to see parallel imports and GSK taking share in the proportions that they  
29 always had previously, the market shrinks and that continues. That would be one  
30 assumption that one could make.

31 Alternatively, one might say, actually, to the extent that the total market declined because of  
32 something like a reduction in the spend on the sales force behind Seroxat, one might think  
33 that you would get a shift away from the Seroxat brand and parallel imports could take more

1 if it is the case that they are reboxed as generic paroxetine. But, I mean, this is -- I sort of  
2 come back to, "We do not know".

3 MR. GLYNN: If I may.

4 MR. SCANNELL: Of course.

5 MR. GLYNN: Since we know that the total supply of parallel imports plus the generics was  
6 greater than parallel imports, if we think about the world in the absence of the agreements,  
7 would it not be a reasonable way to think about things to say: if we were to go back just to  
8 the parallel imports, so that the change in the mix would be as a result of removing the  
9 generics' share of the market, would that not be a reasonable way of thinking?

10 A. So we definitely have to think about it without the generics. We are in a world where it is  
11 only the parallel imports and the brand that is being sold.  
12 If we think that when the market declines that they remain as they previously were in terms  
13 of pharmacies' preferences over those two, then I think that would be a reasonable thing to  
14 say, okay, absent the agreements, then we would have expected the same shares that they  
15 previously had to have continued under the --

16 MR. GLYNN: The same volumes rather than shares, perhaps?

17 A. Well, I do not know about the volume point. I would think that it may be reasonable to  
18 think they had the same shares, so they each took a lower volume.  
19 Now -- but I do not know that for certain, and I am also not certain that the preferences  
20 would necessarily have remained the same across the two.

21 MR. SCANNELL: Ms. Webster, the share that GSK had while the market was increasing was  
22 holding steady at 70%. Do you accept that?

23 A. Yes, broadly.

24 Q. Would you not, therefore, expect that if the market started declining it would stay at 70%?

25 A. It depends on the reason for the decline.

26 Q. Could you elaborate on that, please?

27 A. That is the point that I have just been discussing.

28 If there is something particular about Seroxat, so there is less marketing in relation to  
29 Seroxat, maybe the negative publicity particularly hits Seroxat, actually what you have got  
30 in the parallel imports is a set of product that is reboxed as generic paroxetine, maybe  
31 actually the pharmacies' preferences shift towards generic paroxetine.

32 My main point here -- I do not want to overemphasise what I do know -- is that we do not  
33 quite know what would have happened absent the agreements but with this very marked  
34 change in the overall market for paroxetine.

1 Q. But the point that you have just made, they are essentially speculative points, are they not,  
2 which you use to make the point that it is fair to say that the GSK volumes would not have  
3 remained at 70% despite the decline? That is right, is it not?

4 A. My point is that it is speculation in either direction and that we do not know.

5 Q. Okay. You also make the contention on behalf of the CMA that this decline in demand was  
6 not anticipated.

7 Now, I think I can take this point shortly. I am sure that you would agree with me that the  
8 question whether or not, on the factual evidence before the Tribunal, this decline in demand  
9 was or was not anticipated by GSK, is not a question for you as an economist. Do you  
10 accept that?

11 A. I do accept that.

12 Q. Can I, therefore, just ask you about one paragraph of your report in bundle {H/4/24}.  
13 What I have in mind here is your paragraph 3.48:

14 "Based on my reading of the evidence set out in annex B, I observe that this decline in  
15 total market demand was not anticipated by the parties at the time when the  
16 Agreements were entered into. A GSK 'Seroxat brand planning' document dated  
17 December 2002 clearly sets out GSK's view ..."

18 You refer to Dr. Reilly's witness statement.

19 Can I just ask whether you accept that your interpretation of that evidence is not really  
20 relevant to what the Tribunal has to decide given that you are here to provide expert  
21 economics evidence?

22 A. So perhaps I might just explain my motivation in relation to this section. I have -- seeing  
23 Dr. Majumdar's chart, the colourful one that we talked about either yesterday or the day  
24 before, that draws a very stark picture and that caused me to look at what was lying behind  
25 these changes in share. Of course, Dr. Majumdar's chart only deals with share, it does not  
26 show us the volumes as well, which is why I looked at the figure 1 in my report, which also  
27 shows us what has been going on in total volumes.

28 The question that was put to me that I am looking at as an expert is: can you look at the ex  
29 post pricing evidence that was considered in the decision and has been considered by Dr.  
30 Haydock? The way that that has been presented in the decision is it is about understanding  
31 what happened with prices ex post in order to inform the expectation of likely effects of  
32 those agreements on prices.

33 Therefore, it strikes me that it is a very relevant question. Given that one can observe that  
34 the overall decline in total market volumes is -- has quite a material bearing on actually this

1 mix -- the size of the mix effect that we get, then it becomes relevant to think about whether  
2 that decline in total market volumes was anticipated or not.

3 So there -- if the answer quite clearly is it was anticipated, then there is no point me going  
4 any further with any of the expert evidence that I am putting forward.

5 So it felt to me that it was very relevant for me to consider whether the documents  
6 suggested to me that it was anticipated or not.

7 In relation to that, there were three different pieces of evidence that I relied on, and that  
8 made me think that this was a material point that should be raised. Firstly, the  
9 contemporaneous evidence that talks about the expectation that the entrants would be  
10 brought in and would primarily displace parallel import. If, actually, there was an  
11 expectation that the entrants would take 50% of the market, then that is going a long way  
12 beyond just displacing parallel imports. So that was the first piece.

13 The second piece was the brand planning document, and then the third piece is Mark  
14 Reilly's evidence that I cite, I think it is paragraph 4.2 --

15 Q. Ms. Webster, all I am asking --

16 THE PRESIDENT: Does it amount to this: you explain why it may be relevant to reach a view as  
17 to whether or not the decline in market that everyone is agreed happened was anticipated?

18 A. Exactly.

19 THE PRESIDENT: But the question of whether or not it was anticipated is not a question of  
20 expert opinion?

21 A. No.

22 THE PRESIDENT: It is a question of fact from the Tribunal?

23 A. Yes, sorry, and I was --

24 THE PRESIDENT: Can you explain why you carried out the exercise but you accept that it is a  
25 matter for us to decide, not for your opinion?

26 A. That is absolutely right. I just wanted to draw attention to the facts that I relied on and why  
27 it is relevant.

28 MR. SCANNELL: I am grateful, Mr. President, and thank you, Ms. Webster, that is all that I  
29 have to ask you.

30 THE PRESIDENT: Yes, Mr. Kon.

31 MR. TURNER: Sir, before Mr. Kon begins, would it be convenient to ask one question in re-  
32 examination to get it out of the way? Otherwise I am happy to wait until the end.

33 THE PRESIDENT: Is there a particular reason for interposing it?

1 MR. TURNER: It is only that the cross-examination having finished, to carry on and pick up on  
2 the point --

3 THE PRESIDENT: No, I think -- it might interrelate then with things Mr. Kon wants to ask about  
4 which you do not know. I think you can wrap it all up together. Cross-examination by  
5 MR. KON

6 MR. KON: Good afternoon.

7 A. Afternoon.

8 Q. I have a few questions to ask you. Some of them overlap a little bit with Mr. Scannell's  
9 questions, but hopefully we can short-circuit it to avoid any repetition.

10 I would like to ask you a few questions on wholesaler benefits. Do you agree, Ms. Webster,  
11 that in the event that wholesalers were able to obtain paroxetine at a material discount to  
12 parallel imports, that that in itself would imply that there is greater competition to supply  
13 wholesalers?

14 A. Good question.

15 Q. Thank you.

16 A. So I think, as Mr. Glynn put it yesterday, it is difficult to not describe that as additional  
17 competition, to supply those wholesalers, and that is the position that I have taken in the  
18 joint report. I do think that it is relevant, however, just to caveat that, in terms of describing  
19 the nature of that competition.

20 So what we know is that a new product was made available. It was made available to  
21 wholesalers at a price that was quite significantly below the price of parallel importers.  
22 Parallel importers did not respond to that price by cutting their own price. They seem to  
23 exit the market.

24 So we have got a sort of process of displacement of one product, parallel import product,  
25 with the entrants' product. We also know that there is not apparent competition on price  
26 between the generics.

27 So there are two things which are relevant there. We know that the pricing process, at least  
28 from Alpharma's point of view, was to work out what was the price to pharmacists that they  
29 wanted to achieve and then to work back from there to understand the price that they  
30 charged to the wholesaler. We also know that when there was additional sources of generic  
31 product that are becoming available to the wholesalers, that then did not lead any of the  
32 individual entrants to reduce their price in response to that additional competition.

33 Q. Thank you, that is a very full answer.

1 Can I just take you to {I/2/9}, which is the second joint statement by the experts. That is  
2 the internal numbering, page 9. If I could take you to paragraph 3 in there. This is an  
3 executive summary of it.

4 It says:

5 "The experts also agree that, if it were the case that wholesalers were able to obtain  
6 the new source of paroxetine at a material discount to parallel imports, this would  
7 imply that there is greater competition to supply wholesalers."

8 Do you have that?

9 A. I do, thank you.

10 Q. That was an opinion that you shared?

11 A. Yes. As I say, it is difficult to avoid the conclusion that there is additional competition at  
12 the wholesale level. Actually, if one looks at it, one would add the caveats that I just --

13 Q. No, I understand that. You acknowledged also I think in the same joint statement that the  
14 price to wholesalers by the entrants was at the material time lower than the price charged by  
15 parallel importers. I think that is common ground. Again, I can take you to the joint  
16 statement if you wish me to. It is {I/2/68}.

17 A. No, that is my view, is that the price to wholesalers for the entrants' product was less than  
18 the price to wholesalers of the parallel imports. I do not agree with Dr. Majumdar that it  
19 was between 14% and 16% --

20 Q. I am coming on to that because that is exactly where I intend to go, thank you.

21 I think in fact that is exactly where I am going to now: that you have agreed on the basis of  
22 the numbers presented in the decision that during the course of the agreements the  
23 wholesalers obtained paroxetine from the generic entrants at a price which was 14% to 16%  
24 lower than the price charged by parallel importers. But that is subject to two important  
25 caveats, I think, and one of those caveats is the parallel import price. Is that correct?

26 A. Correct.

27 Q. In relation to the parallel import price, I think that you make the point, as we have already  
28 heard today, that the parallel imports were over the price in the decision, and I think on the  
29 basis of the upper limits of your sensitivity analysis, that is at 5%, would that be a fair  
30 summary of where we got to this morning?

31 A. That is correct.

32 Q. Otherwise I can again take you to the statement, but if it is unnecessary -- you are happy  
33 with that?

34 A. I am happy.

1 Q. Thank you. Am I right, therefore, and I am sure you are much more qualified to do this  
2 than I am, that as a matter of mathematics, reducing the price of the wholesalers of parallel  
3 imports by 5% implies that the entrants' products were available to wholesalers at a price  
4 some 10% to 12% lower than the price for wholesalers of parallel imports? That is a matter  
5 of mathematics, I think, based on that evidence?

6 A. I have not followed through the maths of it, but --

7 Q. I am happy for you to do so. As I said, I suspect you are far more qualified to do it than I  
8 am. I can assure you that that is what it does produce. I can take you to the relevant  
9 passages of the joint statement, again, if that would be helpful. Would that be helpful?

10 A. No, I am happy that -- I do not dispute that on the basis of the numbers and even with an  
11 adjustment to the parallel import price that is up to 5%, adjustment to the prices that are in  
12 the decision, we are still in a position where the wholesalers would have been receiving a  
13 price for the generic entrant's product that was materially, you know, of the order of 10%  
14 below that of the parallel import price.

15 Q. Thank you. You have almost answered my final question on this point, which is that you do  
16 not disagree that that is a material discount to parallel importers. I think that is exactly what  
17 you just said?

18 THE PRESIDENT: I think you just said that.

19 A. Yes.

20 THE PRESIDENT: Yes, that is agreed.

21 MR. KON: Therefore, going back to paragraph 3, which is still, I think, on the screen, therefore  
22 you would agree that this implies that there was greater competition to supply wholesalers,  
23 as you agreed in that joint statement?

24 A. I think what is very clear is that there is a benefit to wholesalers. That benefit results from  
25 there being new suppliers that came into the market as a result of the supply agreements.  
26 I do not think that the evidence suggests that there is a process of active competition that is  
27 going on either with the parallel importers or between the generic entrants themselves.

28 MR. KON: Thank you.

29 You keep pre-empting my questions very skilfully. So may I go on to the wholesaler mark-  
30 ups and the bargaining power of pharmacies in that dynamic downstream.

31 I think you make it clear in your joint statement that -- in fact, this is a word you use, and  
32 interestingly, it is a word also used in some of the CMA's Section 26 requests which I am  
33 going to come onto in a moment -- that there were certain industry conventions in relation  
34 to wholesaler mark-ups. Would be that a fair characterisation of your evidence?

1 Perhaps I could actually take you to your joint statement again. This is on page {I/2/14} at  
2 point 2.

3 You say:

4 "As I note at paragraph 3.8 of my report, I expect that the costs incurred by  
5 wholesalers would have differed depending on the service model of wholesalers, in  
6 line with the existence of certain industry conventions regarding wholesaler mark-ups  
7 that were applied. The evidence I have reviewed suggests that the following mark-ups  
8 typically applied: 3.3% for branded products; 3-5% for parallel imports; 20%-25% for  
9 generic products when sold via full-line wholesalers; and anywhere from 5% to 100%  
10 for generic products sold via short-line wholesalers."

11 Some of this evidence, of course, we looked at this morning and I am not going to take you  
12 to very much more of that. But the question that I have is: what do you mean by "industry  
13 conventions"? Could you explain your understanding of that term?

14 A. Another good question. So my interpretation -- what I have looked at is the extent to which  
15 there were some standard expectations around the mark-ups that would be applied in each  
16 case, and to the extent that I refer to a convention, it is simply that there is a standard  
17 business practice.

18 So I think -- so the Actavis response to the CMA Section 26 notice in relation to mark-ups  
19 and wholesaler margins is fairly instructive in this regard. It talks about the standard mark-  
20 ups that would have been charged by full-line wholesalers when dispensing generic --

21 Q. I hesitate to interrupt you, but I am going to a bit of that evidence, so perhaps, if I may, I  
22 will keep going, and please come back to that if I have not allowed you to address the point.

23 A. Yes.

24 Q. My understanding of your evidence this morning in relation to mark-ups, wholesaler mark-  
25 ups, that we focus very much on the 15% that you conclude, I think, in your evidence was  
26 the correct mark-up for GUK, which is my primary focus in this questioning. But as I  
27 understand it, you are not saying that that is a standard mark-up. Your basis is that that is an  
28 average mark-up. Would that be a correct understanding of the evidence you gave this  
29 morning?

30 A. Yes, that is correct. I mean, what I was going to go on to say is we know that there are sort  
31 of standard rules of thumb, these standard conventions, and those are the ones to which I  
32 refer in the joint report.



1 We know that there is variation sometimes from those standard rules of thumb. I have not  
2 sought to rely on the industry conventions when thinking about the mark-ups that would be  
3 appropriate for the generic and the parallel import price in this case.

4 So we have got direct evidence on the relevant mark-up for Seroxat that is sold, so for the  
5 brand. We know that the mark-up that the wholesaler owned there was 2.5% margin  
6 compared to the list price, which translates into the 3.3 mark-up.

7 When it comes to parallel imports, then we have taken the evidence from -- I have taken the  
8 evidence from Waymade and the BAEPD, the trade body that we talked about, parallel  
9 imports. Then when it comes to the generic companies themselves, I have looked at their  
10 responses. So I have used Alparma, and then I have applied a method which allows me to  
11 identify what I think the likely mark-ups would have been for IVAX and for GUK, and then  
12 to compare those responses with their own responses and their own mark-ups.

13 So I have not -- although I note that there are industry conventions, industry standards here,  
14 I have not relied on them.

15 Q. Thank you, that is very helpful.

16 So I am right in saying, I think, based on that answer, that the 15% figure that you use in  
17 your evidence in respect of GUK was, firstly, an average, and secondly, it was based on  
18 applying the principles that emerge from evidence, for example Mr. Collier's evidence. You  
19 then are forming certain views based on that evidence on what you consider to be  
20 appropriately valuable. Would that be a fair summary?

21 A. That is a fair summary.

22 Q. What I would like to do, you mentioned that you looked at the evidence given by other  
23 parties and I think when Mr. Scannell was cross-examining you you referred to Actavis and  
24 IVAX. What I would like to do is take you to the GUK evidence on that subject. So could  
25 I please take you to {A2/21/1}. It is the Section 26 notice which hopefully will come on the  
26 screen, and hopefully I will be able to identify it when it does.

27 Let us have a look at the question. It is a question that I think you have seen in very similar  
28 terms already in respect of the other parties:

29 "For the period 1st May 2002 to 31st December 2005, based on GUK's knowledge of  
30 industry pricing conventions, please provide an estimate of the mark-up that  
31 wholesalers typically applied to prices when selling a generic product to pharmacists  
32 in the UK and that, in the same period, was likely to have been applied in relation to  
33 paroxetine supplied to them by GUK."

1 I would like to take you through this response by GUK because we have not looked at that  
2 before:

3 "GUK's understanding is that wholesalers generally set their prices to pharmacies by  
4 taking into account the applicable reimbursement levels for the product under the  
5 Drug Tariff and the prices set by competitors in the market."

6 I will come back to each of these points:

7 "The reimbursement level effectively set a ceiling for the price that wholesalers could  
8 reasonably charge for generics. Usually prices of wholesalers were below that ceiling  
9 and the actual price that was charged would have been driven by competition in the  
10 UK market, including the wholesale market and the price of branded drugs. GUK is  
11 unable to provide a 'typical' mark-up in this regard."

12 I would note that in particular:

13 "While price lists were published by wholesalers, actual prices would have varied  
14 depending on the discounts and rebates negotiated between wholesalers and their  
15 respective customers and GUK was not involved in these negotiations."

16 To have done so would have been quite improper.

17 Could I just go through each one of those points. Do you agree that the drug tariff price set a  
18 ceiling that wholesalers could reasonably charge for generics?

19 A. I am not an expert in the operation of the drug tariff or pharmacy reimbursements.

20 Q. You accept that the drug tariff, without being an expert but having read the decision as  
21 much as anything else, is the price at which pharmacists are reimbursed by the NHS?

22 A. I mean, that seems like a reasonable proposition.

23 Q. I think it is -- I would be interested to know why it is not a compelling proposition.

24 THE PRESIDENT: I think Ms. Webster accepted if you tell her that that is right.

25 A. Exactly.

26 MR. KON: Thank you. Otherwise would it not be the case that if, in fact, wholesalers were  
27 charging more than the drug tariff price, pharmacists would be operating at a loss, if that  
28 was not their general way of approaching life? Would you agree with that?

29 A. That sounds sensible.

30 Q. I do not think this requires any detailed knowledge of the drug tariff, but again, you will  
31 correct me if I am wrong on this, that actually what pharmacists would want to do would be  
32 to get the lowest price, possibly because actually the difference between what they were  
33 paying the wholesaler and what they were reimbursed went straight into their pockets; it  
34 was profit for that particular pharmacist?

1 A. Yes, I would agree with that.

2 Q. Is that not exactly what the CMA was being told in this response by GUK, that rebates and  
3 discounts would be negotiated on an individual basis and there was room for bargaining  
4 between wholesalers and pharmacies?

5 A. So what I understand -- and this is consistent with what we see in Mr. Sellick's data -- is that  
6 the wholesaler discount that -- sorry, the wholesaler mark-up -- sorry, the discount that the  
7 wholesaler passed through to the pharmacist, which was then their final discount that the  
8 pharmacist received off list price, would have varied to a small extent between customers,  
9 between pharmacy customers.

10 So sometimes they received 10% on an average, sometimes it was 9%, sometimes it was  
11 11%, and presumably that would have depended on the size of the pharmacy that was being  
12 supplied.

13 What is clear is that that seems to be a discount which is for that wholesaler to that  
14 customer, but all products sold by that wholesaler to that customer would have had the same  
15 discount.

16 Q. May I just take you to the decision on the drug tariff.

17 I know you are not an expert on the drug tariff, but there is one particular point that I would  
18 just like to point out to you and it is something I am sure you have already read.

19 If we could go to {V/1/57}, which is the decision which considers the drug tariff.

20 Interestingly, we have not heard very much about the drug tariff over the last two weeks.

21 There is quite a lot of evidence in there from Dr. Stillman, of course, which is largely  
22 unanswered, as I understand it.

23 This is actually from the decision, but the one thing I would ask you to look at in that paper  
24 that you have is 3.108. This is the fact that there is a category C, both 20mg and 30mg  
25 tablets were initially in category C of the drug tariff because that is the category where there  
26 was no generic competition, and they moved to category A on 1st June 2002, and in turn  
27 30mg on 1st November 2004.

28 If you then look at the footnote to that and you go on to category A -- forgive me, if you go  
29 to category A it is probably easier. That explains what category A is into which the generic  
30 paroxetine, or paroxetine generally moved, and these are usually available from several  
31 sources.

32 So this is a change in the drug tariff that occurs when generic competition is introduced. I  
33 am sure this is familiar to you from Dr. Stillman's evidence as much as anything else. It is  
34 normally set on the basis of a basket of two wholesalers and three generic manufacturers.

1 Here, you have the CMA acknowledging that wholesale prices are and were relevant when  
2 the drugs moved into category A, and if you look at footnote 167 you will see he says:

3 "During the relevant period, the 'basket' consisted of AAH, Unichem, APS, Alparma  
4 and IVAX. This was confirmed to the OFT by DH."

5 So my only point in going into that is going back to our discussion on the drug tariff.

6 Therefore, the wholesaler prices are relevant, based on the decision itself, to the change that  
7 occurred in the drug tariff, and therefore they are not altogether irrelevant from the point of  
8 view of competition at that level. Would you agree with that?

9 A. That very last part, sorry, of your sentence: they are not irrelevant to?

10 Q. Well, I mean, let me put it -- it is a fair point. Let me put it to you differently.

11 In terms of assessing the wholesaler benefits that we agreed a moment ago were conferred  
12 by the entrants' products, part of that benefit, in addition to prices that were passed on the  
13 pharmacists that I have been discussing with you so far, was indeed the fact that the  
14 paroxetine products moved from category C to category A and, therefore, there was a lower  
15 reimbursement price. That is the point I am making.

16 THE PRESIDENT: I am sorry, Mr. Kon, I am not quite clear what the question is. We are  
17 talking about wholesaler benefits. Does that mean benefit to wholesalers?

18 MR. KON: No, it means benefits conferred by generic paroxetine becoming available to  
19 wholesalers because the product was now available at the wholesale level, and the only way  
20 that a product could move from category C to category A was it being available at least to  
21 wholesalers of which, you can see from the footnote, it included the full-line wholesalers  
22 who were supplying generic paroxetine.

23 THE PRESIDENT: I see. So not a benefit to wholesalers?

24 MR. KON: No, wholesaler benefit --

25 THE PRESIDENT: A benefit from the fact that it is available to wholesalers?

26 MR. KON: Yes, sir.

27 A. Am I right in understanding this first bullet in 3.108, to the extent that there is a benefit that  
28 flows on to the NHS, it is concerned with the price that has been set by wholesalers to  
29 pharmacists, as opposed to the price at which the wholesaler can purchase from the entrant.  
30 So is it slightly different from the point which I have been debating with Dr. Majumdar?

31 Q. It is a slightly different point to the point you are debating with Dr. Majumdar. But my  
32 point is that we are currently talking about wholesaler benefits and margins, and my only  
33 point is the one that I just made to the President, which is that a number of benefits to  
34 competition, which is of course a first line of questioning that we are exploring, arose from

1 the fact that cheaper entrants' products were available at the wholesaler level and, in  
2 addition to the flow through, which is currently under discussion, to pharmacists, there was  
3 a clear benefit in terms of the NHS reimbursement price. That is the only point I am  
4 making here.

5 THE PRESIDENT: What I do not understand lying behind your question, Mr. Kon, is Seroxat, or  
6 the product that constitutes Seroxat, was available from two wholesalers before the entry  
7 because it was parallel imported Seroxat.

8 MR. KON: If you look at the first line of the category A description, it requires generics that are  
9 usually available from several sources. So it is a category that is specific to generic  
10 products, sir.

11 If there were no generics, it would stay in category C and category C would be the GSK list  
12 price, for want of a better way of putting it. So what this has done is actually made a  
13 significant development in the way that Seroxat, and indeed, of course generic paroxetine,  
14 are reimbursed because it moved from one category to the other.

15 THE PRESIDENT: I understand that, but the fact that it goes to category A is because it becomes  
16 a generic supply.

17 MR. KON: Yes.

18 THE PRESIDENT: Not because it is being supplied by wholesalers. If it was not a generic  
19 supply it would not be in category A; is that not right?

20 MR. KON: That is correct, but normally -- it is partly the fact that it has been supplied through  
21 wholesalers and partly the fact that generics become available.

22 THE PRESIDENT: It has to be a generic that is being sold by at least one wholesaler?

23 MR. KON: Yes, but it is the price of those wholesalers that is relevant, sir, and given the price is  
24 what we have ascertained, some 10, 12, 14, depending on whose data you accept, below the  
25 reimbursement price for Seroxat, it is that wholesaler price that is determinative of what  
26 price category A is going to land up at.

27 A. I think that is why I asked my question, which is: is it the price to the wholesaler as opposed  
28 to the price that the wholesaler charges to the pharmacy?

29 Q. It is the price to the wholesaler.

30 MR. TURNER: No, it is not.

31 THE PRESIDENT: It cannot be, surely not, because it is a basket. What is --

32 MR. KON: I am sorry. Let me correct. That is the price the wholesaler will charge on. I am  
33 sorry I said the price to the wholesaler. The wholesaler price.

34 THE PRESIDENT: Yes.

1 MR. KON: Forgive me.

2 THE PRESIDENT: So your question is the fact that wholesaler prices come into the basket and if  
3 they are lower, the reimbursement price to pharmacy goes down?

4 MR. KON: Yes. That is undisputed evidence, I think.

5 THE PRESIDENT: That is clear. What, then, is your question to the witness? That is what  
6 happens.

7 MR. KON: My question is: is that not an indirect benefit as a result of generic paroxetine coming  
8 on to the market as a result of the supply agreements?

9 A. So that would then depend on what price the wholesalers charge the pharmacies for the  
10 generic paroxetine, and that is the point that we are debating around mark-ups.

11 Q. All I would say to you is that is a lower price than the Seroxat price.

12 A. So in most likelihood it will be a lower price, but it is not the price that we have -- where we  
13 have been talking about a lower price, we have been talking about the lower price of the  
14 generic product relative to the parallel import and that being the price to wholesalers, and  
15 we have discussed that that is somewhere between 10% and 16% depending on the view  
16 that you take of parallel imports.

17 That is not the relevant bit here, in this discussion, for identifying what the benefit is to the  
18 pharmacies that could then get passed on through a move from category C to category A.

19 Q. That is the pass-through question that we have been debating.

20 A. That is.

21 Q. I agree entirely, and I am not questioning that. It was a peripheral point that has become far  
22 more significant, but nonetheless I maintain that it is a benefit as a result of generic  
23 paroxetine coming on the market which it would not otherwise have, done absent --

24 THE PRESIDENT: I think that is a submission really, is it not?

25 MR. KON: Perhaps.

26 THE PRESIDENT: I can understand the submission.

27 MR. KON: Perhaps. So where we got to on the pass-through question is that, according to the  
28 GUK evidence that we were looking at -- could we go back to that, please -- which is  
29 {A2/21/1}.

30 As you can see from the final sentence of that, there were:  
31 "... discounts and rebates negotiated between wholesalers and their respective  
32 customers and GUK was not involved in those negotiations."

1 Is that not simply a bargaining process, therefore, between the wholesaler and the  
2 pharmacist, which is not based on a convention as such but is based on individual  
3 negotiations?

4 A. So there will be discussions. I imagine there will have been discussions between the  
5 wholesalers that GUK sold to and the customers of those wholesalers, so the pharmacies.  
6 Now, if they were full-line wholesalers, then my understanding is that they could be selling  
7 12,000 different product lines on average, and that is a figure that I took from the medicines  
8 distribution market study that was undertaken by the OFT, paragraph 1.56 of annex C.  
9 If they are short-line wholesalers, then the short-line wholesalers are selling in the region of  
10 2,000 products. So the question then is -- sorry, what we also know, we think we know is  
11 that the mark-up that would have been charged by the wholesaler to the pharmacist would  
12 have been an average mark-up across all of those products that they were selling.  
13 Some of those products would have been high value, some of them would have been low  
14 value, but we do not expect to see a difference in the overall mark-up depending on -- you  
15 know, for each individual product.

16 So it will be the case that there will be some products that those wholesalers would have  
17 been selling where they will have made more money than the costs of getting that product to  
18 the pharmacy, and there will be some products where they will have made less money than  
19 their cost of getting their product to the pharmacy, and on average it will come out that they  
20 will cover their costs.

21 The question is you get another product coming along like paroxetine and it is a higher  
22 value product, and the question is does that then change that negotiating position between  
23 that wholesaler and the pharmacy? Really it is a practical question: do we think that the  
24 wholesaler would have been particularly aware of it, one more product which was a slightly  
25 higher value product? Do we think that that would have changed the position of that  
26 wholesaler in its negotiations with the pharmacy? Do we think the pharmacy would have  
27 even known? It is very unclear to me the extent to which it would necessarily have been  
28 passed on for GUK.

29 We talked yesterday about the situation being slightly different for Alparma and we talked  
30 a little bit about IVAX, and it might be helpful to describe actually what we do know about  
31 the way in which IVAX reached its pharmacy customers.

32 THE PRESIDENT: I think Mr. Kon is asking specifically about GUK.

33 MR. KON: Yes, quite.

34 THE PRESIDENT: So I think concentrate on Mr. Kon's questions.

1 MR. KON: Perhaps I could go on and raise a few more questions in this area.

2 Do you agree that in principle the right way of testing this would have been for the CMA to  
3 actually look at exactly what the pharmacists were paying and investigate the wholesaler  
4 margins themselves?

5 A. So I think if one can get the data, that it is helpful to look at that data. I note that actually  
6 the approach that I have taken to establishing what the relevant mark-up could have been  
7 for GUK actually means that it is based more closely to what we think the final price was to  
8 pharmacies than just saying, "I think that the mark-up was 15%, it is in line with what was  
9 charged on average, let us just go with that".

10 As I described earlier, the approach that I have taken is to start with what we know, which is  
11 from Andrew Collier. We know that he was looking at market prices. I think they were  
12 approximately around £13.15, and he said he wanted to set his prices at the pharmacy level  
13 at a similar rate. We also know he had a mark-up of 25%.

14 Q. Ms. Webster, I am going to go to Mr. Collier. I hesitate to interrupt you.

15 A. Could I just finish that brief point? I will be brief.

16 Q. Sure.

17 A. So the point is that we know that he was entering into the market trying to match the market  
18 price. That market price would have been GUK, would have been IVAX. So we can then  
19 say, okay, but I know -- I can then back out from that what the mark-up would have been  
20 for GUK, and the mark-up that I back out from that analysis is 15%.

21 Now, that 15% is assuming that whatever -- because it is based on what we think the price  
22 was to pharmacists that GUK was charging, that price by definition includes some element  
23 of standard mark-up, but also it is some element of -- sorry, to the extent that there was pass  
24 on, that should already be captured in that approach that I have taken.

25 Q. 15% you have agreed is an average figure? It does not reflect the individual. You do not  
26 know what the data is so it is an average calculation. You agreed to that?

27 A. Yes, so what I know is that Andrew Collier observed the market. In the market he saw that  
28 there was a selling price for generic product which was around £13.15. I do not know how  
29 much fluctuation there would have been around that. Then we can work out from that what  
30 the price charged to wholesalers would have been. So we can just take 15% off that. That  
31 gives us our price to the wholesaler for GUK. Again, I do not know what the fluctuation  
32 would have been around that, but perhaps you would not have had very much variation  
33 between those two.



1 Q. Thank you. Just to confirm if the data were available, and there is no reason to believe it  
2 was not, the best way for the OFT/CMA to have tested this would have been to have had  
3 that data and to be able to demonstrate exactly what was going on after the wholesaler --  
4 what the mark-up was?

5 A. I think that is ideal, but I think that the way that we have been able to work it out gives us  
6 an approximation to that.

7 Q. But do you have any reason to know why the OFT/CMA did not produce that in the  
8 decision?

9 A. I have not looked at that.

10 MR. KON: Thank you.

11 I just wonder whether you might want to take a break at this point?

12 THE PRESIDENT: How much more?

13 MR. KON: I have another 15 to 20 minutes.

14 THE PRESIDENT: Right, then yes, we will.

15 MR. TURNER: I have one question so far.

16 THE PRESIDENT: Good.

17 Yes, we will take a break of 5 minutes. Thank you.

18 (3.30 pm) (A short break)

19 (3.35 pm)

20 MR. KON: Ms. Webster, I would like to go back to Mr. Collier's evidence which we talked about  
21 earlier, because clearly I think it would be fair to say that you put quite a considerable  
22 significance on his evidence as informing you of the wholesaler mark-up question. Would  
23 that be a fair characterisation?

24 A. Yes, that is fair. I used his evidence as the basis for my approach and then I checked the  
25 consistency with the results that I get from that approach with the other evidence provided.  
26 But I do agree that I do place weight -- material weight on Andrew Collier's evidence.

27 Q. Thank you. If you go to {F/1/3}. Perhaps as we are going there, Mr. Collier of course  
28 worked for Actavis AlphaPharma and his knowledge is deeply informed by that experience. I  
29 think, without taking you through the first couple of pages of his CV etc, I think it's fair to  
30 say that a great deal of what he says is informed by his knowledge of the AlphaPharma  
31 arrangements?

32 A. Understood.

33 Q. But you agree. Yes. Could I just take you, therefore, to paragraph 8 of his witness  
34 statement on page 3 -- that is internal and external numbering 3 -- because what he does is

1 he explains to you, or explains to the reader exactly what the Alharma distribution  
2 structure is for wholesalers.

3 If I may, I will read it:

4 "The majority of Alharma's sales were made to pharmacy 'scheme' members."

5 That is their own scheme members:

6 "These sales were made via 'full-line' wholesalers (including independent regional  
7 wholesalers) which provided a full range of branded and generic products to  
8 pharmacies. The pharmacy scheme members paid a pharmacy price to the wholesaler  
9 ..."

10 So the pharmacy price was paid to wholesalers, which was specified by Alharma:

11 "... (although pharmacies may have also received volume rebates from wholesalers  
12 based on their overall purchases from the wholesalers). The relevant wholesale price  
13 was equal to the pharmacy price less a distribution fee or discount."

14 So, essentially, if I have understood that correctly, and tell me if you think I have  
15 misunderstood that, Alharma determined a pharmacy price, in other words the retail price,  
16 and then a distribution fee was paid to wholesalers and then after that fee was deducted that  
17 essentially was the price as Alharma had calculated it. But the key is that the pharmacy  
18 price was actually predetermined essentially under this scheme by Alharma. Is that your  
19 understanding of it? And the wholesaler essentially was paid a distribution fee or a service  
20 fee?

21 A. That is my understanding of it.

22 Q. Thank you.

23 Secondly, I think it emerges very clearly from that, but I can take you elsewhere in the  
24 witness statement, that generally very little was sold by short-line wholesalers by Alharma.  
25 In other words, Alharma sold -- and he says later on in the witness statement, which you  
26 no doubt will recall, that given the volumes available most of it went through full-line  
27 wholesalers and a small proportion went direct to pharmacy. But most of it, insofar as  
28 wholesalers were being used and not pharmacies supplied direct, it was full-line  
29 wholesalers?

30 A. That is my understanding.

31 Q. Good. If I may, therefore, take you to what he says about GUK, because going back to your  
32 earlier evidence, the 15% average mark-up that you have calculated is based to a significant  
33 extent on Mr. Collier's extrapolation or reverse engineering from Mr. Collier's witness  
34 statement. That would be a fair summary of, I think, the evidence that you have given?

1 A. So what it is based on is Andrew Collier's observation of the market price that prevailed and  
2 an intention that Alharma has product get to the market at a similar price to the other  
3 generics.

4 From there, I make -- in order to get to my GUK mark-up, I make no other -- I have no  
5 other reliance on Andrew Collier's evidence, ie how the wholesale mark-up operated or who  
6 was acting as a distributor, who were the wholesalers. I do not need to know any of that.  
7 What I need to know is what was the price that Andrew Collier was targeting and, therefore,  
8 that tells me what I need to know.

9 Q. I mean, that, I think -- perhaps we can go to it now. I was going to go to it a little later, but  
10 given what you said it would be useful to turn to it now. That, I think, emerges from  
11 paragraph 21 of the witness statement, the third sentence which you are no doubt familiar  
12 with, where he says: {F/1/8}

13 "As the person who was responsible for setting prices for Alharma's paroxetine  
14 product, I can also say that it was never my intention to sell paroxetine at prices that  
15 were much different from the prices charged by IVAX and GUK."

16 But of course Mr. Collier would not know what the prices charged by IVAX and GUK  
17 were, would he? He might try and ascertain that in the marketplace, but there clearly was  
18 an element, as you have seen in the GUK evidence, that they were negotiating individual  
19 rebates and discounts all the way along and there would not be a level of transparency.  
20 His intention, I accept, was precisely as he has formulated it there, but his knowledge would  
21 not have been?

22 A. So I am not sure that I would agree with that. So my understanding is that Andrew Collier  
23 has tried to work out what the market price is, the price that the pharmacists are paying,  
24 because as we know, under the Alharma scheme Alharma needs to be setting that price or  
25 wants to be setting that price for pharmacy.

26 So Andrew Collier does not need to know what the price was that IVAX charged to a  
27 wholesaler or the price that GUK charged to a wholesaler. What he needs to know is what  
28 is the price that pharmacists are paying.

29 I do not have any reason to doubt that there would have been some degree of transparency  
30 on that. So just as we have seen in relation to Mr. Sellick's spreadsheet with parallel import  
31 prices, Mr. Sellick and his team went to quite some length to try to get an accurate view of  
32 the parallel import price that pharmacies would be able to obtain.

33 I imagine that there was a similar approach taken to understanding what the price was for  
34 the generics, and then that was the price that Andrew Collier would have been trying to

1 identify because that was the price that was relevant to him pricing his own product to his  
2 scheme customers.

3 Q. I understand that that may be your assumption or your instinct, but there is no evidence to  
4 support that proposition you just put forward, I do not think, is there?

5 A. His email of 14th October 2002, which is his email to Torben Laursen, talks about  
6 confirming a market price of £13.15, being the current retail price. Off the back of that, he  
7 then uses that figure to identify what his selling price needs to be to the wholesalers, and  
8 that then gives him the value of the agreement.

9 So I think there is some evidence that Andrew Collier was looking at the pharmacy price  
10 and had some knowledge of the pharmacy price.

11 Q. But you have no way of verifying the extent to which that was accurate?

12 A. So I mentioned earlier that I looked at the generic price that was charged by GUK in  
13 October 2002. I do not know the actual price that was charged on GUK product to  
14 pharmacies. I have got a price which assumes a 15% mark-up, which is what I had backed  
15 out.

16 When I apply that 15% mark-up I get to a price of £13.07, and that is quite close to the  
17 £13.15 that Mr. Collier references in that email.

18 Q. Bear with me for one moment.

19 MR. MALEK: Mr. Kon, you are coming close to trying to probe what is behind paragraph 21  
20 with a witness who is not the person who made the statement, but without asking for that  
21 person to be called to be cross-examined.

22 MR. KON: That is correct, sir. But equally, I am probing the basis upon which the witness has  
23 actually formed a fairly firm view as regards the value of this evidence, and I am simply  
24 probing the witness's knowledge which supports the emphasis put on this witness statement.

25 THE PRESIDENT: Well, the evidence is not challenged.

26 MR. KON: Forgive me, sir. I am just looking at the -- I will come back to that. I do not want to  
27 be distracted by that.

28 Could we then go to paragraph 20 of the same witness statement, please {F/1/7}. This is  
29 where he turns to GUK, and we have looked at this before in these proceedings.

30 He says:

31 "In relation to GUK's argument that '[t]here is no basis to assume that [my evidence]  
32 applies across the board and/or indeed bears any relevance to GUK's position' ..."

33 Which is the submission made in the GUK notice of appeal:

1 "... my recollection is that, unlike Alparma GUK did not have a scheme in place at  
2 the time ..."

3 Obviously it sold in a more traditional wholesaler route:

4 " ... and therefore its prices to wholesalers may have been individually negotiated. I  
5 recall that GUK principally sold to short-line wholesalers but I do not know if it sold  
6 paroxetine to short-line wholesalers. For that reason, I think that it is difficult to say  
7 what GUK's average discount would have been. It is likely to have varied from  
8 customer to customer."

9 I will leave it there. I am not so concerned about that.

10 Insofar as you are putting an emphasis, as I replied to Mr. Malek, on the witness statement  
11 of Mr. Collier, is it not fair to say that actually what his evidence clearly points to, and Mr.  
12 Malek says we have not cross-examined him because we are happy to rely upon that, but he  
13 did not know what the mark-up was of GUK, that there were material differences between  
14 the Alparma arrangement and GUK, and that, therefore, to place a reliance upon Mr.  
15 Collier to reverse engineer, as we have suggested, the mark-up applied by GUK would  
16 actually not be consistent with this witness statement?

17 A. No, I thought I had provided an answer to that earlier, in the sense that to the extent that I  
18 want to look at what the mark-up would have been for GUK, the only part of Mr. Collier's  
19 evidence -- witness statement that I rely on is his aim to price his own product at a price to  
20 pharmacy which is close to that of GUK and IVAX. So the fact that Mr. Collier does not  
21 know what the approach to mark-ups were for GUK's product, is not relevant to me.

22 Q. But to finish, Ms. Webster, you cannot be sure that Mr. Collier would achieve the objectives  
23 which he described in paragraph 21 of charging prices which were consistent with IVAX  
24 and GUK?

25 A. No, I cannot be sure of that. I have no reason to doubt that he would not have been able to,  
26 but I personally cannot be sure.

27 Q. Finally, I would like to go on to wholesaler distribution costs. In your report you suggest  
28 that the differences between wholesaler mark-ups were related to varying distribution costs  
29 between distributing generics and parallel imports and, indeed, the (inaudible) price as well;  
30 is that correct?

31 A. Are you referring to my --

32 Q. The second joint statement.

33 A. So in that report I suppose it is fair to say that I make two points. If you have got a full-line  
34 wholesaler versus a short-line wholesaler, my understanding is that the models of

1 distribution differ somewhat, and therefore it may well be the case that the costs associated  
2 with distributing the product may be different.

3 I think that I make that as a general statement as opposed to thinking necessarily about the  
4 specifics of this case. But what it -- so it could be, to the extent that we see different mark-  
5 ups that are applied, it could be the case that these are reflective of costs -- differences in  
6 costs between the wholesalers.

7 I have listened to the debate so far in these proceedings. I think it is probably the case that I  
8 do not think that the wholesaler benefit that we have identified associated with the larger  
9 mark-ups for the generic product sold by wholesalers is going to be predominantly  
10 explained by costs.

11 I believe that there is a benefit there to the wholesaler which is not -- the difference in mark-  
12 up is not fully explained by differences in cost.

13 Q. That may well make it much easier for me to finish very quickly now, because that is  
14 exactly the point I -- if I may just refer you to your actual statement, point 2, page {I/2/14}.  
15 Yes, the second paragraph:

16 "Since it cannot be assumed that wholesaler costs would have been the same for  
17 parallel imports of paroxetine and for each of the Entrants' products, as these will  
18 have differed according to the wholesalers used, I believe it is necessary to take a  
19 view on the costs that we think it was likely that the wholesalers actually incurred."

20 I think that is entirely consistent with what you have just said. I think in the light of your  
21 comments a moment ago, I do not think I need to ask you any further questions.

22 Thank you very much.

23 THE PRESIDENT: Thank you, Mr. Kon.

24 Yes, Mr. Turner. Re-examination by MR. TURNER

25 MR. TURNER: Ms. Webster, only one question. You were asked earlier by GSK's counsel if  
26 you could recall certain witness evidence which you said you had seen on parallel imports  
27 and where those were coming from. May I ask if on the screen we could bring up  
28 {A2/15L/1}.

29 You see this is a witness statement from Dr. Reilly in the patent proceedings dating from  
30 October 2001. If we go forward in that to page {A2/15L/4}, there is a section 3 entitled  
31 "The Parallel Importers". If you look at paragraph 3.2 and read that to yourself. (Pause)

32 A. Yes.

33 Q. Can you comment any further on what the missing witness evidence you were referring to  
34 might have been?

1 A. Thank you. This is the missing evidence that I was trying to recall.

2 MR. TURNER: I am obliged. No further questions. Questions by THE TRIBUNAL

3 MR. GLYNN: May I ask one final question. When you are making the comparisons, for  
4 example, at the end of the joint experts' report of the effect of making different adjustments,  
5 all of you use periods to make the comparisons; for example, May 2002 to January 2003,  
6 February 2003 to November 2003. Would I be right in thinking that if one were thinking  
7 about the volume adjustment, which is a major one of these adjustments that we are talking  
8 about, the effects of the volume change, and one were to look at the effect by the end of the  
9 period, would you expect that to be a larger figure?

10 If you took the average of, as we have here, for example, in table 7(c), February 2003 to  
11 November 2003, if you took a short period at the end, you would get a different number,  
12 you will probably get a larger number, would you not?

13 A. That would be my expectation. I am just flicking to the chart, figure 1, to see.

14 THE PRESIDENT: This is page 70 onwards, I think.

15 A. It is true that the total market continues to decline throughout 2003. So yes, I agree, if you  
16 were to take the three or four months at the very end of the year.

17 MR. GLYNN: You would have a larger volume or larger weighting effect?

18 A. That is right.

19 MR. GLYNN: Thank you.

20 THE PRESIDENT: We have no further questions. Thank you very much, Ms. Webster, you are  
21 released.

22 A. Thank you. Housekeeping

23 THE PRESIDENT: That concludes the part of these appeals concerning Chapter I, Article 101.

24 We shall move tomorrow to the Chapter II part of the case, in which GUK is not involved, I  
25 think, so, obviously, no reason for you to attend.

26 We will be writing to all the parties, given that some are not here, with regard to written  
27 closings, but I will say this now for the benefit of those who are here, we would like please  
28 in the written closings references to be hyperlinked to the documents and the authorities in  
29 the Magnum system.

30 We are also going to impose a page cap on written closings. We have no doubt you could  
31 all write volumes based on what has transpired in the case, but bear in mind that we have to  
32 not just read but digest them and it does not help us and, therefore, does not help your  
33 clients, which is why you are here, if we get too much.

1 We take account of the fact that you have not addressed penalty, as regards the appellants.  
2 So for the appellants, other than GSK, we will say a maximum -- but this is not an  
3 encouragement to write to the maximum, it is a ceiling -- of 50 pages, one and a half  
4 spaced, 12 point font; for GSK, 75 pages and for the CMA, as you are facing five  
5 appellants, 100 pages.

6 Also, we have asked if you can supply the paragraph references in the *Lundbeck* cases,  
7 which you would like us to read, so that we can read these before, just separately. We can  
8 either do it altogether or we can do it separately, if that is more convenient. It is not  
9 something you need to agree, you just put in whatever ones---including the other judgments  
10 of course, not just the main *Lundbeck* judgment. That is all I want to say regarding  
11 closings.

12 As regards the Chapter II, abuse of dominance case, having reflected on this, we think it  
13 will be helpful in fact to have a full day of openings from GSK and the CMA going into the  
14 law and that one day for the hot tub of the two experts will be sufficient.

15 Just two things I wanted to raise, which will help me, Mr. Turner. In the decision, if you  
16 have that, either in hard copy or on the screen, page 218 in the decision {V/1/218} there is  
17 that table.

18 MR. TURNER: Yes.

19 THE PRESIDENT: Where there appeared to be some anomalies in both the totals and some of  
20 the earlier figures when looked at against the source document that is referenced. I do not  
21 know if there is a good explanation of that or it is just some mistakes.

22 MR. TURNER: I am able to help.

23 THE PRESIDENT: Yes. Is that something you can do now or you can put in a note, if that is  
24 more appropriate, I do not know what the answer is?

25 MR. TURNER: I have been told what it is, but I will put it in a short note to make sure that it is  
26 accurate.

27 THE PRESIDENT: That also means that it is circulated to everyone, so that is probably more  
28 satisfactory.

29 Again, just to help me, on page {V/1/209} there, can you just help me understand this figure  
30 4.1. There is the dark shading which is depression, perhaps appropriately, but the bar in the  
31 bar chart then narrows at some point. So everybody stops and the broad bar, at just about  
32 42%, and then -- is that supposed to be a distinction?

33 MR. TURNER: That is a --

34 THE PRESIDENT: You see the point I am making. Is that significant?



1 MR. TURNER: No, that is a formatting error. It is not significant.

2 THE PRESIDENT: Right. Really the dark black continues up to the -- is that right?

3 MR. TURNER: I am told that we will produce a clean version which eliminates that error and  
4 then we will be able to see.

5 THE PRESIDENT: But that is the idea, that it should continue in the same way?

6 MR. TURNER: It should continue in the same way.

7 THE PRESIDENT: I think we can probably work it out then with that explanation. The other  
8 table, is it going to be a correction of the other table or an explanation?

9 MR. TURNER: If we go back to the other table.

10 THE PRESIDENT: On page {V/1/218}.

11 MR. TURNER: There is obviously an error in the totals for the profit columns, which was picked  
12 up. But there is an explanation in relation to the early years, 2001, 2002, for the 30mg  
13 version and what that was based on.

14 In short, although the source here refers to calculations based on annex 4 of GSK's second  
15 response, at a certain point, partly because of a jump in the data that was unexplained for  
16 30mg, which was talked about earlier today, they switched to using adjusted IMS data. That  
17 needs to be explained to you and I will do that in writing.

18 THE PRESIDENT: I think the same may be true of 2001, 20mg, the 44.9. It is not a big  
19 difference but I think the source document is 52.0.

20 MR. TURNER: We will check that.

21 THE PRESIDENT: If you will check that. So the total is just an arithmetical error. Is that right?

22 MR. TURNER: I believe so.

23 THE PRESIDENT: Fine.

24 Very well. So 10.30 am tomorrow morning for GSK and the CMA and everyone else it will  
25 be the week after next with written closings by Tuesday afternoon, 4 o'clock on Tuesday.

26 Thank you.