IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1279/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4 December 2017

Before:

ANDREW LENON QC
(Chairman)
PROFESSOR JOHN BEATH OBE
EAMONN DORAN

(Sitting as a Tribunal in England and Wales)

BETWEEN:

PING EUROPE LIMITED — Appellant

- and -

COMPETITION AND MARKETS AUTHORITY — Respondent

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Mr Robert Donoghue QC and Mr Tom Pascoe (instructed by K&L Gates) appeared on behalf of the Appellant.

Mr Rob Williams (instructed by CMA Legal Services) appeared on behalf of the Respondent.

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CASE MANAGEMENT CONFERERENCE

THE CHAIRMAN: Good morning, welcome to this first CMC in this appeal. Thank you for your written submissions which we have read, and I propose to take agenda items in the order they are listed in the draft agenda.

MR O'DONOGHUE: Mr Chairman, thank you very much, good morning. Mr Chairman, from a personal point of view, myself and Mr Pascoe would like to thank the Tribunal for rescheduling this CMC for today. We were in the other court for many weeks during November, so we are extremely grateful to you for doing that.

On the agenda items, taking things on which there is accord, you will be delighted to hear that the forum is agreed. The work on the non-confidential version of the Decision is well at hand, as I understand it. It is agreed that something should be produced to that effect. Mr. Williams may have further updates on that.

It is agreed there should be a confidentiality ring. It is agreed that the legal advisors as set out in the annexe thereto should be admitted. There is a query I think about some at least of our economists in the ring. At this stage, all I would like to say on that is we have retained AlixPartners, who are a highly respected, reputable economics firm. The five individuals listed are all professional economists and from our perspective it is felt that it is necessary and proportionate that they should be in the ring at this stage. We fail to see any objection of principle or proportionality at this stage as to why those individuals should be excluded. Again, Mr. Williams may have one or two things to say on that, but we think it would be surprising at this stage if an arbitrary number or limit were imposed on our professional economists. These are people who are assisting us in the case, and they are an important part of our appeal in this case.

The next issue from my perspective is the redacted documents on the CMA's case file. In fairness to the CMA, this is something which we have raised, at least in detail last week. They have made, I think, the perfectly reasonable point that in relation to these detailed documents they will need to go away and take them on a case by case basis. They have helpfully intimated in their supplemental submissions at para.8 that they may ultimately be unlikely to object to the documents being included in the confidentiality ring, but they will have to deal with those on an individual basis. So I think there is a proposal from the CMA that this will be dealt with on paper between the CMA and the parties and the Tribunal, if it agrees, and from our perspective we are perfectly content with that.

The one point I would make is that if one looks at the schedule of documents individually, the overwhelming proportion relate to s.26 information request materials. I would wish to lay down a marker at this stage that where the redacted material concerns information

request responses made on a statutory basis then in principle that evidence must be relevant to the case, and it would be very, very surprising in my submission if information provided by respondents to information requests were made unavailable either partially or totally to my client. So I wish to lay down that marker at this stage. It may be that it simply doesn't arise on analysis once the CMA has done this exercise, but the bulk of the material relates to evidence of that kind, and we would have a concern about such evidence being made unavailable.

The next issue from my perspective is the question of the identity of the complainant Can I ask the Tribunal, just to put into context how this fits within our appeal - I don't know if the Tribunal has our notice of appeal somewhere to hand. It wasn't in the CMC bundle for some reason. I will pick this up at para.86(b) and (c) of the notice of appeal, as we understand it, there was a complaint by an individual who is or was or may wish to be a Ping account holder, or a retailer. At para.86 we set out our evidence on the theory of harm, and one of the points we raise at (b) is:

> "The majority of retailers do not make any, or any substantial, sales of golf clubs online. According to Ping's supplementary retailer survey, 97% do not sell any golf clubs online. [An individual] of Foremost Golf says [it is something of the order of] of 3-4%.
>
> (c) Even on the CMA's figures only 10% of golfers have reported ever purchasing clubs over the internet."

Across the page at 90(a), last sentence:

> "However, it does not follow that the ability to sell Ping golf clubs <u>online</u> is important for a large number of retailers. In fact, the evidence strongly suggests the contrary."

That's the evidence I've taken you to. Then at (e):

> "… the CMA asserts that there is consumer demand for buying Custom Fit golf clubs online …"

Then finally at 123, p.49 of the notice of appeal - this is where the complainant fits in - in the middle it says:

> "Indeed, the clear commercial strategy of the Complainant is to sell high volumes of golf clubs on the internet with no intention of ensuring they are custom fitted to the needs of the individual golfer."

So the simple submission we make is that if this complainant is indeed a "pile 'em high, sell 'em cheap" retailer, it is someone who is atypical, based on the evidence we have

submitted, of retailers in general, or in fact retailers overwhelmingly, and if this complainant is being put forward as some sort of archetype of a retailer who is or may be interested in online selling, in our submission, that is entirely unrepresentative of the evidence as we have put it forward, and we would wish to test in some detail the nature of the complainant's business and the mix of online and offline. In that context, its identity would be highly material.

We simply don't understand - the only point made against us is, well, there might be reprisals or commercial repercussions. We would say a number of things on that. First of all, Ping is not said to be a dominant undertaking, and therefore the suggestion of reprisals needs to be seen in that context. More importantly, the entire thrust of these alternative measures is that there would be a series of non-discriminatory, mandatory criteria for the admission or non-admission of retailers. This complainant, if it's already an account holder, those conditions would apply, and if it is not an account holder but wishes to become one for Ping, those conditions would also apply. So, on any view, the complainant in terms of so-called commercial repercussions would be treated in an entirely non-discriminatory and even-handed manner. So we simply don't understand where this point about commercial repercussions goes.

That's all I wish to say on that, and we would invite the Tribunal today to make a ruling on the lifting of the anonymity of this complainant's identity, because his evidence is something we would wish to test in detail.

Our case, we essentially would have one hand tied behind our back without being able to understand the nature of this undertaking's business. That's all I wish to say on that.

So, sir, those are the measures of accord, or relative accord. We then, of course, get into the admissibility issues where there is discord.

We will have to hear from the CMA, but there are a number of things I wish to say at this stage, with the Tribunal's permission. First, we find the suggestion that there would be a full scale or partial challenge to admissibility of our evidence extraordinary on many, many levels. I have participated in two significant trials before the Tribunal this year alone, one in *Paroxetine*, and one which we've just completed in *Phenytoin.* In each of those cases, and in fact in every case I have been involved in before this Tribunal, both parties, including the CMA, have submitted substantial new factual, expert and other evidence, and in the *Phenytoin* case, for example, the week before the trial two new expert reports were served without any objection to admissibility by the CMA. It is routine, because this is a merits appeal, for new evidence in general to be tendered in these appeals, so we find it extremely

surprising, as a matter of initial impression that an admissibility objection has been taken at this stage. That is the general point.

We find it all the more surprising and all the more extraordinary given the indications we have had from the CMA to date. If I can very quickly run through the sequence of events, we can pick this up at tab 20 of the CMC bundle. This is a CMA letter and it's under the heading, "New evidence", if the Tribunal has that. The CMA makes the point about allegedly new evidence, which I will return to, and then it says that the CMA was obviously unaware of its contents, and could not consider its response. Then over the page:

> "We understand Ping's position on why this evidence was not submitted to the CMA during the administrative phase. Whilst the CMA disagrees with Ping on this issue it is prepared to work constructively with Ping on relevant case management issues. Whatever the reasons for the submission of Ping's new evidence, the CMA requires sufficient time to properly review the new material and to respond. This includes assessing whether it is necessary to obtain further evidence in response, and, if so, making contact with possible witnesses and obtaining any requisite evidence prior to completing the defence. In our view four weeks would not be sufficient."

Then under "Holiday Period":

> "It is likely that for at least two weeks of that period, if not longer, the CMA will be impaired by the unavailability of any witnesses and/or experts that it might wish to consult. A number of internal decision makers [and so on] are unavailable during that period."

Then under "Ping's Reply and Next Steps", it says:

> "The CMA will in turn be willing to agree to any reasonable request from Ping for an extension to the filing date of its reply to take account of any new evidence from the CMA."

So that was the opening gambit, if you like.

Then if we continue through the bundle at 23 - I can take this very quickly - this is a further letter from the CMA. It is para.3 if the Tribunal has that:

> "The CMA submits there are exceptional circumstances justifying an extension of this length, primarily due to the volume of new evidence relied on by Ping in the appeal and the impact of the intervening holiday period."

Then on p.3 under (i), last sentence:

> "The CMA reached the view that it would require until 14th February 2018 …"

THE CHAIRMAN: Sorry, which tab is this?

MR O'DONOGHUE: Forgive me, it's tab 23. Mr Chairman, the first reference I gave was to para.3, and I'm now on p.3 under (i), the last sentence:

> "The CMA reached the view that it would require until 14th February given the volume of new evidence."

Then over the page at 12:

> "The central reason for the extension requested by the CMA is the volume and nature of the new evidence adduced by Ping."

Over the page:

> The new evidence is extensive. It consists of two new expert reports, six new witness statements and a large number of exhibits that were not provided to the CMA during the administrative investigation."

I will come back to that, that's not quite right. Then at 14:

> "Ping has adduced four witness statements from representatives of its account holders and two witness statements from within Ping, which, among other things, comment on the viability and effectiveness of the illustrative alternative measures identified by the CMA during the investigation."

Then over the page at 6 at 18 - there is again a complaint about [*inaudible*] at 17, which I shall come back to, and then at 18:

> "The CMA requires sufficient time to properly review the new material and obtain such responsive evidence as it considers necessary. It requires time to make contact with witnesses and, if necessary, obtain their evidence, and must do all of this prior to being able to finalise the defence. This is a time consuming process and is dependent in large part on the availability of potential witnesses, a matter over which the CMA has no control."

Then at 20, and this is important:

> "It is critical that the CMA be afforded a fair and adequate opportunity to conduct a proper analysis of the new evidence adduced by Ping and to prepare any responsive evidence that it considers necessary for its defence.
>
> Were the CMA to be denied an adequate opportunity to prepare its defence it would suffer considerable prejudice."

I will come to that, and you will understand the point I wish to make in that regard, sauce for the goose, sauce for the gander. In fact, the prejudice to my client, with the CMA

having rendered a decision, which it is willing and able to defend in these proceedings is far more significant.

One final point, and this comes in the CMA's supplemental submissions, which was the second round of written submissions. This is in tab 8. This time it's para.21(b). The CMA said:

> "The CMA's application for an extension of time did not depend on the admissibility of the evidence. That is because the CMA has not suspended work on its defence, including the new material, pending the determination of the issue of admissibility."

So the Tribunal is now to understand that the CMA will in any event prepare its evidence on the defence, essentially on a contingent basis, as I understand it, and that will be subject to the outcome of the admissibility challenge they wish to make. So we have an extraordinary situation, in my submission, of an entity which says, we are willing and able to bring forward the evidence we need to, at least on a contingent basis, to defend our decision and respond to Ping's evidence, but we will essentially hold it in abeyance until the middle of January when an admissibility determination is made. Frankly, in circumstances where we have put in our evidence, they are willing, at least on a contingent basis, to prepare their evidence, and it would be extraordinary if the evidence as a whole, subject to seeing the CMA's evidence, were not considered admissible, and really the question becomes one of weight for the trial. So it really is quite surprising what the CMA has suggested in these supplemental submissions.

Now, very, very quickly, a few further points on the specifics of the evidence, if I may. The first point is a point we have developed in detail in our written submissions, which is that the Tribunal's case law and the Tribunal's Rules set out an overwhelming presumption in favour of appellants at least being able to submit new evidence on appeal.

The two citations from *Napp 1* and *Napp 2*, which we set out in our written submissions, are actually expressed in uncategoric terms. We accept there has been a small change to the Rules since 1st October 2015, but the Tribunal's Guide at 7.75 remains very, very clear: an applicant can, in principle, put in new evidence. That is the starting point.

We say our case is *a fortiori*, because we do not accept, at least in full, the suggestion from the CMA that this is all new. There are a number of points to make in this regard: first of all, a lot of our evidence is responding to a new point made in the Decision. One of the things which was surprising in the Decision is that the CMA for the first time queried the results of the first Ping consumer survey on custom fit rates; and secondly, it raised for the

first time a query over relative custom fit rates. Now, those objections had never been put to Ping before the Decision. We had submitted the first survey in good faith. We had not had a single question on that survey, whether in relation to Ping or relative custom fit rates. So that is a new and important objection recorded in the Decision. We were plainly entitled to respond to that new objection, and our retail evidence and some of our expert evidence and the evidence of Mr Clark, the managing director of Ping, responds in a very direct and full way, as we needed to, to that new allegation. That is an important part of the case, and we were plainly entitled to put in our response to that new objection. That's the first point. The second point we make, and we say this is a fundamental failure on the part of the CMA's investigation, they put forward these alternative measures, essentially as an abstract exercise, because not one of them has been tested with any one of Ping's 1,200 retail accounts, or indeed any other retailer. It is a context free decision from this perspective. Again, that is one of the objections we make in our notice of appeal. I'll give you the reference, it's notice of appeal, para.105(j). This isn't something new. If I can pick this up in tab 18 on p.2 of the CMC bundle, para.4. Sir, we make the point:

> "We also note the majority of new evidence has been gathered from retailers which the CMA could and should itself have gathered during its investigation."

That is also one of the criticisms made.

We go on to make the point:

> "Indeed, the CMA has far more scope to do this than Ping, given its powers of compulsion and its control over its investigatory timetable. It seems to us that the CMA has quite improperly skipped over steps which it should have included in its investigation process, such as reaching out to retailers and market testing its proposed alternative measures. Ping is therefore surprised that the CMA is apparently now taken aback that there are third parties with relevant views on these issues. In an appeal on the merits of the CMA's Decision it is self-evidently in the interests of justice that evidence from such third parties on central issues is now put before the Tribunal. Indeed, it would be extraordinary if Ping's evidence on the issue of alternative measures, which has become central to the CMA's case against Ping, were allowed to go unanswered in these circumstances. How the CMA chooses to respond in its defence is a matter for the CMA, but Ping reserves its position."

So we do make the further point that the CMA itself should have done this during the investigation. To suggest that it can turn the industry on its head without speaking to a single stakeholder on the retailer side is, with respect, extraordinary and wrong.

Our notice of appeal is essentially plugging gaps in their investigation, and in a sense it falls into the same book as my responsive point, which is that this is something which should have been in the Decision and to which we would clearly have been entitled to respond, and we cannot be criticised if it is not in the Decision and we are left to fill in the gaps via the notice of appeal.

That's what I wanted to say on retail statements.

The next point I wish to make is that the CMA has made, in my submission, what is quite an improper suggestion and it should be withdrawn. There has been a suggestion that we have either deliberately withheld, or withheld, certain information or evidence. We have dealt with that in correspondence, if I can take you to tab 26 of the CMC bundle. It is the second paragraph:

> "The CMA is making unsupported statements of fact which are not true. It is incorrect that Ping had carried out any material work in relation to the appeal prior to the Decision. In particular, Ping had not begun work on potential retailer witness statements, nor made contact with its brand expert. It is quite wrong for the CMA to imply otherwise without knowing the facts."

Then in relation to our economists we say:

> "Ping sought to add Mr Holt to the confidentiality ring before the Decision was rendered. The CMA initially refused to add him delaying Ping unnecessarily. Eventually the CMA relented but Mr Holt was unable to do any meaningful work on the case until he saw the Decision. Indeed, this is one of the reasons why Ping did not engage with its witnesses and experts before the Decision. It was potentially a waste of money to do so without having seen the Decision in a case where Ping wishes to conduct the case cost effectively."

I don't wish to get into privileged discussions we had with our experts or other witnesses, but we entirely refute the suggestion that we have had this on the stoves for some time. It is simply not true and it should be withdrawn.

In relation to the objections, there are essentially two categories. One is to the witness himself and the other is to particular documents annexed to Ping's notice of appeal. I can take those very, very quickly. We have four retail statements. Frankly they are very, very short, they deal with a very small handful of central and obvious issues in this appeal, and

the CMA, in my submission, will have no difficulty in getting a response if it wishes to put one in. Indeed, it can cross-examine these retailers during the trial, and it can put in expert and other evidence going to the same issue. We simply don't understand on what basis these short statements dealing with central issues in the case can be objected to.

Essentially, the retailer statements make two points. One, they give evidence on Ping's absolute and relative custom fit rates; and second, they are the people in the market, they are the people at the coal face. They set out evidence on the effects on retailers, and to some extent Ping, of the alternative measures. This is evidence from the horse's mouth, and, in my submission, is plainly admissible.

Then we have Mr Clark, the managing director, and Dr Paul Wood, a Ping engineer. We simply do not understand the objection to their evidence. Both of them gave significant evidence before the CMA at the oral hearing. Mr Clark was interviewed in some detail by the CMA. His evidence touches on essentially all of those issues. I accept that Mr Clark touches on the alternative measures. Of course he does, he's the managing director of Ping. But again, it is well within the CMA's compass to deal with that evidence to the extent it wishes to.

The objection to Mr Wood's evidence, if there is one, is truly extraordinary, because his evidence essentially is in all material respects the same as the evidence he placed before the CMA at the oral hearing. So we simply don't understand (a) that that is, in any sense, new; and (b) what could possibly be the objection.

So that then leaves our two experts. Mr Holt is an economist - I've been doing this job for many, many years before the Tribunal, I've yet to see a case where the CMA or any other party has objected to the evidence of an expert economist. We have an expert member of the Tribunal's panel, who is an economist. The suggestion that some or all of his evidence would be inadmissible I find extraordinary with respect.

That then leaves Mr Brady, who is a branding expert. His evidence is crucial to our case on the Charter of Fundamental Rights. If I can give you the reference in the notice of appeal, it is para.60(d). We have a separate case, nothing to do with competition law, under the Charter of Fundamental Rights, and his evidence goes to that point primarily and to some extent to alternative measures.

So that is the witnesses. Then very, very quickly on the documents, and then I think I can probably sit down.

It also seems, although we don't know in detail, that there may be further objections to the admissibility of some of the documents appended to the notice of appeal. Again, we find

this truly extraordinary. If an appellant has appended documents to a notice of appeal, in principle those are the documents before the Tribunal. It bears emphasis that 21 of these documents are actually public documents - they are available on the internet - so there really can be no objection to those. In the context of the Tribunal's practice, again in the *Phenytoin* case which we've just completed, even during closings documents from the case file and otherwise will be handed up all the time. This is the meat and drink of litigation before the Tribunal. We simply don't understand how a relatively small *corpus* of documents appended to the notice of appeal many, many months, if not a year before trial can cause the CMA any great difficulty. How can these documents, with respect, be inadmissible? We don't understand.

In a sense, Mr Chairman, that then, I think, leads us into the question of timetabling both in relation to the application and in relation more generally to the steps to trial and the trial itself. My submission, as you will have seen from our written submissions, is that the Tribunal has everything before it today to determine that Ping's evidence is admissible and the Tribunal can and should make that ruling today. If you're against me on that and there is to be a satellite piece of litigation at some time after the New Year, I will have a number of things to say on timetabling. I don't think I can sensibly say more on trial timetable until we have a handle on what to do with the admissibility application. So I may come back to you on that if that's okay.

THE CHAIRMAN: I can say that the Tribunal's provisional view is that we're not going to deal with the objections to admission today in circumstances where the CMA says that it may drop the objections in due course, and it has come up with a timetable which allows a hearing to take place to deal with that without disrupting the eventual determination of the appeal. It seems to us that it would be better to let that matter rest today.

We entirely take the force of your points that you have made, in particular the predisposition of the Tribunal to allow in new evidence, and of course if the CMA persists in objections which turn out to be not well founded it will be at risk as to costs, but that is our position at the moment.

MR O'DONOGHUE: Well, sir, that's what I apprehended. In that case I may as well continue for a couple more minutes.

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Sir, I entirely take that on board and it is, in a sense, as we expected. But they have had many, many weeks to think about this, and it is surprising to us that the application is not ready. They have had five weeks already, and we're not talking about that

much evidence. It is hard to avoid the impression that, as you see from the correspondence, they have apparently been very, very busy trying to contact potential witnesses. Our impression is that they haven't had much luck, but that's for another day. We are surprised that the application hasn't been made. It should have been made.

On timetabling it is hopelessly one-sided, and they want, I think, until 15th December to even issue the application, which again is extraordinary. They have then said we can have Christmas and New Year to digest this and we can get back to them on, I think, 5th January. In my submission, that is completely one-sided. In my submission, they should issue their application a week today and Ping should be given until 8th January to respond to that application.

THE CHAIRMAN: Subject to what Mr Williams may say to us, we did indeed have in mind that the application should be served a week today, on 11th December.

MR O'DONOGHUE: Sir, that really leaves the further directions to trial. We are essentially in the Tribunal's hands. The options are that we set down a trial date today, which I think is probably a good idea, or we set down a date and include all of the steps up to trial, or we essentially do nothing and we wait until the admissibility application has been determined. In my submission, the Tribunal should at least take the first option. I can see that there's a case for not setting too many directions to trial until we know the full extent of the evidence. We could of course do that on a contingent basis. You will have seen from our proposed trial timetable that we do build in the possibility of what I would call a 'full suite' of CMA evidence, and if for some reason there is no evidence or less evidence then we can simply strike that out. In our submission, on any view, this trial cannot, it seems to us, last more than 12 days, and we would hope it could be quite a bit shorter.

Sir, the issue I suppose for today is whether we want to go to the trouble of laying down a series of detailed steps to trial or whether we hive off - we set down a trial date and then deal with the detailed steps some time in the second half of January.

THE CHAIRMAN: Yes, I think we were in favour of a half-way house. We do want to set down the trial date, and there are some intermediate steps that we want to provide today as well. We have been working off the CMA's timetable, para.24 of its first submission.

MR O'DONOGHUE: Sir, it has slipped slightly in their second round of submissions. We raised the point that, particularly because of reply evidence and the distinct possibility of rejoinder evidence, having a trial seems to us extremely difficult. The CMA I think has taken this on board, at least on an alternative basis because----

THE CHAIRMAN: Their submission provides for a trial in May, and that suits the members of the Tribunal.

MR O'DONOGHUE: Sir, there's been a slight shift in their supplemental submissions if I can take you to that. It's in tab 9 towards the end. It starts at 21. Mr Chairman, you're quite right, their position as set out in tab 8 is 10th May. Then they're responding to a point we made that even early May is quite tight. They said they wouldn't object to 1st June, and then, I assume because of availability difficulties, they mentioned 7th June.

Sir, the only point we made is, without wishing to sound like a broken record, Ms Demetriou, who I understand is doing the trial for the CMA, and I are in an expedited hearing in the Court of Appeal in early May. From a slightly selfish perspective of allowing some breathing space, we did have some preference for certainly the second half of May, but obviously the Tribunal has its own availability issues, so there isn't much else I can say about that.

THE CHAIRMAN: Yes. Well, as I say, because of the Tribunal's own difficulties we are keen to stick to the window between 10th and 25th May. I appreciate that causes difficulties.

MR O'DONOGHUE: If the alternative would be a significant gap we will have to make that work.

THE CHAIRMAN: Shall we just have a look at the other dates in the timetable?

MR O'DONOGHUE: Mr Chairman, yes. The big point for us on the other directions really is the reply evidence. You will have seen from the CMA's suggested timetable, which is very one-sided, they suggested the defence in late January, and then we have just over two weeks on their timetable to put in reply evidence. You will have seen from our written submissions we would seek until 9th March because we expect there will be substantial reply evidence to be brought to bear, at least potentially so. That is my submission.

THE CHAIRMAN: Yes, subject to anything Mr Williams says to us that seems to us quite sensible.

MR O'DONOGHUE: Indeed, at this stage it is a contingent position. I am working on the assumption that our evidence is admissible and that we will receive by way of response at least some factual and/or expert evidence, and that is the basis on which we seek until 9th March.

THE CHAIRMAN: Can I just go back a bit to the hearing that is planned - this is para.24(d) of the CMA, this is the objection to an admissibility hearing. The date we have in mind for that is Monday, 15th January. It seemed to us that that would also be a convenient date for dealing with any other loose ends, in particular as regards confidentiality. We had in mind

that if there were any other applications they should be made by 4 pm on 5th January with supporting submissions, and that there should be a response to any such other applications and submissions by 4 pm on 10th January. That's a Wednesday, I believe, and then the hearing is, as I say, on Monday, 15th January.

If the only matter to be determined is the question of admissibility, I would be surprised if it would take as long as a day, but I'm not going to quarrel with that time estimate at the moment given that there may be other matters that need to be sorted out.

MR O'DONOGHUE: Sir, there may be. It is disappointing that the CMA cannot at this stage at least indicate what it might be minded to challenge. We simply have no idea.

THE CHAIRMAN: We haven't heard from Mr Williams, and he may be able to enlighten us as to that. The reply date we've touched on, and in principle we're happy with 9th March, which you've suggested.

Then a further CMC: it seems to us that it would be better to make that a bit later because otherwise it would be fairly soon after what would be effectively a second CMC in mid-January. We had in mind a CMC in the last two weeks in April. I don't propose to fix a date for that, but that will hopefully be a date that will suit everybody.

Then the rest of the timetable seemed to us to be sensible.

MR O'DONOGHUE: Sir, I'm grateful. A couple of points, if I may, one minor one and one bigger: we were surprised at the suggestion that Ping's skeleton would be served a month before the trial. Certainly in my experience a couple of weeks would be the maximum distance. We were also surprised that the CMA would wish to have a further two weeks for its skeleton. Again, the normal position would either be concurrent skeletons or no more than one week between the two skeletons, if done on a sequential basis.

THE CHAIRMAN: Well, if we put yours off to the 23rd then.

MR O'DONOGHUE: Sir, I'm grateful.

Sir, at the risk of trespassing further on the Tribunal's patience, I have a particular difficulty on the 15th, because I'm in a pre-trial review in a five week trial starting at the end of January, which is floating on Monday, Tuesday and Wednesday. As you will be aware, sir, the practice of listing is not to tell you until probably the Thursday which of Monday, Tuesday or Wednesday, so I am in that difficulty on 15th January.

THE CHAIRMAN: 15th January, okay.

MR O'DONOGHUE: It is in relation to a five week trial, so it's difficult for me to duck out of that one.

THE CHAIRMAN: Okay, we can try and sort that out.

MR O'DONOGHUE: Sir, I think we should hear from Mr Williams. That's all I wish to say at the moment.

THE CHAIRMAN: Thank you. Yes, Mr Williams?

MR WILLIAMS: Sir, members of the Tribunal, working through the agenda, item 2 relates to the publication of the Decision. To update the Tribunal, the key issue to be resolved is, as always, confidentiality, and the CMA is following its own internal procedures to deal with that issue. That involves considering representations from interested parties. The way that works, the CMA communicates the position to the party and then if the party remains dissatisfied they have a right to make representations to the procedural officer.

The position now is that there is only one party continuing to consider the CMA's position. It's not Ping, it's a third party. The time for that party to make representations to the CMA expires this week. So once those issues are finally resolved the CMA can proceed to publish the Decision. If things go one way that could theoretically be this week, it's more likely to be next week at the soonest, but things are moving in the right direction.

THE CHAIRMAN: Thank you.

MR WILLIAMS: There's a linked question of what version of the Decision will be used in these proceedings. Although Mr O'Donoghue didn't touch on the point, you've probably seen the discussion in the correspondence about the preparation of a colour coded copy of the Decision, where different colour codes identify the different parties to which confidential information relates. Again, we anticipate working on that in due course, but it is linked to other questions: what is confidential, the issue I just touched upon; and what confidential information is going to be disclosed to Ping in the proceedings. So, once those issues are resolved, we can start to think about which version of the Decision will be used in the proceedings, but there shouldn't be any difficulty preparing one in due course, and certainly not before trial.

In relation to the confidentiality ring, I think the only issue for discussion today is the position in relation to experts. In relation to that, the CMA's position is that here it is really making representations at this stage on behalf of third parties, because it's a question of disclosure of third party confidential information to Ping. The CMA really takes the position that third party confidential information should not be disseminated more widely than is necessary. There's no difficulty with the legal team seeing the material, and indeed that's necessary in order to facilitate the review of the material and assessment of what further disclosure might need to be made.

Really, all we're proposing is that as far as confidential material is concerned, there ought to be a more incremental process than simply an approach under which essentially everything in the ring is seen by everybody. That's not because we're casting aspersions in relation to AlixPartners, it's simply that we're dealing with the confidential information of third parties.

What we've proposed is that the ring for today's purposes includes all of the legal personnel. That will facilitate the next stage of the review. We don't anticipate being difficult about this, but we just think it's appropriate to be cautious while we're dealing with third party confidentiality.

THE CHAIRMAN: Yes, a two-stage process does seem rather complicated in the circumstances. Hopefully that can be----

MR WILLIAMS: Yes, as I said, we're not going to take points for the sake of it, it's just that that will allow us to make an assessment of the sensitivity of the material. Obviously the position will be clearer once we've reached a landing on what material is going into the ring, which is the issue that Mr O'Donoghue has indicated is going to be progressed between now and the beginning of January.

Sir, I don't think I need to say anything in relation to the request for disclosure of the redacted documents. The only point to make is that whilst, by definition, material provided in relation to s.26 requests will be relevant to the case, the question is going to be, is it relevant to the appeal? So the CMA needs to apply that filter in the first instance.

As we said, in terms of whether this is likely to come out, we don't anticipate objecting to provision of confidential material into the ring, but that's really then a question of taking account of the position of third parties. We indicated that some breathing space could basically be allowed to resolve that.

In relation to the complainant and the identity of the complainant, the Tribunal may have picked up that this was an issue which was first raised in these terms in the submissions which Ping filed last Wednesday. We didn't have notice of the point by prior correspondence. The issue is raised in the notice of appeal in somewhat different terms, as I'll indicate in a minute.

There are really two points. The first is that this is a substantial issue, it's not a trivial issue, and it's one which can't, in fairness, be resolved today in the way that Ping proposes. The complainant had the benefit of considered decision to give it anonymity in the context of the investigation. That decision took account both of the position of the complainant in particular, and also the wider policy issue of how far anonymity ought to be afforded to

complainants in investigative proceedings, and that obviously had implications beyond this case - it has implications for the regime. If a decision of that nature is going to be challenged, it should be dealt with carefully and on proper consideration, not on two working days' notice, which is the way in which the issue has been raised by Ping.

The second point we make is that actually, dealing with the issue today would be premature. That's because there's already a submission in Ping's notice of appeal, para.15, that the Tribunal can't attach weight to the complainant's evidence if they're anonymous. So that was Ping's approach to the issue in its notice. That's the submission that we were considering until Wednesday. Given that submission, there is a possibility, and I put it no higher than that today, that the complainant's identity may be disclosed without an order and without the Tribunal needing to resolve the points of principle I mentioned a few moments ago.

So the request may be overtaken by events when we put in our defence. The issue needs to be resolved, but we say not today, and it should be adjourned until after the defence. If the issue is put off and there are consequential issues then they can be dealt with at the time, but it wouldn't be appropriate to deal with it today for both of those reasons.

I think in relation to admissibility, we're now down to the question of timetable, if I can proceed on that basis, rather than whether the Tribunal ought to take it further than that today.

THE CHAIRMAN: What about the confidentiality points that are taken in relation to the notice of appeal?

MR WILLIAMS: Sir, they are also being worked through. I didn't think either party was asking the Tribunal to determine those today.

THE CHAIRMAN: No.

MR O'DONOGHUE: That's correct.

MR WILLIAMS: I don't know how quickly that process is going to move, but it may be that they fall into your early January category, sir.

THE CHAIRMAN: Yes. Having had a quick look at some of those points, it did seem to us that some of the points that are being taken were quite bold points to take. In particular, starting at the beginning, a point is taken as to the admissibility of letters that are being sent by Ping to a large number of retailers. I think a point is also taken about the confidentiality of its terms and conditions. It just occurred to me that there may be some room for a bit of flexibility there on Ping's side.

MR WILLIAMS: Sir, in terms of Ping's claims for confidentiality.

THE CHAIRMAN: Yes.

MR WILLIAMS: Which way round are we doing it?

MR O'DONOGHUE: I thought we were dealing with the CMA's redactions to case file documents that we are challenging.

MR WILLIAMS: I thought we were dealing with the request for confidential treatment of material in the notice of appeal. Am I right?

MR O'DONOGHUE: Yes.

MR WILLIAMS: That issue is being resolved, and obviously those behind me have heard what you've said. If that affects the position taken then that will be taken into account.

So, in relation to the timetable on admissibility rather than the substance of the question, sir, you've seen the way this has unfolded. I don't want to drag you back through all the correspondence to date, but the position in the Tribunal's Rules is that the appellant is supposed to identify the substance of the material which they regard as new. That's Rule 9(4)(h). I don't know if you want to turn it up. I am not going to labour the point. The submission I am making is just that it has taken time to get where we've got to. It's a statement identifying the evidence, the substance of which, so far as the appellant is aware, was not before the maker of the disputed decision. Ping, we say, didn't do that. What it did was it included in its annex - it might be helpful just to have a quick look at it. It's the schedule of annexed documents to the notice of appeal. In the bundle I've got it's the first document in volume 1 of the notice of appeal. The various witness statements are footnoted, and the footnote says, "In accordance with Rule 9(4)(h) of the Rules, we note that this evidence contains information the substance of which has not been put before the CMA". So what Ping didn't do was identify what within those statements was new.

You have heard Mr O'Donoghue say to you today that not all that material is new. So that's a task which was really on Ping to do this under this Rule. I won't labour the point by going through the correspondence, but when we wrote to them saying, "Can you please comply with Rule 9", they said, "It would be disproportionate for us to have to do that". So really that's put the onus back on to the CMA to do that task. We are doing it. That's part of the reason why our position on admissibility crystallised when it did, and obviously that's affected the whole work stream and it feeds into the timetable which we proposed for dealing with the admissibility question.

Obviously, as of a week ago, we got the Tribunal's agenda, and for the last week we've been arguing about whether the issue was going to be resolved today rather than whether it's going to be resolved in the New Year. We've now reached a point where we can

actually focus on the issue. So it's taken us longer than we would like to get here, but we are now where we are.

It's in that context that we proposed that we file our application at the end of next week. We appreciate that there's a squeeze with the holidays trying to get this resolved in time for a view to be taken in advance of the CMA's defence. Part of our reason for proposing that timetable was that Ping, as you've already heard, sir, knows what it's position is in relation to this material, broadly speaking, because it's opposed the application before it was made this morning. So it knows what it is going to say. Obviously it needs a period of time to pull that material together in response to the application, but we didn't think the timetable that we proposed was unduly onerous. If a reply date of 8th January can be accommodated with the hearing, which it could be, I think, with a hearing on the 15th, though the Tribunal is going to look at that again, then we say that a deadline for us to make the application by the end of next week wouldn't unduly squeeze Ping, and particularly not if it's then going to have until the 8th to file its responsive evidence.

It is the case that we haven't been able to put that application together until now for the reasons I've explained, sir. So that's really the next task after this CMC.

(The Tribunal conferred)

THE CHAIRMAN: The Tribunal considers that the CMA will have had enough time by next Monday to prepare its application. We are going to stick with the 5th January for Ping to reply.

MR WILLIAMS: And the hearing date?

THE CHAIRMAN: Well, the hearing date is slightly up in the air, but it will be on or about the 15th.

MR WILLIAMS: In relation to the remaining directions, sir - I think that's all that's left - the proposals in relation to the 5th and 10th January, I will just take instructions in a minute about that, I haven't had a chance to do that. I think as far as the reply is concerned, as Mr O'Donoghue mentioned, that is to some extent bound up with questions of scope and admissibility. We've got no difficulty with that being identified as an outer limit, if you like, at this stage, but obviously we will be back before the Tribunal in due course, and if the CMA's objection to admissibility succeeds then that might be reconsidered at that point. Then in relation to a further CMC, I don't know if the hearing the Tribunal has in mind at the end of April would then effectively become a pre-trial review.

THE CHAIRMAN: It would be, yes.

MR WILLIAMS: Just to check that I understood what you said to Mr O'Donoghue correctly, sir, was it that the skeleton should go back a week - was that effectively what you said?

THE CHAIRMAN: That Ping's skeleton would have to be served by 23rd April, and the CMA's would stay on 30th April.

MR WILLIAMS: I'll just take instructions, if I may. (After a pause) I think that covers everything on the agenda. In the circumstances, I don't know if it would be productive for me to start to get into the substance of the admissibility question. I could touch on some of the issues, but perhaps that's for another day at this stage.

THE CHAIRMAN: Thank you.

MR O'DONOGHUE: Sir, a couple of points very briefly. On confidentiality, we would make the general point that the relationships at issue in this case are vertical relationships. This is not a horizontal case where British Telecom and Sky or Virgin are in the same court room, and the approach to confidentiality in general in these proceedings must reflect that vertical relationship. That's a general point I wish to make on confidentiality.

I wasn't entirely clear from Mr Williams' so called incremental approach whether the individuals from AlixPartners we put forward today in the annex will be admitted today. In my submission, we would encourage the Tribunal to make that decision today. It is, in my submission, inefficient and unnecessary that the process becomes very, very stilted and we have application on application. I have submitted to the Tribunal that these are professional economists who are assisting us today, and we would want them to assist us going forward. That, in my submission, really should be the end of it.

On the complainant's identity, if I can ask the Tribunal to turn up tab 9 of the CMC bundle, it's footnote 1 at the bottom of the page. Sir, in my submission, the Tribunal already has before it today all of the evidence that could reasonably be brought to bear on the complainant's objections, or the CMA's objections to the disclosure of the complainant's identity. It has alleged retaliation, alleged commercial repercussions, and so on. Again, the idea that this would be hived off to January or some other date is simply inefficient and unnecessary. In normal commercial litigation it would be entirely unacceptable for somebody's identity to be withheld from the other party in these circumstances. I've made the point to you that there are non-discrimination requirements of the CMA's alternative measures, and that is the sufficient and only protection that the complainant should be entitled to.

Sir, you have the evidence before you today of what he or she says. It is difficult to imagine how, with a longer statement amplifying the same points, it gets any better or worse. It is

what it is. So, in my submission, the Tribunal should decide that issue today in the interests of efficiency and proportionality.

(The Tribunal conferred)

THE CHAIRMAN: Thank you very much. The Tribunal is not proposing to rule on the question of the identity of the complainant. That is essentially for the reason that there is an important point of principle involved. The CMA has had not very much time to respond to Ping's request, and, as Mr Williams pointed out, it may be that the application is premature in the sense that it may be possible to reach an agreement as to disclosure of the complainant's identity. If that matter can't be resolved by agreement then it will have to be sorted out at the hearing that we're going to have in January. That really goes for all issues of confidentiality and admissibility, they're all going to have to be revisited, if they can't be agreed, at the next CMC.

I hope that we are clear as to the timetable. There is a small point I noticed in the CMA's proposal, 24(b), that Ping should include in its amended notice of appeal its response to the questions which it has set out in the annex to its letter of 21st November. It seems to us that that would be convenient, and it would also be convenient in terms of any response that the CMA wants to make.

MR O'DONOGHUE: Mr Chairman, we have responded. It appears in the annex to our skeleton argument.

THE CHAIRMAN: I'm sorry, I missed that, are you happy to have that included in the notice of appeal?

MR O'DONOGHUE: We have set out our position on the questions in the annex to our skeleton. If the CMA wishes to add something then so be it.

THE CHAIRMAN: Yes, but what I'm saying is that it would be convenient to have that document incorporated into the amended notice of appeal.

MR O'DONOGHUE: Yes.

THE CHAIRMAN: I am reminded by Mr George that the timetable might need to be adjusted in due course to allow for an expert joint statement. Looking ahead, in principle, if there is a sufficient overlap between the expertise of whichever experts are chosen, the Tribunal would, in principle, be in favour of 'hot-tubbing', the simultaneous giving of expert evidence by the experts, but that's obviously a matter that we can review at a later date.

Is there anything else? No. Thank you very much.