IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1271/4/12/16 & 1272/4/12/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd January 2017

Before:

HODGE MALEK QC
(Chairman)
WILLIAM ALLAN
PROFESSOR COLIN MAYER CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INTERCONTINENTAL EXCHANGE, INC Claimant

- and -

COMPETITION AND MARKETS AUTHORITY Defendant

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5 Chancery Lane, London EC4A 1BL
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

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Submissions by MR. HARRIS

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: Good morning, gentlemen. May it please the Tribunal, I appear with Mr. Lindsay on behalf of the applicants, ICE. Ms. Demetriou and Miss. Abram appear on behalf of CMA. You ought to have, sir, gentlemen, the first notice of appeal bundle, the second notice of appeal, defence, some additional documents and then three volumes of authorities.

THE CHAIRMAN: Yes.

MR. HARRIS: Unless there are preliminary matters -- I do not have any, save simply to mention, which I think you have seen in correspondence that NASDAQ are not attending in person. They have submitted their skeleton.

THE CHAIRMAN: We have read their skeleton. I can say that we have all read, obviously, the report, the pleadings and the skeleton arguments. It does not mean we have read every single page --

MR. HARRIS: No, there is quite a lot. I'm very grateful.

THE CHAIRMAN: The skeleton argument has been very helpful in crystallising the issues together with the list of issues, but I'm not saying this case is necessarily straightforward, as we all appreciate.

MR. HARRIS: No, I accept that. Some of the points that at first sight look involved in the sense that they have generated, say, five generated from here, five pages back and then five pages in response. They are actually, at heart, quite simple judicial review points, in particular when we turn to ground 2; it has got five subdivisions. But they are all ultimately fairly simple judicial review points, for example, inconsistencies, illogicalities, lack of an adequate evidence base, those sorts of things. So when I get to that, I shall be careful to introduce each one by reference to the relevant judicial review concept.

THE CHAIRMAN: That's good, thank you very much.

MR. HARRIS: I have the decision separately, unsurprisingly in rather marked-up form. It may recur, but one of the places is in the first notice of appeal bundle behind our first notice of appeal.

THE CHAIRMAN: I have just put it in my additional documents.

MR. HARRIS: I was going to say you might want to keep that out separately because needless to say we will be looking at that quite often, and likewise I have the skeletons separately although I think you find them in the additional documents bundle.

One document that I hope you all have is the annex to my learned friend's skeleton, which is the note of a call; it's rather redacted. At the appropriate moment we will actually need to look at the annex itself.

THE CHAIRMAN: Okay.

MR. HARRIS: If we need to get more copies, we can do that. Unsurprisingly, I am not going to trawl through reams of legislation at the outset. I just want to pick up on a couple of very quick and short points.

The legislation you will find in volume 1 of the authorities bundle at tab 1. I am going to take this quite rapidly for obvious reasons.

In my bundle it is volume 1 of 3 authorities, tab 2, and that is the Enterprise Act, and I am turning it up on internal page 37, which you find in the top right-hand corner, and in particular section 35.

THE CHAIRMAN: Yes.

MR. HARRIS: Unsurprisingly, given that one of my challenges is a vires challenge, I draw your attention to 35(1) and in particular (b). What the CMA has to decide is (b):

> "... whether the creation of the relevant merger situation has resulted, or may be expected to result in, a substantial lessening of competition" (otherwise known as the SLC).

And that is the focus of their enquiry, and of course, as we shall see, you have to remedy the SLC or the adverse effects of the SLC. You are not looking at other matters. You are looking at that matter.

Then if we just flick over a couple of pages to page 45 internal, and we look at that remedy section, section 41, we can see the very point in subsection (2):

> "The CMA shall take such action as it considers to be reasonable and practical ..."

Then for what, gentlemen? (a):

> "To remedy, mitigate or prevent the substantial lessening of competition;
>
> "(b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the SLC."

So the focus throughout is on the SLC, and when it comes to remedies, you remedy the SLC or the adverse effects, the adverse competitive effects of the SLC. You are not looking at other matters, and obviously that is relevant to my ground 5.

You are entitled in subsection (4) to -- as the CMA:

> "... have regard to the need to achieve as comprehensive a solution as is reasonable and practicable."

But, again, to what:

"To the substantial lessening of competition and any adverse effects."

It does not talk about giving remedies, for example, so as to give purchasers choices or other people choices, or because there may have been a lack of fairness, alleged or real, or any of those matters. It is all about the SLC and the adverse effects.

Then the only other point to which I would like to draw your attention is schedule 8, and that is towards the back of this second tab, and you will find that on page 418 in the top right-hand corner.

In paragraph 2, under the general restrictions on conduct -- so this is under their general heading "Provisions that may be contained in certain enforcements orders", and in paragraph 2:

"An order may prohibit the making or performance of an agreement, or may require any party to an agreement to terminate the agreement."

So that is a rather broad power, and I turn it up because it is relevant to one of the points that the CMA makes in their own skeleton. I'll come back to that just so you have it in mind.

That is all I have to say about the legislation, and I have three short topics on the case law before going to the first ground of appeal.

Just as I give you the road map for these three short topics, one is about Tetra Laval and the principles for which that stands. So we will turn that up in a moment. The second is about the relevance of the Article 1, Protocol 1, Convention Rights to Property, and the third one is the relevance of the finding in the Tesco tribunal decision about not supplementing your reasoning when you are defending a CMA report or decision.

In that case, of course, it was the Groceries Market investigation, supermarkets. So first then, Tetra Laval. Tetra Laval is to be found in volume 3 of the authorities at tab 28. If you could just turn that up, and as you turn it up I'll give you a very potted summary of what the facts were.

This was a so-called conglomerate merger case, where we had a rather large and well-known and, indeed, very dominant company. The Tetra group of companies, specialised, as you know, in packaging materials of certain types. In one particular type of packaging they had a very dominant position and what they were doing was buying another company, a separate company, merging, and that specialised in a different type of packaging. The details do not matter. What was said, the theory of harm in the case was that even though they were not competing in those specific types of packaging, nevertheless by buying the

second company with a different type of packaging, Tetra would be able to leverage its dominance from the one market into the other market, and that could create effectively the equivalent of a substantial lessening of competition.

But what is most relevant about the case for present purposes is it is a non-horizontal merger case. It has the label or epithet "conglomerate merger", but what is important is that these two were non-competing companies in the relevant product market, and that is just like in a vertical case, where by definition they are not horizontal competitors.

That is our case. This is a vertical merger, the ICE/Trayport merger, not a horizontal case, and as we all know, vertical mergers as a broad rule -- I'm not overstating it. As a broad rule they do not generally tend to create the same or the same obvious competition concerns as a horizontal case. Conglomerates are the same, they are non-horizontal. They do not tend to create the same concerns as a broad rule, and that is the context in which we are operating.

Tetra Laval makes, in that context of non-horizontal mergers where generally speaking you are not thinking there is very likely to be a problem, some very useful remarks about future-looking analysis and the standard to be expected of the regulator who is analysing that sort of non-horizontal situation.

So could you please turn up two pages. The first one is to be found at tab 28. In the Court of Justice numbering it is 1-1060. What they are doing here is these indented paragraphs that begin 152, 153, 154, they are from the court of first instance's judgment that is being recited in the Court of Justice's judgment, and I just begin here to set the scene.

So at 154:

> "In this context ..."

This is the CFI talking:

> "... it is also appropriate to distinguish on the one hand between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market ..."

So that is the one they were allegedly going to leverage their power into:

> "... and results in the creation or strengthening of a dominant in that market ...(Reading to the words)... already held on the first market, and on the other hand a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger."

That was their analysis of this case; it was not immediate, it might happen in the future, what is the standard. They went on in the CFI to say:

"... but will occur in those circumstances only after a certain time and will result from conduct engaged in by the ...(Reading to the words)... where it already holds a dominant position."

Moving on to 155 and picking up at the top of the second page. So this is, again, still the CFI talking:

"Thus, the Commission's analysis of the merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for the assessment of that effect on the conditions of competition in the reference market. As the court has already held, where the Commission takes the ...(Reading to the words)... create or strengthen ...(Reading to the words)... foreseeable period, i.e. future looking, it is incumbent upon it ..."

So the CFI is saying it is incumbent upon you, the Commission, to produce -- and this is their phraseology:

"... convincing evidence thereof ...(Reading to the words)... to be neutral or even beneficial for competition on the markets concerned as is recognised in the economic writings ..."

Et cetera:

"Examination of such a merger calls for a ..."

And, again, this is their phraseology:

"... precise examination supported by convincing evidence."

Then in the usual way they set out the arguments of the various parties and then the Court of Justice presents its findings on this relevant topic several pages further on at 1-1069.

So at 39 they talk about margin of discretion with regard to economic matters. No issue there. At 40 they make a point that is not desperately relevant, talking about analogies with a situation of creating collective dominance, but those two just introduce the paragraphs that I rely on more particularly.

So at 41:

"Although the CFI stated in paragraph 155 ..."

That is what we just looked at:

"... that the proof ...(Reading to the words)... supported by convincing evidence of the circumstances which allegedly produced those effects, it by no means added a condition relating to the requisite standard of proof."

That was one of the criticisms that was being levelled against the CFI judgment in the Court of Justice.

This is the key part for this case:

> "A prospective analysis of the kind necessary IN merger control must be carried out with great care since it does not entail examination of past events for which often many items of evidence are available and which make it possible to understand the causes, or of current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned calculation ...(Reading to the words)... Thus the prospects of analysis of an examination of how a concentration might alter the factors determining the state of competition in a given market, such an analysis makes it necessary to envisage various changes of cause and effect with a view to ascertaining which of them are the most likely."

And 44:

> "The analysis ...(Reading to the words)... lengthy period of time in the future, and secondly, the leveraging necessary to give effect to the significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish.
>
> "That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a ...(Reading to the words)... incompatible with a common market is particularly important since that evidence must support the Commission's conclusion that ...(Reading to the words)... envisaged by it would be plausible."

So what do we get out of this? Non-horizontal merger, not expected ordinarily to cause competition concerns, very future looking, and in those circumstances you have got to take particular care with convincing evidence to establish your prospective analysis that this type of merger will lead to competition difficulties.

THE CHAIRMAN: What do you say about Ms. Demetriou's argument at 83.2(a) of her skeleton, which is, they say, the question has no direct relevance to this tribunal, which is required by section 120 to apply domestic judicial review principles?

MR. HARRIS: Well, this met approval in BAA. That is my answer to that, and we were going to look at --

THE CHAIRMAN: We will look at that in a minute.

MR. HARRIS: Yes, we will look at BAA. That is, we say, a non-point.

In fact, I could probably take you to that right now.

THE CHAIRMAN: Yes, that is a good idea.

MR. HARRIS: I am done with the case of *Tetra Laval*, and I do not want to -- you can put this volume away, and if you turn to volume 2, this time of the authorities, at tab 20 you will find BAA. So my note says tab 20.

THE CHAIRMAN: It is tab 20, yes. Thank you.

MR. HARRIS: For this purpose, it is paragraph 20(6) on internal page 14. So that is my response to the point that you just raised in the parenthesis in the middle of the paragraph.

But whilst we are here, since it is the second of my case law points about the Convention right, gentlemen, could I just ask you to read subsection (7) on the next page as well.

THE CHAIRMAN: Yes.

MR. HARRIS: So, again, I do not overstate it. I recognise at the bottom -- I am not saying that this is some kind of fundamental sea change and it makes this case utterly and completely different, but what I do rely upon is the fact that in *Tetra Laval*, as endorsed in subsection (6) of paragraph 6 you have to have particular care depending on the particular context, such as our context. In subparagraph 7 -- and this is the wording from line 5 -- again, you have to have exercised particular care, and as I shall develop when I get to ground 2 of my appeal in the first notice of appeal, we do very much make a complaint about the lack of adequate care. There is a fundamental disconnect, we say, in this case between the CMA's analysis of, on the one hand, our alleged ability to create the partial foreclosure concerns and, on the other hand, whether or not we actually have the incentive to exercise that ability. That linkage is missing in the decision and it is critical that that linkage be set out in this decision because this is a market with stickiness, as I shall develop in a little bit. In any market you need to establish the link, but above all in this market, where there is the stickiness that means that things do not regularly shift. I should develop that. But that is why -- if you ask yourself, well, why are you emphasising these points? That is why. There are some gaping holes in CMA's analysis and that is a critical one.

So that then takes me on to a document that you may not have perused, annex 2 to our skeleton, which you will find in the additional documents file at tab 1.2. The name rather gives it away. The heading of this annex rather gives it away. These are references in the decision to the CMA's analysis being long-term. Why do I bother with that? Of course, Tetra Laval makes a particular point about the standard of care required in a forward-looking prospective analysis.

Gentlemen, I am not going to read them all out, but can I just invite you to just to cast your eyes, please, down just the plethora, in virtually every part of the decision, of references by

the CMA to its forward-looking long-term analysis. It is the underlined bits, obviously.

(Pause)

THE CHAIRMAN: I think we have got the point.

MR. HARRIS: Precisely. That is why I do not read them out. There is no way that the CMA can suggest that this is not a long-term, forward-looking analysis that compounds the problem for them.

THE CHAIRMAN: I do not think it stops them from suggesting it.

MR. HARRIS: I take that point. There is no way that they can convincingly suggest that this is anything other than a forward-looking analysis, and of course that is why, again, I emphasise Tetra Laval.

So that is what I have to say effectively about Tetra Laval and the propositions from it. I have really rather dealt with the next point, which is the Convention right to property. That is subparagraph 7.

You have had an opportunity to read that, and what we say is that those in this case stand for the proposition that there needs to be a very hard and careful look, and there needs to be convincing and cogent reasoning by reference to the evidence so as to establish this supposed -- very unusual, but nevertheless supposed partial foreclosure mechanisms leading to substantial lessening of competition -- these are their words -- in a market that has this critical stickiness feature that I will come back to in a minute.

Just before I get there though, what else do I have to say about the principles in the case law. The last case is the case of *Tesco*, and I would like you, please, to turn that one up. It is in volume 2, tab 17.

Obviously this case was about the analysis by the Competition Commission of the groceries market, and in particular various interesting questions about local markets in which supermarkets operate and whether you should introduce things like what was called the competition test and some various controlled land remedies. I am picking it up in the internal page numbering at page 41. That is paragraph 124.

Picking up there at the top. So it was a judicial review-style challenge as we are today. It is not for the reviewing court to resolve such evidential issues, which are ultimately a matter for the decision maker.

This is one of the key points:

"The important point ..."

So says the Tribunal:

"... is that an assumption, which the Commission now says underpinned ...(Reading to the words)... (see paragraph 110 of the defence ..."

Just pausing there. What was going on, there was an argument about how the competition case test was relevant and there is a judicial review point taken that, hang on a minute, that is not in your decision or your groceries report.

The Tribunal is addressing did, and what it is saying is:

"It is important that the ...(Reading to the words)... in its defence ..."

About then it goes on to say:

"... but which by ...(Reading to the words)... let alone properly analysed and considered in the report itself."

So that is, hang on a minute, you have supplemented your reasoning in your report by reference to some other bits that you now put in your defence, but they were not in your report. They are not articulated and they were not analysed and they are not considered.

Then it goes on. Could you just read to yourselves, gentlemen, the rest of that paragraph.

THE CHAIRMAN: Yes. (Pause)

MR. HARRIS: I am going to go to 15 as well, but by the time we reach the bottom of 124 you can see Tesco's complaints. They are saying, hang on, look what is in the report, certain findings in the report, and you cannot just now assume or advance a whole set of different reasoning that is just not in your report. In particular at 125, the Tribunal opines and gives judgment on this issue:

"Nor in our view does the fact that the Commission, with assistance from intervenors ..."

That rings a bell:

"... has sought to substantiate that assumption by means of evidence and submissions in the course of this proceedings satisfied the need for such investigation and consideration," which they might have added the words "in the report".

That is the difficulty. You cannot come and have another bite of the cherry when this is a judicial review and you have to defend your, in our case decision, in that case report, on the face of what is in it:

"We do not believe that this is an appropriate way of supplementing the report's consideration and findings in relation to the ...(Reading to the words)... of this kind. We agree with Tesco that the Commission's assumption and reasoning in respect of the risk of ...(Reading to the words)... 'new' in the sense that it is not to be found in the report."

Why do I raise this? Obviously we say that in many places, to give you a very good example, the vires challenge, the defence now is brand new. It just does not exist in the decision that you gentlemen have been asked to look at before this hearing. It does not say, to preface some remarks that I will get to later, for instance, you have to terminate the new agreement because otherwise it would undermine the effectiveness of the remedy. It just does not say that.

We will look, obviously, at the parts of the decision where they set out their reasoning, but now it is said, oh, well, it is all about effectiveness, and there are various other -- there are quite a few instances that, as I go through our grounds of appeal, are inviting you to agree with my submission that this is new and different reasoning. We know that in a judicial review, as per *Tesco*, that is not permitted.

That is all I have to say about the case law. So that takes me on to the next stage, which is a very potted summary of some of the key highlights of the decision that I have challenged.

THE CHAIRMAN: You say that they can respond to your arguments within the framework of what is in the report.

MR. HARRIS: Absolutely.

THE CHAIRMAN: But what you are saying is what they cannot do is respond to your arguments to the new theories and points which are not foreshadowed in the report or, indeed, during the evidence-gathering process.

MR. HARRIS: Very much so, sir, and, indeed, not analysed, considered or set out. I think I paraphrased the wording from Tesco 124. It is not analysed, considered or set out in the report. That is --

THE CHAIRMAN: We need to look at each one on a separate basis.

MR. HARRIS: I accept that, but I say it is not just ground 5 vires to the termination of the new agreement where there is a brand new case in several respects. But there are others too.

Take, for instance, the new case against me that the counterfactual is completely irrelevant. That is what it now says, but that is not what it said in the report.

THE CHAIRMAN: That may or may not be relevant, but we would need to be satisfied to the appropriate standard whether that is right or not.

MR. HARRIS: Yes. So we will come to them as we go through.

If I might respectfully suggest, what I am going to do, I hope in about 10 to 15 minutes, is identify some headings in the report, because they are, as headings, obviously relevant to the grounds of appeal. But this is -- if I may respectfully put it like this, gentlemen. It is perhaps not the time to question me about the next ten or 15 minutes because every time I

then turn to a particular ground, what I will be doing is going back as necessary to the specific bits, and if you have issues or questions, it might be just more productive that way.

THE CHAIRMAN: No questions for the next ten to 15 minutes.

MR. HARRIS: As politely as I can, that is what I am suggesting. But it is a matter entirely for you, gentlemen.

I apprehend that you may have had the opportunity to look at the short video that was prepared by my team prior to this hearing.

THE CHAIRMAN: Yes.

MR. HARRIS: Of course, the key point, as we identified in the pre-reading at the front of our skeleton, that is really coming out of the video, or one of the key points apart from setting the scene is that Trayport is a software supplier and it just provides a screen function for other people to do trading. Trayport is not a trader. It does not generate prices, it does not produce them. It gets them from other people who are the traders and it puts them on the screen if the traders decide to use Trayport. In just the same way that some of ICE's screens get populated by traders. ICE is not a trader either.

One of the ways in which you can conceive of that is, gentlemen, do you recall that passage in the video, that set of frames, where a trader, if you like, turns on his screen early in the morning and there is nothing on it? That is because people have to wake up -- I do not know whether these days they go into the office, but then they start saying "I would like to buy at this and offer at that", and then a line appears and somebody else wakes up or turns on and that is how it gets populated.

So it is traders who are doing the trading and providing the prices, and Trayport is simply providing the software function to aggregate those and facilitate a market in which the liquidity in all of these from different sources can be seen. It does not generate liquidity. That is just not what it does, and that is an alarming failing that we will come back to in more detail later on. I think it is in the defence, but I'll find the reference.

The CMA says it generates liquidity. It could not be further from the truth. The critical thing that I have now adverted to twice is liquidity. Traders want to trade where there is the highest liquidity to obtain the best prices, and if you could turn up one or two passages in the decision it sets it out rather well.

So I am now going to turn to decision, paragraph 2.17:

> "Knowledge of where the highest liquidity resides in any market is an important factor in obtaining the best price for a trade. As such, the trader will need to know which

trading venues are the most active in the relevant...(Reading to the words)... trading venues' front end screens or has access to an aggregated view of those screens."

Then another one is at 2.57, several pages further over:

"In the same manner as the venue used, the choice of clearing house is also driven by the location of the greatest liquidity. When… (Reading to the words)... can be netted and the margin requirement reduced."

I'm not proposing to go through the structure. It is set out in the report. But you will appreciate there is a trading venue, and then, if you like, behind it you can choose whether or not to use a clearing house, it is a matter for you. But in either event the key consideration is, as a trader, when you are deciding where to trade: where do I get my greatest liquidity. Where does that take us to? It takes us to the fact that once liquidity pools or gathers in a certain venue, whether it be a trading venue or, for that matter, even a clearing house, it tends to be sticky because traders are reluctant to leave that venue which has the greatest liquidity.

This is an absolutely crucial point in this case; very basic, but very crucial. It is because the liquidity is sticky that you cannot just blithely or glibly say "Oh well, do not worry because you, ICE, you will be able to move the trading that is happening somewhere else at one of your rivals you will be able to move it to you". It does not work like that and it certainly is not sufficient to just repeat, "Oh well there will be substantial movement, there will be substantial benefits to you because things will move".

This is a case per *Tetra Laval*, forward-looking in a non-horizontal case and per subparagraph 7 of BAA, Convention rights engaged, where you have to have particular care and particular scrutiny and particularly good evidence in any event, and all the more so on the facts of this case where the key feature is stickiness of liquidity. In other words, it is a pretty tough burden and we say the CMA has fallen down.

So that is a potted summary or overview. The counterfactual -- again, a heading -- I am going to be developing this in quite a lot of detail when I turn to ground 1 of the first notice of appeal. But the counterfactual in a very high level nutshell, what the CMA did was they made a finding about the counterfactual, namely that it was uncertain whether the new agreement in its current form was merger specific, i.e. caused by the merger. But what the CMA did not ask itself was whether or not the parties would reach an agreement in some form.

There is the problem. Because when we look at those passages of the decision about how this market is structured, how it works, what we see is the crucial distinction that the CMA

itself draws is between being a customer of Trayport and Trayport helping you, and not being a customer of Trayport and Trayport not helping you or helping its customers against you. So the question is: are you a customer or a venue customer, or are you not? That is the relevant question, and the CMA just did not ask it. It asked itself a question about whether the new agreement in its current form would have been put in to position. What I shall show you when I turn to that ground is those many, many passages in the decision in which we can see that the critical distinction is customer or not customer, not customer on these particular terms, as opposed to those particular terms, not relevant.

That is counterfactual. Moving on, again a very high level, where do we go next in the report? So the report analyses ability and incentive and effects.

It found, as regards the first of those, that there were four specific types of partial foreclosure mechanism, and we are going to be looking at, we say, the judicial review problems with those, some of them in ground 2. But what is germane to note down, gentlemen, I respectfully submit, at this stage is that these alleged specific partial foreclosure mechanisms were said in the provisional findings of the decision not to be detectable at all. It was, if you like, some insidious behind-the-scenes: you, ICE, once you own Trayport, you will be able to get at all these other market operators without them even knowing.

But that has now changed. That theory or harm has been altered in a relevant sense that we shall come on to. I just invite you to note now that it is now no longer said that it is all insidious behind-the-scenes undetectable, but some of it is detected and is detectable. This is principally relevant to ground 3, where I say, as you know, you should have looked into this. It is so important that you should have looked into it properly. You should not have just speculated about what the effect of people seeing the damage to them would have been.

So that is ability, detectability. It is common ground, of course, that the relevant analysis of incentive, you have to look at -- has somebody got incentive. That is a two-part question. Can they generate benefits and, if so, are they outweighed by the costs, because if they are outweighed by the costs, there is no incentive.

So it is a separate, distinct issue from ability. Just because you have an ability does not mean you have an incentive, because if the costs outweigh the benefits, even though you have the ability you are not going to do it.

Can I just, before I move on -- I should have perhaps done this earlier on --draw your attention to the Commission's own guidelines in this regard, which you will find in volume 3 of the authorities. It is the document known as CC2, which is relevant guidelines, and you

will find that at the merger assessment guidelines at tab 32. There are two parts that I just draw your attention to.

One, I am terribly sorry, this is slightly out of order, but if you pick it up in internal page 49 at 5.6.1, this goes back to my Tetra Laval point and I'm afraid I overlooked it at that stage. The CMA itself treats non-horizontal mergers together, so if we read it:

> "Non-horizontal mergers bring products together ...(Reading to the words)... they include vertical mergers and conglomerate mergers."

That is why I should have raised it.

It goes on to say:

> "Non-horizontal mergers ..."

So our merger, or the Tetra Laval merger:

> "... do not ...(Reading to the words)... most are benign and do not raise competition concerns."

Of course some can, I accept that. I am not overdoing it.

But now I move on to the point that I had got to in my bird's eye overview of the decision about ability and incentive. If you could turn over the page, please, to 5.6.6, this is an important analytical framework for what is going on here today and what is going on in the report albeit, we say, in a flawed manner. What does the CMA in its own guidelines say? It says:

> "Despite differences in detail ...(Reading to the words)... analysis of non-horizontal mergers by reference to the following three questions."

And they are distinct:

> "(a) Ability. Would it have the ability to harm rivals.
>
> "(b) Incentive."

That is a distinct analytical step. Would it find it profitable to do so. That is the point I was making a minute ago.

It might do if the costs do not outweigh the benefits, but if they do outweigh the benefits, you are not going to do it, you do not have the incentive to do it, even if you are able to do it. This will come back when we talk about the GFI subground of ground 2 because GFI plainly, in our respectful submission, had the ability to use Trayport supposedly to weaken its rivals in a foreclosure sense, whether partial, whole, detectable or non-detectable, but it did not do it. Presumably it did not have the incentive to do it.

But the CMA brushes all that aside and says, oh well, never mind, you are going to do it. The point here though -- and then it goes on to effect: would it be sufficient to reduce

competition? I am slightly less interested in that for the purposes of my analytical construct.

But anyway, there are three separate steps and what the CMA says in overview is that it is difficult to predict in this market, but we can tell you in our report that there will be a substantial beneficial effect on volumes. So that means not only that volumes of trading would leave some other venue because somehow, in your rather naughty manner, you partially foreclosed them, not only would it leave other event venues, but it would come to you, ICE. It's not good, obviously, it's not of benefit to me if I cause it to leave somewhere else but it does not come to me. Right?

So every step of the analysis, the CMA in its report has to establish and, we say, on this convincing basis for the reasons I have now given more than once, that the sticky liquidity moves, problematic, and it also has to move to me, further problematic. Going through -- I'll come back to these points -- they say that part of the benefits that I would be benefiting from, my client, would be shifting volumes in what is called OTC bilateral. We say there is a flaw in that because they just do not analyse it. I am just giving you some headings here. Then they say, the CMA, that we would be winning volumes in products where we have little or no current position, and we say that is not made out, not rational and not made out. So that is as regards benefits. Then we move on to the costs, and they in overview say, the CMA, that there might be potentially a shift as a cost, the people whom you are damaging with your partial foreclosure mechanisms, it is conceivable they might shift. But we do not think that is made out and we say that is a perfect -- this is my ground 3 -- example of a situation where you should have analysed that and investigated further.

Then they say there might potentially have been a risk of retaliation, but it is not made out. We say in a judicial review sense that is a case where you irrationally failed to investigate that to the proper extent.

Then there are remedies. Just to give you a potted overview of remedies. Plainly, I will come back to this as I develop my ground 4, the remedies challenge, but can I just identify for you where the key passages are. So I am now back in the report, the decision at paragraph 12.102. So we are towards the back. And as you know, from your pre-reading, members of the Tribunal, there were various remedies debated, and at one point the parties put forward what they called "the parties' remedies proposal". That is the heading at the bottom of the internal page 199 of the decision.

It had several elements: (a), the FRAND element; and then (b), the one which we are concerned with today, the separation element; and then (c), the firewall element.

The separation element is further identified in two pages further over at paragraph 12.110, and it has certain key features, each subheading. It is a new Trayport board. So this is what the parties were putting forward:

> "Remain a separate legal entity ... a new board [and] it had a majority of non-ICE affiliated directors and only a minority representing ICE. ..."

Well, you can see for yourself -- and I know you have read this -- just reminding us how the land lies on the critical remedies dispute. Then there are provisions about reporting lines, veto rights and commercial arrangements, including that they would be at arm's length. So that is what we said would be, as regards separation, apt to address any substantial lessening of competition should one be found. Obviously we have never accepted that that is the right analysis.

Then at paragraph 12.122, the CMA says:

> "In our view, the primary issue which would undermine the effectiveness of the separation element lay in ICE being the ultimate owner of 100 per cent of Trayport, which we considered to be incompatible with a fully independent and autonomous Trayport."

As you know, we say that is just the wrong test. Your test is are you introducing a remedy, which is why we started in the statute, which is apt to address, albeit, I accept, comprehensively, but nevertheless apt to address the SLC and the adverse effects. But what the CMA is doing as regards its analysis of the separation element, is assessing whether it would be incompatible with a fully independent and autonomous Trayport. We say you do not need to go that far. That is not the right test. So you have gone wrong.

Then just a couple more passages in this remedies section. There is 12.128. So the CMA comes to a conclusion on the separation element that it would not be effective, and it says:

> "In summary, concluded that (a) complete autonomy … would be incompatible ..."

Again, we say wrong focus. What you need to do is how much autonomy is needed in order to prevent the alleged partial foreclosure mechanisms, not does it have to be completely and utterly separate.

(b) -- this is an important subparagraph, the CMA concludes that:

> " there would be a need for ongoing monitoring and compliance...(Reading to the words)... independence, and we would not find it acceptable to entrust this to the new board for self-regulation."

Then:

"We also have concerns in relation to how an external monitor might be able to verify compliance."

So what, in our submission, is going on is the CMA is rejecting the separation element. Firstly, misfocusing on the alleged need for compete autonomy, which is just not right, but then it is also, as part of its reasoning, also relying on concerns about external monitoring. That is important because, as you know from the response against me, it is said: you are wrong about all your separation points, and anyway it does not make any difference because we still would have rejected your remedy on monitoring grounds.

It is totally separate and free-standing. That is the case against me, but that is not how it looks to us in paragraph 12.128. The two are linked and they are not totally separate, and you cannot say by reference to the case that I am never going to turn up because it is so trite, Ex Parte Derbyshire Primary Care Trust, it has to be inevitable. If I succeed in knocking out one strand of reasoning in a judicial review-based decision, for the regulator nevertheless to succeed they have to be able to show to you that inevitably it would have been the same even though that ground of reasoning has been knocked out, and we say they cannot because these things are not separated out.

If I am right, therefore, in this face this Tribunal would have to remit the remedies decision to the CMA.

Then the last part I would like to show you, two last parts, in remedies, 12.154(a), under the heading:

"Parties remedies proposal: Our conclusions on effectiveness

And at 12.54(a):

"We consider that if the separation element was effective, then it would obviate the need for a FRAND or firewall element to be included in the parties' proposed package of remedies, as it would create a fully independent and autonomous Trayport."

In other words, we say that they are recognising, which was right to recognise, that the separation element was the key one. If the separation element works so as to address the substantial SLC or the adverse effects, then that on the CMA's own analysis would have been effective and you would not have needed the FRAND and firewall elements.

Then the very last section is, in our respectful submission, the truly fascinating part of this decision and betrays a fundamental mistake on the part of the CMA as regards its vires. That is to be found in internal page 192 under the heading at the top of that page "Our assessment of the treatment of the new agreement". It is internal page 192, and this bears going through.

12.71:

> "As set out in our assessment of the counterfactual in section 6 ..."

I just interject there, which is now said to be completely irrelevant.

So:

> "As set out in our assessment of the counterfactual in section 6, we concluded that it was not sufficiently certain that the new agreement would have been entered into by ICE and Trayport ..."

I would invite to you underline "on the same terms". I am going to take you some more passages about that. But even here in remedies, the counterfactual is completely bound up with on the same terms.

So:

> "It was not sufficiently certain ...(Reading to the words)... same agreement would have been signed."

This is the reasoning that the OFT then sets out as to why it says terminate the new agreement:

> "Given this uncertainty, we concluded that it would be appropriate for any new owner of Trayport to decide whether to accept or reject the terms of the new agreement entered into whilst Trayport was under ICE ownership."

Just pausing there, I do not recognise any of those words in sections from statute to which I draw your attention, particularly not section 41(2), which sets out the vires for making a remedies decision. I do not recall it saying anything about it being appropriate for a new owner to decide whether to accept something or other; it is all about SLCs and adverse effect. So it is already starting to go wrong, in our submission.

12.73 it goes on:

> "In order to provide the eventual purchaser of Trayport under this remedy with sufficient flexibility to make this decision, we consider that the new agreement should be fully unwound, thereby giving the new owner of Trayport the choice as to whether to negotiate or not."

Again, none of that appears in the statute.

Where does it say "sufficient flexibility or allowing people the choice"? It does not mention it at all.

12.74:

"For the avoidance of doubt, following the termination of the new agreement, ICE would be under no obligation under this remedy to enter into negotiations with the new owner."

But very tellingly -- and in fact this is my last cross-reference, I do apologise. If we turn over several pages to 227, the CMA itself says, at its paragraph 12.198, that whilst it was its view that the new agreement should be unwound -- second sentence:

"We consider that a similar agreement could be voluntarily negotiated between ICE and the new owner of Trayport should this be in their commercial interests."

So it is all about appropriateness of giving choices. It does not mention anything to do with SLC or adverse effect. Indeed, the proof is in the pudding.

They plainly do not think that the new agreement gives rise to a SLC or an adverse effect because they are quite happy for a new owner to come along and do the same thing. What is it about? It is about giving the new owner a choice. Well, we can see that that is what they did, but it does not have any vires. Then there is the points that I adverted to in my opening remarks, that it is now said that it is about giving effectiveness and it is now said that it is about fairness for a new owner. But those (a) are not in the statute. Effectiveness is, but fairness is not. But where does it say, I ask rhetorically, in 12.71 to 12.74 that I carefully read out all of, it is about effectiveness? It just does not say it.

It does say it in the defence in the skeleton, but it does not say it in the decision. So there we go, gentlemen. Where I have reached so far is some legal principles, some guidance, bits of case law and a potted overview.

I am in your hands. Generally speaking, shorthand writers like a short break. I am entirely in the Tribunal's and their hands, but this might be a convenient moment because I am now going, otherwise, to turn to the detailed grounds.

THE CHAIRMAN: We will take a ten-minute break.

(11.22 am) (Short break)

(11.35 am)

MR. HARRIS: Sir, thank you for that indulgence.

I am going to turn now, if I may, to the specific grounds of review and I am going to begin with some passages in the decision about the counterfactual. In order to locate this, or perhaps to ease your note, if you were to turn up in the first notice of appeal bundle and go to the notice of appeal itself, which for me is behind its own tab at the beginning, and then it is internal page 35 -- you will find paragraph 91.

It is in the introduction section and the ground 1 about the counterfactual and there is a footnote, 115. Do you see that?

THE CHAIRMAN: Yes.

MR. HARRIS: And that is introduced with our sentence that says:

> "The CMA identified a counterfactual in which Trayport's exchange and brokering customers other than ICE made their prices available on Trayport's Joule / Trading Gateway, and Trayport sought to promote competition between its customers and their competitors, in particular ICE."

Okay?

So this is what I am going to establish in my submission by reference to the passages in the decision at footnote 115. Once I have identified them and taken you through them, I will explain to you why this is such an important point.

So if we pick it up at the 115 footnote, then the first paragraph in the decision -- you may want to keep both documents open -- is the summary, paragraph 16. So at the front of the decision. It is internal page 7 of the decision, and for these purposes all I need is the final two sentences of paragraph 16. It is a summary of the CMA's conclusions:

> "We concluded that Trayport was not a passive software supplier, but it engaged in active strategies on behalf of its venue and clearing house customers, which are ICE's rivals, in order to ensure trading volumes continued to flow through the Trayport platform."

We set out below a summary of the evidence.

So the distinction there is customers versus not customers, with an acting on behalf of its own customers, which at one point in time did not include ICE, as we know from the background facts.

The next one is paragraph 7.186. So here I am back in footnote 115 and I am moving on to decision 7.186, and that one, again, the first sentence:

> "The internal documents we reviewed clearly indicate that Trayport actively engaged in strategies to promote dynamic competition between its customers and its customers' rivals."

So that is the dichotomy that is being analysed in the decision.

On the one hand, are you a customer and am I, Trayport, promoting dynamic competition in favour of you, my customer? Against somebody who is not one of my customers, namely one of my customer's rivals. Then it goes on over the page, if you turn over, please, to 7.197, and pick it up in the final sentence, the same theme:

"Specifically, we reviewed evidence indicating that Trayport's strength ...(Reading to the words)... enabled it to pick certain customers to support in competition with ICE ..."

That was at a time when ICE wasn't a customer:

"... and it potentially influenced the movement of volumes between them."

I.e. between customers and non-customers.

Then there is 7.199, so just over the page, the final sentence. This begin with the phrase "overall" and then the final sentence reads:

"We also found that Trayport ...(Reading to the words)... dynamic competition and it seeks to influence market structures in favour of its customers and often in competition with ICE."

I have got two more and then I am going to come to the passage that CMA relies upon.

8.12 is on page 114, and here I rely upon the second sentence:

"We consider that Trayport carried out such a strategy in order to ensure that trading volumes continued to flow through the Trayport platform and that specific ...(Reading to the words)... customers could compete effectively with ICE."

As I say, ICE was not a customer at that point in time.

Then the last one is 8.84, and in this paragraph it is the second sentence and it basically says the same thing:

"We considered that ..."

So on its own analysis, the CMA, the big important distinction that runs through paragraph after paragraph after paragraph of the decision is between being a customer on the one hand, in which case Trayport can support you and will support you, as against people who are not its customers, which at one point in time included ICE, versus on the other hand, being a customer. It is said that the merger has given rise to a sea change in the competitive landscape because Trayport has now got together with ICE.

But why does this matter in terms of the counterfactual? It matters because if ICE and Trayport would have got together in a customer relationship prior to the merger and wholly irrespective of the merger -- if -- then the merger has not brought that about. So this so-called sea change in competitive structure and landscape between being a customer and not being a customer, has not been brought about by the merger at all. That is why it matters.

What the CMA have said is effectively it is uncertain and we treat it as the counterfactual not having the new agreement. The new agreement, of course -- all we need to know about

is it makes ICE a customer of Trayport. That is all you need to know about it. So they were not a customer.

Then there is the new agreement. The new agreement makes them a customer, and our case, as you know, is that that would have happened wholly irrespective of the merger. CMA said no, it's not part of the counterfactual, it would not have happened had it not been for the merger. In other words, it is merger-specific. That is why it makes all the difference, because the CMA's whole analysis is: are you a customer, in which case you are outside the club and Trayport fights against you, or are you a customer in which case you are inside the club and Trayport is helping you out.

So to paraphrase, if that happens as a result of the merger, you can see how the merger has created a big change in competitive conditions. But it did not happen as a result the merger, it would have happened anyway. That is why I focused upon this. That is why it is so important, and that is why the CMA is worried.

The CMA is worried about the fact that it makes a critical difference to the competitive analysis what the true appreciation is of the counterfactual situation, and in particular the new agreement. That is why, in our submission, they seek to recharacterise the counterfactual, and it is also why they say it is all irrelevant. That is how they have get out -- this is a problem for them. That is how they try and get out of it: it is all irrelevant; you have misanalysed it.

As to the former, it is all irrelevant, that is not what it says in this decision. So that is a new point that suffers from the Tesco problems that I drew to your attention in opening. As to the supposedly true analysis, that, you may recall -- I do not invite you to turn it up -- it is said, do you remember, there is a subheading in Ms. Demetriou's skeleton saying the true SLC and the true counterfactual. This is her skeleton at paragraph 25, and then she points to paragraph 7.187 of the decision.

It is said I have got it all wrong. I do not really know what the true analysis and counterfactual is. Look at paragraphs 7.187. Let's do that, shall we? Let's look at paragraph 7.187, and it is quite interesting, just before we read 7.187, that it comes after none other than 7.186 which I expressly read out and that I rely upon, that uses the very phrase "promoting dynamic competition between its customers and its customers' rivals". This point just does not go anywhere for the CMA. 7.187 is somehow said to set up some different analysis, but it does not, it is entirely consistent.

It reads:

"In summary, by supporting and defending ..." and the critical words are, "its customers' businesses", "Trayport builds and protects its own business, and in doing so ..."

That is worth highlighting. What does the verb "doing" relate to? Well, it relates to the supporting and defending its customers' businesses in the top line:

"... in doing so promotes and enables dynamic competition between venues and between clearing houses."

So in other words, this paragraph that is now said to be, oh the new -- the most important, this sets outs the true analysis, leaving aside that I have already read out some ten paragraphs that are all consistent with my submission. But actually, this paragraph is entirely consistent with my submission as well because it is about defending its customers' businesses as opposed to not its customers' businesses, and in doing so, in doing that, it promotes and enables dynamic competition between venues and between clearing houses. So the CMA's supposedly true analysis fails. So, again, just to stake stock, they say you have got the analysis wrong. Well, I have not, and they say it is all irrelevant. That cannot be right because so much attention is paid to it.

THE CHAIRMAN: And also this is only a summary.

MR. HARRIS: Well --

THE CHAIRMAN: It is in summary.

MR. HARRIS: It is in summary.

THE CHAIRMAN: You read the rest --

MR. HARRIS: You read the rest of it, exactly. I am happy to take that point. I do not mind that it is a summary because it says what I want it to say in any event.

Therefore --

THE CHAIRMAN: Sorry, can I just interrupt you a moment.

Are you making the point that all customers supplied by Trayport, supported by Trayport, are seen by them as of equal importance, that there is no differentiation in their approach to individual customers within their customer group?

MR. HARRIS: No, I do not make that point and I do not need to because what I am attacking is the reasoning of the CMA in its own report. That is why I took you to footnote 115. There are seven or eight paragraphs plus this new one and it does not distinguish. The description that is made by the CMA itself is between: are you in the club, are you a venue customer, or are you out of the club, are you not a venue customer. And it does not matter for my purposes whether one is more of a, if you like, head boy within the club as opposed to one

of the minions, or more or less important. The reason it does not matter is because I say that the crucial change in, if you like, landscape, and as we will see, Mr. Heffron describes it, when we look at his evidence in a minute -- it's a road to Damascus moment. There is a sea change in attitude from ICE towards Trayport.

Previously, as you know from your pre-reading, they did not get along, they were at loggerheads for years and years and years. But then they appointed a new, relevant point man, a man called Mr. Gordon Bennett, who has put in some evidence. He said, no, no, come on, ICE, we need to be on Trayport, and this all happened months before the merger. We say it would have led to a new agreement in any event and it would have therefore meant that they became a customer instead of being a non-customer.

So all of this stuff about (inaudible) Trayport helping customers against non-customers would have all changed anyway, and for that purpose I do not need to be a particularly good customer or poor customer, or a favoured customer or an ill favoured customer, I just need to be a customer.

THE CHAIRMAN: Is their product not, in any event, promoting competition between its customers as well?

MR. HARRIS: Sorry?

THE CHAIRMAN: Is their product not promoting competition between their customers as well?

MR. HARRIS: Well, that may or may not be right. But, again, I say that does not meet my point in a judicial review, which is I have to say look at the reasoning on the face of your decision, what is important to you is: are you in the club, are you a venue customer or are you not in the club. As we are about to develop in subground 1(a), that is not the question that they asked themselves, and that is why there is a judicial review flaw, because it was an important focus for them, and having set up themselves as that is an important focus, you then have to follow it through, and that is what they did not do. That is my very point in subground 1: they asked themselves the wrong question on the counterfactual.

Throughout the rest of my submissions, it always -- you may find it of assistance to just have a look at the subheadings in my notice of appeal. So I am now within my notice of appeal, which you may still have open, at paragraph 36. I am in sub (a) or emboldened (a), and we say they asked the wrong question, because the question based upon their own analysis should have been: are you in the club or not? But instead they ask themselves: would you have entered into the new agreement on the same terms or not?

THE CHAIRMAN: Sorry, what paragraph are you in?

MR. HARRIS: It is internal page 36 of my notice of appeal and it is subheading in emboldened type "(a)". So I have established why you should be asking that question and now I am about to establish that they did not ask that question. In that regard, can I take you in the decision, please, to the beginning, in the summary at the beginning, in paragraph 44.

So paragraph 44:

> "Of particular importance," even within the summary, "we considered that a loss of competition between ICE and its rivals would have a longer term detrimental ...(Reading to the words)... and find innovative trading solutions in order to be the first to move into markets with new offerings."

This is the sentence -- these two count the most, in my submission:

> "We also considered that under ICE ownership, Trayport would no longer seek to promote competition and shape market structures in favour of its venue customers and in competition with ICE. We placed particular weight on the loss of this dynamic competition."

Okay?

So, again, it is about are you in the club or are you out of it. Then we go into the main body of the report, please, to paragraph 6.30, which is on internal page 59. So this is under the heading "Conclusion on the new agreement" and it is all about the counterfactual.

They say at 6.30:

> "Importantly, we note that the new agreement was concluded post-merger with Trayport already forming part of the ICE group."

Just pausing there, we say so what? It does not make any difference. We would have reached this agreement irrespective of the merger and that is what the evidence shows.

The CMA goes on:

> "As such, it is unclear that the negotiations would have been successfully concluded in circumstances where funds were not being transferred intragroup and/or if Trayport were under alternative ownership in the absence of the merger. We note that even if these discussions had been successfully concluded, absent the merger, ...(Reading to the words)... materially equivalent to the terms negotiated in the new agreement."

6.31:

> "Given that we did not consider it sufficiently certain that the new agreement in its current form would have been entered into absent the merger, we have decided not to include the new agreement as forming part the counterfactual."

Then the last one before I just make some submissions on these paragraphs is effectively the repetition of 6.31 under the heading "Conclusion on the counterfactual" on the next page at 634:

> "Finally, we concluded that it was not sufficiently certain that the new agreement in its current form would have been entered into absent the merger, and therefore we did not include the new agreement as part the counterfactual."

So what is the conclusion? The conclusion is that it would not have been entered into in its current form, and that is repeated in 6.31 and 6.34 and it is a composite conclusion.

It is talking about not just whether there would have been a new agreement or not, but it is plainly addressing on its face whether it would have been entered into in its particular form, in its current form.

What is said against me is -- look at paragraph 6.30 that I've read out. There are two bits to it. There is the second sentence about whether there would have been an agreement, whether the negotiations would have been successfully concluded, and then there is a third sentence, which is:

> "It is uncertain whether the final terms would have been materially equivalent."

And it sought to divorce them. It said, oh well, we reached the conclusion about the fact that there would not have been an agreement at all.

THE CHAIRMAN: Part of the problem is they haven't really addressed it in terms of a balance of probability test.

MR. HARRIS: I completely agree.

THE CHAIRMAN: You have accepted in one of your footnotes -- you have accepted their assurance that, yes, we were looking at the correct test. But then -- you have got two concepts here. One is sufficiently certain, which I think you accept they mean balance of probabilities.

MR. HARRIS: Yes.

THE CHAIRMAN: But the other concept is the one of unclarity, unclear, and it seems to me that your case is that when they talk about it being unclear, that is something less than the balance of probabilities, and it is only later on where they talk about sufficiently certain that they are addressing the balance of probabilities test.

MR. HARRIS: I think, with respect, the dispute about whether it is quite the right standard of proof is now -- that is water under the bridge because we do not take an issue --

THE CHAIRMAN: No, you do not, but the point I am making is that the sufficiently certain -- I am reading to the balance of probabilities. But what I am unclear about is really the second sentence in 6.30, where it says:

> "It is unclear that the negotiations will have been successfully concluded in circumstances ..."

Et cetera.

It seems to me what the CMA are saying is even there they are applying the balance of probabilities test.

MR. HARRIS: Well --

THE CHAIRMAN: I may be wrong. I am just trying to figure out what everyone's case is on this.

MR. HARRIS: Well, for the present moment there is absolutely no lack of clarity for the purposes of this ground, because it says unequivocally in 6.31 and 6.34 that we have -- and I am quoting:

> "We have decided not to include the new agreement as forming part of the counterfactual."

That comes against what the reasoning for unequivocally not including it, it is that it is insufficiently certain that the new agreement in its current form would have been entered into. That is good enough for me for these purposes because what I am saying is, well, hang on a minute, you yourself have said repeatedly that the big distinction is customer/non-customer, not customer on this term and that term and the other term versus customer on some other terms. That is not the point at all. It is in the club or out of the club.

Instead of asking themselves that question, there are just no two ways about it, they are asking themselves the question: would the new agreement have been entered into in its current form? That is why, in the conclusory parts of 6.31 and 6.34, they include those words "if in its current form". That is not an accident, and you may now think "I understand why Mr. Harris invited me to underline some words in para 12.71", when I was doing the please do not interrupt me politely points at the beginning, because you will recall that even in the remedies section when they talk about counterfactual -- this was at 12.71 -- it says, again:

> "It is not sufficiently certain that the new agreement would have been entered into by ICE and Trayport on the same terms absent a merger."

So there is just no two ways about it. If you like, the balance of probabilities test, if that is what it really is, what was it applied to? It was applied to the composite question of would there have been an agreement, and would it have been on the same terms, and that just misses the point.

It just misses the point, and that is a judicial review flaw because what you needed to address was in the club or out of the club. Did you address it? No. So in summary, we say that that was a question that the CMA needed to ask and it is a judicial review error of law that they failed to do so, and it is critical that they should have done so in light of all the passages to which I have taken you that are identified in our footnote 115.

So that, if I am right, wins me the argument on counterfactual. That is 1(a), but I have further grounds to the counterfactual. If you are in my notice of appeal, again the heading sets it out in judicial review terms. So internal page 37 of the first notice of appeal, and we say, look, in any event -- never mind about the point that I say has already holed you below the water line, but leaving that to one side, I also say that you have misdirected yourself in the sense that -- well, actually, you can move to the second line.

I say that:

> "The CMA acted unreasonably in the judicial review sense in not concluding on the evidence that the new agreement was likely to be signed in its current form and/or acted unfairly in making a finding without having put the point to the parties."

And those ones, we no longer persist with used the wrong standard of proof, but I do very much say you have acted unreasonably irrationally in the judicial review sense in your view of the evidence, and/or you have acted unfairly, and those are the two points that I now propose to develop.

So what the CMA says is that the parties were previously reluctant to cooperate, and they say both in the defence, and then -- and here I am quoting the skeleton at paragraph 22.2 -- that it was "a remarkable coincidence" that the parties should have reached an agreement after being at each other's throats for all of these years.

We say absolutely -- it is not remotely surprising or remarkable that there should have been a change in attitude when, as you've perhaps had the opportunity to see in the evidence, including the evidence of Mr. Heffron, that there had been a change in stance between ICE and Trayport many months before the merger was even contemplated. It had utterly nothing to do with the merger. So this is the road to Damascus moment that you may have picked up on.

It is perhaps best identified in one of the exhibits to Mr. Heffron's statement. You will find that at what is known as KLH4, which is in the first notice of appeal bundle. It is after tab 11, which is Mr. Heffron's first statement, and then the exhibits follow and there is KLH4. There is a hearing transcript, and if you could, please, open it to internal page 14. This was a hearing on 12 July 2016 and they were asking about, you know, the genesis, if you like, about the new agreement.

The question at line 4 was:

> "Well, you had been negotiating for ten years before that."

Are you going to be in a proper customer relationship or not?

Mr. Heffron says:

> "I have to say, it was ...(Reading to the words)... by ICE; this is a question I would ask my compatriots ...(Reading to the words)... their acceptance of our business model, which had taken place in 2015. They were our oldest exchange client. We had known them for years and years and years, they had always refused to pay. When they came to us ..."

Pause there. In early 2015, is what the documents identify:

> "When they came to us and said, well, actually we will pay for the connectivity, that was on the road to Damascus moment. Am I making the ...(Reading to the words)... join your ecosystem ..."

That's Trayport's ecosystem:

> "... in the way so that you do not have to explain to other people in our business why effectively we [ICE] get a free ride and they [the other Trayport customers] do not. That discussion was contemporaneous with Gordon Bennett, who was a person we know very well, from one of our broker clients moving over to ICE and saying there is something to be ...(Reading to the words)... on these sorts of commercial terms."

So as we set out in our written document, what happened was there had been tension for years, ICE did not want to be a Trayport customer, not least of all because ICE said: actually, we are doing you a favour by letting you have access to our data; you should pay us and we are certainly not paying you. But Trayport said: no, hang on a minute, we are doing you a favour; you should pay us because we are aggregating and that is good for your business, and they were like that. It was not going anywhere. But then what happened was a man called Mr. Bennett left the broker client in which guise he had generated a good relationship with Trayport. He leaves this broker and he arrives at ICE early 2015, and he is in charge of this aspect of ICE business and he says, effectively: come on, guys, we need to

be on Trayport, this is ridiculous, this is good for us and actually we should accept their terms. Lo and behold in early May, by the time they reach early May, in some emails I will show you in a moment, they do reach substantial agreement on effectively heads of terms. This is all before the proposed sale of Trayport to anybody is even announced. It has nothing to do with it at all, and our case, as you know, is let's have a look at this evidence. What it shows is you would have reached this new agreement irrespective.

There is another fundamental reason why we would have reached this new agreement irrespective of the merger bearing in mind Mr. Bennett's movement, which is that having had the change in attitude, it is undeniably in both parties' interests for that transaction to then take place. In particular, it is in Trayport's interests because what does Trayport get out of it? It gets another big-paying client.

It did not have ICE as a paying client at all. Then it gets ICE as a paying complaint. That is in Trayport's interests, and that is what Mr. Heffron says in his evidence.

THE CHAIRMAN: Mr. Harris, it is really a factual question as to what would have happened absent the merger and to what extent can we substitute our own views of what that fact is for that of the CMA?

MR. HARRIS: That is a very good question, sir, and that is why I took some pains to identify that this is a judicial review --

THE CHAIRMAN: I understand.

MR. HARRIS: What I am saying, and I accept the hurdle is what it is, unreasonableness of the irrational kind. It does not mean they have to become completely unhinged. That is what the case law says. They are not lunatics, I'm not saying any of that. But what I am saying is you had an inadequate evidence base to reach the conclusion in any event. You are logically flawed for the reason I have already developed, but even if for some reason you do not accept that, you should not have reached this conclusion on the evidence because the evidence was, we say, overwhelming that the new agreement would have been reached in any event. This is one of those reasons.

I do not shy away from the fact that that is a high hurdle. I'm not inviting you to substitute or reassess. It is not a merits challenge. What I am saying is the points that they have on the evidence do not stack up in light of the evidence viewed as a whole, and they never did.

There is another point. Sir, I am going to take them in turn. The next point the CMA takes is, oh well, there is no draft agreement. But then -- I said I would take to you these emails; let's see what there was. I accept there was not a draft agreement as at May 2015, but what I can show you is that there was very substantial agreement, if you like, in terms of a heads of

term-type document. That is to be found in the first notice of appeal bundle behind its own tab, tab 2.

I think the figures in this document are confidential to the public at large, but only the figures; so, for example, the fee and the duration and what have you. So I won't read those out, but what it says is -- this is from a man at Trayport to none other than Mr. Bennett, who is now at ICE by this stage. 7 May 2015:

> "Further to ...(Reading to the words)... future relationship between ICE and Trayport might work (subject to agreement)..."

You might want to just underline that:

> "... and the terms on which such a deal would be based."

This is what you and I, sir, might call, in the course of our practice, heads of terms outlined. Obviously it is subject to agreement, you would not expect anything else. It turns out it was subject to sign-off higher up the chain, but again you would not expect anything else given the sorts of figures that I cannot read out that occur later down in the email.

I don't want to read out the entire thing because that would be pointless and I do not have time, but what you can see is that there is a heading "Commercial relationship", and it says:

> "ICE will enter into a licensing arrangement with Trayport for the following things on the following terms. The agreement will cover ..."

Then it is quite detailed: connectivity, access. (c) is worth pausing on:

> "It was agreed ..."

Albeit, I accept, subject to contract:

> "... that the agreement will be on Trayport standard terms of service ...(Reading to the words)... for venues."

Then also a (d):

> "No fees for this."

(e) no periodical maintenance for that, and (f), the overall objective. Then the penultimate paragraph on that page:

> "I trust that this summary encompasses our discussions."

In other words -- paraphrase -- we have reached the agreement on this, this is the heads of terms, now it needs to be signed off by an actual agreement. Because it goes on to say:

> "This represents a consensus across our team on a solution and related commercials."

Then the response to this document, and this was a document -- both of these documents were put to the CMA during the administrative phase -- is over the page. So go, as one does

with emails, up the page, and you can see the response from Mr. Bennett to Mr. Langford on 13 May 2015:

"Hi Nick, a few comments."

Well, not many because it is basically been agreed. But one of them is germane because there is a dispute with -- CMA's next point talks about: we think you may not have agreed on all products.

But what does this one say:

"On firm order status ..."

I do not have to read that one out.

Next one:

"On point (a) We need to make clear what markets."

Pausing there, you will appreciate that ICE allows trading in all kinds of different markets, and if you looked at point (a) on the previous page, it does not identify all of ICE's markets, and ICE is responding to 13 May:

"On point (a) we need to make clear ...(Reading to the words)... do not include oil. It is only for gas power, emissions and coal markets."

Then there is another point that is not relevant today.

Where have we reached at this stage? This is the evidence before the CMA, heads of terms, albeit subject to agreement, agreement on all the key bits, agreement even that it be on standard terms, it represents a consensus across our team and on one issue as to the scope of which markets it is even clear exactly about that. As it happens, the relevant point is it does not include oil.

So --

THE CHAIRMAN: So that last point, there is nothing in writing accepting that, is there?

MR. HARRIS: No, but I will come on to identify -- because this is my fairness point. Having put these documents to the CMA and it never being disputed, it never having been said, hang on a minute, in the administrative phase there is some problem. You couldn't have reached an agreement because there is no agreement on the scope of markets. That did not happen.

THE CHAIRMAN: Because oil is actually a pretty important market, isn't it?

MR. HARRIS: Certainly, in certain respects it is very important. I accept that. But here that is clear and that wasn't disputed, it was not queried. It was not said, hang on a minute, give us some more documents to show this point, okay? Because we now know that if that had happened, we would have produced more documents, because, as it happens, we have now produced them, but the point for a judicial review is, that is where we got, that was what we

(inaudible) them. We say it is irrational, in the evidence-assessing sense, not to take the view that would have led to an agreement. The CMA now says, hang on a minute, we do not know -- it was not really clear. Was oil in or was oil out? We say that is not fair.

THE CHAIRMAN: But you have chosen which emails to give to the CMA. For all I know there may be an email in reply to it.

MR. HARRIS: That is right. I accept that. But the CMA cannot have regard in a judicial review for the purposes of bolstering or, in the words from Tesco, supplementing its reasoning by reference to materials that weren't before you at the time of its decision-making. This is an attack on the decision as expressed by the decision maker in its own decision. That is the answer to that.

Anyway, I will go on to that point, sir. Just to locate us, then, the evidence is that it was not a remarkable coincidence. Mr. Bennett had moved. There had been a change of attitude. That is that point out of the way.

The CMA say next no draft agreement. I say that does not get you very far because look at these emails. The CMA next say: we do not know whether there was final agreement on oil, as to which we say that is not a fair point because we weren't given a fair opportunity to address that issue.

I will just develop that briefly. So paraphrasing the CMA, they say, oh well, you have really got yourself to blame because you could have put some more evidence in about that. To which we say, no, no, that is just not fair. If we had known it was in dispute, if you had -- as you now do in your final decision, say we are not sure about whether oil was in or out, we could have easily shown you that it was out. This point comes out -- I can make this in two ways.

The point that they now rely upon in their final decision about oil wasn't made at all in the provisional findings. Can I just show you that? It is probably the only time today that we will need to look at the provisional findings, and it is in the first NOA behind its own tab, number 13. You will find it at paragraph 6.27, which is on internal page 53.

So this is the PFs, and if you read to yourselves 6.27 you will see no reference to the alleged lack of agreement on oil.

So we say, well, you know, that's unfair. You now say that this is a big -- that is slightly unfair phraseology. You now say it is part of your decision-making, but you did not say it during the administrative phase. It did not feature in the PF, so we did not suggest it.

THE CHAIRMAN: Can you just show, just to compare this, the equivalent paragraph in the main report?

MR. HARRIS: Sir, can I come back to that because I do not have that reference at my fingertip, but Mr. Lindsay, I'm sure, will find it; is that acceptable?

THE CHAIRMAN: Yes, it is. It should not take him very long to find it.

MR. HARRIS: I am just conscious of the time. On my feet it might take me slightly longer --

THE CHAIRMAN: Yes, of course.

MR. HARRIS: The CMA now says in its skeleton -- this is part of my fairness point. The CMA says in its skeleton at paragraph 32.6 and then 35 and 36 that it made an extra request for the parties to produce any contemporaneous documents on this issue. That is what it says in the skeleton. The issue being is oil in or is oil out, we did not know.

We were very surprised to see that because that is not how we understood the administrative phase at all. So we wrote the CMA a letter on 18 January post receipt of their skeleton. If I could perhaps just hand in five copies of that. (Handed)

I am sorry, I should have done this at the same time, handed in the five copies of the response. Sir, you can see in our letter of 18 January that we quote from paragraph 35 of the skeleton that says:

> "We expressly asked for documents on this issue, i.e. about oil."

We say, well, that is not how we understood it.

THE CHAIRMAN: So you are saying that paragraph 35, then, you are saying the issue there is, you say, it's just on the oil issue; is that right?

MR. HARRIS: If you read our letter, in the third paragraph.

THE CHAIRMAN: Let me read your letter, then.

MR. HARRIS: Yes.

THE CHAIRMAN: (Pause)

Okay. (Pause)

All right, let's have a look at the CMA's response. (Pause)

In line 2 on page 2, do they mean 2016 calls?

MR. HARRIS: I am sorry, where are you reading from?

THE CHAIRMAN: Their page 2, line 3. (Pause)

MS. DEMETRIOU: Sir, it should be 2016.

THE CHAIRMAN: 2016, yes. I will just correct that manually.

MR. HARRIS: Yes, I'm going to show you the notes in a moment. That is the one attached to -- yes, sorry, I was slightly behind you there. Quite right.

Okay. Thank you for reading those letters. I can now draw these points together and show you the paragraph you wanted to see.

THE CHAIRMAN: Okay.

MR. HARRIS: So it was 6.27 in the PFs and in the main report it is on 6.29 on internal page 59.

THE CHAIRMAN: Okay, let me just look at mine.

MR. HARRIS: So you will see the difference is buried in the middle of 6.29 of the final report.

He has added in the phrase:

"... including no final agreement on the scope of ICE products to be listed on Trayport, "

THE CHAIRMAN: And no draft agreement and things like that?

MR. HARRIS: Yes, those were there before, or more strictly speaking the one that was there before --

THE CHAIRMAN: I can't see the draft agreement, no draft agreement.

MR. HARRIS: No, that is right, you are quite right. But for my purposes, the critical addition is the no final agreement on scope.

So it was not put to us in the PFs, it appears in the final decision. Then there was no specific request for oil scope documents, as is common ground in light of the correspondence that you have just read.

The CMA says at the bottom of the third paragraph:

"It relates to a more general issue and not to the question of scope specifically."

So it is now common ground in light of this correspondence that we were not ever asked for questions about scope in core oil specifically, and we thought that this was agreed or certainly not disputed in light of the emails that we put in, and we could have dealt with it if we had been asked.

It is not fair for the CMA to now say, oh well, we rely upon this, when it could and should have been dealt with.

So that is one part of my response to why I say it is not fair. The second part is that we put in witness evidence that confirms this very point.

THE CHAIRMAN: Wait a second. (Pause)

Sorry, Mr. Harris, carry on.

MR. HARRIS: Thank you. Just so we are still located, I am saying it did not have an adequate evidence base for the two reasons I have already developed, and it is unfair for you now to say that you can rely upon this supposed dispute about oil.

I have got halfway through that. The second half of that one is it is unfair because we did in fact tell you during the scope of the administrative phase --

THE CHAIRMAN: Is the CMA's point: look, we asked you to give us evidence about the state and the extent of the discussions in order to prove your point, which is it would have happened in any event, and you say, no, there is a subset within that? Or are you saying it is not even in that, which is, well, if you were concerned about which products then you should have asked us specifically. And you say that we have given you an email which shows, so far as we are concerned, we have decided which products we want in and what out, in particular oil, but you hadn't produced at that stage any email or anything like that whereby Trayport has accepted the exclusion of oil?

MR. HARRIS: That is right.

THE CHAIRMAN: That is where we are, isn't it?

MR. HARRIS: That is true, but what we do have is the Trayport email saying this is a consensus across our team.

THE CHAIRMAN: Yes, I have seen to that. That's the earlier email. That's the 7 May email. But then you get the email back on 13 May which is saying: by the way, oil is going to be excluded from this, as if that hadn't been agreed between the parties. It may have been agreed between the parties after that email, but reading that 13 May email does not immediately strike you as saying: actually, we have agreed on the exclusion of oil?

MR. HARRIS: That is right. And the reason the unfairness arises is because we did not know that was in dispute. We thought it was. We were not asked specifically about it at all; that's now common ground. Had we been asked, we could, would have produced none other than the reply email to which you were saying, well, was there not a reply email, which we have now produced. Can I just show that you email?

THE CHAIRMAN: Yes. It is 14 May, is it not?

MR. HARRIS: Exactly. It is tab 12 of the first notice of appeal bundle. This one is exhibited to Mr. Bennett's statement, so it has its own tab, exhibit GB1.

THE CHAIRMAN: Let me find that.

Yes.

MR. HARRIS: So at the bottom of the first page, the 13 May email, which you've seen, and then we have got a response from Nick Langford to Gordon Bennett:

"Gordon, I appreciate the prompt response."

Then talking about firm order status. You can see that for yourself. Then another email just over an hour later, because he had obviously forgotten to deal with all the points in the 13 May email, and he responds.

He says:

"Gordon, further to my email, to confirm re point (a) below ..."

Yes? So that's the one about scope.

THE CHAIRMAN: Yes.

MR. HARRIS: "... To confirm re point (a) for gas power emissions and coal markets is acceptable subject to commercial terms being agreed and the successful implementation of point (b)."

In other words, he is accepting the very point that gas power emissions and coal markets are in and oil is not. That is why it is not fair, because it appears as a new point, never been put to us, we have not asked specifically for this. Had they asked specifically for this, we would have said it has all been put to bed in mid May, no problems, thank you very much.

THE CHAIRMAN: Your point is it is not in the provisional report, and if it had been, you would have produced this email.

MR. HARRIS: Or if we had been asked about it specifically, or if there had been a request for information about it.

But it is not reasonable for us to go into the minutiae of some specific subpoint about the specific scope of point (a) out of point (a) through (g) when we do not even think it is in dispute and we have never been told it is in dispute, and it been in dispute we would have said: there is no problem here, look at this email.

It doesn't end there. That is unfair by itself and that is wrong in a judicial review sense, but Mr. Heffron has given evidence to the Tribunal that he recalls telling the CMA orally during its investigation that oil was outside the scope. So if you were to turn up Mr. Heffron's first witness statement, that is in our first notice of appeal bundle behind tab 11 and internal page 3.

So I am looking here at paragraph 10, and you have to look at two paragraphs to get the point here, paragraph 10. Again, I can't read out the specific numbers, et cetera:

"I am aware from discussions with Nick Langford ...(Reading to the words)... key commercial terms had been agreed, for example ..."

Then the next point:

"The portfolio ...(Reading to the words)... made available, gas, power emissions and coal."

I.e. not including oil:

"We discussed the wider set of products, including oil, but we agreed that these would not be part of the agreement."

Then over the page at 15:

"During the CMA's investigation, I attended a conference call with staff during which I was asked about the background to the signing of the agreement. ...(Reading to the words)... identified above."

So obviously, concluding all the points at paragraph 10. We say that that evidence has never properly or sensibly been disputed by the CMA, though there is now a very, very last minute attempt to do so in the annex attached to Ms. Demetriou's skeleton argument.

But just before I reach there, one would have thought that that would have at least been in the defence. Oh no, you say you have told us, but you did not and here is the material that shows that you did not. It is unsatisfactory that it should come in the form of an annex to the skeleton, but be that as it may, I will deal with that.

What the CMA says in its skeleton as well is that they had contested Mr. Heffron's evidence about telling the CMA that oil was outside the scope in its defence at paragraph 102.3(a). I'm not going to turn that up, but when you look at it, you can see that is not contesting Mr. Heffron's evidence. It is a point of detail, but you can see they are talking about the emails as opposed to any oral evidence. I will leave that for your note.

But what I will address now, if I may, is just the new document that has appeared as an annex to my learned friend's skeleton. So I have that in a separate file and I think I identified it in opening with all the redactions. There are three short points and then one more point about this.

THE CHAIRMAN: Where are we now?

MR. HARRIS: We are now in the annex to Ms. Demetriou's skeleton. So it is this rather redacted looking document.

THE CHAIRMAN: Yes, I've read it. I have got it there. It is in the additional documents bundle at the end of tab 2.

MR. HARRIS: I am very grateful. Thank you, sir.

This is a document, if you like, in two parts. As it says at the top:

"Notes of separate calls with ICE and Trayport about the new agreement."

Then a whole load of blanking, and the first call is the note of the call with ICE on 24 May. I'm not so interested in that for today's purposes. I skip over just on to the third page, and it says:

"Notes of call with Trayport."

That happens to be the next day.

What that says under "Timeline and reasons for the agreements" -- Now, the first thing before I look at the detail is this is not the witness statement, and we have put in a witness

statement with a sworn statement of truth saying that he raised these things to the best of his knowledge and recollection during the oral phase.

Secondly, this document is not and does not purport to be a full and complete transcript of any call; it's just some of the bullet points that got noted down. Then the third point -- and if you like, I can hand in the letters about this, but it is rather mundane -- we wrote to the CMA on 17 January when we got this skeleton and this new document and said, well, can we at least in the confidentiality ring, we and the Tribunal, can we see all of the redactions? And we were told no for a variety of reasons: they are privileged or there are policy concerns, or what have you.

THE CHAIRMAN: We do not need to see them unless they actually go to the points that are raised.

MR. HARRIS: Exactly. We say there is a good chance that they do, and for this reason, and that is why we asked for them.

So if you are on the third page, so the notes of the call with Trayport on 25 May.

THE CHAIRMAN: Yes.

MR. HARRIS: It is outlining in bullet point form Trayport's response when being asked about the heading "Timeline and reasons for the agreements". If we trace down to just above the redacted part, the two bullet points above that -- well, three bullet points:

> "A proposal was sent to Gordon Bennett on 7 May."

Well, we have seen that. That was the 7 May email.

THE CHAIRMAN: Yes.

MR. HARRIS: This is Trayport speaking. So this is a note effectively of what Trayport is saying to CMA in this conversation, and the CMA notes it down that Trayport is saying that:

> "ICE responded that Trayport would not get lucrative oil markets, just the core power and gas markets."

But then it is very telling what then happens that Trayport is saying "parties close to an agreement". Trayport does not say to them, oh well, and of course, ICE, having told us that we won't get lucrative oil markets, well, that is it, game over, no deal, agreement off the table. It just does not say that. If anything, the note supports us, despite the fact that it is not a witness statement and it is only partial, et cetera, et cetera. You would have thought that if there was a good point to be made for the CMA as it now tries to make in 6.29 of its final decision that, oh well, there is no agreement about scope, this would bear it out. In fact, it is the opposite, and the reason the redactions are potentially relevant is because in the

heading "CMA comments", you would have thought -- this is the way I put it -- that if the CMA had thought, hang on a minute, this must have been a problem, right, you weren't getting oil, then some relevant evidence would have been revealed by the CMA commenting on that fact by reference to the two bullet points above.

Anyway, be that as it may, this is what the CMA has put forward. We say it is unsatisfactory in various respects, but even then, even if you do have regard to it, then on the substance it actually supports us. If there had been some adverse commentary or something that supports them, it might be in these redacted out bits, and we asked for them and we were told, sorry, you cannot have them.

So that is what I have to say, effectively, about ground 1(b), the attack on the evidence in the judicial review sense.

Now, I have a ground 1(c) and that is a lot shorter. Then I am going to move to ground 5 as the parties have largely done in their written works.

Ground (c) is to be located in the first notice of appeal, and again, the heading may help to sort of locate in a judicial review sense what it is that I am talking about and why I am bothering. So at 1(c), which you will find on internal page 40 -- this is a short and simple point. As its heading says:

"Inconsistent, therefore irrational."

So what we have identified, in my respectful submission, is a logical inconsistency in the decision which renders it unsafe because it is internally inconsistent and/or internally illogical. In a judicial review sense, that then means that we say you should remit that back to the CMA so that they can iron out or explain away or whatever, do it properly.

What is the inconsistency? The inconsistency is on the one hand, as we know categorically from paragraph 6.30, 3.1 and 3.4, that I read out a few times earlier, that the new agreement was not part of the counterfactual. Categorically stated. So the new agreement was, therefore, merger-specific. That is the corollary. It would not have happened anyway, and it must have been caused by the merger. It must be merger-specific.

Just while we are pausing, it has to be one or the other. You cannot just have it being neither; it is either caused by the agreement, the merger, in which case it is merger-specific, or it would have happened anyway, irrespective of the merger, in which case it is part of the counterfactual. It has to be one or the other, and we know for sure that at 6.30, et cetera, the CMA said it is not part of the counterfactual.

So what happens when we get to paragraph 12.196 of the decision is that we say that the CMA then departs from that categoric finding in an inconsistent manner. This is a section of the agreement where they are talking about the possibility of relevant customer benefits. Gentlemen, you are doubtless familiar with that in the legislation. It does not arise save in this part of this case, but in theory, even if this is an SLC, sometimes it can be outweighed by an RCB, a relevant customer benefit. So that was why. What do they say in 12.196 under the heading "New agreement":

> "In their joint response to our remedies notice, the parties argued that our provisional findings adopted a counterfactual where the new agreement was treated as being merger-specific."

We know for sure that that is what they did because they say that the counterfactual did not include the new agreement. So it must have been merger-specific.

So we go to them and we say: this is the counterfactual you adopted, and therefore you should have regard to some efficiencies and benefits. But what do they then say? They say back to us: ah, we considered that ICE had mischaracterised the counterfactual. Well, hang on a minute, that is not what you said earlier. In your section 6.30, 31 and 34, the agreement is not part of the a counterfactual. So it is merger-specific, and when we say that is what you found, they say, no, no, no, that is a mischaracterisation. Well, we do not understand. That is inconsistent.

And then it goes on:

> "However, even if we were to treat the new agreement as merger-specific," then we pause and say, well, you did, you always treated the new agreement as merger specific. That is why it is not part of the counterfactual, and that is the point. It is as simple as that.

In this part of the decision, they say the reasoning is inconsistent with the categoric finding of the counterfactual in the earlier parts of the decision. And that is unsatisfactory and illogical and internally inconsistent. You cannot have it both ways.

That is the point.

So, sir, gentlemen, that then takes me on to, if I may, ground 5. This one is, we say, an impossible difficulty for the CMA. It is the vires challenge to the decision, to that part of the decision that tells ICE to terminate the new agreement.

I am going to take this, if I may, quite quickly, not least of all because I prefaced some the remarks when I was reading out the legislation.

THE CHAIRMAN: Yes.

MR. HARRIS: We have read carefully paragraphs 12.71 to 12.74 of the decision. We know, if you want to have them up in front of you, you may that of assistance. It is on internal page 192 of the decision.

At heart, this point is not only very simple and short, but we say, with great respect, this is a total slam dunk. You just cannot, no matter how you twist and turn, the CMA, you cannot get out of this point, because look at 12.71 to 12.74. There is not anything in there about the need to terminate the new agreement because it is an SLC or because it is an adverse effect. It just does not say that. It is all about appropriateness of giving new owner of Trayport a choice. That is a completely different test, finds no basis in the legislation, end of story.

But importantly, it also does not say, oh, I have to terminate the new agreement because otherwise it won't be an effective divestiture remedy. It does not say that, and yet that is the case that is now put against me today.

Equally, gentlemen, it does not say, oh, we need to give them the choice because it is all about -- well, it's just a question of fairness for the new guy, the new owner. As a matter of fairness, he or it should be allowed to take his own view. First of all, it does not say that. But that is said today, and secondly, so what if it did because that is equally ultra vires?

THE CHAIRMAN: Just remind me, what is the term of new agreement? How long is it for?

MR. HARRIS: That was one of the confidential matters in the --

THE CHAIRMAN: Okay, put it on a piece of paper.

MR. HARRIS: Yes, we will hand it up.

THE CHAIRMAN: Give it to me at 2 o'clock.

MR. HARRIS: Yes, I will.

That is, in a nutshell the points. I am going to just develop it a little bit because it is important in addition to note the point that I took you to when I opened on the report, which is, if anything it gets worse for CMA because at 12.198, it is not only that the new agreement is not itself said to be an SLC or an adverse effect, but at 12.198 the CMA says in terms the same agreement -- I beg your pardon:

> "We considered that a similar agreement could voluntarily be negotiated between ICE and a new owner of Trayport should this be in their commercial interests."

It was all about giving them a choice. That proves my point absolutely inevitably. If the CMA is completely relaxed that someone else could have had this agreement, obviously this agreement cannot amount to some naughty competition feature. It cannot be an SLC or an adverse effect because the CMA -- it does not matter one jot as long it was somebody else

(inaudible) Yet what are they supposed to be doing in section 41(2) of the Act remedying the SLC and the AECs?

That should be the end of the matter, but as I said, the CMA has advanced -- in my respectful submission, they are really twisting in the wind here. They know this is impossible to get out. So what have they had to do? In my submission, what we have had to do is come up with some new arguments. That is impossible for Tesco reasons, so end of story. But let's just have a look at what the new arguments are.

They say that it was -- their skeleton, paragraph 67 -- a new and additional reason that is not in their report. That it was:

> "In order to make the divestiture remedy effective."

Well, they might have been able to do that if there was evidence to back it up, but then they would have had to set it out in the report.

THE CHAIRMAN: What paragraph are you looking at?

MR. HARRIS: I am still looking at the reasoning at 12.71 --

THE CHAIRMAN: No, their skeleton argument?

MR. HARRIS: Oh, in their skeleton it is paragraph 67, I beg your pardon. So this is under the heading "CMA's vires" in 67. So there are --

THE CHAIRMAN: One problem is that it hasn't been explained here, and it hasn't been referred to at all in the report, why it would make the divestiture remedy effective. This is just a statement. It's just saying, but there is no flesh on that bone.

MR. HARRIS: That will be in Ms. Demetriou's task. No doubt she will valiantly attempt to first of all explain to you how she can now advance this new and additional reasoning that's not in the report, and then how it stacks up. That will be a task for her, but we say it fails on both fronts. Most critically, she cannot even properly be allowed to do it because that falls right in the face of Tesco. New supplementary reasoning not to be found in the report.

So secondly, and in any event, even if there were not a fatal Tesco problem with it, it is a completely incredible new claim. I do not say that you could not have done it in the right case with the right evidence. That is why I took the trouble to take to you the point in section 41(4) saying comprehensive as remedy, et cetera.

But you could not sensibly have ever done it in this case even if it were not new reasoning, and that is because, as you will perhaps have gathered from the papers, when TP went on sale it attracted lots of bidders. It is a very attractive business with a very healthy income stream and it was sold for a considerable amount, and what does this new agreement do? This new agreement, as Mr. Heffron says in his evidence, is unequivocally beneficial for

Trayport. It is a big venue potential client, which for years and years and years would not be a full client and certainly would not pay any money, and what has happened, Mr. Heffron, albeit when Mr. Bennett switched jobs to ICE, he had been able to bring them into the fold. He was over the moon about this, as he says in his witness statement.

Why is that relevant? Because it just means the asset is even more attractive now. So you cannot say that having the new agreement somehow upsets the effectiveness of the divestiture, even if you had said that in your report, which you did not, because it makes no sense. If anything, the new agreement makes the business more attractive. So it does not stack up in any event, the supposed new reason.

Then there is another attempt to advance a new case, which is in the CMA's skeleton in the next paragraph at 68, which is, oh well, the CMA says -- now they twist another way in the wind now. So, gosh, if that new reasoning does not work, let us come up with some more new reasoning. Well, the additional new reasoning is, oh well: "The CMA did not know whether the new agreement was on arm's lengths terms."

That is what they say, and we say, well, so what? First of all, so what? That is no part of the statutory test. It just does not make any difference at all, and where we really reach the point is what the CMA was obviously driving at, because it says it in the skeleton at paragraph 69 now, the final sentence.

This seems to have been what was really going on at the CMA, as we now know from these defences in the skeletons.

The final sentence:

> "It was instead a step taken in order to ensure that the new owner of Trayport was not lumbered with an agreement that might not be commercially fair to it."

Well, fine, thank you for being so very candid. That is what you have done, that is what you say you were doing.

It is just ultra vires. It does not say that anywhere in the statute. This is not an at large, oh, this does not look very fair so we will remedy it jurisdiction. That is just not the way it works. So we say that ground 5 is overwhelming.

The very last point that the CMA takes is that, oh no, no, you have not understood, you have not understood because we were remedying as we were allowed to under section 41(4), the merger, if you like, as a whole and we are allowed to take a comprehensive approach to the merger as a whole and remedy it effectively, all of it, comprehensively. But that one just does not work because the merger -- you will find the relevant parts of the summary of the

decision are paragraph 46 on internal page 15 at the beginning of the decision, and what the CMA says there was:

> "Based on an assessment in the round of all ...(Reading to the words)... taking into account the likely effects overall, we concluded that the merger between ICE and Trayport may be expected to result in an SLC ..."

Et cetera.

Pausing, the merger is a defined term. I will show you where the definition is in just a minute, but it does not say the merger and the new agreement. It does not even mention the new agreement, and when we look at the definition of "merger", it also does not include the new agreement.

I am just finishing off, dotting the "i"s and crossing the "t"s here.

If you go to paragraph 1 of the summary of the decision right at the beginning, the merger is defined in the very first sentence as:

> "The completed acquisition of ICE by ICE of Trayport including their subsidiaries."

That is the merger. No surprises that the new agreement does not find reference in the merger because the new agreement just was not an SLC; it was not an adverse effect.

So much was it neither of those things that the CMA says in 12.198: we are quite happy for somebody else to do it. We actually say, for what it is worth, although I do not need this point, that the new agreement is actually deeply pro-competitive because it allows more aggregation and, therefore, more trading, et cetera.

So that is what I have on ground 5. Then that leaves me with just -- I will be able to deal with, for certain, the additional grounds 2 and 3 in the second notice of appeal. So just to locate that back into your collective minds, gentlemen, the second notice of appeal arose because in November of last year the new agreement, having not been implemented, ICE took the view that that was all unsatisfactory. It is a pro-competitive beneficial agreement and we wanted it implemented in the interim period, if you like, pending the challenge.

We took the view that the interim enforcement order did not preclude that and so we wrote a letter saying, well, we are not just going to give it, we will tell that you we think we are going to do it, if you like, next week. This is in early November last year. The CMA issued a decision, much shorter obviously, saying you cannot do that, and I will show you that in a moment.

When we challenged that decision, we said that -- this is in the second notice of appeal, which you don't need to turn up -- there were three problems with. If it is ultra vires for you to tell us to terminate it, it is ultra vires for you to tell us to suspend it. That just follows. In

other words, ground 1 of the second notice of appeal is the same as ground 5 of the first notice of appeal. It is the same point.

But in addition, we go on and we say irrespective of whether you have got vires or not to do it, you should not have done it, that is tell us to suspend the interim operation of the new agreement pending the challenge. Because to do so is irrational and disproportionate.

So grounds 2 and 3 that I am just going to deal with in the next few minutes, of the second notice of appeal, well, irrespective of the question of vires, you still should not have done it because it is disproportionate and irrational. That basically boils down to this proposition that there is no difficulty in us implementing the new agreement on an interim basis and then terminating it if the Tribunal finds against me on my grounds of challenge. No difficulty.

What you should do is just allow it to go ahead and then if I lose on my challenge, we will terminate it at that point. But in the meantime, want it to operate it because I say, as you have heard me, it's very competitive, very beneficial, certainly generates significant revenues for Trayport, et cetera.

You, sir, heard a little bit of that sort of dispute when we were arguing about timings at the CMC. So very quickly then, the one document I would like you to look at -- actually just two. The first one is what was the direction against which we were appealing and what was the reasoning in it, because obviously this is, again, a judicial review-style challenge. You will find that in the second notice of appeal bundle, which I have not asked you to open so far. You will find that at -- in my bundle it is numbered tab 1.

So there is the notice of application and then there is a numbered tab 1, and it should look like this, gentlemen, a completed acquisition by ICE, directions issued pursuant to paragraph 10.

THE CHAIRMAN: Yes, I have got that.

MR. HARRIS: Thank you. There is a lot of rubric in this sort of document. I expect you are very familiar with that. The reasoning for not allowing us to operate the new agreement in the interim is really only to be found on internal page 4 of this document. The rest, as I say, is just scene setting and rubric, and then it's really (d) and, in particular, (e) on page 4:

"The CMA concluded ..."

Then they recite their conclusions from the main report, that it should be unwound giving the choice -- so we have been through that, and this is the reasoning why we should nevertheless still not do it in the interim.

(e):

"The CMA considers ...(Reading to the words)... agreement should be unwound; thereby pre-empting and impeding ...(Reading to the words)... in contravention of paragraph 4 of the order."

We say that that is wrong as a matter of rationality and proportionality, because as I said a moment ago, the CMA's objectives could have very well been met by a less intrusive, more rational alternative, which was only to make us stop operating the new agreement at the point in time at which, if I do, I fail in my challenges, but in the meantime it should carry on.

There are only two points to deal with here as the arguments develop. So I have set the scene. You can see what it is all about. You can see what the dispute is, and the CMA then says: no, no, no, because you now say there would have been no particular problem operating this agreement in the interim and then shutting it down if you lose. But the CMA says, ah, but you did not say that at the time. You said that it was shutting down an agreement once it started operating, that was all too difficult and impossible. So, Mr. Harris, you and your team, you are flip flopping and changing, and we say: no, no, with great respect you have not understood the point, because the CMA relies upon, for this purpose, a memo in June 2016. That one is to be found -- so we are now back in the first notice of appeal bundle -- I don't think I need anything else in the second -- and you will find the June memo at -- it is own tab, which is number 8.

Gentlemen, just in case you have not had the opportunity to read this memo, it is delightfully short and I would commend it to you on the other two pages in any event, not least of all because it backs up a great deal of what I have been saying this morning. But for the purpose of this point before lunch, I just invite you to the last section on the internal page 3 under the heading:

"Suspension of the new agreement is impractical and would be detrimental to Trayport."

So you can see why the CMA has come back to me and said, oh well, you say now that it would not have been that big a deal to operate it and then suspend it, but look at what you were saying back in June 2016. That is the heading, but there is a critical distinction between what is being addressed in this memo and the submissions that I am making in my second notice of appeal.

The distinction is that what is going on in 17, 18, 19 and, for that matter, 20 and 21, is that the evidence being given there is that it is badly disruptive to Trayport and Trayport's customers if you tell them that they can have the connectivity of a new agreement and then,

without telling them anything else, here is your connectivity, here is your new agreement, and then just some time later say, oh, I am taking it away from you, and they are like, hang on a minute, you cannot do that, you told us we could have it, it is obvious to see why, if you do that to a customer, they are going to be annoyed and it causes disruption and bad customer relations. That makes sense, and that is what being addressed here, as I will show you in just a minute.

But that stands in sharp contrast to situation that we were talking about in November last year, when we wanted to implement the new agreement on an interim basis, because by definition these proceedings have well and truly kicked off. There had already been a provisional report and a final report, and what we were proposing at that stage was to implement the new agreement on the interim basis out on the very express understanding with Trayport's customers that they would be told: this is potentially only interim. If ICE loses its challenge, well, I'm afraid bye bye new agreement.

That does not cause market disruption or bad customer relations or reputational damage for obvious reasons. So the two points are completely distinct, and I can make good the final point before lunch by reference to this memo by just reading you some extracts from 17, 18 and 19.

So in 17, the point is that:

> "Trayport has already communicated and committed to this launch date to the market."

So what does that lead to? It leads to, in the third sentence:

> "They are expecting the additional ICE contracts to appear."

Next paragraph down in the second sentence:

> "Trayport has reached out to a significant number of traders about the enhanced service and is in the process of adding and testing such links."

19:

> "Accordingly ..."

Then skipping down to the second line:

> "... Trayport would need to inform customers it will need to delay and may not be able to guarantee meeting their expectations, and in some cases not be able to guarantee honouring their contracts."

Then skipping down a line:

> "The disruption to markets/participants would be significant and reflect badly on Trayport."

Understandably, Kevin Heffron is extremely concerned that this would be very detrimental to the Trayport business.

What Mr. Heffron was saying then makes perfect sense. If you do something that is not expected, they think they have bought something and it is taken away from them, they are going to be annoyed. Disrupt, causes bad reputation, but his evidence as regards rolling out the new agreement post-November last year in the interim period was the exact opposite. What he was saying there was there is no problem, because if I tell people you can have it in the interim but it may not survive, no problem, and that is what I want to do.

It is disproportionate and irrational for the CMA to say, no, no, the only thing we can do, even if we have the vires, which I say they do not, the only thing we can do is tell you to shut it down completely . What they should have done was say, yes, you can carry on up until such point that you lose. That's the point.

So just to give you a very brief road map, I am going to have to deal with a new point after lunch about how we are said to be in breach of the interim enforcement order. This is a brand new point, but we take exception to it and it is wrong. Having put that to one side, then that leaves me with ground 2, which are the five subdivisions but, as I said, all in judicial review style. Then ground 3, which is really short, and ground 4, which is relatively short, and it is about the remedy. I would propose to do that all within the hour that we had agreed amongst ourselves subject to the Tribunal's --

THE CHAIRMAN: Yes, we may have questions that make it longer, but yes, as long as you finish by 3.30.

MR. HARRIS: I am very grateful. Of course Mr. O'Donoghue is not here.

THE CHAIRMAN: Exactly.

MR. HARRIS: I think we did say 3.30, in any event.

THE CHAIRMAN: Yes.

MR. HARRIS: I am very grateful. An hour and a half.

(1.00 pm) (The short adjournment)

(2.00 pm)

MR. HARRIS: Can I just hand in a short and agreed document about the duration off the new agreement. I am afraid there is only one copy, but at least it is highly legible. As I say, the details are highlighted because they are confidential.

(Handed)

So, sir, perhaps a quick road map for this afternoon, then. Just two minutes on the new allegation of breach of the interim enforcement orders because we reject that emphatically, but I will not go into the detail. I will save any detail for reply if the need arises.

Then there is ground 2 with its subgrounds. Subject to any contrary indication from the Tribunal, I was going to impose a self-proposed guillotine by no later than 3 for me to have finished that because I also have to deal with ground 3 and 4. 3 is short; 4 is nowhere near as long as 2, but it is a bit bigger than 3 and I have already dealt with some of it. It is about remedies.

It might be a convenient moment, subject to the Tribunal, to have the shorthand break then when I have dealt with all of them. Then that gives Ms. Demetriou an opportunity for an hour or so --

THE CHAIRMAN: At least to start.

MR. HARRIS: I am grateful. So the interim enforcement order, you will have seen it features in the CMA skeleton for today that they now say we are in breach, and indeed that logically somehow, in a manner that frankly I do not understand, it is inevitable that we are in breach and that somehow we should accept that we are in breach.

Let me put the record straight. We are not in breach and we certainly do not accept that we are in breach, and it certainly does not follow as a matter of logic or anything else.

The interim enforcement order saying effectively do not do anything that would prejudice the possible outcome later on is not a problem for the new agreement because the new agreement was entered into on arm's length terms. That is what it says in the evidence. Mr. Heffron and Mr. Bennett. It is in an agreement that was good for Trayport's business, indeed good for ICE's business, and they would have done it in any event. But most critically, it was on arm's length terms. That is the evidence, and importantly for this new allegation that we are somehow in breach, you will recall that the CMA's own decision is that they cannot tell whether it is on arm's length terms or not. That is indeed one of their new lines of reasoning supposedly in support of the remedy.

So we just fail to see how it can now be said that we are in breach, let alone inevitably or logically inevitably in breach, in circumstances where they themselves have said we cannot tell whether it is arm's length or not. Anyway, it was arm's length, end of story.

It is not, in our submission, credible to say that an agreement signed on arm's length terms or normal commercial terms, where the negotiations were commenced before the merger was even in contemplation might impede the taking of any action by the CMA at the end of its enquiries, and it is certainly not explained how that happens.

Then just for the sake of completeness, but as I say, if needs be I will come back to this in reply, you would see if you turned up the interim enforcement order again that one has to report changes in contractual arrangements after the event. We faithfully did that. We entered into the new agreement and then we reported it, and at that point the CMA did not say, hang on a minute, that is a breach of the interim enforcement order. That is another reason why this has taken us completely by surprise. Then the CMA never issued a direction telling us that we could not do it, and there is some evidence about that. But as I say, I will only go to that if I need to in reply.

So that is that point.

THE CHAIRMAN: It is a fairly contentious analysis. So Ms. Demetriou will answer that and then you will deal with that by way of reply.

MR. HARRIS: That is my intention.

THE CHAIRMAN: How long do you intend to have for your reply?

MR. HARRIS: As little as possible. I think the provisional arrangement was, if I am four hours, which takes me to 3.30, Ms. Demetriou would have four hours, which would take an hour today, two and a half in the morning --

THE CHAIRMAN: We are starting at 11 tomorrow.

MR. HARRIS: Two in the morning, then that would leave another hour, so that is about 3 o'clock. When Mr. O'Donoghue was going to be here, that would have been him 3 to four and then me left. I'm not proposing to just take his 60 minutes because he is not here. So it hopefully would mean we are finished early tomorrow afternoon.

THE CHAIRMAN: We cannot sit beyond 4.30 tomorrow, as you know.

MR. HARRIS: Very good news. So that's Ms. Demetriou finished by, say, 2.30 or 3 o'clock. There we go, that provides some excellent discipline for us advocates.

THE CHAIRMAN: I would not have thought your reply would be longer than an hour.

MR. HARRIS: Ground 2, which I am about to turn to, that has the multiheads. They are actually all simple and they are all JR, as I am about to show you. I introduce it in that way just because I do not want you to think just because there are some subpoints and one are two of them involve getting into the thickets on some of the more detailed parts of the analysis, that somehow that means that they are all difficult, and it certainly does not mean that they all descend into merits points.

The principal objection that is taken by Ms. Demetriou to this is if you look, it is all detailed and on the facts, and that is just a fact and merits dispute, and bad luck, this is a JR, you cannot do it. That is just wrong, as I will show you in a minute.

But because there are quite a few of them, that is why I say I would almost, come what may, subject to the Tribunal saying otherwise, I would want to finish by 3 so that I have enough time for the others. That may involve hurrying over one or two of them and referring to the skeleton.

But can I take you, please, in the first notice of appeal bundle to where these grounds are located, and again, the clue for this ground 2, if you begin by picking up my notice of application, number 1 on internal page 41 is that there is a generalised heading that this is about a flawed assessment on the benefits analysis. So the whole of ground 2 is about flaws in the benefits analysis. I say that because it contrasts with ground 3, which is flaws in the costs part of the analysis and where do these fit in.

We know from the CMA's guidelines, CC2, behind whatever tab that was, that you have to have not just an ability, but then you have to have an incentive, and the incentive breaks down into: have you got benefits and do they outweigh the costs?

I attack both parts. I do not attack the abilities. Various things are said about the abilities of ICE, once it owns Trayport, to cause partial foreclosure. But my focus is upon why the incentives part of the analysis does not stack up, and I attack separately benefits under ground 2 in subheadings and then costs much more briefly under ground 2.

That is internal page 41. If you were to turn over to 44 and 45, how do these subgrounds of appeal work?

You have 2(a) and the heading gives the game away:

> "The CMA recognised elsewhere X, and it was therefore illogical and irrational to find Y."

So that is that challenge. It is internal illogicality and inconsistency; that is a JR point.

If you just keep your finger on that one, you will see that at 2(e), which is the last of the five subgrounds which appears on page 54 in bold, again the final sentence gives it away. It is about irrationality because of inconsistencies. That is the GFI point.

So (a) and (e), that's the JR territory we are in: Illogical, irrational, inconsistent within the terms of the decision. All standard JR grounds.

2(b) you find at the bottom of page 45. That is an evidence attack. Insufficient evidence of progress of value upon which the CMA could rationally conclude. So again, sir, just to let you debate it with me before the short adjournment, it is an evidence attack but it is put on the JR standard. I am not just saying I disagree, this is what I think of the evidence. I am saying it was irrational in the manners that... Then 2(c) is to be found in the heading at the top of page 50. Again, it is an evidence-style attack, no or no sufficient evidence.

Okay, so that is where we are in terms of JR setting.

2(a), that is what I am going to develop first and this one is probably one of the shorter ones. This is a pretty simple point. What we say is that the CMA found an incentive in reliance on forecasts that there would be a substantial -- that is their word -- liquidity change away from other venues and that that change would go to ICE.

The simple point is just this: it is irrational for the CMA to forecast that there would be substantial liquidity changes and that they would go to ICE in circumstances where the CMA's own view of the world -- and this bit they have got correct -- and I am quoting here from the decision that I will be taking you to in a second:

> "Liquidity is sticky and tends to gather on a certain venue for a particular asset class."

So can we just turn up the decision at that point. It is paragraph 8.104(b), which is internal page 141. Picking 8.104(b) up a few lines down:

> "The precise impact on specific products is unavoidably harder to predict in this industry than most, because liquidity is sticky and tends to gather on a certain venue for a particular asset class."

Just pausing there, unavoidably harder to predict. You might think, particularly against the background of Tetra Laval, we had better do a pretty good job here because we ourselves are saying that our theory of harm encounters an immediate and obvious problem about stickiness.

The CMA goes on to say:

> "As discussed in section 7, the importance of liquidity in open interest gives rise to strong network effects. The implication of this is that in response to a loss of competitiveness, a rival may suffer only a very limited loss of volumes in ...(Reading to the words)... with it being difficult to identify in advance exactly where these large shifts in volumes will take place."

We agree, and that is precisely why we said, and why I said in opening, that this is an archetypal example of a market where, if you are going to have these very long-term forecasts of alleged competitive harm with a divestiture remedy at the end in a non-horizontal merger where you would not necessarily expect anything to be going wrong in the first place, and there is a feature of the market which is entirely common ground about stickiness, then that is why you need to be so very careful and you have not been.

That is the thrust of this ground 2: you just haven't been robust or careful against factors that you yourself recognised, and in particular you never made the link between the benefit alleged and ability. You just effectively assert, oh well, you have got the ability, so Bob is

your uncle, you are going to go and use it. It does not work like that. You only have an actual incentive if the benefits outweigh the costs.

Then they say in 8.105:

> "As a result of these complexities, any quantitative analysis will unavoidably need to make a number of speculative assumptions about the potential long-term gains and losses of foreclosure for the merged firm."

The key words there are "speculative assumptions".

So what, as you know, gentlemen, happens in this report is that there is a, if you like, makeweight appendix F, which is the quantitative analysis, but mostly it is a prosaic textual analysis. We say it will be substantial. But they are pointing out all of these difficulties in 8.1204(b). Then they say themselves if we were to do this on a quantitative basis, that would involve a number of speculative assumptions.

Of course, the selfsame thing applies for the qualitative analysis. It is because of what they say in 8.104(b), sticky tends to gather, may only suffer a limited loss but dramatic loss in others. Difficult to identify in advance exactly where, and that is resonant of what we saw in Tetra Laval, which was that point about change of causation dimly able to be discerned. That is synonymous and that is why you need this robust analysis.

What we say -- and this is it, really, on our first subground, 2(a) -- makes no logical sense to say that there will be substantial switching to ICE, which is the CMA's case, when the CMA cannot tell whether it will occur in any given product, and they certainly cannot tell and certainly haven't spelled out how, even if it does occur for a particular product, it will be to the benefit of ICE.

That is it in a nutshell. So I will move on to ground 2(b). That, as I say, is one of the examples about insufficient evidence in a judicial review sense. This one is slightly longer because I have to go through the supposed strategies for partial foreclosure, of which there are four.

So the CMA finds four mechanisms through which we had the ability to harm the competitors. The CMA now points out, indeed, places great emphasis in its skeleton, including at paragraph 101, on the fact that it is all about -- this is what they now say -- the fact that you, ICE, faced lots of competitors. We think, right, okay, yes, lots of competitors, but how does that mean that ability somehow morphs into incentive just because we are in a competitive market? We do not get it.

We think it does not follow that just because we have the ability in certain subheadings, four of them, and because we are in a competitive market that that is itself meaning that we

are going to exercise these arrangements. It just does not follow. No doubt Ms. Demetriou will explain this, but we are told in their skeleton that it does follow. What we do know from the decision is that their analysis of incentives is based upon us, ICE, winning volumes from rivals and it is not just about harming competitors.

But as I said before, in order to win these volumes from the rivals, we have got to overcome in a manner that the CMA explains and identifies and analyses, the stickiness problem. What we say is that means that the report really is fundamentally flawed, because it never explains by reference to any one of these four arrangements that I am about to look at one by one, how the mere fact of an ability results in there being an actual incentive in the cost/benefit analysis.

This is actually quite a big point of principle for this case. Although it appears for the first time in subground 2(b), what we say is the absence of linkage in a forward-looking, non-horizontal merger between, on the one hand, abilities and, on the other hand, incentives is something that you have to sit back, gentlemen, we say, with respect, and say, hang on a minute, is that -- can you really just get away with bland phrases like there will be substantial switching, or in a non-horizontal case looking many years into the future where there is divestiture at the end of it? Or no, do you have to actually say to yourself, no, you need to spell it out for me: how is it that one of these abilities would actually work?

What we say is that the CMA's report -- that is where it falls on its face because it goes into great length about the abilities, but it never spells out, subject to a new theory that is advanced in the skeleton, which I will deal with afterwards, what that linkage is.

What are these four strategies? This bit I am to take in overview because we have done the depth work, if you like, in the written analysis. But there are four.

The first two are, we are said to have the ability as the new owner of Trayport, subject to this challenge, of course, succeeding, to increase price and damage service quality. Then the CMA says you could increase the price, you have got the ability to do that, and we say, well, yes, we have got the ability to do it, but how does that mean that we have got the incentive to actually exercise that ability? Show us, please, in your report where you draw the link between that specific example of a price strategy to damage somebody and how it will actually cause there to be in an illiquid, sticky market, people to shift from one venue, not only away from that venue but to us. Every single time the linkage has to be two strands or two chain links, not just shifting from somebody else but it has to shift to us. That is all I can say about it, because it does not tell me in the report how that price ability translates into actual incentive, nor does it do it on the next one, which is service quality.

Well, it just does not explain it. So I am at a loss to understand why that ability would in fact be exercised by my client as I don't see the incentive.

Then there are various recitations in the CMA's skeleton of complaints by some third parties, but they are not findings of an actual incentive, linked to my or any specific ability.

What the CMA does, and I am going to come back to this in a minute, is that it seems to say, as far as we understand it, that there is a sort of a general theory that pervades the facts of this case, which are, well, you were in a competitive market, ICE, and that somehow means that your ability metamorphs into an incentive. But we just don't follow it at all.

Every single time you have to go through the CC2 merger assessment guidelines, analysis, ability, incentive, and then the less important one for today, effect, and that hasn't been done.

What is worse for the CMA is that they could have done this. They could have done this. They did ask, as we point out in our notice of appeal -- if you want, the reference is 128 -- they did ask traders some very relevant questions about what they would do if there was a reduction in service quality, but they haven't referred to the answers in the report. We wrote to them and said, you seem to have asked the right question, can we see the answers? No. So we haven't got them either. So they are not in the report and we do not have them.

So that aggravates the difficulty. Then they have got two other stages. Sir, I have said there were four, I have dealt with two -- price is one, service quality reduction is another. Then they have got a third and a fourth strategy. The third is delaying new product, it is said, and the fourth is use of confidential information.

But what we say here, as you know, this is an evidence challenge and I do not shirk from that hurdle, but what the CMA has only been able to do is identify three instances over 20 years where Trayport is said, on their view of the world, to have had anything to do with influencing market outcomes by delaying products or using confidential information.

What we say is that that is a classic example, both of those are classic examples of where you fail the Tetra Laval/paragraph 20(7) of BAA approach. You need a robust analysis, rigorous careful examination of the evidence, and it is beyond belief or, for judicial review purposes, beyond rationality to say, oh well, I am going to rely on three instances over 20 years. In order, what, gentlemen? In order to do what?

The CMA's hurdle is that they have to show substantial shifting of liquidity away from somebody over there, some other venue, and to me. So it is the two links in the chain, and what they say as well, three examples in 20 years where Trayport seems to have been involved in that sort of thing. That gives rise to our conclusion that there is substantial

liquidity shifting in a market like this, and we say that is our challenge. We say it just does not stack up. That is not good enough.

What we say, putting the same point another way before moving on, is if there were this ability on the part of Trayport and it would give rise to substantial volume benefits, then it is inconceivable in our respectful submission that there wouldn't be more than three examples in 20 years.

This is the heart of their case, about benefits to us, and we say that is not enough.

We say that the CMA has recognised this difficulty about the lack of linkage between abilities and incentive, and that is why they have come up with a new theory which is the opposite side of the same coin theory. You will have seen this in the skeleton. If you want the reference -- and perhaps we should just turn up my learned friend's skeleton for a moment at paragraph 95 to begin with. So picking up at 95, this is all about the linkage, and this is, we say, the OFT's new theory.

So in the middle of this paragraph:

> "The fierce competition between ICE and its rivals means that if ICE is able to use its control of Trayport to harm its rivals, it will quite plainly benefit from additional trading volumes."

We say, no, that just does not follow at all, let alone quite plainly. What it boils down to, this paragraph, is that it is an assertion, it is an assertion, quite plainly. We say that is the very question that you should have been analysing, and in this market above all markets you need to set it out.

Then it gets, we say, even more extraordinary on the part of the CMA, because if you turn to 98 at the bottom of the page, they posed the right question. The question is whether ICE would take advantage of its ability to use its ownership of Trayport to harm its rivals. The key factors are 1 and 2. The combination of these factors means that ability -- this is a key passage, gentlemen -- the combination of these factors means that ability is in essence the opposite side of the coin from the benefits to ICE. We just say no, absolutely no, no, no, they are distinct. Just because you have ability emphatically does not mean that you exercise it. You only do it if the costs are less than the benefits, and it is no good to say, we say, oops, we haven't done a very good job in our report, it is lacking in exposition of the reasoning on linkage, so, you know what, we will now say that it is all inevitable; it is the opposite side of the same coin.

First of all, they do not say that in their report, and secondly, it is wrong anyway. Then look at 99, gentlemen. Given the market context and the CMA's other unchallenged

finding, it is therefore logically incoherent for ICE to accept it has the ability to use its ownership of Trayport to damage the competitiveness of its rivals.

Not at all. It is expressly coherent for us, even though we might have had the ability to not exercise it in circumstances where the costs might outweigh the benefits. Indeed, as we will come on to in a minute when I -- 2(e), I think, is the GFI one, we have a real world example.

GFI was in the same position as ICE for relevant purposes. GFI owned Trayport, GFI was a market participant. Trayport was a -- we will look at this later -- was a very, very important critical input to its rivals, GFI's rivals. Did GFI go about invoking these insidious partial foreclosure mechanisms? No. So there is somebody who had all these abilities in the same analogous market circumstances and it did not go about doing this. Yet the CMA now says it is absolutely inevitable, the flipside of the same coin.

That is the big flaw, and as I say, again at the risk of some slight repetition there, that is a big point because what we cannot, in our respectful submission, have is a situation in which the CMA is allowed, not just in this case but in other cases, to have a forward-looking analysis in a difficult, non-obviously anti-competitive context with very invasive remedies and then say: I will just elide the critical questions, ability and incentive. I will just elide them and say one obviously follows like night and day follows from the other, when it does not, and it especially does not in this market.

So that would be the problem in any similar case, but in this case it is magnified by the fact that in any market where there is this stickiness, it is even more difficult. So arguably you would need a better analysis in another case, but you certainly need it in this case.

So that is what I have to say about (b), 2(b). Then there is 2(c). So I am still attacking what are said to be the alleged benefits. So just so we are still located in the same ballpark. Then this one involves looking at two supposed benefits. Just so that you know what they are, they are alleged gains by my client in something called OTCs bilateral -- I will just remind you in a second what that is -- and alleged gains by my client in markets where my client does not have any existing products or volumes. So these are two of the supposed benefits.

OTC bilateral, just so that you remember, that is a -- "OTC" stands for over the counter, "bilateral" means obviously just two parties. Sometimes it is called OTC bilateral retail non-cleared. If you like, that's the long form, and it just means two people get together, they do not necessarily have to do it on a venue, they can either do it directly or via a broker, but they do not have to go to an electronic venue or any other venue, and critically

they do not also go off to a clearing house so as to mutualise the risk of one party not performing its side of the bargain.

Why is that relevant? It is relevant for this reason. If you look at paragraph 8.113 of the decision, this is item 3 in the list of five potential benefits to ICE. So it says in 8.110 there are five potential benefits, and then the first one is 8.111, and then the second one is 8.112, then the third 8.113. What is it? It is an alleged benefit:

> "In particular it ..."

That is ICE:

> "... may be able to increase the rate at which ...(Reading to the words)... being cleared."

Et cetera, et cetera.

That is an alleged benefit that they expressly rely upon. We say you cannot sensibly. At least in a judicial review sense that is flawed because look elsewhere in your report and what you say elsewhere in your report is you have not analysed OTC bilateral, and I paraphrase here because you say you do not need to. SO let's just have a look at that.

Go in the report to page 7.65, which is internal page 74, and just take the first sentence so we can locate our position:

> "Firstly, we considered competition between ICE and brokers for trades that are currently executed OTC bilaterally, i.e. without being cleared."

That is the topic. Turn over, please, to 7.66 and where do they get. They say:

> "In examining ICE's internal documents, we found a mixed picture on the ...(Reading to the words)... bilateral segment Overall, based on the evidence we have gathered our view is that whilst there is a degree ...(Reading to the words)... segments, especially over the longer term, the extent of this will be less than between exchanges and the OTC cleared segment. We have, therefore, not considered competition in this segment in further detail for the purposes of our assessment by segment."

So what they are saying here is: for these reasons we do not think we are going to analyse it, so we haven't analysed it, and yet in the benefits section they are saying one of the five supposed benefits is this very supposed switching.

The highest they are able to ever take it in this report is to be found at paragraph 2.67, which is internal page 33. So I have just shown you where they say we are not going to analyse it, mixed picture, et cetera. This is the extent of the analysis that they do to it. It is at 2.67:

"As a result of regulation and standardisation, there has been a long-term trend towards greater exchange-based trading and a general decline in broker trading."

Right, that is it.

THE CHAIRMAN: As a statement that seems right, does not it?

MR. HARRIS: No particular difficulty, but it does not begin to get close to the standard of analysis that you would need to have in order to identify as one of five specific benefits a meaningful, let alone in their phraseology, substantial shift in liquidity on OTC bilaterals.

MR. ALLAN: Can we just go back to 7.66?

MR. HARRIS: Please.

MR. ALLAN: Could you just perhaps complete the paragraph which follows the sentence you quoted, saying:

"However ..."

It seems to me there is a contrast between an analysis of competition within the segment and some comment about competition between that segment and exchanges, because they say we do consider that exchanges may target bilateral trades. I just wondered what you make of that.

MR. HARRIS: Thank you, Mr. Allan. The point, I think here is the first bit after "however" is the very other paragraph to which I just took you, 2.67. So it is a simple analysis or recitation or statement, if you like, to use your phrase, Mr. Chairman, of a supposed trend and no more.

My criticism of the bit after the second subclause to that sentence is absent any analysis, which they say we have therefore not considered, and in reliance seemingly on only this trend, no more, which is the 2.67, that is not sufficiently robust for you then to say, at least with any meaning or power or oomph, we do consider that exchanges may target bilateral trade at least to some extent.

That is not enough to get you to that conclusion, and it is certainly not enough to get you to the conclusion that it leads to substantial switching of sticky trading to ICE.

So that is my answer, Mr. Allan. I mean, you can put it another more generic way, which is this is not the robust analysis that you require on, frankly, any view of the word, let alone a Tetra Laval divestment long-term analysis approach.

What is more, we find ourselves a little befuddled because in the skeleton, the CMA now says that the OTC bilateral is "not important", and in their skeleton -- if you want to turn it up, I think it is 111.1, they say that they place zero reliance on forecast switching from OTC bilateral to ICE.

It is one of your five benefits. You have only got five. You do not analyse one of them at all. So that is flawed, and now you are saying -- maybe, of course, this is why they are saying, but in any event they are now saying, well, frankly, it is irrelevant, it is not important, we place zero reliance upon it.

So we say that that in the relevant sense is flawed.

Then the next way in which we are said to have a benefit, the next benefit, that is to be found back in the report where we were a moment ago where we identified the third benefit, OTC bilateral. This time we are in the next subparagraph, the fourth benefit at paragraph 8.114.

I said I would come to this. This is where we are said to have derived the benefit in markets in which we do not have any existing products or volume, and the CMA says that that is a material benefit of foreclosure. Look at the bottom of 8.114.

THE CHAIRMAN: It would be nice if you could get it.

MR. HARRIS: Would it not just? But their job is to explain how on earth this happens. If we knew, we would be happy, but we do not know how it happens because we look at the markets and we think the difficulty with all these liquidity stickiness problems, but you, the CMA, you are saying that this is a material benefit of foreclosure. So please tell us and the world at large how you get from the ability supposedly to do this into a world in which the benefits outweigh the costs.

What we do know is that in their quantitative analysis -- I'm not going to delve into that particular thicket in light of the passage of time, but what we do know is where we say in the notice of appeal at paragraph 145 that the quantitative analysis reveals that there has been 23 per cent, even in the low scenario, of gains to ICE come in this category, you do not need to particularly concern yourself with the details. The point is that that figure is not disputed, and it reveals a considerable switching of this type even in the low version quantitative analysis of appendix F.

In other words, this is quite important. On any view of the world -- well, on the CMA's view of the world, this was quite important to them, and what we say is we just do not get it. Where in the report does it explain how in a sticky market of this sort of type you can have suddenly ICE generating part of the substantial switches in liquidity in places where it has no products --

THE CHAIRMAN: But surely their case is not suddenly incurs, they are saying it is going to occur over the long-term. I think no one would dispute it is very difficult to shift liquidity in these types of market in the short-term.

MR. HARRIS: I will take that one on the chin. We know from Tetra Laval that even more so where you are looking at a speculative -- what do they call it? -- predictive analysis or forward-looking prognostication where the chains of causation are dimly discernible, et cetera, et cetera. You have got to spell that out because, especially in this context -- you know all about the context, non-horizontal, not obviously anti-competitive, et cetera. So I actually pray that point in aid. How is it, in the short-term or the long-term, going to happen? What is more, for judicial review purposes, it is incumbent upon you to explain how it is going to happen, because you only get home on your "we would do it if we have got the ability" if the benefits are made out and they outweigh the costs. What I am saying to you here, members of the Tribunal is they do not make it out. They just do not make it out.

Then there is the points that the CMA in its defence made. This is what I referred to in opening as the alarming mistake of, on this point saying, that, well, Trayport generates liquidity. That is a direct quotation. But that is just wrong, as I explained to you in opening.

THE CHAIRMAN: Is that not just shorthand?

MR. HARRIS: Well, it may be. In any event, it is morphed. That has now been slid away from, and in the skeleton what they say is that really means -- or at any rate our case is that trading venues depend upon Trayport to disseminate their prices and thereby generate liquidity.

THE CHAIRMAN: I think that is what --

MR. HARRIS: But then the CMA says it follows that ICE's control of Trayport would allow it to use Trayport to divert liquidity to ICE. But it just does not follow at all. It is not logical. One thing does not follow the other.

What we say is that the CMA, all they are able to do is point to two instances in 23 years in which a new entrant has gained volume in an area where it had no previous existence at all, which is our topic area for the moment, even though that liquidity is sticky. What is critical about this is two things. That is only two in 23 years, not withstanding that this is said to be one of the benefits that you can get when you have the ability. It does not stack up just in the pure, if you like, forensic sense. Even more -- and I'm not going to go into the nitty gritty of this because it is set out in the writing, but neither of those examples involve Trayport in the relevant sense of the one being responsible for the new entrant suddenly getting volumes in the new market.

Again, I would invite you to go back if you are interested in the detail. It is in the written -- for reasons got nothing to do with Trayport. It is not Trayport, if you like, that is provoking

or enabling this new entrant to suddenly gets its hand on. So two in 23 years is not good enough in this context and in any event the two just do not work.

So that is what I have to say about ground 2(c), and as I said to you before, that is, as its name suggests, an example of a flawed evidence base in the judicial review sense.

Ground 2(d) is completely distinct. It is of a different genre. Ground 2(d) is the dominance point. Ground 2(d), what it comes down to in judicial review terms is failure to take into account a material and relevant consideration.

What was that consideration? Well, that consideration is that on the CMA's view of the world, undoubtedly -- and I will make good that last point in just a moment -- the CMA's view of the world, undoubtedly Trayport was in a dominant position on the facts of this case. I do not say that in the sense that they made a formal finding to that effect. So that is a straw man that can be burned immediately. I'm not saying they made a finding. I'm not saying they should have made a finding. What I am saying is when we look at the extracts from their decision to which I am about to take you, it leaps off the page that the CMA considered this to be a dominant business with a critical and essential input. Of course, that is the sorts of people who can, in theory, exercise foreclosure strategy; dominant people, people with essential products. So just from a -- I step back for a moment. What do we say about this ground? We say that is your own view of the world, CMA. You obviously think that they were the sorts of people that had a big position of dominance with an essential product, and yet you simply never asked yourself the relevant question: would that not act as a disincentive because obviously foreclosure mechanisms by a dominant undertaking, they are illegal.

So what has gone wrong in the decision? It is very simple. We say your own view of the world is this is who they are and how dominant they are. Your own view of the world is doing something that, if dominant, is illegal, but you did not take it into account. That is wrong in a judicial review sense, and why do I say it is wrong with some force in the case law?

Can I take you to a new case, please, members of the Tribunal. That is to the case of *General Electric*, which is to be found in volume 3 at tab 29. You do not need to know anything at all about the facts of this case. I am going go straight to paragraph 70, which is on internal page 2-5618, the bottom of the page, these numbers.

Can I, please, invite you to read paragraphs 70 through to 75. (Pause)

THE CHAIRMAN: I have read that.

MR. HARRIS: You can see what it stands for. You must take into account, we say, as a matter of principle, the deterrent effect of the likelihood that the merged entity will engage in such conduct. You do not have to do the full monty dominance analysis. We are not suggesting otherwise.

So that is another straw man that can be burnt. We are simply saying, very simple: on your view of the world, you think that these guys are in a dominant position. You do not have a to make a formal finding, but having analysed it in that manner, you should have taken into account as a relevant countervailing point the disincentive to act in an illegal manner. We all know dominant companies that exercise foreclosure strategies, let alone ones leading to substantial lessenings of competition, that is illegal.

THE CHAIRMAN: It's not your case that Trayport was in fact --

MR. HARRIS: It does not have to be, because my point is this is your view of the world -- because I am about to take to you an annex which sets this out. This is your view of the world, so on your view of the world, you should have taken it into account.

THE CHAIRMAN: Not on your view.

MR. HARRIS: My view does not matter two hoots. I am attacking their decision. That is another straw man that can be burnt.

Sir, how do I know -- I can save your hand, members of the Tribunal, some writing on this point because I have an annex that addresses the point expressly. It is in the first notice of appeal bundle. You may not have had any reason to look at this before today. It is tab 16.

So tab 16 is extracts from the decision, as I say, to save your pen, of the literally tens and tens of instances in which, on the CMA's analysis of this market, Trayport is said to have a critical input, have a massive market share, other people be completely dependent on it, that dependency rising to the level of the inputs of Trayport's Joule trading platform and associated software being essential. Very important.

They even, if you look at the bottom of page 1 and over the top at page 2, refer to documents in which there were references actually to dominance. Then -- well, the rest of it is of a piece if you were just to scan the rest of it.

THE CHAIRMAN: Yes.

MR. HARRIS: Monopoly, virtual monopoly -- you have got the point.

This is the point all over and done with. That is your view. It frankly leaps off the page that you think that this is a dominant undertaking. Plainly, it follows that if the dominant undertaking does that which you say it is going to do, namely foreclose leading to a massive substantial lessening of competition, that is illegal. So why on earth did not you

say, companies, especially, you know, responsible companies like this -- well, they are disincentivised from acting illegally for all manner of obvious reasons, and yet you never took that into account in the opposite direction from the alleged incentives that you point to for them to exercise any strategies in the first place. What we know from General Electric is they should have looked at it, and that is that.

So that is ground 2(d), and then that leaves me only with, within ground 2, 2(e). Again, I foreshadowed this one a couple of times already so I can take it fairly swiftly.

2(e), as I showed you when I went through the notices of appeal a moment ago, is, again, a JR ground because it is about irrationality and inconsistency of approach to evidence. The only really valuable, real world evidence that the CMA had about whether somebody who has an ability in this market to foreclose will actually exercise that, in other words, do they actually have the incentive -- the only real world evidence they had was about GFI.

GFI is the former owner of Trayport. GFI is a broker. GFI participates in the market. GFI, you would have thought -- if the current report is to have any credibility -- to itself, I have got all the same abilities. I am going to exercise them as well. I have the incentive to exercise them because I will be able to foreclose my rivals, my competitors by using my software that I own, the Trayport software when I owned Trayport.

Did they do it? No, they did not, and we said during the administrative phase this is really important, this stuff. It is the only real world evidence you have, and what is more you need to be doing a robust, careful scrutiny. All the points that I have mentioned loads of times now about forward-looking, non-horizontal, et cetera, this is the best stuff, and they said, no, we do not buy it.

We have got four points, according the CMA in the report, why this is just not good enough. I am going to do them very quickly one by one, but the theme that runs through all of them is the following: that they are inconsistent and therefore irrational compared to other parts of the report, and in all cases the inconsistency arises by reference to the theory of harm that the CMA itself advances.

So they say we distinguish GFI because of this and we distinguish GFI because of that -- there are four of them and that and that. Then in distinguishing it, they put forward a theory of harm for each of the ... and there is the problem, because the theory of harm they put forward for the subpoints is not the same as the theory of harm that runs throughout their report. That is where the illogicality and irrationality lies, and that is why I have this good JR point.

So, again, I am going to do this quickly. The first point of supposed distinction is, well, ICE operates clearing houses as well as exchanges, whereas GFI was just the broker. Right. On the facts, yes, that is a factual point of distinction, but is it illogical and irrational? Yes. Why is that? That is because the CMA's theory of harm analysis did not depend upon ICE having clearing houses as well as exchanges. CMA's theory of harm was that the gains from foreclosure would be big, or to use their word, significant, and the losses would be small; in other words, a huge mismatch. It was not finely balanced or anything, it was massive benefits and tiny losses or costs, and it certainly was not: you are going to get any or some particular part out of doing in exchanges as opposed to brokers. It was all of it. Okay? There is the inconsistency. Next point: GFI, it is said, as a point of distinction, would be hit harder by a foreclosure strategy because it does not have its own front end screen whereas ICE does. Again, true, so far as the facts go. We have a front end screen and some of the traders -- some or all of them do not. But that does not make any difference because it is inconsistency and irrationality by reference to your own theory of harm. Your theory of harm is not that ICE would damage Trayport when ICE owns Trayport in a way which harms ICE, but rather in a way which harms ICE's rivals.

So just to make good that point, can I turn you up paragraph 8.116 in the decision. That is internal page 144. 8.116. It is the second sentence:

> "As a result, in terms of ICE's incentive to engage in partial foreclosure to obtain these benefits, we find that it would be able to use this flexibility to engage in [and these are the key bits] the targeted foreclosure of specific rivals in individual products, where it saw the greatest benefit for ICE's exchanges and clearing house."

So the theory of harm is you go off and you pick people off. You do not just blanket damage Trayport across its board, including stuff that applies to you as a user of Trayport. So it makes no difference that ICE may have had a front end screen and GFI did not have a front end screen. So that is the inconsistency there. No logical point of distinction.

Point 3. It is said again the GFI real world example does not matter, it is to be distinguished, because thirdly GFI's main targets would be brokers, whereas ICE's would be exchanges. We say the CMA says the risk in relation to the exchanges are likely to be lower. So there is a difference in the incentives. But again, it does not work because the CMA's theory of harm was based upon ICE foreclosing brokers as well as exchanges, not just one or the other. You cannot have the CMA picking and choosing or having its cake and eating it. You cannot assume that ICE will foreclose exchanges and brokers for the purposes of calculating the supposedly large potential gains, but then only assume

inconsistently and illogically that its focus is upon changes without reference to brokers when you are trying to compare the situation of ICE with the situation of GFI.

So, again, it is a simple point. It takes a little bit longer to explain because of the underlying facts, but it is a simply point. Theory of harm says this; every time you are trying to distinguish, you change your theory of the harm. When you recognise that the theory of harm has been changed, you can see that the distinction is flawed, and that is why there is a judicial review impermissibility there.

Then the last one is slightly different. Again, it is a point of supposed distinction. The point of distinction says, well, Trayport accounts for a smaller proportion of ICE's revenues than Trayport accounted for GFI's revenues when GFI was the owner. All that really means is ICE is a lot bigger than GFI was. So Trayport is a bigger part of its portfolio than it is for ICE, and that is true. As a matter of pure fact that is true. But the theory goes, well in those circumstances ICE may be less focused on that part of its portfolio in relative terms than GFI was when it owned it. It was a bit portfolio, you look after it more, so this theory goes; when it is a small part of your portfolio, it is not such a big deal.

But that is irrational because this is a different form of irrationality, because the CMA did not ever dispute ICE's evidence in its case that its rationale for purchasing Trayport was to diversify its income away from transaction fees that are generated in its, if you like, home market, venue trading market, which can be volatile, obviously up and down, it is a trading venue affected by all kinds of things. ICE's rationale in buying Trayport was that it recognises this feature of its business model, its portfolio, and what did it want to do? It wanted to rationalise and diversify into buying a business that has a different sort of income profile, and I would add there is a jolly good deal. Right?

So there was a good reason for buying it at that price and it was a good strategic investment for diversification purposes. But then when we say it does not make any sense that we are then going to harm a that I thing that we bought for good other reason, even if it is a lesser part of our portfolio, quite the opposite, we want to build it up for diversification reasons, and the CMA did not ever say that that was not a rationale that it accepts.

THE CHAIRMAN: It is possible that there is more than one rationale, is it not? The rationale you have given sounds perfectly logical, but is it possible within that you have got a desire to use Trayport to increase your market share?

MR. HARRIS: Sir, the answer to that in a judicial review sense is that if you are going to disallow a rationale that you seemed, on the face of it, to accept and say it is to be set aside,

or it is of lesser importance or it is overcome by some other rationale, then you need to say it on the face of your decision. But you did not. And that is a judicial review flaw.

What we have in the decision is -- and I'm afraid I have lost the reference. May I just take one second?

THE CHAIRMAN: Yes. (Pause)

As usual, Mr. Lindsay is several steps ahead of me.

THE CHAIRMAN: He knows the case backwards.

MR. HARRIS: The reference I am looking for is in the early part of the decision, paragraph 4.2, on internal page 44.

THE CHAIRMAN: Yes. That is where they set out what you say the rationale is.

MR. HARRIS: Exactly. Bang on, sir, if I may say. What they now say is that begins with the words "I said that", and that is not the same as us finding that or accepting it or agreeing with it or buying into it, or whatever. We say, come on, if you do not agree with it when we are putting it forward on a point that gives rise it an otherwise illogicality, you have got to tell us. No, no, that is nonsense, we do not accept that. They did not, and obviously we could have borne this out, there are documents showing this, but they did not ask for it.

THE CHAIRMAN: Am I right in thinking there is nothing in this report that says that in the CMA's view part of the rationale of this merger is for you to increase your market share?

MR. HARRIS: Can you say that again, please?

THE CHAIRMAN: Is there nothing in this report by the CMA which asserts that part of the rationale for this merger is your desire to use Trayport in order to increase your market share?

MR. HARRIS: Well, no, I'm not quite sure that is fair to the CMA because, if you like, their principal thrust or thesis is that we are going to -- on their view of the world, obviously I do not agree with it for the reasons I have been through, but on their view of the world, we are going to take liquidity away from our rivals in that sense.

THE CHAIRMAN: I understand that could be a consequence of what it is, but --

MR. HARRIS: Oh, I see, yes. I am willing to stand corrected. I don't believe there is a separate and distinct finding that we set out --

THE CHAIRMAN: That is all I am asking.

MR. HARRIS: I beg your pardon, I hadn't understood. That aggravates the problem. That was the rationale, and if we had been asked to produce documents, we could have produced reams of documents. They are do not say there now, in their decision, no, that is not the rationale. Of course if they had, we would have said, yes it is, and here is some documents.

What is more, would you like to see five or more of our witnesses. It did not happen. So they cannot rely upon it now as a supposed point of distinction.

So there we are, four minutes past three and I have finished ground 2. So I am four minutes over schedule, but I am pleased to say I ought to be able to nevertheless finish grounds 3 and 4 within the allotted time.

Ground 3, I am delighted to say, since you have been listening to me for a long time, is delightfully short. Ground 3, as I said before -- ground 2 is all about you have gone wrong in your benefits analysis in all of these judicial review senses. But you have also gone wrong in a judicial review sense on your costs analysis. Two relevant ways in which we say that the CMA has gone wrong in a judicial review sense, they both come down to, in judicial review terms, you could and should rationally have looked into two matters further. I accept that that is a high hurdle. In a minute you are going to hear from Ms. Demetriou no doubt, look at this case and that case, and it is an incredibly high hurdle and I just do not get anywhere near it. We just do not accept that. On the facts of this particular case in this market context I four-square stand behind my submission no matter that the test is high, you should have gone further. You should have gone further in two respects, and they are that the CMA in paragraph 8.148 of its decision, if we could please turn that up on internal page 151 and 152 -- the CMA itself found in 8.148, picking up at the bottom:

> "They had an incentive to totally ...(Reading to the words)... clearing houses … and there is a limit on how far the merged entity could go without ..."

This is the key thing:

> "... provoking a market-wide shift in liquidity away from Trayport."

What that is saying is if you push it too far, what you might find is that everybody gets together market wide and says that is it, Trayport, I have had enough, I am going somewhere else. If needs be, I am creating something else, sponsoring a new other entrant. I have had it with what you are doing in foreclosing me. There is a limit.

That is CMA's own case, and what we say is absolutely there is a limit and what you failed to do is investigate where that limit lies and whether what we are doing in your view of the world about these partial foreclosure mechanisms goes past that limit, and instead of investigating it -- just pause. What kind of a cost would this have been if in fact we had crossed this limit line? Armageddon. End of business.

THE CHAIRMAN: Rationally you would not want to go beyond that stage, but it would be quite an extreme stage to get that far.

MR. HARRIS: That is right, and we do not say that it would have happened. What we say is this is just a massive cost, it is an Armageddon cost on the costs scale that instead of speculating that it might have happened or could have happened, or something like that, you should have asked the people who were in the market whether it would have happened, and in particular you should have recognised that these people who you would have been asking -- you did not do this, but what we say is you should have done this -- are sophisticated market participants who are the very people, such as NASDAQ -- I know they are not physically present today, but the very people who are coming along and saying to you, the CMA at the administrative stage, do not allow them to do this, that and the other, they are naughty people, they are going to engage in all these partial foreclosure mechanisms. These people are not blind; they are sophisticated. They know about these supposed possibilities. They come along and explain about them repeatedly. They intervene in the case, they put in skeleton arguments, and yet it is being said by the CMA, we do not think that would have happened.

My point is very simple in a judicial review sense. We say not good enough to speculate. You should have investigated. What they do is they say in paragraph 8.121 -- this is under the heading "Costs of foreclosure", so it is in the decision at page 145:

> "On the costs of the partial foreclosure, we first considered the party's point they would face ...(Reading to the words)... associated with ...(Reading to the words)... as a result of undermining its business model. While we found that they could face some costs in this regard, our view is the magnitude of these costs is likely to be small."

That is it, and what we say is you should have gone further, you could recognise it might be an Armageddon cost, you recognise that there is a limit beyond which you will get this catastrophic cost, and all you do is you say: we think they are likely to be small.

Then in 8.121 -- well, you can read that for yourself.

So Mr. Lindsay reminds me, if you look at 8.121, the second sentence, they say:

> "The fact that the partial foreclosure would then take the form of incremental changes also means that it would not fundamentally undermine the Trayport platform, and therefore would not force market participants to use an alternative."

That is the speculation that should have been investigated. So you go to these market participants, who, as I say, are sophisticated people, are busy moaning about these very supposed foreclosure mechanisms, and the CMA, recognising that there is this limit or line, simply asserts or speculates that wouldn't be enough fundamentally to undermine the Trayport platform.

We say on a topic as important as this you should not have just speculated, you should have investigated. That's the JR flaw, and let's just --

THE CHAIRMAN: You are saying that although that, on its own, looks a perfectly rational conclusion, you are saying that it needs some form of evidentiary base as opposed to just the mere opinion of whoever has not written this report?

MR. HARRIS: That is absolutely what I say. And why: because of the market context and the potentially catastrophic nature of this countervailing cost.

It is not at all -- the other thing you should bear in mind, sir, when assessing the power or otherwise of that submission, is the market context. This is supposed to be a venue neutral aggregation piece of software and the clue is in the name "venue neutral". If market participants realised that it is not venue neutral then that is anathema to them. They cannot afford to be messed around by a non-neutral piece of market aggregation equipment, where, for example, their prices do not come up as quickly as somebody else's prices or they do not come up at all, or their products don't get listed in the same way, somebody else's products get favoured. In other words, the very sorts of things that the foreclosure strategy is built up around.

So if they figure out that that is happening, then there was every chance they might say that has crossed the line, we are obviously not going to put up as a group with that sort of non-neutral venue aggregation function.

PROFESSOR MAYER: Could I just ask in that regard to what extent does your stickiness argument go the other way in suggesting, well, actually it is quite difficult --

MR. HARRIS: That is a point taken against me, and on the face of it you might think that seems to cut against you. But it does not for this reason, because I'm not talking here about individuals leaving the market aggregation software of Trayport. As I read out earlier on, which is why I emphasised the term "group market wide", we are talking about a group. We are talking about, for example, all the big traders saying, well, it is no longer venue neutral, it is obviously biased in favour of the ICE, that is useless to me now, we are all going to leave. That is the sort of thing --

MR. ALLAN: Is that not a collective boycott which the CMA might have something to say?

MR. HARRIS: It is funny you should say that, because what is a collective boycott and what is sponsoring a new entrant into an anti-competitive market. So not clear. Indeed, there is a case starting a week on Friday in this very room in which I say collective boycott, it is about an estate agent, and the other side say, oh no, sponsoring jointly new entrants into an anti-competitive market.

So sometimes yes, sometimes no. If this is, according to annex 16, a market which is an effective monopoly with a massively dominant undertaking with a critical input product and it is messing people around through foreclosure strategys, which incidentally was similar to -- well, it had some analogies with the world of horse racing about ten years ago, on the televising of horse racing in betting shops and then when some race courses collectively got together, this is the case of *British Afternoon Greyhound Services*, sir, and then a collective of market participants got together collectively and exclusively took some content and introduced a new market entrant. In those circumstances, that was said to be not even in breach of article, what was then 81 or 80, or whatever it was, because it was sponsoring a new entrant into a market. So not necessarily is the answer.

Then I have got to move on because I have still got ground 4 to do. So that is the first flaw, a limit, they do not define it. They speculate about it, about switching, if you like, en masse and then there is retaliation by traders. That was another potential big cost and they rule this out, the CMA, at paragraph 8.123. We put this point to the CMA in the administrative stage, and they say at 8.123:

> "We considered the parties' second point that ICE's exchanges and clearing houses would face substantial costs from retaliation by market participants switching their trading activity away..(Reading to the words)... or to OTC trading."

Then they say not, oh no, do not worry, this is not going to happen because we have asked these traders and those traders and those market participants and this is what they have to say. What they say is it is unlikely. They say it is particularly so given that the attractiveness of these alternatives would be diminished. That just misses the point because we are talking about potentially moving en masse to a new venue or a new type of software product:

> "In essence, such retaliation would require traders to respond to the decrease in ...(Reading to the words)... by switching to using them more."

Professor Mayer, that is your point. What it is saying is that is completely diminished if you do it as a group.

Then they just say as a result, the opposite of the reaction we would exempt. It is the same point. We say retaliation potentially dwarfs the supposed benefits, and as you know, I have all kinds of difficulties with the benefits. But even assume there are some benefits, if you all switch away, you utterly kill Trayport, so it defeats the benefits; in other words, costs massively outweigh the benefits and there is no incentive. That is the first one, and this one too: retaliation would massively outweigh the supposed benefits and you did not look into

it, you just say we wouldn't expect this to happen, and there we go. That is what we say. You should have looked into it. You could have looked into it and you did not.

Again, I reiterate that these are sophisticated traders busy complaining left, right and centre about these foreclosure mechanisms. These are the sorts of people who are well able to retaliate.

THE CHAIRMAN: But the CMA's view is, using its own experience and the ordinary course of events, they are saying it is very unlikely they would respond in this way. You are saying they cannot do that unless they have done some sort of enquiries of the other market participants?

MR. HARRIS: That is right, exactly, and I do not shy away from that. You will hear later on, oh well, it is all in our margin of discretion, you cannot tell us what investigations to do and not do, and that is the end of that. I say no, because I rise to that challenge on this occasion and I say that in this context for the reasons I have given, it was incumbent upon you not to just speculate and not to rely upon speculation when you could have asked the very people who came probably into this building time after time, we think we are worried about ICE because they are going to foreclose us in this manner, that manner and the other manner. We are worried about that. We say right, okay, ask them about this.

Now, we think we have an explanation for why this may have gone wrong. It does not really matter to me why it went wrong, if it went wrong, but we think we have an explanation, and it is this: that in the provisional findings, all of these supposed partial foreclosure mechanisms were said to be -- and the phrase used was "undetectable", i.e. market (inaudible) is so insidious, all this foreclosure was going on in the background and nobody could tell that it was going on.

Plainly, there is no point in asking the market participants about how they would react to something that they cannot detect.

THE CHAIRMAN: Some things would be more detectable than others. It depends on the nature.

MR. HARRIS: Good point, sir. We agree and, indeed, the view of the CMA may change. The CMA's provisional findings it was all 100 per cent undetectable and we said, come on, get real, these guys know what is going on in the market, they do not walk around with their eyes shut. They are busy trading and making money. They know when people are messing them around on prices and on products and taking their -- what would have been their product and copy catting and putting ICE's version of that on in front of theirs, and they are not just going to sit there and take it on the chin. That is why I am saying you should have looked into it. Because in this market context people will detect and, indeed, the irony of

this is in the final version of the report the CMA agreed. They have switched from it is all undetectable, which might have been a reason for not asking about it, to actually it is only now -- this is why they used the phrase "partially undetectable".

We say, well, all the worse for you, CMA, because now even you have acknowledged that some of it would be detectable and it is even more incumbent upon you then to turn to the very people who are moaning about it and who have detected it ex hypothesi, and say "What would you do?" We say the flaw is you did not do that. You just go on your speculation, whether that was the reason or not.

THE CHAIRMAN: Can you give us the paragraph references in the provisional findings report?

MR. HARRIS: Yes, in the PFs it is 11.9 and 8 -- in the main report, so the final report, that changes, if you compare it with 8.128. So in the PFs it says "would be hard to detect" and in the main report it says:

> "Our view is that many, though not all, of these mechanisms would be difficult to detect."

THE CHAIRMAN: Can I just clarify, the evidence that you would have wanted to have seen relates to market participants' views on the subject?

MR. HARRIS: I wouldn't put it quite like that, Professor Mayer, because my point is that the flaw judicially in a judicial review sense is you just did not do the investigation. For judicial review purposes that is good enough, we say, to get me home.

If I needed to go further, which I do not, then yes, we would say you probably would have turned up evidence that the sophisticated people who are busy detecting the very things that they are moaning about would say, right, enough is enough. We are either going to retaliate or we could retaliate, there is a likelihood of retaliation, or we are going to switch en masse to somebody else. If needs be, even sponsor it ourselves.

PROFESSOR MAYER: And you would have found that sufficiently compelling?

MR. HARRIS: Yes, because they are catastrophic, utterly catastrophic for us. ICE cannot engage in strategies with the owner of Trayport and have it completely holed below the water line. What on earth is the point of that? That dwarfs any supposed benefit. So, yes, very, very important.

That leaves me only then ground 4, remedies, and as I say, I have prefaced some of this. I have shown you where the separation element fits into the remedies at the back of the report and we had suggested that there be an independent board and that ICE should not have veto rights.

CMA, amongst other things, says that such a proposal was not credible. I do not invite to you turn it up in light of the time but if you could just note down that in volume 3, tab 36, we have extracted from a leading textbook a summary of the *Deutsche Borse* case, obviously an electronic market trading case, in which the very remedy that is now said is not credible, it does not really begin to stack up, that is the remedy that was employed in that case. It was a independent board, without veto rights, with a degree of monitoring. We say the real question on this part of the case is what duties would the directors of Trayport have in our world under our parties' remedy proposal, including the separation element. How do they work, these duties, and in particular is it permissible for the directors of a Trayport to go about damaging Trayport, even though they are directors?

THE CHAIRMAN: You accept as a board member of Trayport they are entitled to have the interests of the shareholder in their mind but what you are saying is what they should not do is convert that into a situation where that would positively damage the company itself?

MR. HARRIS: Absolutely, sir.

THE CHAIRMAN: Is what you are saying?

MR. HARRIS: In that sense it is quite a short point and I would just like to draw out -- I can read it for you; you can turn it up if you like; it is in the CMA skeleton at paragraph 121 -- that the CMA's theory of harm -- I am quoting there paragraph 121:

> "The CMA's theory of harm was in general that ICE may damage the quality of the Trayport product."

That's what they say their theory of harm was. So the whole point of their theory of harm is that ICE buys Trayport, not withstanding that we did this for good diversification and different income stream reasons -- and their theory is that ICE -- having bought it, we deliberately damage it because, in damaging it, it is said, damage the other people more than we damage ourselves.

We say, no, Trayport's directors cannot do that; they cannot set out with the objective and the strategy and then implement that objective and strategy so as to damage the company of which they are directors. They cannot do that. They certainly cannot do it when we put in place the separation element, which is (inaudible) the independent board, absent ICE's voting rights, and we say that, amongst other things, by reference to the Companies Act, which you have seen cited in the skeletons, section 172.1:

> "The duty is to promote the success of the company, not to promote the interests simply of the shareholders."

Then various things are said in response: oh, well, this goes too far. But they are all dealt with because, although in some cases, for example, you could have ratification by the shareholders of a prima facie adverse, if you like, event by the directors, you cannot in this case because that is going to be monitored.

There are various other sort of more minor points in the skeletons, but what it comes down to is that that is not how directors are allowed to behave. We have cited the case of *Hawkes v Cuddy*. You may be familiar with that one. That was a case of two sets of directors coming into a new rugby club in South Wales and they both represented a feeder club, and what the court said -- it is quoted in our skeleton at paragraph 104 -- is you have to have regard -- I paraphrase, but effectively principally your duty is to the company of which you are a director. Just because you have been appointed by somebody else, that does not mean that obviates your director's duties to the company.

The same situation arises -- you may be more familiar with this one -- nominee directors. For all I know, you may well be nominee directors, but when you sit on the board of a company as a non-exec, as a nominee of X or Y or Z, you still have to act in the interests of the company. You are entitled to have regard to the interests of either the shareholders or your nominating party but they cannot override your duty.

That is the very essence of company law, and so we say that that is the big problem at the heart of the CMA's case when it takes issue with the effectiveness of the separation element.

THE CHAIRMAN: They could run Trayport in a way that promotes ICE's business over everyone else but once it gets beyond a certain point and it actually hits a bottom line on Trayport and damages Trayport's business, you say that is beyond the pale. They cannot do that, and you say they cannot do it because of the remedies that you have been proposing whereby that cannot be ratified by the shareholders.

MR. HARRIS: Principally they cannot do because that is not consistent with section 172(1).

THE CHAIRMAN: Yes, but when you have got that inconsistency, you can deal with that by having a shareholders' resolution, can you not?

MR. HARRIS: Yes, that is fine, you have the point, exactly.

THE CHAIRMAN: And you are saying you cannot do that on the facts of this case?

MR. HARRIS: One of the complaints in the skeleton is: you have not explained why your remedy is effective. But this explains exactly why it is effective. You cannot do the partial foreclosure mechanisms on our remedy because the partial foreclosure mechanisms damage Trayport. That is the whole point.

THE CHAIRMAN: We will see what the CMA say about that.

MR. HARRIS: They then say in response -- and these are my last two points -- that effectively: you put it forward, your fault; you said that you were going to put forward a remedy that included a fully independent and autonomous Trayport.

So in our report, where we talk -- all those places that I identified to you in opening, gentlemen, where I said look at the tests they seem to be adopting: fully independent, complete autonomy -- it is not the right test. You have got to ask yourself can I address the SLC and the adverse effects. So you remember those. Their response is: that was your idea, you put it forward, you said it was going to be a fully -- and we say so what.

You are the one with the statutory jurisdiction vires. Even if what you say now about us having gone too far, saying, oh, complete autonomy and total independence is not what you have achieved, so what? Your vires is limited to addressing the SLC and the adverse effects and that is what you should have done and that is what you have not done, and it is not good enough to turn around and say: it was your idea and you did not come up trumps on your own idea. Irrelevant.

I have effectively dealt with the point about the footnote. You recognise that the footnotes, where they cite section 172, we say that that was an additional part of their reasoning. I think we would characterise that as this, that in the skeleton and the defence, where they now say: well, forget about that, it's just a footnote, it is not part of the analysis, no wonder they have to disavow effectively themselves of that because it is such a fundamental problem.

Then the last point is, in addition, it is now said -- and this is my very final point -- oh, well, another reason why your challenge fails on ground 4 is because, even if everything you have to say about the separation element is correct, that wasn't the only reason why you did not allow your separation element; it is about the monitoring and that does not work because, as I showed you in opening, for that to work you have to meet the test in Derbyshire Primary Care Trust of inevitability and, as a result, you would have to show without doubt on the face of the document that that is a totally separate and free-standing, if you like, self-insulated ground that kills off the remedy. Monitoring by itself killed off the remedy such that it is inevitable that if I am right about my other points, who cares. We say that you cannot do that on the face of the agreement and, because it is not inevitable, if I am right on my points, then the remedy for you, gentlemen, is to remit the question back to the CMA.

So, members of the tribunal, those are ICE's submissions on the grounds of appeal in both notices of appeal.

THE CHAIRMAN: Thank you very much. We will take a five-minute break before we hear the CMA.

(3.31 pm) (Short break)

(3.36 pm) Submissions by MS. DEMETRIOU

THE CHAIRMAN: Yes, Ms. Demetriou.

MS. DEMETRIOU: Members of the tribunal, the applicant has made a number of challenges to the detailed reasons of the CMA's decision and it is very important in my submission, given the role of the tribunal in applications such as this, not to lose sight of the main focus of the decision and with that in mind, I want to start my submissions by reminding the Tribunal of the key stages in the CMA's reasoning, the key reasons why the CMA considered it necessary to order divestiture by ICE of Trayport.

I am going to take you to some of the more important sections of the report and then second, after that, I will address the relevant legal principle -- I think I can take that quite quickly -- and then finally I will address the applicant's grounds in the same order as Mr. Harris.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: To start with the decision -- and before turning to the decision itself, to the report itself, in a nutshell, if I may just summarise in the following stages: ICE is the largest European utilities trading exchange; Trayport provides the leading utilities trading software platform -- these are uncontested facts; thirdly, ICE's rivals depend on Trayport's software platform for their businesses, and that is fully substantiated in the report; fourthly, before the merger Trayport actively promoted competition in the market between different trading venues; fifthly, after the merger, Trayport -- under ICE's ownership the CMA found that Trayport would have the ability to weaken ICE's rivals so as to benefit ICE, and again I can remind the Tribunal that is not contested.

THE CHAIRMAN: The first five propositions, you are saying --

MS. DEMETRIOU: Are common ground.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Sixthly, the CMA found that not only would Trayport have this ability but it would also have the incentive to do that because the benefits would outweigh the costs. Those are challenged in grounds 2 and 3.

Next it follows that the merger may be expected to result in a substantial lessening of competition, and the CMA found, finally, that the only effective way of remedying this SLC is to require divestiture.

So my submission is that the theory of harm is in a sense intuitive once you understand the importance of Trayport's software platform to ICE's rivals and the prominence of both ICE and Trayport in the market.

The Tribunal will have seen -- and that's in appendices D and G to the report -- that all of the third parties who have made submissions to the CMA and participated in the various hearings expressed very significant concerns about the effect the merger would have on competition in the market.

But, of course, of course, it goes without saying that the CMA has not based its decision on intuition and nor has it based its decision simply on the weight of the third party evidence; on the contrary, this report examines very carefully the respective roles of ICE and Trayport on the relevant markets and also examines the role before the merger, the state of competition in the market before the merger, and the effect that the merger is likely to have on Trayport's commercial incentives and the ability it would have under ICE's ownership to weaken ICE's rivals so as to benefit ICE.

In examining these issues, the CMA has taken into account a very wide range of evidence and has followed its procedures and carefully assessed that evidence and the submissions of the parties and the third parties.

I think it bears taking you to appendix A to the report, which is right at the end of the report, although not at the end of the tab. So immediately after section 12, which is where Mr. Harris left off.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: You have got appendix A, which is headed "Terms of reference and conduct of the enquiry", and if you go forward a page you see paragraph 9. There is a heading "Conduct of the enquiry", and this sets out the key steps that were taken.

So you see, for example, at paragraph 10:

> "We invited a wide range of interested parties to comment on the merger. These included customers and competitors of ICE and Trayport. Evidence was obtained from third parties through hearings, telephone contact, written requests and unsolicited submissions."

Then there is a teach-in session with Trayport, initial submissions from two exchanges and three traders, and then it goes on. So one sees a very substantial body of evidence and substantial consultation that was carried out by the CMA in reaching its decision.

If you could keep the report open, I want to take you to some key passages, and I will start near the beginning at paragraph 3.1. This just makes good the uncontested point about ICE being the largest exchange active in European utilities trading.

So you see a description of ICE at paragraph 3.1, and then at paragraph 3.13 we see the key products offered by Trayport. At 3.18 we see that Joule is the Trayport screen that each trader sees when it signs into the trading system, and Trading Gateway is the software running behind that screen. The key point you see from that paragraph is that the Joule/ Trading Gateway product offers a single screen which aggregates data from multiple venues for traders. That is why it is so important in the market and why all the participants are reliant on it.

Then at 3.20 you see that:

> "As a result of its aggregation function and first mover advantage, Joule/ Trading Gateway is the primary front end screen for traders active in European utilities trading, where it underpins over 85 per cent of trading."

Then finally on this point at paragraph 3.30 at page 43 you see there reference to the network effect of Trayport's offering. So in other words, the more transactions carried out on its platforms, i.e. the more liquidity there is, the better the prices. So there is a network effect which contributes to Trayport's importance in the market.

None of this is contested.

Turning forward to section 7, and this is a very important section because it examines the pre-merger competition in the market, and if I ask you first of all to read paragraph 7.3.

What that says is that:

> "Understanding the nature and level of competition between ICE and its rivals is important for our assessment of vertical theories of harm because it is the downstream market and the supply of trade execution services and trade clearing services to energy traders which would be adversely affected by successful foreclosure strategy. If ICE competes closely with those of its rivals that use Trayport's software, it makes it more likely that the merged firm will have an incentive to foreclose ICE's rivals and adversely affect competition."

It is important to bear this paragraph in mind when it comes to the applicant's ground 2, because the theme behind Mr. Harris' ground 2 is that the CMA is illegitimately merging ability and incentive. But what you see there is a perfectly logical recognition in the report that a key element to discerning the incentives of Trayport post merger is to look at the degree of competition in the market pre-merger, and that makes perfect sense.

Then we see at 7.4, over the page, that in assessing the role of Trayport, we consider whether ICE rivals are dependent on Trayport's services in order to compete effectively. So those are the two strands that the CMA is examining in section 7.

Then going forward to paragraph 7.42 to 7.45, these are the conclusions on competition between ICE and rival exchanges, and it follows on from a section -- I'm not going to read out the whole of these sections, but it follows on from a detailed section where the evidence is examined. These are the conclusions, and we see at paragraph 7.42 that:

> "ICE hosts substantial liquidity in the exchange based execution of European gas and emissions and in these asset classes it is by far the leading exchange, with a share of over 90 per cent."

Then European gas is discussed, and then European emissions are discussed. Then for these asset classes we found that there was direct head-to-head competition between ICE and its rivals. So this is the conclusion, but it is all substantiated by the discussion leading up to that conclusion. I'm not going to take the Tribunal back to that discussion because I know you have read it, but it is important to bear this conclusion in mind. So that is actual, direct head-to-head competition.

7.43 then looks at potential head-to-head competition:

> "We are of the view that exchanges impose an important competitive constraint on one another through potential head-to-head competition. In particular, ICE and the EEX group impose substantial competitive constraint on one another through the threat of potential head-to-head competition even where one exchange may currently hold most or all of the liquidity in a particular asset class,and this is a result of the close correlation of their existing offerings making the threat of entry and/or expansion credible. ICE's and third party rivals' internal documents also demonstrate a broad intention to compete with each other across all European utilities asset classes."

So again, potential competition between ICE and other rival exchanges. That is something which is substantiated in the discussion, and on the basis of the evidence leading up to this conclusion.

Finally at 7.44:

> "Dynamic competition between exchanges that compete with one other over time by launching new products and developing innovative trading solutions."

Then we have the overall conclusions summarised at 7.45. So that is competition between ICE and other exchanges.

Then we move on to competition between ICE and rival clearing houses, and again, if you just skim through the sections, you see the same analysis. So first of all you have head-to-head competition and you see the conclusion at 7.51. So where clearing houses have existing volumes in the same products, they impose a competitive constraint on one another through head-to-head competition, and it explains what ICE's main rivals for clearing are. Then you have the section "Potential head-to-head competition", and again, at 7.58 the evidence is discussed.

Then at 7.58 you have the conclusion that:

> "Clearing houses can and do successfully enter into new product categories and successfully challenge incumbent providers."

So there is the threat of potential head-to-head competition.

Then you have the section on dynamic competition, and again at 7.61 that is the conclusion there. There is dynamic competition too, and then you have the conclusions set out. So that is summarised at 7.62 to 7.64. Then you will see the heading "Competition between ICE and rival brokers".

The final conclusion here is at 7.85 to 7.86. So you see that to a lesser extent there is competition between ICE and rival brokers, and the overall conclusions on competition between ICE and its rivals pre-merger are explained at 7.88 and 7.89.

So this is a very substantial section of the report. It is critically important when one comes to look at incentives, for the reasons explained in paragraph 7.3 of the report, that plainly the nature of competition, the pre-existing competition between ICE and its rivals, is of critical importance given that the merger would give it the ability to harm rivals when one looks at incentives. Those factors are built upon in the section of the report dealing with incentives, which are in part 8.

Then moving forward still in this section to 7.91, you have a section "The role of Trayport", and this explains why assessing the level of dependency or reliance on the Trayport platform is important when considering the extent to which any available foreclosure mechanisms could adversely affect ICE's rivals, which I would say follows as a matter of common sense.

Then at 7.167, following a discussion of all the evidence we have the conclusions on dependency on Trayport, and we see at 7.167 that:

> "Third parties were broadly consistent in their views that Trayport was very important for all market participants, and it was difficult or impossible to trade effectively without licensing its products and thereby gaining access to the Trayport platform.

"Venues emphasise that Trayport's technologies were an essential input into trading on the European utilities space. They highlighted the importance of aggregation of multiple venues on one screen and Trayport's closed API, therefore reinforcing the Trayport platform network effects and resulting in a lack of viable alternatives for market participants."

Then at 7.168:

"Our assessment of volume usage data is consistent with third party views."

Then also in that paragraph:

"Brokers are particularly dependent on Trayport."

Then at 7.169:

"As such, we concluded that all of ICE's rival trading venues in the European utilities trading markets are dependent on Trayport to disseminate their prices and offerings to traders in order to generate liquidity. This dependency is a result of the ubiquitous use of the Trayport platform by traders, venues and clearing houses, which generates network effects and deeply embeds the value of the Trayport platform when compared to other alternative front end, back end and STP-link solutions, which are typically available in isolation and are therefore weaker alternatives."

Then moving forward to 7.185 to 7.187, you see here -- and, again, this follows a substantive discussion of the evidence -- so these are the conclusions. These are the conclusions on the role of Trayport in enabling and promoting dynamic competition. And you see there that the CMA is saying that it was not a passive software provider, but it was active in its efforts to influence competition between trading venues and between clearing houses in order to ensure that volumes flow through the Trayport platform, and that this was supported by a review -- this is 7.186 -- of the internal documents.

Then at 7.187:

"In summary, by supporting and defending its customers' businesses, Trayport builds and protects its own business, and in doing so promotes and enables dynamic competition between venues and between clearing houses."

Then at 7.188 through to the end of section 7 there is the summary of the CMA's assessment on pre-merger competition, bringing all those threads together and summarising them. If I could just ask you -- I know that Mr. Harris has taken to you this paragraph, but I would ask you to note again paragraph 7.189 because what is being said there is not that liquidity is sticky and therefore switching does not take place. No, what is being said there, what you

see there is a recognition that there is stickiness, but at the end of the paragraph, the last sentence:

> "Although we found that once liquidity and open interests have settled with a particular venue or clearing house it is difficult to shift, we found evidence of head-to-head competition between exchanges and between clearing houses to win liquidity / open interests where these were on multiple venues or clearing houses in a particular asset class."

Then at 7.190, again a reiteration of the potential head-to-head competition, and so what you see there is a recognition that, yes, there is stickiness, but despite that there is actual head-to-head competition and potential head-to-head competition imposes a significant competitive constraint. Those are not simply assertions that are made out of the blue; this is the summary section, which is drawing on those passages that I just took the Tribunal to, which in detail looks at the evidence.

So moving on from section 7 to section 8, this is the competitive assessment which explains how the merger gives rise to the SLC. Again, at 8.1, I would ask you to note that because that refers back to appendix 1 and summarises the evidence and submissions that were made and were taken into account.

At 8.2, nearly all of those who provided views to us about the merger expressed concerns about the potential effect on competition:

> "In assessing the competitive effects of the merger, we have critically examined these concerns and assessed them against the parties' views, evidence from the parties' internal documents and our assessment of European utilities trading."

This is obviously not a case where the CMA has just taken third party views at face value, not at all. But we say that it is significant that all the third party views went in one direction.

Then at 8.11, this is an important paragraph because here the CMA is saying that:

> "As a starting point we considered that ICE, as the sole owner of Trayport, would have the ability to control its strategic direction, innovation priorities and/or levels of investment. We considered that in the longer term, ICE would have the ability to direct Trayport's strategy and commercial priorities in such a manner that may benefit ICE to the detriment of its rivals. We considered that this was particularly significant in the circumstances of this case. In a complex and dynamic sector such as the software industry, a shift in strategic direction, innovation priorities and/or levels of investment in ICE's favour could have significant consequences for its rivals. Such

consequences are likely to play out over the longer term, but are significant given ICE's rivals' dependence on Trayport as a critical input into their execution and/or clearing service offerings" --

THE CHAIRMAN: Presumably it is your case that it does not necessarily follow that in pursuing that, it actually damages trade?

MS. DEMETRIOU: It does not necessarily follow that there is discernible damage to Trayport.

THE CHAIRMAN: You can still benefit ICE without harming Trayport?

MS. DEMETRIOU: Well, yes, in the sense that -- if, for example -- and I just take one example. If, for example, investment is redirected such that the Trayport offering becomes less attractive and that results in people moving towards ICE, then that may not be detectable. So that may not immediately have an impact on Trayport's bottom line, but it could at the same time benefit ICE.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: But we are not saying that none of the possible foreclosure mechanisms damage Trayport. We do recognise that some of them may well indeed damage Trayport.

THE CHAIRMAN: Okay.

MS. DEMETRIOU: But what we do say about paragraph 8.11 is that it is clear from this paragraph that the starting point for the whole SLC enquiry, for the whole enquiry into the competitive effects of the merger, is the position of ICE post merger as the sole owner of Trayport, able to control its direction.

That is the critical thing and one sees that follow through the whole of section 8. So the critical element in the SLC is that post merger ICE will be the sole controller of Trayport and can influence its direction such as to engage in the partial foreclosure mechanisms and damage ICE's rivals to ICE's advantage. That's the nub of the SLC.

I will come back to this, but we say that that is highly relevant to the question of whether Mr. Harris' ground 1 goes anywhere at all, because the SLC has nothing to do with the new agreement, nothing to do with the new agreement. I will come back to this point, but the SLC is all about ICE being able to control Trayport and engage in these partial foreclosure mechanisms.

Skipping forward, there is then a lot of analysis about the partial foreclosure mechanisms. They are not in dispute. There is no challenge to those mechanisms, to the CMA's conclusions. So you can skip forward to the conclusion on ability to harm rivals that starts on page 135.

At 8.85:

"We considered carefully the views of the third parties and the main parties and concluded there are a range of mechanisms through which the merged entity would have the ability to harm ICE's rivals. These include a refusal to supply, increasing prices, lowering service levels, delaying and frustrating product development and innovation and using confidential knowledge of rivals' plans and innovations."

So no challenge to those conclusions.

The CMA then went on -- and you see the heading above paragraph 8.89 -- to assess the merged firm's incentive to engage in those foreclosure mechanisms.

At 8.89, you see the broad approach. First of all, the parties' views are set out, then third parties' views, then the CMA's own assessment, and finally our conclusions on incentives.

Then at 102, so skipping a couple of pages on, 8.102 and 8.103:

"Approach to the assessment of incentives. We primarily analysed the parties' incentives to foreclose ICE's rivals through a qualitative assessment. This involved consideration of the costs and benefits to the merged entity of carrying out a foreclosure strategy. In carrying this out, we undertook a combined assessment of whether the merged firm would have an incentive to foreclose exchanges, brokers and clearing houses, we recognised there are differences ..."

Et cetera, et cetera.

Then at 8.103:

"In assessing the parties' submissions on whether the merged firm would have an incentive to foreclose its rivals, we then considered how much weight it was appropriate to place on any quantitative analysis of this issue."

So you will recall that the parties themselves presented a quantitative analysis, which was examined by the CMA, and the CMA carried out its own quantitative analysis.

But what it is saying here is that given the context, given that we are talking about the importance of dynamic competition, that it is appropriate for the CMA to take a relatively long-term view on the impact of the merger. That is not the same as saying that all the effects are only going to play out in the long-term, because the CMA found -- and I will take you to these bits -- that some of these effects will happen in the short-term. There is a mixture. There is a long-term timeframe, but some of the effects will happen quite quickly and some will take a longer period of time to play out.

But what the CMA is saying at 8.104 is that in view of the long time assessment horizon that one has to look at and the specific features of this industry, the quantitative assessment

is not particularly informative of the parties' foreclosure incentives, and then it explains why.

I would ask you to look again at subparagraph (b), which was a paragraph relied on by Mr. Harris, and it is very important to see precisely what is being said there.

So what is being said is that:

> "While a loss of competitiveness may result in a reduction in the volumes hosted by ICE's rivals in the longer term as discussed below, the precise impact on specific products ..."

I think it is common ground that there are more than two dozen products in the market --

THE CHAIRMAN: There may be new products over time.

MS. DEMETRIOU: -- and new products over time:

> "... the precise impact on specific products is unavoidably harder to predict in this industry than most because liquidity is sticky and tends to gather on a certain venue for a particular asset class. As discussed in section 7, the importance of liquidity and open interest gives rise to strong network effects. The implication of this is that in response to a loss of competitiveness, a rival may suffer only a very limited loss of volumes in some products, but a very dramatic loss in others, with it being difficult to identify in advance exactly where these large shifts in volumes will take place. This difficulty is exacerbated by the need to base this forward-looking long-term analysis to historical data which may not reflect prevailing circumstances in the market as and when these foreclosure mechanisms are gradually introduced."

So it is important to look at this paragraph carefully, because what is it not saying, it is not saying that there will not be shifts in volume or switching because of stickiness, because the CMA has already found in the lengthy analysis that I took the Tribunal to in section 7 that there is very important head-to-head competition and potential competition and dynamic competition between ICE and its rivals.

It has already found that on the basis of a substantial body of evidence. What it is saying is that it is impossible to be specific because of the nature of the market and the stickiness of liquidity -- it is impossible to be specific as to exactly where and in respect of which products the switching will take place.

THE CHAIRMAN: It is difficult to predict which products, how long it is going to take and the degree of the shift.

MS. DEMETRIOU: That is precisely the point.

THE CHAIRMAN: If you look at these markets, you do get flows over time.

MS. DEMETRIOU: That is precisely the point.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Moving on. 8.107 and 8.108, these are very important paragraphs, and again, this is under the heading "The benefits of foreclosure".

The benefits of foreclosure, the analysis is attacked by Mr. Harris under his ground 2, and the starting point here is we first noted the CMA says that:

> "Pre-merger ICE and Trayport had conflicting incentives. Trayport's objective was to support competition between multiple competing venues with liquidity fragmented between them, which meant that its aggregation software offered significant value to industry participants."

So that is what Trayport's incentive was pre-merger. It is facilitating and promoting competition between its customers inter se.

Then at 8.108:

> "In contrast, ICE's goal has been, and continues to be, to have as much trading as possible concentrated on its venues and clearing house. This raises the prospect that under ICE's control, Trayport's focus will change from supporting continued competition between multiple venues and clearing houses to actively trying to move liquidity towards ICE venues and clearing house at the expense of rival exchanges, brokers and clearing houses through the use of the various foreclosure mechanisms."

So this is, in two paragraphs, the nub of the SLC which the CMA finds in this section of the report.

So what the CMA is saying here is that pre-merger ICE and Trayport wanted very different things, and Trayport, in order to benefit itself and to encourage liquidity, what it did was to support competition between its various customers. So that is what its incentive was.

But ICE's incentive is very different, obviously. Its incentive is to try and get as much of the business itself as it can. So as I said when I first asked you to look at this section of the report, at the beginning of this section, really the nub of the SLC case is that post merger ICE will exercise control over Trayport's direction and will enable it to change its incentive, its incentive will change because of ICE's control so as to promote ICE and disadvantage ICE's rivals.

Then we have the identification, and Mr. Harris --

THE CHAIRMAN: Let's go back. Pre-merger you say that Trayport had the incentive and what it was trying to do was to help to support competition between venues.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: But within that are they trying to promote the interests of their customers as opposed to non-customers?

MS. DEMETRIOU: So Mr. Harris relied --

THE CHAIRMAN: I am trying to get back to the point he was making.

MS. DEMETRIOU: Yes. So Mr. Harris took you to various paragraphs of the report that suggest that, but we say that those paragraphs, most of which are in section 7, what those paragraphs do is they describe the factual position pre-merger. So it is true that pre-merger in promoting competition between its customers, pre-merger those customers did not include ICE. So what in fact Trayport was doing pre-merger -- one of the things it was doing was as well as promoting competition between its customers inter se, it was also necessarily promoting its customers' interests vis-a-vis non-customers, which included ICE. So that is part of the factual background to this. But we say when it comes to the SLC -- and this is an important point on ground 1 -- there is nothing in section 8 that says the SLC that we have identified is that Trayport post merger will no longer assist ICE's rivals to do down ICE. That's just not part of the SLC.

So the CMA is not worried about that. The SLC is not that at all. The SLC is that post merger ICE will use its control over Trayport to disadvantage its rivals.

So although references to assisting its customers vis-a-vis non-customers, including ICE, are part of the factual background, that does not form any part of the SLC. I will come back to that when looking at ground 1.

THE CHAIRMAN: Okay, good.

MS. DEMETRIOU: So moving on, we then see paragraphs 8.111 to 8.118, the five potential benefits to ICE of using Trayport to foreclose its rivals, and I'm not going to read those out. You will have read them, and Mr. Harris took you to them. We will come back to them when looking at ground 2.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: The CMA then considered the costs of foreclosure. So this starts at paragraph 8.119. Again, I don't think I need to dwell on this at the moment. You've seen the paragraph that says that the costs would be limited as a result of a strategy of partial foreclosure, but that total foreclosure would lead to substantial costs and that is why the CMA rejected a strategy of total foreclosure as being something that would be in the merged entities' interests.

Then at 8.133 to 8.134 you see reference to the quantitative analysis.

At 8.133:

"The parties submitted to us a quantitative analysis to the merged firm's incentive."

Then you see reference to the CMA's quantitative analysis, and this, as I have said, was used as a high level cross-check and that is explained in these paragraphs.

Then after that section you see the section discussing the comparison with GFI's ownership, and again, I will come back to that section when looking at that ground.

Then at 8.148, you see the conclusions on incentives to foreclose:

> "On the basis of the above, our view is that the merged entity is less likely to have the incentive to totally foreclose its rival venues or clearing houses and there is a limit on how far the merged entity could go without provoking a market-wide shift in liquidity away from Trayport. However, we consider that the merged entity would have the incentive to partially foreclose ICE's rivals."

That is on the basis of the lengthy analysis that has come before that paragraph in section 8.

Then we have effects of foreclosure and conclusion on effects, and then we have a rejection, mixed evidence on horizontal effects. So that is not pursued.

So that is section 8. Section 9 is a section on barriers to entry and expansion, and here again this is not challenged by my friend so I'm not going to dwell on it. But here you will see a very careful analysis of whether market entry or expansion might prevent the SLC that has been found, and that is rejected in that section.

Section 10, you see that there is no evidence from the parties as to the significance of any efficiencies. Then section 12 concerns remedies, and we see at 12.8 -- this is page 174 -- we sought views on a number of specific remedy options, one inviting the parties to put forward their view. Then you see under A, B and C the options on which views were sought.

Then skipping well forward in this section to 12.101, that follows a lengthy analysis of the FRAND remedy, and there is the conclusion that a FRAND remedy on its own would not be effective. Again, that is not something which is challenged here.

Then we have the section dealing with the parties' remedy proposal, and as Mr. Harris explained, the CMA found that although that proposal comprised various parts, the CMA found that it only needed to examine the separation element because it found -- and this is a point it found in the applicant's favour -- that if the separation element was adequate, then the other elements would not be required. So that was really the key element of the proposal.

At 12.125 you see here separation element practicality:

"As noted above, we concluded that ICE continuing to hold Trayport as a wholly-owned subsidiary was incompatible with the aim of achieving autonomy from ICE for a newly formed Trayport board."

Just pausing there, and to foreshadow my submissions, we entirely accept that what we were looking at here, what the CMA was looking at, was autonomy and independence, and that is not surprising given that, as I explained, the nub of the CMA's finding on SLC was that Trayport would no longer be independent and instead would be controlled by ICE, who could use it to engage in a partial foreclosure strategy.

So given that that is the SLC, it is not at all surprising and certainly not wrong that what the CMA should be looking at when looking at remedies is that shouldn't happen, that Trayport should instead be autonomous and independent.

But the second sentence of that paragraph is also important:

"Nevertheless, even if we had concluded that the parties' proposals on operational autonomy were effective, we considered that the separation element would require ongoing monitoring and that compliance with the separation element would itself be difficult to monitor."

So what is being said here -- and we say that it is quite clear -- is that there are two limbs to the CMA's rejection of the parties' remedy proposal, the separation proposal, and those two limbs stand by themselves. So they are both separate bases on which this remedy was found to be ineffective, and that is quite clear on the face of paragraph 12.125.

Even if we had concluded that the parties' proposals on operational autonomy were effective, we still would have had problems with the ongoing monitoring, and I will come back to that in looking at ground 4.

Then at 12.176 we have the overall conclusion on remedy effectiveness. Then at 12.201, no relevant consumer benefits, and again, that is not something which is challenged. That conclusion is not challenged.

So that is an overview of the structure of the report, of the decision, and I will have to come back to various specific elements when dealing with the particular grounds, but I hope that provides a framework for my submissions and for what we say really the nub of the CMA's decision is, and the CMA's findings were.

THE CHAIRMAN: It is always very important to understand what is agreed and what is not agreed in these reports. Thank you very much.

MS. DEMETRIOU: Can I make a start on relevant legal principles?

THE CHAIRMAN: Of course you can, yes, that is fine.

MS. DEMETRIOU: Again, it is not in dispute that section 120 of the Act requires the Tribunal in this case to apply the same principles as would be applied by a court on an application for judicial review.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: We say that of particular relevance to this case are four principles, and I think I can take them quite quickly from the Tribunal's two judgments in the *Ryanair* case. The first *Ryanair* decision is at authorities 3, tab 26. Could you turn up paragraph 158, which is page 72 of that judgment.

So the first principle is that the report should be read as a whole and not analysed as if it were a statute.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: And the Tribunal, we say, should bear this point in mind, particularly when examining the arguments raised by the applicant in relation to the new agreement and the counterfactual, and in relation to the points about remedy.

So that's the first principle.

The second principle is you can see from the citation from the Stagecoach group case, and that is that the hurdle that has to be overcome by the applicant in this case is a high one. In summary, when it is saying that the CMA's decision is irrational, that there is no or no sufficient evidence to support the CMA's conclusions, it must show either that there is simply no evidence at all or at least no evidence of any probative value at all, or that there is evidence but that the conclusion reached by the CMA in considering that evidence is an irrational one.

So that is a very high hurdle and we say that it is very important for the Tribunal to bear that principle in mind. Most relevant to grounds 2 and 3 of the applicant's challenge and also to ground 1, which seeks to challenge the CMA's conclusion on the counterfactual, and I will take you to the facts on the counterfactual.

But Mr. Harris said it was a recurring theme of his submissions. He kept saying "I am going to express this in judicial review terms" and "the judicial review way of putting this is as follows", and we say that is quite revealing, because when one looks at the grounds in ground 2 and ground 3 in particular, these really are not, on proper analysis, judicial review grounds.

They are asking the Tribunal to take a very partial view of the evidence and make a finding that the CMA had no evidence on which to reach its conclusions, or at least reached an irrational conclusion. In fact, of course, my friend has to dress up the points as being

judicial review points, otherwise they wouldn't get off the ground at all. But we say on proper analysis it is revealing he kept using that language, because on proper analysis these are not judicial review points at all. They are properly challenged, they are challenges to the merits of the CMA's decision. I will come back to that when looking at grounds 2 and 3.

Next, if I could ask the Tribunal to turn up the second *Ryanair* judgments, which is in the next tab, and paragraph 30 of this judgment, which starts at page 8, conveniently sets out the principles in BAA, which we all accept are the right principles.

If you look at the third subparagraph from the citation, the third key principle is that:

> "The CMA has a wide margin of discretion in deciding what investigations to carry out."

So when Mr. Harris says the CMA, particularly in relation to ground 3, should have carried out further investigations, the standard to be applied in determining whether the CMA's approach is lawful is one of rationality. So was the CMA irrational in not carrying out further investigations?

It is also important to have regard -- this is a responsive point to something Mr. Harris said. He relies on Article 1 of the protocol number 1, but if look at subparagraph 5 in the citation, where that gets to is still a manifestly without reasonable foundation standard. So one is not applying a very intrusive standard of judicial review; it is manifestly without reasonable foundation.

The fourth principle I want to derive from these cases is at subparagraph 6 and it is that the Tribunal, of course, should not apply a more rigorous review because it has specialist knowledge and it should show particular restraint in second guessing the educated predictions for the future that have been made by an expert and experienced decision maker such as the CMA.

Again, a recurring theme of my learned friend's submissions is that the CMA sought to make relatively long-term predictions about the future, but we say that this says quite clearly that the Tribunal must exercise restraint in second guessing predictions about the future. Quite logical because predictions about the future are predictions which are best made by an expert body that has looked at all the evidence.

The only other point I want to make in relation to legal principles is to deal with my friend's points on *Tetra Laval*. Would it be convenient to deal with that now? It will take about five minutes.

THE CHAIRMAN: Let's hear Tetra Laval now.

MS. DEMETRIOU: Okay. So that is in the same bundle at tab 28, and our points on Tetra Laval are as follows.

We say first of all it is not binding on the Tribunal because it relates to the EU merger regime and not section 120. That is the starting point. But in any event --

THE CHAIRMAN: Against that, they cite the passage in BAA, do they not, that refers to that in a rather global way?

MS. DEMETRIOU: That is right. So there is no finding in BAA that in this type of merger Tetra Laval, the approach in Tetra Laval is binding. There is a throwaway obiter comment which says that in situations where one might expect there not to be any competitive damage -- I am paraphrasing. Maybe we should see just go back to the section.

THE CHAIRMAN: We should, yes.

MS. DEMETRIOU: We can see, so in the second Ryanair judgment, if someone just reminds me where it is. Subparagraph 6, thank you.

So what is said here, and in brackets halfway down that paragraph:

> "No doubt the degree of restraint will itself vary with the extent to which competitive harm is normally to be expected and anticipated in a particular context in line with the proportionality approach set out by the ECJ in Tetra Laval."

It says not something which is particularly materially at issue in this case. So it is an obiter remark.

But we say that there is no suggestion here that Tetra Laval is binding; it is simply making the point, which is a point that would apply in a domestic judicial review, that the standard of review may vary given the context, and that is a trite proposition of law that applies in domestic judicial review and they are saying that that is in line with the ECJ's judgment in Tetra Laval.

In this case what we say about that is that this is not a case in which one would not anticipate a competitive effect of the merger. I made my nutshell points in opening about the key propositions, and I said that in a sense this is a very intuitive case. So once one sees the position of the parties on the market and how their incentives are going to change once Trayport is controlled by ICE, then it is not a case in which it is difficult to anticipate competitive damage, precisely the opposite is true. So BAA does not take things any further.

But in any event, going back --

THE CHAIRMAN: It is all very case specific, is it not?

MS. DEMETRIOU: Very case specific.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Very case specific, and we would accept -- I'm not demurring from the proposition that in an appropriate case, given a particular context it might be appropriate to apply more rigorous review. I'm not saying that is not the case, I am just saying that is not this case.

Going back to Tetra Laval, the important thing about Tetra Laval is that it is a conglomerate merger case, and it is important to look at paragraph 22 of the court's judgment, which is in the bottom left-hand corner of page 1058.

THE CHAIRMAN: Which tab is it?

MS. DEMETRIOU: Tab 28 of the third authorities bundle.

THE CHAIRMAN: Where do you want me to go?

MS. DEMETRIOU: This is paragraph 22, and what that says is this.

It says:

> "The first ground of appeal relied on by the Commission relates to a number of paragraphs in the judgment under appeal. However, it is appropriate to reproduce the passages from that judgment which relate to the conglomerate nature of the notified merger, which is defined in paragraph 142 of that judgment, as a merger of undertakings which essentially do not have a pre-existing competitive relationship either as direct customers or as suppliers and customers. A merger which does not give rise to true horizontal overlaps between the activities of the parties to it or to a vertical relationship between the parties in the strict sense of the term and in respect of which it therefore cannot be presumed as a general rule that it produces anti-competitive effects."

So my short point is even if Tetra Laval were in some way binding or persuasive, which we say it is not, it is concerned with conglomerate mergers and not vertical mergers and it is making the distinction in this paragraph between conglomerate mergers on the one hand and horizontal and vertical mergers on the other.

So we say this is not a case, for the reasons I have given, where the chains of causation are dimly discernible, which was the phrase latched on to by Mr. Harris. They are not at all dimly discernable. On the contrary, they are intuitive.

Then finally on Tetra Laval, I would just ask you to note paragraphs 38 and 39, which reaffirm the margin of discretion to be accorded to the Commission.

So in conclusion on legal principles, we say that many of the applicant's submissions are in reality, on proper analysis, asking this Tribunal to step outside its proper role, its proper role

under section 120 of the Enterprise Act, and second guess the CMA's conclusions, and we say that is impermissible.

So, sir, that is where I propose, subject to any contrary view the Tribunal has, to leave it now.

THE CHAIRMAN: Okay, that is a convenient time to stop.