IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1275/1/12/17
1276/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th November 2017

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

(Sitting as a Tribunal in England and Wales)

BETWEEN:

FLYNN PHARMA LTD AND FLYNN PHARMA (HOLDINGS) LTD Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

- and -

PFIZER INC. AND PFIZER LIMITED Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

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HEARING – Day 13

A P P E A R AN C E S

Kelyn Bacon QC, Ronit Kreisberger and Tom Pascoe (instructed by Macfarlanes LLP)

Mark Brealey QC, Robert O'Donoghue QC and Tim Johnston (instructed by Clifford Chance LLP)

Mark Hoskins QC, David Bailey, Hugo Leith and Jennifer MacLeod (instructed by CMA)

Friday, 24 November 2017

(10.30 am)

Reply submissions by MR BREALEY

THE CHAIRMAN: Good morning.

MR BREALEY: Good morning. We have a few things to hand up. I am just trying to get to grips with it at the moment.

Just so you know, I want in reply to deal with four things. I would like to deal what appears to be now the change of the case and the tribunal's jurisdiction, what Mr Hoskins calls the JJB point. I would like to deal with economic value of Phenytoin very briefly. Thirdly, I would like to deal with the comparator AEDs. And then finally, the tablets.

So the change of case, economic value of Phenytoin, AEDs and the comparator tablets.

THE CHAIRMAN: Nothing on market definition.

MR BREALEY: That is for Ms Bacon. I am obviously not going to repeat, I will reply. By way of handing up, and this is essentially just I think a convenient crib sheet, and we can do this afterwards or we can ... (Handed)

Mr Hoskins referred to yesterday -- this does go to market definition. We thought it was best if we had just a crib sheet of the references to competition from NRIM in the contemporaneous documents. The tribunal probably has it, but we just thought it would be

a convenient summary of where in the bundle there are documents relating to competition from NRIM. We shall hand that up.

The other document that we would like to hand up, this is the evidence relating to the Department of Health's powers. Mr Hoskins referred yesterday to the fact that the cross-examination had "knocked" this issue. We say he did not knock it at all. But this is the crib sheet that we have that relates to the Department of Health's powers. Again there is no submission there, it is simply drawing the tribunal's attention to the passages in the evidence so it saves the tribunal some time.

What I would like to do then is start with the reply. Could I hand this document up. (Handed)

THE CHAIRMAN: Can we get all our material before you start so we can crib from the right document. (Pause) Thank you.

MR BREALEY: So we have two what I call crib sheets, one is the competition from NRIM which clearly is relevant to market share and dominance, the other is to the Department of Health's powers, clearly relevant to dominance, and is in response to a submission yesterday that the cross-examination had knocked this point, and then it was not developed, so we just bring the

tribunal's attention to the relevant correspondence and evidence.

I would like now to begin and I essentially, given the time, would like to go through this written reply. There is one extra authority that is relevant to the tribunal's jurisdiction and its powers which is the Imperial Tobacco case. We will need to have a look at that.

If we start with the Pfizer reply. Clearly, as Mr Hoskins candidly accepted yesterday, there has been a change of case in closing and therefore it is relevant to know what the powers of the tribunal on this appeal are, and Mr Hoskins has repeatedly referred to the JJB point and it is important that the tribunal knows exactly where that comes from.

What we have done in the first few pages is refer to essentially the exchange between the tribunal and Mr Hoskins for the CMA where, as I say, the CMA has accepted that the analysis in the decision has changed.

So we start at page 1, and we have it appears economic value in limb one. I would just like to go through this slowly so that we have the point in mind. I have underlined the relevant bits:

"... if you rely on just cost plus, and I include in that the notion of reasonable return, that may not be

sufficient in itself to identify the competitive price."

This is on page 1. So if you rely just on cost plus, that may not be sufficient itself to identify the competitive price.

"And that is, we say, where the concept of economic value comes in."

So we have competitive price and economic value. I have given you the quotes.

If we go to page 2:

"... if you are doing at limb one a cost plus analysis and you are trying to get to the hypothetical price, I can see a sense in doing it all in limb one ..."

So there is a recognition there that the CMA sees a sense in doing it in limb one.

Then we pick up on the point, which is not unimportant, that all relevant issues should be considered.

And then we pick up on the exchanges about the role of comparators, and this is obviously extremely important.

So page 36/10, and let me come to that.

"... but let me come to that, because we know that in looking at excessive limb you can look at cost plus, reasonable return and economic value to get to

competitive price. The other sorts of options that are available are different types of comparator. If a comparator is a good one then it actually should be telling you what the competitive price is. And if a comparator is a good one it should be including -- you're not looking at it in this way, but a good comparator should be telling you what the competitive price is ..."

The next sentence I have underlined is quite important:

"Because the comparator prices will, by definition, be taking account of the demand side as well as the supply side considerations."

So we are looking at economic value, we are looking at demand side, which we know the Court of Appeal in Attheraces has said is very important. But "the comparator prices, will by definition, be taking account of demand side", so the comparator prices are very important to this demand side issue.

Then we have the exchange between you, sir, as chairman and Mr Hoskins where you asked whether you could arguably ignore plausible comparators. And at that stage Mr Hoskins said the former, that you could ignore it. But then there is the exchange, because Mr Hoskins says, well, it can all be sorted out on

appeal, basically. And there is an exchange between you, sir, and Mr Hoskins, and what you say is fully supported by what the tribunal said in Imperial Tobacco:

"I am quite uncomfortable with a proposition that allows the Authority to take a decision on one basis, on the basis that there is a further appeal on the merits. That is not very good administration, is it? The authority ought to take the right decision on the right evidence and it ought not to have to be subject to appeal."

That is an exchange between you, sir, and Mr Hoskins, but it reflects what the tribunal says in Imperial Tobacco.

That exchange seems to -- whether the CMA was referring to limb two, this is my paragraph 3, it is not clear. But what is relevant are the further exchanges because the CMA does ultimately accept that comparators should be taken account of.

This was the exchange between Mr Lomas and Mr Hoskins. I think this is where Mr Lomas says it is really quite important:

"I do not think I have anything to add. The law says what it says. If there is a good comparator, if it has been shown to be a good comparator, must it be taken account of before you reach an overall conclusion?

Absolutely. We say the case law indicates that the good comparator should be -- if you are doing classic United Brands it would come in at limb one. Again, I am not going to be didactic about it. If there is a good comparator it must be taken account of."

That effectively accepts what I submitted in opening. Mr Lomas quite rightly says:

"Sorry, this is really quite important."

And then Mr Lomas presses Mr Hoskins, and Mr Hoskins at the top of page 4:

"Let me start by saying it this way: if there is a good comparator, an Authority cannot reach a decision which is unimpeachable before this tribunal without having that comparator taken into account at any stage."

Mr Lomas:

"So they are not true alternatives."

Mr Hoskins:

"The question is ..."

Then Mr Lomas:

"That is slightly ducking the question."

Mr Hoskins:

"Our submission is as a matter of law, because of the language of limb two, then at limb two unfairness the Authority can choose unfairness itself or comparators, which means logically and legally that if

there is a good comparator it comes in at limb one."

And then again I have underlined:

"But our submission on the law is if there is a good comparator it has to be taken account of but it comes in -- it must come in limb one if it does not come into limb two but the Authority has a choice at limb two.

That is what he says.

Mr Lomas then pushes the CMA on this, and ultimately Mr Hoskins says -- well, then we get chairman saying:

"Yes, it is not a redundant exercise."

Mr Hoskins right at the bottom of page 4:

"That is I think the position that is being put. If that is the position then I think, despite the clear wording of the case law, the Authority tribunal would have to look at the comparators because there cannot be a situation in which an Authority is able, as I said before, to block out a relevant consideration."

That phrase "relevant consideration" again totally and utterly mirrors what I submitted in opening, that the Authority cannot wilfully shut its eyes to a relevant consideration.

Then we have the analysis is not in the decision, because this is the continuation.

"But I think that is, to be honest, a development of the analysis that is in the decision."

Mr Hoskins:

"It is."

So he is agreeing that it is a development of the analysis in the decision.

"I understand that. But the point then in this case, the gravamen will become are the comparators good comparators and what do they go to?"

So ultimately at this stage, the stage we have reached is that comparators should be taken account of, they are relevant, but because we have evidence on this appeal on comparators then the tribunal can decide whether they are good comparators or not.

Then there is a further exchange about plausible comparators later on.

So that is the shift, and it is a shift and there is no doubt about it, of the CMA's case.

What are the implication of this shift? This is my paragraph 4. The shift in the case is therefore a good comparator is a relevant consideration. A relevant consideration under limb one, it seems, but possibly under limb two. The good comparator is relevant to economic price -- again this is quite important -- as the CMA itself puts it, because of the comparator prices will by definition be taking account of demand side as well as the supply side considerations.

So where does that leave us? If a good comparator is a relevant consideration to the correct economic price, the burden must be on the CMA to decide whether a comparator is a good comparator. It cannot be left to the defendant appellant to prove the comparator is a good one. It cannot with fairness to the tribunal on the appeal on the merits either be left simply to the tribunal to decide in the absence of any investigation by the CMA. If there is a prima facie plausible comparator the CMA must investigate it.

As the tribunal knows, we have complained to the CMA at length that it should have regard to the tablet benchmark in the reply to the statement of objections and in the notice of appeal, and I have given one of the references in the notice of appeal. The CMA has repeatedly told us at the oral hearing, in the decision, that the tribunal can examine the evidence on appeal and that it would be unfair in itself and there is no need to investigate comparators.

If the CMA is leaving comparators to the tribunal, so on the basis of the evidence that has been adduced, we say -- this is paragraph 8 -- this misunderstands the nature of the process as the chairman indicated and as the tribunal held in Imperial Tobacco.

So I had better just go to the Imperial Tobacco case

because it does highlight the issue (Handed). Whether one regards it as a question of jurisdiction or discretion, the unsatisfactory approach of not doing the investigation to support the decision and then see what comes out on appeal and leave it at that. The tribunal in Imperial Tobacco -- I know the tribunal will know it well, this was obviously a very large case where the OFT fined Imperial Tobacco and Gallagher and a lot of retailers essentially for price-fixing.

I know the tribunal will know this, so if we go for example to page 10, paragraph 28, and again I will just refresh the tribunal's memory as to what this case was about. One sees at paragraph 28 the relevant agreements that were in the decision. They were called P&D, parity and differential. And essentially it was all about the two tobacco manufacturers fixing the price with the retailers.

So paragraph 40 of the skeleton, the OFT's skeleton, was quite critical. This is page 10, paragraph 28:

"Assuming that ITL had a parity and differential agreement with a retailer of the kind identified by the OFT ..."

It set out the theory of harm that was subject to these vertical and horizontal agreements. So for example, if the retail price of the Gallagher brand

increased then the retail price of the rival would increase and it was like a yo-yo.

So that was what was called the paragraph 40 restraints. All the expert evidence and the factual evidence went to this. And as things panned out during the trial, there were lots of witnesses, it was quite clear that the nature of that agreement could not be supported.

If we go to page 15, paragraph 39, we see the tribunal referring to the OFT's "refined case". So essentially because of the way the evidence came out, the OFT refined its case to allege a slightly different agreement. One sees there at page 15, paragraph 39, in quotes, the nature of the refined agreement. So it was still a sort of price fixing agreement but it had a different flavour to it.

What then happens, if we go on to page 18, the tribunal asked the question: is the refined case part of the decision? So again we could say is there a comparator case AED or tablet part of the decision? And the tribunal says in paragraph 44 onwards to 61, which is at page 24:

"We are therefore satisfied that the decision does not include findings by the OFT that the refined case restraints are infringements of the Chapter I

prohibition."

So there we had a case where the refined restraints were not in the decision. This is now where we come to jurisdiction and discretion. So issue 2: should the appeal still proceed? The OFT argued that the appeal should proceed on the basis of the evidence that had been heard before the tribunal. At paragraph 62 to 75 on page 29, the tribunal says, well, it does not have jurisdiction to determine the different infringement.

Whether that is our case here can be debated. In my submission it probably is, because economic value is an inherent part of a case on abuse, and if you fail to investigate an important part of the economic value and leave it to the tribunal, the evidence at the tribunal, we are in a similar situation.

But what I would like to do is go to how the tribunal exercised its discretion -- assume that it did have jurisdiction to determine the issues, how would it exercise its discretion.

I set this out at paragraph 8 of the written reply. Paragraphs 76 onwards quite clearly show that simply leaving it to the evidence that has been adduced before the tribunal is not a fair and appropriate way of proceeding.

So we would say -- I am looking at

paragraph 8(b)(i), page 6 of our response -- that there are distinct analogies between the present case and what happened in Imperial Tobacco so the approach to comparables has not happened in any unexpected way. Pfizer has been complaining to the Authority at length about CMA's failure to investigate comparators.

Over the page on page 7, as the CMA has failed to investigate AEDs at all, and, we would say, and we will come on to this in a moment, not properly if at all investigated the tablet, the tribunal cannot be confident that it has all the necessary information from the CMA on the issue of comparators.

And then the tribunal refers to procedural unfairness at the end of this judgment. Ultimately if you are going to shift a case in closing and say, well, okay, we have not investigated it, or we have investigated but the tribunal says, well, you have not properly investigated it, you still have the evidence that has come out at trial. That happens in closing. The tribunal says enough is enough, that is too late. What should happen is you should amend the defence, put positive evidence on comparables, investigate the tablet, all of this short of information should be before the tribunal.

We say that Mr Hoskins has, with the greatest

respect to him, rather glibly just said, well, JJB, there is evidence of comparables. We would say there is evidence of comparables in our favour, and we have shown that they are prima facie comparables, and in my submission we have shown that they are good comparables. But the point is the CMA has not investigated AEDs at all, they are not mentioned in the decision. And we will come on in a moment to the extent of the limited, if any, investigation into the tablet.

THE CHAIRMAN: And you are quite clear that the plausibility of other AEDs as comparators was put to the CMA during the administrative procedure?

MR BREALEY: I do not believe it was, in fairness. The tablet clearly was.

MS BACON: We did.

THE CHAIRMAN: Other AEDs?

MS BACON: Yes.

MR BREALEY: I will leave Ms Bacon to ...

MS BACON: I was not going to go to it because it was not part of our case on appeal but we did put it to the CMA.

THE CHAIRMAN: It is necessary to be clear about this because the exchange we had yesterday, as I understood it, was in the context of the tablet, not the other AEDs. So you are extending it to the other AEDs, I think we need to be clear what was put to the CMA and

what you say the CMA did not take account of.

MR BREALEY: As I stand here, I can categorically say we have already seen it in. I can categorically state in response to the statement of objections, we have seen the document, they were put on notice about the tablet. We have looked in the notice of appeal, and I showed you, sir -- we did refer to AEDs, so there were other AEDs, but in our response to the statement of objections we did not refer to AEDs as a comparator.

THE CHAIRMAN: So far as Pfizer is concerned that is new evidence raised on appeal.

MR BREALEY: Yes. But what the tribunal is saying in Imperial Tobacco is if you raise it on appeal, then the CMA has to deal with it on appeal and has to deal with it in its defence.

THE CHAIRMAN: Right.

MR BREALEY: It is not good enough simply to say nothing about it, make a few little criticisms, and then say actually they are -- assuming that we have raised a prima facie case, they are a prima facie good comparator, oh well, although we have not adduced any evidence on it, there is sufficient evidence before the tribunal.

THE CHAIRMAN: Is that not a slightly different point from the one we were alluded to yesterday which was that any

shortcomings, I use that word without a pejorative sense, any shortcomings in the investigation can easily be cured on appeal? Which I think was what was informing my observations.

MR BREALEY: Yes. And any shortcomings in the investigation on a point as critical as economic value should not be cured on appeal. The CMA should be investigating the tablet properly. It should be investigating the AEDs properly.

THE CHAIRMAN: So would you say that what you see as the non-investigation during the administrative stage of other AEDs is itself something which is questionable?

MR BREALEY: Absolutely, because we would say -- we referred the CMA to other AEDs, I showed the tribunal I think it was in 2013. But at that time the CMA just said comparators were not relevant. We all know. They looked at cost plus and is it unfair in itself.

THE CHAIRMAN: So you are not saying they were not mentioned to the CMA, you are saying they are were not specifically relied on as part of your response.

MR BREALEY: I cannot say that we, at the administrative stage, maybe Flynn did, but we -- I have asked people to check and I cannot say that we mentioned it in the administrative phase. We obviously did in February when Mr Ridyard's report went in, and we raised it

squarely then, and the criticism that we level on the CMA on the AEDs is that they have not engaged with the AEDs at all, they have not put in any evidence, they have not investigated AEDs at all.

And this is what the tribunal is saying in Imperial Tobacco, that if the appellants do raise a point on appeal, and it is a critical point, it is not sufficient for the CMA just to say, well, let us see how it pans out on appeal.

THE CHAIRMAN: Where is the bit in Imperial Tobacco where they say that specifically? Just remind me. I should say "we" say that, not "they".

MR BREALEY: If I go back then to paragraph 76.

THE CHAIRMAN: It says:

"How we would exercise our discretion, if we had such a discretion ..."

MR BREALEY: I will just go back to ... (Pause) If we pick it up at 62:

"Should the appeal still proceed ..."

So we know at 61 that the refined case, although slightly overlapping, is not part of the decision. So it argues that:

"... the refined case is not part ... the tribunal can and should allow the hearing ... This is because if the existence of those restraints is established on the

evidence, and if, further, all other issues are determined in the OFT's favour, the tribunal could, on setting aside the decision, exercise its powers under paragraph 3.2 of schedule 8 in respect of those restraints. The possibility of exercising those powers enables a tribunal, the OFT argues, to continue with these appeals on a modified basis. Mr Lasok said this course would enable the OFT 'to bank the progress' that had already been made before the tribunal in these proceedings and move on from there. The alternative, which would involve the OFT issuing a new statement of objection, would, he said, be much more cumbersome, involve more time and costs and be more onerous for the OFT and for the appellants."

That submission is not dissimilar to the one Mr Hoskins was making yesterday, that you can essentially bank the evidence that is before the tribunal and no one wants a remittal. So that is the submission.

Then we get does the tribunal have jurisdiction to continue? What I then would like to go to is paragraph 76: how would we exercise our discretion if we had a discretion?

"In case we are wrong about the scope of our jurisdiction, we have considered whether we would

exercise a discretion to allow the OFT to change course at this stage in the proceedings."

Ie to say, well, these comparators, we should have considered them but actually, when you look at the evidence, they are not good:

"In our judgment, the arguments against such an exercise of any discretion are overwhelming. We cannot see how continuing the hearing could result in circumstances which would be fair or appropriate for us to exercise our powers in a manner proposed by the OFT. In formulating the test which should apply, we have been hampered by the uncertainty about what application we are in effect considering. If the OFT had applied to amend its defence we would apply the criteria in rule 11. That would require us to consider whether the proposed new defence is based on law or fact come to light since the defence was first served, whether it would be practicable to include these matters in the original pleading, whether the circumstances are exceptional.

"Those were the criteria the tribunal applied in Albion Water. The application of each of those criteria points firmly against allowing these appeals to proceed.

80:

"We have considered whether the OFT's refined case

is based on matters of fact that have come to light since the defence was served and which it was not practicable to include in the original pleading."

THE CHAIRMAN: All right. I know I asked you to point it out, but you say it is in this section?

MR BREALEY: Yes.

THE CHAIRMAN: We can take it from there. We will study our own decision. Thank you.

MR BREALEY: The point there is they have been on notice for a considerable period of time that AEDs were in issue, were a comparator, and they have not dealt with it. So Ms Bacon may refer the tribunal to the part in the Flynn appeal where AEDs were mentioned.

MS BACON: Do you want it now? It is bundle J2, tab 35. It is the transcript of the oral hearing, page 29, line 79.

THE CHAIRMAN: CMA oral hearing. Okay, we are familiar with that.

MS BACON: That is it. I am told that -- well, I know because I was there. What accompanied that transcript was some slides, and the slides are not in the bundle. If you want to see the slides we can send them to you.

THE CHAIRMAN: I think leave them for the moment.

MR BREALEY: That is the first point I wanted to make by way of reply. Can I now go to the economic value of Phenytoin, there are two issues here I just want to

flag. The first is the benefits of Phenytoin. I have made four points there. The first is when I rose to my feet about the continuity of supply, this is the exchange between Mr Lomas and Mr Hoskins. Continuity of supply is about switching brands, it is irrelevant to the question of whether patients stabilised on Phenytoin should continue to be treated with that AED. In other words, patients are on Phenytoin because it effectively controls their seizures.

The second point is -- again I have given the reference -- the NTI should not be exaggerated. That is the evidence of Professor Walker.

The third point is responding to Mr Hoskins' "small cohort" of people for whom Phenytoin is effective. In fact there are 48,000 which represents 10 per cent of epilepsy patients in the UK. It is rather unfair to describe them as a "small cohort".

And then compare the answer given later on in the exchange with Mr Hoskins and Professor Waterson where, and this is not an unimportant point for the tablet either.

Professor Waterson:

"That leads, to me, to a puzzle which is if that were literally true then we would not have expected any entry into this market. Yet there has been entry into

this market."

Mr Hoskins:

"Are we talking tablets and capsules?

Professor Waterson:

"Tablets."

Mr Hoskins:

"Yes."

Professor Waterson:

"So on what basis have firms entered the tablet market if people who are previously on Teva are supposed to be maintained on Teva?"

Mr Hoskins:

"This will probably make at least one of you smile."

It is a serious point, though.

"But if you look at Professor Walker's evidence the use of Phenytoin, be it capsules or tablets ..."

Pausing there, capsules and tablets seems to be interchangeable.

"... the use of capsules or tablets is not limited to the stabilised historic cohort although that is the main -- certainly for Phenytoin capsules that is the main body of patients.

"So for example a company could take the view, looking at the high price of tablets perhaps: we are going to enter this market and we are going to build up

a cohort of new patients."

So there is the evidence about first line, and there we have some speculation from Mr Hoskins about the competition between the tablet manufacturers and why they are entering into this market. We would say clearly there is a lot more switching going on than the CMA leads us to believe.

That is the first point just on the benefits.

The second point is what is the economic value? So the CMA made the same JJB point, the Imperial Tobacco point, about economic value assuming it was wrong on its complete dependency point.

Again this is another area where, in my submission, it is putting the tribunal in a very unfair position. We have quoted Mr Hoskins, this is at the bottom of my page 8:

"That alternative is in the decision. But I come back to: you have heard all the argument, you are perfectly capable of proceeding in that way. To put it another way, in practical terms, if you were to say: the decision does not deal with this, so what should we do, quash the decision or remit it back to the CMA, I do not think that is going to benefit anyone. You are in a position where you have heard all the evidence. The CMA is not going to be in any better position and then

bring it back to you."

That is quite important.

"You are in a position where you have heard all the evidence. The CMA is not going to be in any better position and then bring it back to you. You are well equipped to determine this issue now."

To which we say in fact the decision does not condescend to any examination of what economic value, how it should be ascribed to Phenytoin if it is wrong on its extreme case that no value should be afforded to Phenytoin at all. Pfizer has, we say, shown that Phenytoin is a valuable drug in treating epilepsy but the CMA has not offered any evidence to challenge this.

So -- this is paragraph 12 -- either the tribunal has not heard all the evidence, because there is none from the CMA, or it seems the CMA would not offer evidence anyway. It says it is not going to be able to put a value on Phenytoin.

So again it is very unsatisfactory for the CMA to say, right, we appreciate we may lose on our complete dependency case, now it is for you, tribunal, to put a value on Phenytoin, in circumstances where it has not adduced any positive evidence on value, and says even if it went back it probably would not be able to do it.

So that is what we say about Phenytoin and economic

value. It does have a value and it is not good enough for the CMA to say, well, you have heard all the evidence. We say we have shown it has a value, we say that the value can be by reference to the comparators, the AEDs and the tablet.

THE CHAIRMAN: Do you accept, on this paragraph 10 of your sheet, do you accept when Mr Hoskins says:

"That alternative is in the decision ..."

MR BREALEY: No, not at all.

THE CHAIRMAN: You don't.

MR BREALEY: No.

Can I then move to the third point, which is the AEDs, and just make several points here. First, as we have already been debating, the CMA does not consider other AEDs at all. Yesterday it referred to the MHRA guidelines, and one remembers that those guidelines expressly refer to the five AEDs referred to by Mr Ridyard, they are all our favourite -- the Keppra, Levetiracetam.

The second point is the CMA in closing referred to the fact that some generic prices had fallen in 2014. That is true, but all the CMA was doing there was simply repeating what Mr Ridyard had expressly told everyone. We have given the reference. And the last question in cross-examination was did he confirm that paragraph, and

he said yes.

But it remains the fact that the generic -- and this is even in 2014, Topamirate and Oxcarbazepine are comparable with the Pfizer price. But it does not detract from the fact that at the time of launch of the capsule, the DH was willing to pay generic prices and was comparable to the Pfizer price. And I do not detract from that submission one iota.

The third point is that, as we know, Mr Ridyard actually concentrates in his report on the branded AEDs and the fact that the prices are higher that Pfizer's Phenytoin capsule. In this respect, Mr Harman considers that the Pfizer capsule is more akin to a branded product and he agrees with Mr Ridyard, yet in closing the CMA could not come off the fence and say whether it should be treated as a generic or brand or mid-way between the two.

But remember -- and again it is in the schedule that I handed up -- this AED, this is a branded AED. This is, in 2012, £471 and the price does not change. It has just over 20 per cent of the market, far in excess of the Pfizer capsule. £471 compared to, in 2012, £268. And this branded product has, in 2012, 22 per cent of the market --

PROFESSOR WATERSON: Just to be clear, when you talk about

these prices, are these the prices that pharmacies pay or the prices on the drug tariff?

MR BREALEY: This, as I understand it, is on the drug tariff. It is the cost to the NHS of a six-month treatment. This product is a branded AED. In 2012 it is £471, I think in 2014 it is £470, and the market share is about 20 per cent.

So that is the brand.

Fourth, this is my paragraph 18, although Mr Ridyard estimates that these branded products must have been making returns in excess of ROS 6 per cent, as he says:

"The focus of my analysis was to determine if AEDs represented effective comparators from the demand side such that their selling prices could provide valid benchmarks in a value-based assessment of the Pfizer supply price."

When one looks at that and what the CMA has accepted in closing, that proposition goes hand-in-hand with what the CMA says it now should do.

Fifth, and again an important point. As Mr Ridyard states, the purpose of his benchmarking analysis is primarily to consider whether Pfizer has exploited a position by charging -- and this "exorbitant" we put there because that comes from Advocate General Wahl, and he refers to the case law on that.

This is not price regulation, this is whether Pfizer has exploited its position by charging an exorbitant price, an outlier. And what is important is to consider a range and whether the Pfizer price is an outlier outside that range. We have set out there the bit in the cross-examination where he says it is sensible to consider the range.

Lastly I come to the tablet. I will finish on that, and then Mr O'Donoghue has about two or three minutes to add. I will be hopefully less than ten minutes on the tablet. It is set out in the written response.

I am not sure we have had a response but can I hand up a letter that we sent to --

THE CHAIRMAN: We have it.

MR BREALEY: It is at N37.

THE CHAIRMAN: The one that starts off quoting me, I see.

(Handed)

MR BREALEY: This was just as to what the CMA has done by way of investigation into the tablet. As I understand it, and we will be corrected if we are wrong, there is in I.1, if we go to I.1, tab 62, this is a Section 26 response from Teva. It is dated 8 May 2013, we see that from the index, so it is slightly out of sync.

8 May 2013, this is the Teva response. The CMA refer to this in its closing, in its famous paragraph 282. If we

just keep that open, we might just refer to it when we get to 282.

But we then have the exhibit to the letter that was sent to the tribunal. This is not confidential, I understand. So we have had the 2013 response, and then we have a call between John Schmidt, Shepherd and Wedderburn, on behalf of Teva and the CMA personnel in charge of the investigation:

"JS called for an update on the Phenytoin investigation. JS noted it had been a while since he or his client had heard from the OFT/CMA but also noted the updated timing on the web page. The relevant CMA person explained the current timing is set out on the web page. At this stage we are not planning to request any further information from Teva but may decide to do so. Explained if we did decide to we would provide Teva with some advance notice. Added that any further information request would likely be in relation to prices, sales volume. We would not accept anticipate the request to be particularly onerous."

So I am sure we will be corrected if we are wrong, but that seems to be the limit of the investigation into Teva. We know that it sent some Section 26 notices to pharmacies in order to prove their continuity of supply. And before I forget, on the competition between the

tablet manufacturers and this issue of switching, the Kantar report has a similar question in question 7 as in question 5.

So when one is looking at the competition between the tablet manufacturers, it is instructive to look at question 7 of the Kantar report because that would give some indication as to whether the Section 26 notices are really what they appear to be.

But this appears to be the extent of the investigation into the tablet. Heaven knows what the CMA did with other tablet manufacturers. We do not know.

Dealing with the tablet as the obvious comparator, the CMA, as we know, in closing makes nine points. This is at page 89 of its closing, it starts at 268. We have dealt with these in our written reply, I will just go through some of them.

The first point is the obvious one. This is the Beighton meeting. It is again shocking really that the CMA remains in denial and the Department of Health remains silent on the Beighton meeting. The statements made in the decision that the reduction by Teva was "voluntary" just cannot stand. And both the CMA and the Department of Health have had every opportunity to challenge the parties as to the evidence they have

adduced about the Department of Health meeting and how we say the Department of Health insisted on the £30.

As I say, the CMA, with great respect to it, remains in denial. The Department of Health remains silent. We do pray in aid Lord Sumption's warning in the Prest case -- this is at paragraph 24 of our closing -- that silence may convert that evidence into proof. And silence in this case is not golden it should be used against them.

Just on paragraph 25, it is a little point but these little points just appear in the CMA's submissions at times. It refers to a subsequent talk by Mr Beighton and focuses on the word "unrestricted". We say that has nothing whatsoever to do with the Beighton meeting in 2007. In any event in cross-examination, and the cross-examination is not -- I do not have the quote there, I will try and get it to you. He says what he meant was free pricing. And that is true, the government encourages generic free pricing, and we have given the reference in the decision there.

The second point, no contact with Teva. We say that is just a non-point.

The third point, DH not happy. We have dealt with that, but again -- paragraph 27 -- one cannot just come to trial and have some stray statements from the DH

saying it is not happy, and the DH not coming to the tribunal to explain in any meaningful sense. Litigation is not about that. The DH just cannot remain silent on the sidelines.

What I think is important -- paragraph 28 -- regardless of the Department of Health's silence, is that if it is believed that the Department of Health did intervene in this market, it did set a price upon which Teva relied and then subsequent tablet manufacturers have relied, so it is not just Teva, it is other tablet manufacturers. Capsule manufacturers have relied on it, the market has relied on that price, and the market has relied on that price for some years. And at some point when you put all that together objectively, that price becomes a valid benchmark price.

The fourth point is no competition for tablets at the relevant time. That is a non-point again.

The fifth point, Teva engaged in similar conduct. The CMA cannot properly run that point without squarely putting it to Teva and, in any event, it cannot be correct if indeed the Department of Health did impose the 30 per cent.

The sixth point, tablets are not in the same market. Again we deal with that. Legally it is relevant.

The seventh point, over the page on page 14, no

sufficient data on tablets' cost of production. To a certain extent that is indicative of the lack of any investigation by the CMA. I did ask respectfully that the tribunal keep bundle I.1, tab 62 open.

If one goes to page 3, it is in green so I will not read it out, but it is the bit above section 3 on page 3:

"In the period between 2003 and 2013 ..."

Et cetera.

So there is some information about Teva's costs, it seems, but that does not seem to have been followed up in the slightest. But clearly we cannot write to Teva and ask Teva for its costs. That is why it is in green.

The eighth point, Category M. Again, we say this is a point against the CMA. We have given the reference -- or, if we have not, we will give it now. The same reference is decision page 73, we do not have to turn it up. Decision page 73, paragraph 3.143, where the CMA refers to the Category M, Scheme M, as encouraging competitive pricing. Pricing in Category M, Scheme M, arises because of competition.

So we really do not understand the point, and we have raised this in our notice of appeal and our skeletons, why Category M is some sort of inferior benchmark price when it is supposed to be a price where

there are several manufacturers competing in the generics market.

The ninth point and then I shall finish. This is the paragraph 282 ASP. We set out there -- again, this is another JJB/Imperial Tobacco point. It is not certain what the CMA is doing in relying on this. If it is saying the drug tariff price is not the correct price but the ASP price is the better benchmark, that gives rise to a whole host of issues that have not been squarely put to any of the appellants.

As Mr O'Donoghue, when he rose to his feet yesterday, said, the difference between ASP and the drug tariff price and clawback has apparently taxed the tribunal at length in the Paroxetine case where there has been substantial expert evidence and hot-tubbing.

So for the CMA to raise this in closing in almost the last paragraph of their closing submission is not appropriate.

In any event, as I tried to explain yesterday, it is a bad point -- and this is my paragraph 39 -- because the comparison that the CMA make, with great respect, is a little misleading because all it does is it gives the Pfizer launch price and the Teva 2013 price, but we do know that the Pfizer price was reduced in March 2014. And when one looks at the comparison on the ASP, the

Pfizer price is £[✂] and the Teva price is -- I do not think it is confidential ... it is that. We have a figure of [✂] in 282 but then it is green in the box.

But you see that the Pfizer price is not an outlier, it is not "exorbitant", to use the Advocate General's phrase, borrowing from the court, it is not "exorbitant" even when compared to the allegedly competitive ASP price for the tablet.

So we would respectfully submit, just to wrap up, that the tablet price, the drug tariff price is the benchmark price. But even if the ASP price is the valid comparator, which the CMA now wants the tribunal to accept, the Pfizer capsule price is not exorbitant when compared to the tablet price.

Unless the tribunal has any questions, those are my submissions in reply.

THE CHAIRMAN: In relation to the final point, is it Pfizer's submission that this is not sufficiently covered in the decision or not covered at all?

MR BREALEY: In my submission, for a point to be taken against the appellants, it is not covered at all.

THE CHAIRMAN: Mr Hoskins drew our attention to a couple of paragraphs.

MR BREALEY: To a paragraph. But as Lord Justice Jacob once said, you cannot scrabble around an 800-paragraph

decision trying to work out what the implications of particular paragraphs are.

If the point is going to be made that the drug tariff price is not the appropriate benchmark price but the ASP price is the valid benchmark price, that has to be put to the appellants. So stray paragraphs in a lengthy decision is not, in law, sufficient for it in any meaningful way to be put. And we have relied on the drug tariff price for four years.

So we say it gets them nowhere because, when you compare it, it is actually a point against them. But this notion that the drug tariff price is not a valid comparator -- also, when one thinks about it, that means the CMA is trying almost to read out of the pharmaceutical competition tested pricing cases any comparator because no company is going to know the ASPs of its competitors. That is why it is in green.

Ultimately the drug tariff price is the price that the NHS, the Department of Health pays. It is the cost. That is the price that they have to pay and that is why we say it is the valid price. But it has never been explained to us, and it has only been raised right at the end of closing, that somehow the drug tariff price is not the valid benchmark but the ASP.

THE CHAIRMAN: Thank you, Mr Brealey.

MR BREALEY: I am grateful. Thank you.

THE CHAIRMAN: Mr O'Donoghue.

Reply submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, five minutes, two points.

The first point, before and after pricing. Ms Bacon was asked a couple of days ago for Flynn's position on before and after pricing. I do not think we have been asked. For the avoidance of doubt, we say it is irrelevant in the context of this case.

Can I ask you very quickly to turn to our closings on this point, I just want to make sure you have got our point. I am sure you do. It starts at paragraphs 224 and following.

THE CHAIRMAN: Sorry, paragraph?

MR O'DONOGHUE: 224, page 77. I just want to rattle through the six points we make, just for the avoidance of doubt.

The first point we make is that the before and after point has grown like Topsy during this case, but when one actually looks at the decision it is a minor feature of the decision. So it comes up in two parts, one under limb one.

As we say in paragraph 225A, the primary reason under limb one is cost plus, and then before and after is one of four supplemental reasons in that context.

Equally under limb two, over the page, again the

primary reason is the disparity itself, and then before and after is one of five further issues said to provide context and information against which to assess whether Pfizer's prices are unfair.

We are happy to take the before and after point on the chin in this trial, but it has rather grown a life of its own during this trial that it simply did not have in the decision.

The second point, I am not going to go into these cases, but the pedigree of before and after case law is pretty thin. We have one case, British Leyland, which in reality is about penalising a parallel importer through price discrimination and is rather a long way from suggesting that the mere fact that one company has price A in period one and price B in period two is something dispositive or even important.

So we would obviously encourage you to read British Leyland, and actually General Motors is even worse for the CMA because it was overturned.

The third point. There is of course a context here, it was not simply a before price that was set in free competition, it was part of the PPRS. Now, because of the iterative and water bed nature of the PPRS, Phenytoin sodium for Pfizer became something of a sacrificial lamb in the context of getting a better

return on other parts of the water bed, so there is a context here which cannot simply be forgotten.

I think our fundamental point in some ways is the fourth point which is, well, the cost plus figure of the CMA is essentially a modified version of the before price. So to some extent this is already baked into part of the decision. So to suggest it has an independent vitality, in my submission, simply is not true; it is in there as a component of cost plus which is one of a number of sub-components of the analysis.

So to suggest again that this has some sort of independent vitality that is, perhaps even as Mr Hoskins suggested, a genuinely free-standing alternative does not make any sense.

The fifth point, I do not want to make too much of this because it is a limited point in some ways, the before price was loss-making and that has some legal significance.

The sixth point is really a practical one which is it rather reverses the burden of proof because it is not for a company when it changes its price to justify the change in price on the basis of cost or anything else. The way the law operates, even if you are dominant, is that your pricing is presumed to be lawful unless it is proven to the relevant standard that it is an unfair

price. And the suggestion that each time a dominant firm changes its price it is under some sort of cloud of suspicion, and it has to come up with some justification based on costs or something else, simply is not there in case law or common sense.

So that is my first point.

The second point is one of the inevitabilities about this area of litigation is that when your opponent hands up a table there will be a table coming back in the other direction responding.

So Mr Bailey handed up a page on Mr Poulton's cross-examination and all the wonderful things which were put to him. We have responded to this overnight. What we have done -- let me hand it up and then I will explain what we have done. (Handed)

On the two left-hand columns we have the CMA's reference and the point they make that they put to Mr Poulton. Then on the right-hand side we have said, well, it is not quite that simple. Here are all the other parts of the transcript and the contemporaneous documents that you have forgotten. So that is a self-contained point.

The last point on page 6, the way I put this in closings was the CMA's intent case was a dog that barked but did not bite, and the fundamental point we wish to

make is what was not put to the witnesses and we list the various things there.

Just to conclude before I sit down, Pfizer has faced a number of years of criticism and adverse public comment from successive CMA chairmen and the CMA itself, and in my submission the one thing which is clear after four weeks of this trial, there is a series of very odd circumstances in this case, it is legally, factually and economically highly complex, and to wave the flag of the price rise as being the answer to everything in this case simply belies all the genuine difficulties. That of course is relevant to a number of issues in case including, of course, fines.

Those are my submissions.

THE CHAIRMAN: Could you just explain your fourth point, paragraph 233 of your closing submissions.

MR O'DONOGHUE: So this is the before price.

THE CHAIRMAN: The before price is the price approved within the PPRS and which was valid in 2012.

MR O'DONOGHUE: Yes, which had a loss-making component.

So when one includes the relevant costs of production and adds the plus of a reasonable return, that transforms the loss-making before price into something adjusted which is effectively cost plus. So the before component is baked into a part of the

decision.

THE CHAIRMAN: Why are you making the adjustment?

MR O'DONOGHUE: Even the CMA suggests we should not be forced to sell at a loss. So it is in there but --

THE CHAIRMAN: It does not seem to amount to very much of a point.

MR O'DONOGHUE: It deals with the before point in the sense that it does not have some independent vitality that is an answer to everything. It is in there in the mix as one of a large number of sub-components that you will have to assess.

MR LOMAS: As I understand what you are saying, it does not add very much to the debate if you are comparing the actual price with the CMA cost plus --

MR O'DONOGHUE: Indeed.

MR LOMAS: To go back and say, well, there is an added increment which goes back to the actual loss-bearing price under the PPRS. That is the force of the point?

MR O'DONOGHUE: Yes, absolutely. It is not a big deal. They have adjusted the loss-making to make it profitable and that is in there.

THE CHAIRMAN: Just another way of saying there is a large excess.

MR O'DONOGHUE: Well, we deal with that. But that the suggestion has a vitality beyond this does not make any

sense, in my submission.

THE CHAIRMAN: Thank you, Mr O'Donoghue. We will break for ten minutes and, Ms Bacon, then you will be on.

(11.45 am)

(A short break)

(11.55 am)

THE CHAIRMAN: Just before you start, Ms Bacon.

Mr Hoskins, I realise we are at the eleventh hour, actually the twelfth hour, but it occurs to me that some points have been made this morning, particularly by Mr Brealey, which you haven't had an opportunity to comment on and you may wish to do so, and, if so, we could probably make time for that.

MR HOSKINS: That is very kind, sir. I did want a couple of minutes on Imperial Tobacco. And we are working on -- as Mr Brealey said, if he was to be corrected on his note on what happened in relation to the tablet investigation, we are working on something in relation to that, but hopefully we can hand that up.

THE CHAIRMAN: Are you likely to do that by 1 o'clock?

MR HOSKINS: I will be less than 5 minutes.

THE CHAIRMAN: No, I mean will you be in a position to address us by then?

MR HOSKINS: Sorry, the note. Yes, I think that will be ready. People are beavering away as I speak.

THE CHAIRMAN: Okay, so we will try and fit it in before lunch. It may be a late lunch. Thank you.

Okay, Ms Bacon, and of course you may say things that Mr Hoskins may not have heard before.

MS BACON: I am going to try not to. I do not have anything to hand up, I feel a bit like Santa coming along without any presents.

THE CHAIRMAN: If you regard those as presents, that is fine.

Reply submissions by MS BACON

MS BACON: I am going to run through my submissions in broadly the order that Mr Hoskins addressed the tribunal yesterday so I am going to start with market definition.

Mr Hoskins focused his submissions on that on the third and the fourth of my four periods and I propose to do the same. So if I start with period number 3, which is November 2013 to May 2014, and you remember that I said there were various things going on in that period, volatility and market shares, Flynn reducing its price, NRIM reducing its price and major pharmacy customers switching. Mr Hoskins focused on the second of those points, namely the price reductions.

Now, as you will recall, in his written closing submissions he made various arguments about the price reductions which I showed in my errors note were simply

incorrect. In his closing submissions yesterday he did not try and pursue any of the points that I had shown to be wrong, instead he speculated that Flynn may simply have chosen to reduce its prices in April 2014 for reasons of customer relations relying on Mr Fakes' witness statement in the interim measures hearing.

Even leaving aside the point that the chairman made about that witness statement having been put forward for a different purpose, the problem that Mr Hoskins has with this point is that it was not put to Mr Walters, and Mr Walters, as I said on Wednesday, said categorically in his first witness statement that Flynn's price reduction was implemented in response to NRIM. Mr Hoskins did not challenge that, he did not put to Mr Walters that that statement was incorrect. He did not put to Mr Walters that Flynn would have passed through Pfizer's price reduction anyway because of customer relations. So this is Mr Hoskins simply speculating without any evidence and without putting the point to the one witness who could have addressed it.

His next point was that if Flynn really was in the same market as NRIM, one would have expected to see switching following NRIM's price reduction, or at least a further price reduction from Flynn. The answer to that is that there was switching. You have seen on the

volume and market share graphs that NRIM's market share recovered after Flynn's spike. So there was apparently, as we have said before, a price response to both Flynn and NRIM's price reductions.

Should it follow that Flynn should then have responded by reducing its prices even further? The industry evidence says not. Mr Davies' evidence was that in a market with three players, they will not seek to compete vigorously on price after an initial price reduction because the increase in volume will be offset by reductions in the price, so there will otherwise just simply be a race to the bottom. That is what he said at paragraph 36(b) of his report. And we know from Mr Walters' evidence and indeed NRIM's own evidence that NRIM's strategy was not in this market situation to engage in a race to the bottom, it would not have been economically profitable for it to do so.

So the absence of further price competition, once NRIM had captured essentially the same volume as Flynn on the 100mg capsule, which is what it did, is exactly what Mr Davies, the industry expert in this case, says he would expect to happen even in a market with three players.

The other point Mr Hoskins said the tribunal should

be focusing on was his figures regarding Flynn's ASPs after April 2014. And he maintained yesterday on the basis of those figures that, following the price reduction, the prices go up again. He made that point -- I was a bit surprised about that, because he made that point despite the exchanges between me and the tribunal on Wednesday in which I had said this point was not put to Mr Walters either. There was an explanation that the CMA had not asked us about. But despite that, this is the point that Mr Hoskins said the tribunal should rely on for that period.

So that is all I wanted to say about period 3 because he does not really address the other points I made for that period.

Then moving on to period four, which is from May 2014 onwards in my categorisation. Mr Hoskins made three main points in relation to that time period. His first was that the level of switching decreased in that period. I simply do not know where he got that from. If he was referring to some of the data, for example the Boots data that we were looking at, or the total NRIM figures in the Alliance top 10 spreadsheet showing something of a decline in NRIM's sales from about January 2015, that does not show that there was not switching going on. All it shows is that at some point

around that date, and it looks like January 2015 was the tipping point, Alliance's customers were showing for some reason a drop off in their NRIM purchases that was a bit more than the general market decline, and we had a debate about that when we looked at those figures.

But there could be a number of explanations for that. One explanation could be that pharmacies were purchasing NRIM's product from somewhere else. We know that for Boots that would have been quite unlikely, we just do not know whether that was the case for other pharmacies because we do not have the data.

Another explanation could have been that pharmacies were purchasing more of Flynn's product. We know from the volume and the market share graphs that that probably was not the case because both Flynn and NRIM's market shares were broadly stable. We do not see Flynn's market shares going up from January 2015. But even if that had happened, that would have been switching in the other direction, so that would have contradicted Mr Hoskins' case that there was not any more switching going on.

A third option, a third possibility, could have been that pharmacies were purchasing more parallel imports. That seems to us to be the most likely explanation, but again if that was the explanation, that would have again

indicated switching back to Pfizer's product because parallel imports were Pfizer's product.

So two out of the three of the possible explanations that we have come up with indicate that there was switching back the other way. The third explanation, the one about purchasing NRIM from elsewhere, is a possibility, but to verify it the CMA would need data from the other wholesalers which they did not ask for.

That brings me to Mr Hoskins' second main point in relation to this period which is the Alliance data are incomplete, and they are. I completely accept that and I said that. But it is a point in my favour, not his, because the CMA could easily have solved the incompleteness by asking for precisely the same data from the other wholesalers and that would have told them exactly who was buying what and when.

And/or it could have asked the large pharmacies, such as Boots, to supply the CMA with a breakdown of where they were sourcing their products from over the period of the infringement so we could have then seen if there is a tail-off in NRIM -- or not a tail-off, I think a slight decline in NRIM which was more than the market decline. Was that due to parallel imports or was that due to sourcing NRIM from elsewhere or buying more Flynn? We could have seen that if we had more granular

data from Boots.

To get around that difficulty, ie that the data were incomplete, Mr Hoskins says, and this is his third main point, well, this is all digging around in the weeds. You do not need to look at that kind of granular data, you can just look at the overall sales volumes.

But that, in our submission, is the CMA's big problem, because just looking at the overall sales volumes, particularly for that period when what you see is a general convergence, does not tell you anything about whether individual pharmacies were switching or not which is what he needs to know in order to know whether NRIM and Flynn were in the same market then.

As I said on Wednesday, all that the total market share figures tell you is there were convergences of volumes but it does not tell you what the reason for that convergence was. It could have been because the market had suddenly ossified. It is not clear when, maybe around January 2015. There is no explanation for what happened then to make it ossify. But it could have been that from around January 2015 every pharmacy started dutifully asking their customers which product they had been taking before and dispensed only that product. Or it could have been simply that the market was in equilibrium and there was a bit of switching in

both directions, including, for example, to parallel imports, but not enough switching to cause the large market share swings that had been seen in the earlier periods, my periods two and three.

The point is that without drilling down into the actual pharmacy purchasing data, looking at what is going on on the ground, you do not know which of the explanations is correct. And certainly the data that we do have from Alliance in the top 10 spreadsheet suggests that it was not an ossification of the market because, if that was the case, you would have not expected to see any variation at all, you would have expected to see consistent volumes of purchases of NRIM's product subject only to the overall market decline. And if you see anything other than that, other than a consistent decline from the point that they had started purchasing NRIM, then that indicates that there was actually switching going on throughout the period which is and has always been our case.

Mr Hoskins said at the outset of his submissions that the question on market definition was whether there was sufficient and reliable evidence to support the CMA's market definition. And in our submission it is abundantly clear from Mr Hoskins' submissions yesterday, as well as everything else that we have said, that

the answer is there is not sufficient and reliable evidence.

That is all I wanted to say on market definition.

Now moving on to dominance, the major new insight that came out of yesterday was Mr Hoskins' submission that if we are right on the market definition, then the tribunal can simply trawl through the evidence and decide for itself that we were still dominant despite the fact that there is no finding to that effect, or even argument to that effect, in the decision, the defence, the CMA's skeleton argument or even the CMA's written closing submissions. So in our submission, it is far too late to make that claim now.

I gratefully adopt what my learned friend, Mr Brealey, said this morning in relation to Imperial Tobacco. I would refer the tribunal to a couple of passages that he did not take you to, but we do not need to go to them now, paragraphs 46 and 67. 67 says in terms that JJB is not authority for the proposition that whatever evidence emerges during the trial that indicates that an infringement of the competition rules has been committed, the tribunal is entitled to make a finding to that effect even if that infringement has not formed part of the decision and is not therefore addressed in the pleadings served in the

appeal.

So if the CMA did want to make a case that we were dominant, even if NRIM was in the relevant market throughout the period of infringement, it should have explained that in the decision. We already have two alternative cases in the decision. It should have had that third alternative case and it should have explained why the threshold for dominance was met in circumstances where, on the hypothesis that we are right about market definition, Flynn and NRIM had equal market shares for the capsule strength that formed the vast majority of the market, and where there had been a price reduction by Flynn on the two capsule strengths where it faced competition from NRIM, and where NRIM had then responded by reducing its prices below Flynn's. The CMA would have had to explain why, given all of those things, it could still say that Flynn was dominant. We have never seen any of that analysis, and a few comments by Mr Hoskins in his oral closing submissions on the penultimate day of the trial are, in our submission, simply not sufficient.

So that is dominance.

My next big heading --

THE CHAIRMAN: Just a little point. Maybe we should have asked Mr Brealey. Just supposing you were right on all

this, and we were to find that you were not dominant, is it right that Pfizer is also not dominant? Or can they be dominant on this different market definition even if you are not? Maybe that is not the point to put to you.

MS BACON: I think that is a point to put to Mr Brealey, in all fairness.

THE CHAIRMAN: We are probably too late to put it to him. We may have to work it out for ourselves.

MS BACON: Yes. But my submissions are focused on Flynn's position.

If I could move on to legal principles, there is not very much to say on that. You have our submissions on the relevant questions that you asked and indeed a number of other questions that you did not ask.

I just want to make two short points, one about comparators and one about economic value. The comparator point has been addressed by Mr Brealey this morning, and again I gratefully adopt what he said on that. In particular, I entirely agree with paragraph 5 of his note that if there is a prima facie plausible comparator, the CMA must investigate it. And prima facie comparator or plausible comparator, those are the benchmarks we have set and they were the benchmarks I explored with Mr Harman. That is, in our view, the threshold for putting the comparator in

the basket and then investigating it.

That does mean that the CMA cannot simply say that it was not under an obligation to get more information about potential comparators because it was not required to look at them, and that is what seems to be suggested at paragraph 309 of the CMA's written closings.

We are of course not saying that the CMA has to proactively go out and look for a needle in a haystack. That is not our case. Our position is that if we have put forward something that is a prima facie good comparator then the CMA cannot avoid taking a proper look at it by saying that it thinks it has enough evidence because of its other points, such as the cost plus analysis or the before and after point. It cannot say, well, we have done those, we think we have made our case on those, so we do not have to investigate your proposed comparator. In our submission, if there is a plausible comparator or a prima facie good comparator it has to investigate that, and it then has to weigh that in the round against the other evidence that it has which may or may not point in the other direction.

THE CHAIRMAN: Leaving aside needles in haystacks, which is a rather extreme case, are you saying that the CMA only has to have in its basket of comparators, candidate

comparators that are put forward by the parties under investigation? Or does it have some wider general obligation as an authority to look at the market and see whether there are comparators? I think I got from you that it does not have to.

MS BACON: Yes, I thought about that question. I think you are right to say, sir, it does have a general obligation to look at the market and look at what may be reasonable comparators. But I do not need to rely on that in this case because I am not saying we were totally negligent, we did not put forward any of this but we think the CMA should have looked at it anyway. That is not my case.

Our submission is we did put all of this forward, in fact we put a number of generic comparators forward to the CMA in our various responses to the Section 26 notices. Also in our response to the SO we explicitly relied on Mr Williams' best comparators, that was Alliance and Martindale. We had all of the evidence in Mr Williams' first report. We had all of the evidence in CRA's first report on internal comparisons.

I totally accept at that stage we had not done the further analysis that Mr Williams and Mr Davies went on to do of actually trying to come up with an average across generic comparators, but we had absolutely said we think the best comparators here, if you are looking

for them, apart from the tablet which we and Pfizer both raised, we think the best comparators would be looking at other generic companies.

I will come to that in a minute on some of the points of substance, but this is all stuff that we raised anyway during the administrative procedure, this is not a new point I am making now that we only put in the appeal.

THE CHAIRMAN: You mentioned earlier other AEDs.

MS BACON: Yes. So the reference I gave you was a passage in the transcript of the oral hearing. We had said: and by the way, if you look at other AEDs, that also shows that the price of Phenytoin is not excessive. We did not rely on that in our grounds of appeal for purely pragmatic reasons, we thought we had enough other grounds of appeal to be getting on with, but we had put it forward in the oral hearing.

THE CHAIRMAN: But not as a central part.

MS BACON: Exactly, no, it was not a central part. That is why we did not pursue that point. We were trying to keep our grounds of appeal to a manageable number.

THE CHAIRMAN: That is very commendable. Have you succeeded?

MS BACON: I hope we succeeded.

I told you we have the slide. If you want it, we

can provide it. You have not asked for it yet so we are in your hands on that.

So I said I had two points on the legal principles. The only other point is a short one and it is this point about complete dependency.

I was really surprised that Mr Hoskins again yesterday read out paragraph 323 of his closing submissions, which is the point where it is said that most patients taking the product have no choice but to keep taking it. I was so surprised, that is why I rose to my feet and asked what he meant by "the product". And he said it was "Product", capital P, defined in the same way as in the decision, ie Flynn's Phenytoin product.

So what this paragraph is saying is that most patients taking Flynn's product have no choice but to keep taking it. That is on our errors note, and it is there for a good reason, because there is no support for this statement at all. There is a reference to the decision. I went and looked at those paragraphs of the decision and those paragraphs do not support this paragraph 323, they do not say what Mr Hoskins wants them to say.

The fact of the matter is that more than 90 per cent of Phenytoin prescriptions are open. That is common

ground. And the MHRA guidance says that when a specific product is not stated on the prescription then usual dispensing practice can be followed. The references for those points are in our written closing submissions at paragraphs 19 to 20.

So that means that 90 per cent of Phenytoin patients, in broad terms, do not have to keep taking Flynn's product because the prescribers for those patients have decided that there is no need for them to receive only one manufacturer's version. So 90 per cent of patients are not completely dependent on Flynn and this paragraph is therefore inaccurate. The analogy with the complete dependency point in Tournier therefore falls away.

That is all I wanted to say about the general legal principles.

With the tribunal's permission, I will then turn on to the points of substance, again in the order they were addressed by Mr Hoskins, so that is starting with the tablet comparator.

Again I respectfully adopt Mr Brealey's submissions on this. You asked Mr Brealey what his position was on whether this new point at paragraph 282 of the CMA's closings, and as Mr Hoskins elaborated it yesterday, was in the decision, and our position is it is categorically

not in the decision.

There were three references given to us yesterday, paragraphs 3.141, 5.513 and 7.42(d). I have looked at all of them, none of them contain this point. What some of those paragraphs say is that there was a difference between the drug tariff and the ASPs. Well, that is not contested. But the point that Mr Hoskins is making here is that therefore the appropriate benchmark is ASPs, and by reference to that benchmark we fail, ie our prices were excessive. That point was never in the decision in any of those paragraphs or anywhere else.

If anything, as Mr Lomas pointed out yesterday, this paragraph of the closings and Mr Hoskins' submissions on it suggests that the CMA should have investigated tablets as a useful comparator. Had it done so, and had it put this point to us, we would have wanted to put in factual and expert evidence on the level of Teva's ASPs and their relationship to the drug tariff price. We did not have a chance to do that because it was not put to us.

We would also have needed more information about what Teva's ASPs actually were and what the ASPs of other tablet manufacturers were and that is not information that we can obtain ourselves. Obviously Teva's ASPs, I think as Mr Brealey said, are

a commercial matter between Teva and its wholesalers. We did not know them at the time of launching our product and Flynn does not know what they are now.

What we know about them is a single sentence in Teva's Section 26 response, and I am afraid I am going to ask you to go back to that document. It is on a page that you have looked at but you might not have seen the sentence.

It is I1, tab 62. It is on page 3 and you have looked at the page. I am going to be careful because this section is green. It is the words in the middle of the page, just above number 3:

"From October 2008, the reimbursement prices remained constant at £30 per pack of 28 tablets and ..."

Then a green section.

Then you see a sentence beginning with the word, I think I can read that out, "However", can you see that sentence? That is a statement about a snapshot of time on 4 June 2013 when the response was filed. That is the only source for the CMA's statement about what Teva's ASP was. We do not know if that was the price when Flynn launched because Teva was not asked that question. We do not know when Teva's ASPs dropped to that level because Teva was not asked. We do not know whether Teva's ASPs stayed at that level or whether they

went up or down, again they were not asked. We also have no idea why Teva's ASPs were at that level on the date that they filed their Section 26 response.

Mr Hoskins at one point seemed to be describing that as a competitive price or at least a potentially competitive price. And if it was the case that Teva's ASPs fell to that level in June 2013 because of competition from all of the other tablet suppliers that we know were on the market, then that would suggest that the CMA's main reason for rejecting the comparison should just fall away and that it should have taken a much closer look at what was going on.

But ultimately, and without any further information about this single sentence on which the CMA founds its paragraph 282, we really cannot make any conclusions at all, and nor can the tribunal.

Mr Hoskins tried to get around all of this by saying:

"It must be acceptable for an authority to conduct an investigation and at any stage of that investigation to reach the conclusion that it is not worth us going any further because there is not going to be a good comparator."

That was what he said verbatim on page 94 of yesterday's transcript.

But the problem was in this case the CMA decided that the tablet was not a good comparator because of something they had not investigated, namely, the extent of competition on the market. You will see this at paragraph 275 of their written closings. They say, in terms, there was no competition for tablets at the relevant time. Therefore they say it is not credible to suggest the tablet price assists the tribunal in determining the benchmark in paragraph 249 of United Brands, even leaving aside the point that actually the CMA has known from the outset that there were numerous tablet manufacturers.

What they are saying here is there was no competition, therefore it is not credible, therefore we did not have to investigate it. But of course they had not done the investigation to show them whether or not there was competition. Instead they simply assumed that the tablet market was uncompetitive and stopped there. That was their main reason for rejecting the comparison, apart from other footnote points, like the tablets are supplied in different strengths to the capsules which really get them nowhere.

So that is what I wanted to say about the tablets, really as a postscript to what Mr Brealey said in more detail earlier on.

Can I then turn to the meat of our appeal, our case on cost plus. The CMA's case on reasonable rate of return is the foundation of its case in the decision against Flynn and it really all does turn on the 6 per cent. Mr Hoskins in his oral opening submissions tried to suggest that the tribunal might be able to find for him on the before and after analysis as a free-standing point, but then in the note that was subsequently sent the CMA conceded that that was not in the decision and you have our points on whether they can raise that now. It comes back to the same point about the change of case.

So in our submission, if the 6 per cent falls away, then that really is it and the decision has to be set aside.

So it is quite extraordinary that Mr Hoskins raced through this central point of his clients' case in his closing submissions in about two minutes, it was I think two and a half pages of the transcript, and it was really blink a few times and you would miss it.

In that two minutes he made a total of four points which I want to respond to now.

THE CHAIRMAN: There was quite a lot in writing.

MS BACON: There was, but actually there was surprisingly little about Mr Harman, and Mr Harman had provided the

economic underpinning for what they had said in the decision. I just make that point.

Anyway, his four points in two minutes. Number one, he said the definition of a reasonable rate of return is in paragraph 5.49 of the decision and that is that an undertaking will require a financial incentive to engage in the activity of supplying a good or service as a return of capital invested and/or as a reward for taking on any risk associated with these activities.

That is simply wrong in law because paragraph 249 of United Brands does not say that excess is to be judged by reference to what an undertaking would need to incentivise it to enter the market, the benchmark is the normal competitive price. As I said, it is an evidence-based or empirical benchmark, it is not a theoretical, finance theory benchmark.

That is one of the main reasons why I explained in my closing submissions that Mr Harman's conceptual framework just did not work as a means of justifying the 6 per cent in this case. His conceptual framework is a purely theoretical construct which does not correlate to the way in which prices are set in this market.

I also explained why, even as a theoretical construct, there are problems with it and that is in my closings submissions. But my basic point here is it

does not relate to the way that prices are actually set in the market.

So that is point one: the benchmark for reasonable rate of return in the decision and in Mr Hoskins' closing submissions is the wrong one.

Point two, he said the choice of 6 per cent is justified by absolute margins. Short answer: no, it is not. The absolute margins on a product tell you absolutely nothing about where the ROS should be set unless you are relying on Mr Harman's theoretical framework. But with apologies for making the point again, it is clear from my cross-examination of Mr Harman that his theoretical framework was not fit for this purpose.

And that is an economic point on which we have had economic evidence on both sides, cross-examination of the experts, and Mr Hoskins has provided no explanation at all of why, contrary to everything I have said and everything Mr De Coninck has said about this, it is still relevant to look at volumes and therefore absolute margins in order to derive the ROS.

So just to summarise once more, the only reason why the ROS would vary according to volumes is if Mr Harman's theory of the inverse relationship between ROS and volumes is correct. But if the CMA is

abandoning that conceptual framework, which they seem to have done in their closing submissions, then the economic support for their claim that it is necessary to look at absolute returns and volumes falls away, and there is then just an assertion which is not founded on the evidence and which our economic expert has said is simply not correct. There was no recognition of this in Mr Hoskins' submissions yesterday, or indeed any attempt even to engage with this point.

So that was his second point.

Point three. The other indication for the rate of return, he said, was Flynn's activities in relation to Pfizer because if 6 per cent is right for Pfizer then it is generous for Flynn. That is what he said. So what is being said is that if 6 is right for Pfizer, because they have not impugned it, so he is basically saying if we win on the 6 per cent for Pfizer then we also have to win on the 6 per cent for Flynn.

But this 6 per cent for Pfizer, therefore 6 per cent for Flynn, is not in the decision. What the decision says is that Pfizer's absolute rate of return under a 6 per cent ROS is X, and because Flynn's absolute rate of return under the same ROS is more than X that must be generous to Flynn. But that is back to the absolute profits point, and if absolute profits are not relevant

for deriving the ROS then this point about Pfizer making so much, therefore if Flynn makes more than that then that is generous, that falls away.

So Mr Hoskins is trying to run a different point now. He is trying to say if he gets home on Pfizer's ROS then ours should be the same and that point is absolutely not in the decision. And it is a bad point anyway because what he is effectively saying is that the ROS for the generic supplier of the product, ie the undertaking that puts the product on the market and has the marketing authorisation, my client, should be benchmarked to the ROS for the manufacturer of the product. But he has no evidence at all that this is how prices are set in generic markets or actually even any market.

So that was his third point.

His last point, he mentioned the PPRS. In about ten seconds he said there was not anything to be gained from addressing it and he was not going to deal with my points about Mr Williams' evidence. Well, that speaks for itself.

Moving on then from the ROS rate to cost allocation. Again this is an issue which attracted a lot of economic evidence and we addressed it in detail in our written closings and in my submissions on Wednesday. According

to Mr Hoskins he had just two points to make. The first was that a volume-based approach was reasonable because it allocated 20 per cent of Flynn's common costs to the product even though it was one of a larger number of products in Flynn's portfolio. In my submission that is an utterly hopeless point. Simply dividing the common costs between the products would be a completely unreasonable approach and it would hardly be a cost allocation at all. So one cannot say his allocation is reasonable because an even more unreasonable approach makes it look okay.

Mr Williams, in his third report, explains very robustly why simply doing a division like that is not a meaningful approach. And it is very telling that after all the detailed evidence on cost allocation it seems to be the CMA's best response and the best support they have for their cost allocation method which, as I have said, is something that is never used in the industry and leads to arbitrary and very odd results.

Mr Hoskins' second point was that Mr Williams' sensitised approaches were wrong because they employ an enlarged cost pool that is not actually all common costs. But that point is just wrong. Cost allocation is a different issue to the cost pool. The sensitised approaches that Mr Williams did do not assume the

enlarged cost pool at all. It is true that some of the calculations, and I took you to some of them, change both the cost allocation and the cost pool.

For example, the calculations where Mr Williams assumes the 6 per cent ROS is uplifted by the MOT, and then he also used the enlarged cost pool because he is doing a kind of PPRS approach, and in that he changes both the cost allocation and the cost pool and, by the way, he also uplifts the ROS.

But he is showing what you do if you aggregate approaches. He is not saying: with my sensitised approach you have to use the bigger cost pool. In fact, the contrary. In his 21 per cent example he accepts that you do not use the bigger cost pool, and the pages I took you to, paragraphs I think 57 and 58 of his third witness statement, if I am right, with the big tables on the 21 per cent ROS, those do not use the bigger cost pool. And in that case he had done a base case analysis and his most conservative sensitised analysis to make the most extreme. So that was divorcing the issue of the sensitised analysis from the cost pool.

So Mr Hoskins' second point is wrong because he seems to have misunderstood Mr Williams' evidence on this.

The final point on cost allocation is just

a footnote and it relates to my errors note. Mr Hoskins at the start of yesterday drew the tribunal's attention to a single point in my errors note relating to his paragraph 243 and said, well, if you look at what Ms Bacon says about it, it shows she is cherry-picking the evidence, not me.

I am assuming he took you to that because he thought that was the best point he could make on my errors note, but what he said actually makes my point for me. The point in question was about the PPRS controlling circularity, and that was the point that he put to Mr Williams by reference to Mr Harman's evidence. You might remember he said, well, Mr Harman says circularity does not arise under the PPRS because it is controlled at a portfolio level. And Mr Williams gave a detailed explanation. He said, well, I think Mr Harman was just looking at one line of business, and if you have one line of business then cost allocation is not an issue because it all goes in the one column. But of course once you have more than one line of business then circularity could be an issue because you have to allocate between different columns.

What then happened, and I need to find the relevant passage in the transcript. I do not think we need go to it, it is page 30 of Day 6. What then happens is

Mr Hoskins asks Mr Williams:

"So if we restrict Mr Harman's observation to branded products that fall within the PPRS you would agree with him?"

And the answer comes back:

"Yes, because they are looking at -- the Department of Health would be looking at a single column."

He was just saying what he had already said.

So I put the longer and more detailed explanation on the transcript because that actually showed what his answer was. If you just cherry-pick the second of Mr Hoskins' questions where he says, ah, so if we restrict Mr Harman to the branded products, if you just cherry-pick those lines and look at those in isolation you do not understand the evidence the witness was giving. And that was the point I made on the errors note, you need to look at the longer passage to understand what his evidence was on the point. And as I said, that was just a footnote on cost allocation.

Mr Hoskins' only other point on cost plus analysis was his paragraph 252 point that he gets home even if we are right about all of the parameters, even if you do 21 per cent revenue and so on, and you know my submission on that. JJB does not get him close to being able to say he should be able to run this point now with

no analysis of that at any point in time until a single sentence in his closings submissions at the eleventh hour in a four week trial.

The next point I wanted to make concerned comparators. There was a lot of debate about whether Phenytoin is or is not a niche drug and, in our respectful submission, that misses the point. It is not whether Phenytoin is a niche drug or not, but whether looking at other generics is or is not a good comparator for Phenytoin. For that we need to go back to the basic benchmark in paragraph 249 of United Brands which is what there would have been under normal market conditions.

If it is the case that one can say that overall the returns made by other generic companies are an indicator or prima facie good information of what a generic drug on average will make under normal market conditions, then it does not matter if Phenytoin is niche or not. Because if it is a niche product for some reason, then we know from Mr Williams' evidence that it would be expecting a higher than average return. So looking at an average generic weight, as I said before, it is conservative.

I think where Mr Hoskins arrived at yesterday was saying that he thought Phenytoin was not niche but was

somehow sui generis. But that does not help him either, because the only sui generis thing about Phenytoin compared to any other bog-standard generic product is the narrow therapeutic index point and continuity of supply. But in all other respects Phenytoin is the same as any other generic. As I said in my submissions, any other generic does have an established track record. That is the whole point of there being a generic. You get your piggy-back marketing authorisation on the basis of the referenced product's track record of efficacy and safety and a generic does typically come on to an existing market.

So the real point of difference is the NTI and continuity of supply point. But how does that make Phenytoin different? According to the CMA, it means that Flynn has a captive market and is not exposed to so much competition. And I have explained why that is wrong as a premise. But even if the CMA is right about, and I am presuming they must have been to some extent right about that if we are even looking at abuse, because if they were wrong about that we would have succeeded on dominance. But even if the CMA is right about that, that would mean again that looking at the average of generic comparators which were not subject to the same conditions was a good comparator because it is

doing precisely what paragraph 249 of United Brands tells us should be done, which is to look at a counterfactual of what would happen if there is normal competition.

So the CMA's premise is: Phenytoin is not normally competitive, that means that all generics are not good comparators. But my response to that is no, they are good comparators, because you do want to find out what would happen in normal competition and the starting assumption needs to be that other generics are normally competitive.

The only reason why looking at generic averages would not be a good comparator, ie a good thing that would tell you what the counterfactual normal competitive ROS should be, would be if those generics that we are comparing Phenytoin to were themselves distorted by there being a load of products that were not subject to normal competition. But the CMA does not have any evidence that that is the case and it is not even suggested that that is the case. And in fact the BGMA document that Mr Hoskins took you to yesterday at H2, tab 42, he took you to paragraphs 2 and 3 of that document, that said that most generics are subject to normal competitive forces, and it was just a few that the document referred to as somehow being not subject to

normal competition.

Just another footnote point on generic comparators, but it does not mean I need to take you to a document. Mr Hoskins again mentioned the indemnity point and I think we actually ought to go and look at the indemnity to see what a big point this is. It is at G1, tab 53. It is clause 18 on pages 15 to 16. You will see at the bottom, 18.1, "Supplier Indemnity", and 18.1.1 and 18.1.2. So that is the indemnity.

This is a very ordinary indemnity clause --

MR HOSKINS: That is evidence, I am sorry.

THE CHAIRMAN: This is an indemnity clause.

MS BACON: This is the indemnity clause. You can see what it says and what it does not say. As I said in my closing submissions, if the CMA wanted to make anything of this at all, they would have had to ask whether this was an unusual clause to have in this sort of an agreement. But they didn't put that question to either of the two people who could have answered it, namely, Mr Walters and Mr Davies.

The other point I wanted to pick up on then, comparators, was the wonderful outlier analysis. Mr Hoskins tried again to avoid dealing with the economic evidence on this by saying that there is this great technical debate, statistical approach, et cetera.

But ultimately all this outlier analysis shows is that the CRA's comparators are not good ones for identifying a reasonable ROS for Phenytoin. Again, unfortunately trying to brush the economic evidence under the carpet is not possible and you can see this from what Mr Hoskins then went on to say.

If I can ask you to turn to page 145 of yesterday's transcript. So the blithe skipping over the economic evidence is at lines 9 to 11 where he says:

"It is a wonderful technical debate/statistical approach et cetera."

Well, I would not describe all the large number of economic reports on this in those terms myself.

But then he goes on to say at lines 17 to 19:

"If you take account of factors which are relevant to looking for the relevant ROS, Phenytoin does not fit within the pack. That is simply where we take it."

So his argument for why Phenytoin does not fit is that if you take account of factors which are relevant to looking for the relevant ROS, it looks like it is an outlier. But that comes back to the question: why is it that volumes and absolute margins are relevant? And that again comes back to the debate between Mr Harman and Mr De Coninck. So it is a matter that turns on the economic evidence, he cannot just skip over that and not

look at it. Without Mr Harman's theoretical framework, there is not a reason why volumes and absolute margins are relevant to comparing profitability in an excess analysis and Mr De Coninck says categorically they are not relevant.

MR LOMAS: He says the linkage is weak, he does not say there is no linkage. On the theoretical framework.

MS BACON: Even theoretically the conceptual linkage is weak. But he says more than that --

MR LOMAS: Right, but not zero.

MS BACON: The actual theory is wrong because he says one actually looks at percentage margins.

MR LOMAS: I understand that.

MS BACON: So, yes, the theory is wrong anyway because of the weak link, but he says anyway one does not do it like that, what is relevant is looking at percentage margins. And he makes the point about the ROS and the WACC and tending towards the -- or not, as he says. This is the point about whether the ROCE would tend to the WACC in anything but a competitive --

MR LOMAS: In ideal conditions.

MS BACON: Exactly. So there is a great deal of economic learning on that and one cannot simply skip over that and say, right, I am going to brush that under the carpet. There is this wonderful debate, but here I am,

I am jumping to the conclusion of it all and saying, well, it is therefore relevant to look at volumes.

MR LOMAS: But there is also a risk in oversimplifying it.

MS BACON: Well, he was over simplifying. I am perhaps over-simplifying now, but I did set out in detail in my closing submissions the series of reasons why Mr Harman's conceptual framework was not fit for this purpose. There are a number of reasons. I read through all of those with Mr Harman in detail in cross-examination.

So I think we have made our position quite clear, and we have set out all the references. It does come down to this debate between Mr Harman and Mr De Coninck. Ultimately Mr Hoskins seeks to not rely on any of his economic evidence. That is his choice. But he is not saying: I am right because of Mr Harman's conceptual framework, and he has not engaged with my reasons why that conceptual framework does not work in this case. He just says: there is this nice debate, volumes are relevant, and therefore if you look at volumes Phenytoin is an outlier.

MR LOMAS: I do not think he has abandoned his economic evidence.

MS BACON: Well, maybe he is not wanting to talk about it too much which seems to be the case. But unless he does

grapple with that economic evidence, he is just making an assertion, so he has to rely on it in order to make good that assertion. And in our submission it is telling that he has not grappled with the points we have made in our closing submissions about that.

So that was the last point I wanted to make on the substance, and just one short point therefore on penalty, and then I hope that leaves time for Mr Hoskins' response on Imperial Tobacco.

Penalty. Mr Bailey paraphrased our case as being that the precise analysis advanced by the CMA must be reasonably foreseeable in order to establish intent or negligence. That is not quite what we are saying. What we are saying is that what must be reasonably foreseeable is that the pricing conduct would distort competition, and our point is that the many difficulties in the CMA's case of which you have heard a lot over the last four weeks, and the frequent shifts in the CMA's own approach, means that it was not reasonably foreseeable that Flynn's prices, benchmarked as they were to tablets, would be characterised as excessive and unfair.

Unless the tribunal has any further questions, those are my submissions.

THE CHAIRMAN: Thank you, Ms Bacon. Mr Hoskins.

Reply submissions by MR HOSKINS

MR HOSKINS: Thank you, sir. I am just going to respond to the Imperial Tobacco point because that is a new legal point. If you still have Imperial Tobacco to hand, if you could perhaps turn that up, please. The suggestion that any of the new arguments put in this case are similar to the new allegations of infringement that were put forward in Imperial Tobacco is misplaced. Just to make good that sort of distinction between a new alleged infringement as opposed to a new argument going to an infringement in the decision, if you could look at paragraph 55 of Imperial Tobacco, you see the nature of what was at issue in that case:

"In our judgment it is not open to the OFT now to argue that a restraint which is significantly different from any of the restrains set out in paragraph 40 is a restraint that was found to be part of each Infringing Agreement and subject to the theory of harm set out in the Decision."

You will immediately I hope see the distinction between trying to rely on a significantly different restrain to establish a breach of the competition rules and, in the context of a trial which is a moving feast, if I can put it like that, relying on new arguments that

may have not appeared specifically in the decision, but new arguments which go to precisely the same allegation of infringement which is in the decision. There is clearly a difference, and Imperial Tobacco is clearly the former and not the latter.

If you go to paragraph 66 and 67. 66, I won't read the earlier paragraphs but:

"This approach was also applied by the Tribunal in JJB Sports plc v Office of Fair Trading [2004] CAT 17 (at paragraph 284) where the Tribunal said that provided each party has a proper opportunity to answer the allegations made and that the issues remain within the broad framework of the original decision, the Tribunal should determine the appeal on the basis of all the material placed before it during the appeal."

Then 67, because of course they did not allow the OFT to change its case in Imperial Tobacco:

"Nothing that we say here is intended to cast doubt on the potential for flexibility described in those cases. We do not, however, regard those statements as authority for the proposition that wherever evidence emerges during the trial that indicates that an infringement of the competition rules has been committed, the Tribunal is entitled to make a finding to that effect, even if that infringement has not formed

part of the decision and is not therefore addressed in the pleadings served in the appeal."

So that distinction between an argument going to an infringement which is in the decision and a new infringement I think hopefully comes out very clearly from those passages.

In relation to the weight that Mr Brealey sought to put on Imperial Tobacco, if I can just give you some references to the decision. I am not going to detain you at this stage in this part of the trial. The suggestion given is that the CMA just turned a blind eye to comparators that were proposed. If I can just ask you to turn up the decision. First of all, if you could turn to 5.496. 5.496 to 5.518 is where you find the consideration of tablets as a comparator.

Mr Brealey gave you the letter about what steps they understand were taken in relation to tablets and very fairly said that, if I had anything to add, I could. As I said, we have prepared a note in the time available. As I say, these are the key steps that were taken. I cannot hand on heart say this is exhaustive, but this is certainly what we consider to be the key steps taken by the CMA in the investigation in relation to tablets. (Handed).

MR LOMAS: Tablets, not AEDs?

MR HOSKINS: I am going to deal with each of them separately. This is tablets. I am not going to take you through that now, partly because I have not had a chance to read it, but obviously I extend the same courtesy to Mr Brealey and his team; if he has anything to add to that, he could and should do so in writing.

In relation to other comparators in the decision, if you could turn to 5.103 to 5.106, this deals with comparators that were put forward by Pfizer in the investigation relating to other companies' ROS rates. I am only going to give you the references now. Then 5.163, the CMA has considered the following possible benchmarks for reasonable rates of return Flynn's internal ROS, other companies' ROS rates, allowable ROS under the PPRS. So the comparators that were put forward by Flynn in the investigation were considered, and you see the substantive consideration in the decision. First of all, if you go to 5.187 to 5.192. That is consideration of Flynn's internal ROS, which was one of the comparators put forward by Flynn, and then 5.193 to 5.198:

"Flynn submitted to the CMA that its margins on Flynn's products are entirely consistent with those in the industry."

And you see the consideration at those paragraphs.

In relation to specifically other AEDs as comparators, Mr Brealey very fairly accepted that that was not put forward by Pfizer as a comparator during the investigative process. In relation to Flynn, Ms Bacon said it was not central. Certainly that clearly is the case. That may itself be an overstatement. I cannot remember if you actually looked at the oral hearing. She gave you the reference to J2, tab 35. If you quickly look up the reference she gave you; J2, tab 35. At page 26, it was lines 7 to 9. I was not there like Ms Bacon, but you have a 74-page transcript of an oral hearing and the only reference that -- sorry, page 26. The only thing that is said to be Flynn raising other AEDs as a comparator is what is said at lines 7 to 9. That is it.

There was a slide and the slide set out some treatment prices for different AEDs. That is what went with those lines. That is not sufficient to now come to this appeal, Pfizer having put in more detail, to say this was something you obviously should have looked at because we put you on notice.

There is one final point, just as a correction. It is probably mea culpa on my part. I do not want to leave you with a false impression. If you have Mr Brealey's reply note, point 10. Page 8 at point 10.

It is the transcript extract, and just to -- it is not a very elegant way of putting it. You remember it is about the economic value, not that it has to be one pie. It has to be split up. The transcript reads that Mr Hoskins said:

"That alternative is in the decision."

Either I misspoke or it was not picked up, because what I meant to say and what is correct is that alternative is not in the decision. I do not want to leave you with a false impression of what I said. I apologise if I misspoke.

THE CHAIRMAN: The phrase "misspoke" carries a certain amount of baggage.

MR HOSKINS: I am trying to take the sting out of it, to be fair.

THE CHAIRMAN: You wish to correct what you said, if that is what you said.

MR HOSKINS: I am happy if it is a mea culpa. I always knew that it was not in the decision. I did not intend to mislead you or anyone else, and I apologise if I did.

THE CHAIRMAN: Mr Brealey?

MR BREALEY: In answer to the document on the tablets, it is a very simple point. Paragraph 1B appears to be the only Section 26 notice to a manufacturer. That is Teva. In the decision at 3.453, page 177, the CMA does know of

other tablet manufacturers: Teva, Wockhardt and Milpharm. We have referred to others but they do know of other tablet manufacturers. That is Teva, Wockhardt and Milpharm. So two points from this tablet note. The first is that it does not appear that any information was sought from those tablet manufacturers and, secondly, it also appears that the CMA never followed up with any further information requests from Teva. So if you remember, the possible request would be not particularly onerous. It was not onerous at all because there was no follow-up. They never sought information in relation to Teva's prices and sales volumes.

THE CHAIRMAN: Mr Hoskins, I think we have to ask you, in view of what we have learned over the last day or so, it is correct, is it not, that the CMA has changed in some respects the argument that it began this trial with?

MR HOSKINS: Changed the argument? Have we added some arguments?

THE CHAIRMAN: It has added some alternative arguments.

MR HOSKINS: Yes.

THE CHAIRMAN: And it has, how can I say, moved the position of certain concepts in the analysis as compared with how you began.

MR HOSKINS: Yes.

THE CHAIRMAN: Yes. That is clear, is it? You do not

regard that as changing your case? Or do you regard that as changing your case?

MR HOSKINS: No. It would be very odd if the CMA came to a hearing of this nature and did not react to, for example, live evidence or questions from the tribunal. You would be infuriated if I had stood here and just blithely trotted out what I said at the start. So has there been development in light of the evidence and in light of the tribunal's questions? Absolutely. Is that a legal problem or a procedural problem? Absolutely not. You see the distinction I took you to in Imperial Tobacco.

THE CHAIRMAN: So you are not seeking to amend your defence in any way?

MR HOSKINS: If there is a problem in terms of legal arguments. But the reason I am hesitating is, in a pleading in a civil case, the defence actually sets out the facts you rely on but not legal arguments. So in a civil trial, if you want to put a new factual case, you would amend, but you would not amend to put new legal arguments. So that is why I am hesitating. I am not sure -- I appreciate this is different from a civil trial.

THE CHAIRMAN: It is a little.

MR HOSKINS: Do I want to change my defence to add the legal

arguments that we are putting? I think the answer is "no" because I do not think it would be appropriate or we should have to.

THE CHAIRMAN: So insofar as the arguments you have put to us, assuming they are arguments and not evidence, insofar as that is not covered by the decision, you are putting propositions which the decision does not itself canvass, you are saying that we are able to take that on board and make a decision ourselves on the evidence that has been provided, is that correct? That is your position?

MR HOSKINS: I absolutely am saying that, and I rely on JJB and I rely on Imperial Tobacco itself for that proposition.

THE CHAIRMAN: Right. So you are not asking us to do anything other than decide the case on the basis of what we have heard.

MR HOSKINS: That is right.

THE CHAIRMAN: Is that true for everybody else? Ms Bacon?

MS BACON: Yes, but I think we would ask you to do something different from what Mr Hoskins wants you to do.

THE CHAIRMAN: I am trying to create an umbrella of agreement. Mr Brealey?

MR BREALEY: Clearly in light of the evidence, the tribunal can quash the decision and allow the appeals. But what

our point is going to is that now the case has undoubtedly changed. If you look at the way that Mr Hoskins opened the case and it is the defence --

THE CHAIRMAN: I think we have the point that that is what you think. What I was asking was: are we in a position to make a decision on the basis of what we have heard?

MR BREALEY: You are in a position to quash the decision on the basis of the evidence you have heard, yes.

THE CHAIRMAN: So quashing a decision includes making a decision.

MR BREALEY: Yes.

THE CHAIRMAN: Is there anything else that we should be covering? I hesitate to say "that concludes the proceedings". We shall be reserving judgment, as I think I mentioned earlier.

MR BREALEY: I fully understand.

THE CHAIRMAN: I hope you are not going to ask how long it is going to take us to write it because the answer will be non-committal at this stage. We are aware of the need for speedy justice.

MR BREALEY: Thank you.

THE CHAIRMAN: In which case, I would like to thank everybody for the pretty much uniformly courteous and occasionally enthusiastic way in which the case has been presented. I think we have had the benefit of some

excellent written submissions which have been very helpful, and not too long despite my remonstrances. There is always room for improvement. But I think we have had the case argued very well. Thank you very much.

(1.05 pm)

(The Hearing Concluded)

INDEX

1

2