IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st 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 3

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)

Wednesday 1st November

(10.00 am)

HOUSEKEEPING

THE CHAIRMAN: Good morning.

MR BREALEY: Good morning. Just out of courtesy I wanted to mention confidentiality. I know there has been a flurry of letters. I should also inform the Tribunal that the Department emailed Pfizer and Flynn yesterday asking for copies of the daily transcript.

THE CHAIRMAN: Do you mean the Government Legal Department?

MR BREALEY: Yes, sorry. They have asked for copies of the transcripts on a daily basis so they can check whether they regard anything as confidential or not. Clearly, ultimately it is a matter for the Tribunal and also for the CMA. We have not objected to that, so we've agreed that they can have the transcripts, obviously subject to the Tribunal's direction.

THE CHAIRMAN: Have you provided it to them?

MR BREALEY: Not yet, because I think that they were then going to write to you to seek permission. Having got our agreement, they were going to write to you, but I thought it right that we should tell you that we have agreed to --

THE CHAIRMAN: Thank you. That's very kind. Has anybody else received a similar letter?

MS BACON: We were also asked and we don't have an objection with them doing that.

MR BREALEY: It is obviously regrettable that they still put all their efforts into this confidentiality rather than actually the merits of the case but, you know, that's where we are, and we have at least agreed -- I don't know about the CMA, I don't believe they'll object to --

THE CHAIRMAN: The CMA?

MR BAILEY: The CMA was also copied to that email and has no objection to the Department having copies of the transcripts.

THE CHAIRMAN: I think, I suppose I'm talking on the transcript at the moment, the correct procedure would be for the Government Legal Department to apply to the Tribunal. We have written to the Government Legal Department this morning in reply to their previous letter, so they would probably want to read our reply before they make any further requests, and that request will be considered in the usual way.

MR BREALEY: Out of courtesy we have informed the Tribunal that we think we are agreed and therefore we can take it.

THE CHAIRMAN: Yes, we appreciate the courtesy. Thank you very much.

Mr Hoskins, good morning to you.

Submissions in opening by MR HOSKINS

MR HOSKINS: Good morning. The submissions I'm going to make are going to follow the order of our skeleton argument. I'm going to avoid simply rehashing --

THE CHAIRMAN: I've read your skeleton argument.

MR HOSKINS: I'm sure you have. Just in terms of following where I'm going, I will cross reference the skeleton at various stages so we can keep track of where we are.

In relation to the introduction, there's actually two bases upon which Flynn and Pfizer's prices can be shown to be abusive. The first one is the absolutely classic United Brands test, and you've seen that the CMA has done that and the decision, I'll obviously come back to that at various stages this morning and deal with the law and some of the facts and economics. The other important marker which demonstrates abuse in this case is the comparison over time of the same product, Phenytoin capsules. I'd like to spend a bit of time now dealing with the question of well, what relevance does that comparison over time have?

The first point I'd like to deal with is the loss-making point, because yesterday Ms Bacon on behalf of Flynn accepted correctly, as she had to, that a comparison of the same product over time could be relevant to the assessment of abuse. But she said

except when it was loss-making, if it was loss-making, suddenly it becomes irrelevant. That attempt to create an exception to the relevance of the comparison over time is clearly flawed for the reason given by Mr Lomas.

Assume you're selling a product for a pound, when two pounds is the break-even price. If you then increase the price of the product to £100, it's clearly legitimate to have regard to the prior price when considering abuse, and indeed, if needs be, to the break-even price. It doesn't suddenly remove the comparison over time from any relevance at all because the starting point was loss-making.

If you can look at our skeleton argument, paragraphs 13 and 14, you'll see how the loss-making point has actually played out in the proceedings, because Pfizer had originally raised the point: Phenytoin was loss-making. And the decision, paragraph 5.317, found that, even if one accepted Pfizer's submissions as to the fact that it was loss-making and the nature of the losses, then all the losses for a period of January 2007 up to September 2012, i.e. pre- genericisation, all of those losses would have been recovered within two months of the price increase. So that put the nature of the alleged losses into context.

Pfizer has not at any stage challenged that analysis

in the decision. What you now find is that they've actually disavowed any reliance on the loss-making point as a justification for the level of their post-September 2012 price. You get that from their reply. We've quoted the whole paragraph in our skeleton argument at paragraph 14.

"The CMA repeats yet again [with bold italic emphasis] the point that Pfizer's past losses would have been recovered relatively quickly with its new prices. This, too, is legally irrelevant to the question of abuse."

Well I've dealt with that, Ms Bacon accepted it could be relevant. Important words:

"Pfizer does not rely on its historic losses to justify the current price levels."

So there's the disavowal, because they know it's a hopeless point because the losses were too small in light of the elevated prices. They say:

"Rather, it raised the issue of losses in order to explain why it took the product out of the PPRS."

So it is a reason for saying why did we enter into this arrangement with Flynn? Because we wanted to make the product not loss-making, but when it comes to looking at the level of the price, they do not rely on the fact it was previously loss-making to justify the

new level, because the losses are simply too small, given the new price.

Now, what use can we then make, having established the comparator over time is relevant, what use can we take of it in the analysis? We've put forward a number of comparisons over time with the same product, and you see these at paragraphs 7, 8 and 9 of our skeleton argument.

The first one, so it is at the top of page 5 of the skeleton, it compares Pfizer's pre-September 2007 prices to pharmacies and wholesalers, with Pfizer's post-September prices to Flynn. So just looking entirely at the Pfizer position.

You'll see the eye watering level of the increase, it is 783 per cent up to the maximum of 1615 per cent. These are enormous increases.

Paragraph 8, the table there compares Pfizer's pre-September 2012 prices to pharmacies and wholesalers, with Flynn's post-September 2012 prices to pharmacies and wholesalers, and there the levels of increases become even more astronomic. They're all over 2000 per cent.

The final table, slightly harder to follow, but it compares on the one hand the difference between Flynn's post-September 2012 selling prices and the prices Flynn paid to Pfizer, so that's effectively Pfizer's -- sorry,

Flynn's gross margin. And it compares those with Pfizer's pre-September 2012 prices to pharmacies and wholesalers. You'll see the increases there range from 773 per cent to 1879 per cent. The figures speak for themselves in terms of scale.

THE CHAIRMAN: Ninety-seven.

MR HOSKINS: I'm sorry. Ninety-seven.

Our submission as to how you use these comparisons is as follows. First of all, I'll come back to these points in the context of submissions, I just want to set the scene now for this. Our submission is that you can refer to these price increases, in the first place, to confirm dominance because there were large price increases that were maintained over time with no serious effect on volume, but I'll come back and develop that when we look at market definition and dominance.

We submit you can also use this analysis as a freestanding test for abuse. Again, I'll come back and develop that later, but we've set out in the introduction of the skeleton argument, at paragraph 17, an extract from the Court of Justice judgment in Sirena, 1970.

THE CHAIRMAN: Yes, I read that. That's a very old case.

MR HOSKINS: It is an old case.

THE CHAIRMAN: It is about parallel imports. And that's the

1 1 paragraph that talks about pricing. I'm not sure what
2 you want us to make of that.
3 MR HOSKINS: I'll submit because it is there in Sirena now,
4 and it comes up again, a similar point is made in Albion
5 Water, and the same point is made by the Advocate
6 General in the AKKA case. I'll come to deal with this in
7 more detail, but we're not simply relying on Sirena.
8 When we look at the Advocate General in AKKA, you will
9 see that he says he actually does it all as if he were
10 doing the United Brands test, but he says, in relation
11 to the first limb of United Brands, it is relevant to
12 look at comparisons over time for the same product. So
13 that's what we're doing. If he says that that
14 comparison over time indicates an excessive price, then
15 for him, the second limb of United Brands is: is it
16 objectively justified?
17 Now, take that legal test, which is in the Advocate
18 General in AKKA, and compare it with Sirena. It's the same.
19 First stage: are the levels of the prices so high that
20 they indicate excessiveness? If so, is there an
21 objective justification?
22 We do submit that there is authority -- Sirena, I'll
23 show you Albion Water later, and the Advocate General in
24 AKKA -- to show that reference to the extent of prices can
25 itself be, as recognised in United Brands itself, one of

the alternative ways of identifying abuse.

In relation to the question of objective justification, whether one is looking at it for the purpose I've just said or more generally, Ms Bacon disavowed any reliance on the objective justification when you put the question to her. It's important to see what the basic facts are and what is not disputed. So if I can ask you again to look at our skeleton argument, the key facts and facts that are not disputed, paragraph 2: the product was first marketed in the UK in 1938 long off patent, i.e., decades off patent. Common ground.

After genericisation, if you compare the route to market pre- and post-genericisation, nothing changed except that Flynn placed fortnightly orders. The only thing that changed on genericisation was the price; the route to market was the same except for Flynn placing the fortnightly orders.

Paragraph 10, the appellants try to make a virtue of it, but again it is common ground, it is not disputed, that the post-September 2012 prices were not set by reference to the costs of the product. No attempt was made to look at whether the prices were justified in relation to costs. The case is "we looked at the tablet price, we discounted". So no reference to costs.

Paragraph 11, the reason for the price increases, the reason for the new prices, was not the result of any innovation, product development, additional commercial risk or a material change in costs, and no additional benefits have been provided for patients. Not disputed.

The position of both Pfizer and Flynn is that the purpose of the increases, the purpose of the new prices, was to permit them both to earn profits. It was a purely profit making exercise. Again, common ground. Not disputed.

We say it is, can be used, as a freestanding alternative to United Brands, to show unfairness, and I'll come back to that. You can also use it as part of United Brands. So you can use the comparison over time, for example, to consider excessiveness. You can use the comparison over time with the same product when you're looking at unfairness. You can use it in the classic approach.

We say quite obviously, if one is looking at, for that latter purpose, the before and after Phenytoin analysis clearly corroborates the classic United Brands approach that the CMA has carried out.

That's what I wanted to say by way of introduction. I then wanted to turn to market definition and dominance, so this is page 11 of our skeleton argument. Let's just

revisit what the decision actually finds the relevant markets are, at paragraph 28 of the skeleton.

They are narrow markets. First of all, it's the manufacture of Pfizer manufactured Phenytoin sodium capsules distributed in the UK, including parallel imports, and obviously that's relevant to Pfizer, and secondly, the distribution of the Pfizer manufactured capsules in the UK, including parallel imports, which is the market relevant to Flynn.

It's important to note that the decision finds that Phenytoin sodium tablets do not fall within the relevant product market, and that is not challenged, in either of the appeals. The only challenge in the appeals to the market definitions are that NRIM capsules should have been included in the relevant product market. So let's start with the legal principles in order to assess that challenge. I don't think any of these are controversial; they've not been challenged, so I'll just take them from the skeleton.

The fact there is some degree of substitutability and/or price competition between products is not sufficient in itself to prove they're in the same product market, and there is some old friends cited there.

Hoffmann-La Roche:

"The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market, insofar as a specific use of such products is concerned."

So if there is effective competition: in the same market. If there is some degree of competition but less: not in the same market.

Aberdeen Journals:

"Each case will depend on its own facts and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions. Do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market?"

Then the Commission decision on Servier, if I pick it up about halfway down that quote at the end of the line, it begins:

"When products such as pharmaceutical products can be broadly used for the same purpose, but different terms of price, quality, consumer preferences -- rather significant attributes -- the products are considered to be differentiated."

"Although differentiated products may 'compete' in some dimensions, a relevant market in competition cases should only include those products that are capable of significantly constraining an undertaking's behaviour and of preventing it from behaving independently from competitive pressure."

This case is not a binary case, was there any substitution at any stage between NRIM and Phenytoin? It is not binary in the sense of "was there any reaction in prices" because there clearly was, and the decision recognises that. The question is whether those observed effects, in terms of volumes and prices, indicated sufficient competition to put the products in the same market.

Now, the decision finds the markets looking at a number of pieces of evidence. You might have thought from Mr Brealey's opening remarks that the whole thing hinged on the section 26 notices, but that's obviously not the case, one only has to look at the decision to see that. Section 26 notices are part of the analysis, but they are not the whole analysis. You have to look, classic phrase, at everything in the round.

The fact that, when I go through these headings, there may be some indicators within these headings that actually point the other way doesn't, of course, mean

suddenly you find NRIM is in the market. You look at all the evidence in the round, all the categories and all the pointers within the categories. That's obviously the proper approach.

First indicator: top of page 13 of our skeleton. A classic indicator. The fact that Pfizer and Flynn were able to profitably sustain -- I emphasise that because it is sustain over time -- average selling prices which were dramatically above the pre-September 2012 prices, so maintaining high prices over time, whilst at the same time maintaining high market shares, is a strong indicator of dominance. Because if there was an effective competitor, you'd expect a vast increase in prices, as we've seen, to lead to a corresponding reduction in volume if there was genuine competition to phenytoin capsules and, as we see, that just didn't happen.

The second element establishing market definition: the characteristics of the product and the official guidance. I think you're well aware of that, so I can take this very quickly.

Phenytoin, and this particular product, has a narrow therapeutic index, NTI. That's common ground. See first Walker, paragraph 5.4. The product is characterised by a concept known as 'non-linear pharmacokinetics'. Also

common ground. Same paragraph of Professor Walker. Since at least 2004, official guidance has recommended what's referred to as 'continuity of supply'. That's once you're stabilised on a particular product, you continue to take the same manufacturer's product. You've been shown the guidelines in relation to that and we quote them.

Professor Walker, a lot of what he says is common ground, so you can pick this up at paragraph 39 of the skeleton. You see what he confirms, top of page 15.

"Since 2004 [Professor Walker says] NICE is recommending consistent supply of a particular manufacturer's AED."

Paragraph 620:

"Consistent supply of Phenytoin in some patients had long been part of BNF guidance for Phenytoin, but more prescriptive guidance came from the MHRA in 2013."

Professor Walker, paragraph 6.3:

"The main reasons for the MHRA recommendations for Phenytoin are due to its pharmacokinetics and narrow therapeutic ranges. Properties well-known to practitioners before the MHRA updated its guidance."

Then finally, second Walker, paragraph 2.3:

"November 2013, the MHRA published more specific guidance on prescribing and dispensing practice for

AEDs. For the first time, specific AEDs were referred to and categorised. The advice in relation to AEDs in category 1 of MHRA guidance, which includes Phenytoin sodium, is that patients are maintained on a specific manufacturer's product."

So that's all common ground. In relation to a question of what is the position of tablets, tablets are Phenytoin sodium, as you've heard. All these observations that are made there by Professor Walker apply equally to tablets as they do to capsules. So that's common ground.

THE CHAIRMAN: You say in paragraph 40 that you'll address the relevance of Professor Walker's evidence in closing.

MR HOSKINS: Yes.

THE CHAIRMAN: It would be quite helpful to us if you could indicate your views at this stage of the relevance of that evidence. I appreciate you're going to -- (overspeaking) --

MR HOSKINS: I am going to cross-examine him and I --

THE CHAIRMAN: You must have some idea of what -- (overspeaking) --

MR HOSKINS: I do, but really I would, there are quite a number of areas where I'm going to say to you "I'm going to deal with this after I've cross-examined", for obvious reasons. It's up to you whether you want to push me or

not, but that's the position I would prefer to take and I think it's one I am entitled to take.

THE CHAIRMAN: Perhaps you'd like to reflect on that as we've raised it.

MR HOSKINS: Well I think if I'm pushed, the big point in relation to Professor Walker is he says Phenytoin is still an effective product. That's the big point. Now that point was originally made not by the CMA, it was made by Pfizer to the CMA in a section 26 response where they said Phenytoin is no longer an effective product; it has been superseded by other products. So that's a point that came originally from Pfizer, but Professor Walker disagrees with it.

The point in relation to that is he also accepts that even although it is still an effective product, for the other reasons, there are other characteristics of the product other than effectiveness -- in particular the NTI and the non-linear pharmacokinetics -- which mean that it is no longer used or recommended for use as a first line treatment. It is only used when other treatments have failed generally as a third line treatment now, or as an adjunct.

In relation to this question of 'is phenytoin still an effective product?' Professor Walker says it is and we're not going to dispute that because he's the expert

in these things. Our point is going to be yes, but it doesn't matter because it's common ground between the parties that whilst it is still an effective product, in terms of pure efficacy, it is not a product that is recommended for use or used routinely or at all as a first line treatment or a second line treatment.

THE CHAIRMAN: Okay, that's very helpful. Thank you. Please continue.

MR HOSKINS: The third element that goes to market definition is the evidence on dispensing practice and this is obviously an important heading. Again, it is not determinative, I've already shown you the prices and volumes, etc.

The decision recognises that in spite of the guidance which recommends that Phenytoin should follow continuity of supply at the prescription level, about 90 per cent of prescriptions are actually written on an open basis. Doctors don't follow the guidance. That's recognised in the decision, you see that at paragraph 42 of our skeleton.

In practice, in terms of understanding the competition between, such as it is, NRIM and Phenytoin capsules produced by Pfizer, you've got to look at 'well what do patients actually get at the end?'. You have to distinguish between prescribing practice and dispensing

practice and dispensing gives more information, because dispensing actually dictates what is 'sold' -- I use that with inverted commas round it -- to the patient.

Now in order to obtain evidence of dispensing practice, as you know what the CMA did was, in its section 26 notices to ten pharmacy groups, they covered approximately 50 per cent of pharmacies in the UK and the pharmacies contacted accounted for over 75 per cent of NRIM's total sales. When you're looking at the extent to which there was a switch with NRIM, you'll see the significance of that figure.

It was suggested by Mr Brealey there was no following up, but you saw, as we went through them, there were a number of occasions on which when a section 26 response came back and the CMA felt it was not sufficiently clear, they did follow up with another section 26 notice. So the suggestion that there was no probing, there was simply a section 26, nothing else, is clearly factually incorrect. You have in the bundles the examples of follow-up section 26 notices.

Now, what that evidence shows is that eight of the pharmacy groups followed continuity of supply throughout the relevant period. Two of the pharmacy groups did not follow continuity of supply in the period between April 2013 to November 2013. And note the period, it

is a limited period: April 2013 to November 2013. But they both confirmed that after publication of the MHRA guidance, they did follow continuity of supply.

When you're looking at this question, the only exception to continuity of supply is two pharmacies in the period April to November 2013.

What's the evidential weight of the section 26 notices? I'll take this shortly. Section 26 notices clearly have some evidential value. We have set out in the skeleton, situations in which that has been recognised and clearly they have some evidential value because if you give misleading incorrect information in a section 26 notice, you commit an offence.

But it's a question of weight. Of course it's a question of weight. You will not give the same weight to a section 26 notice as you will to a live witness who turns up in the box and gives evidence, but when you're considering the weight to give to section 26 notices, what you'll also look to see is the extent to which they are corroborated by the other evidence. So that's our submission on what's the evidential value of section 26 notices. They clearly have some weight, it's a matter for you to decide, and in deciding what weight they have, you'll look at them on their own merits and I'm going to take you to some of them, but you'll also look

at whether they're corroborated by the surrounding evidence. That's how you deal with them.

In relation to Boots, Lloyds and NRIM, this is paragraph 48 of the skeleton, we've got data in relation to them which confirms the stories that they were telling the CMA. So if you can go now, please, to the decision, paragraph 4.143. I think I'm allowed to say these names now, you'll see the heading, "Boots' and Lloyds' purchase volumes".

"Boots' and Lloyds' submissions that they seek to ensure Continuity of Supply [that's a reference to the section 26 responses] for stabilised patients following the publication of the MHRA guidance are corroborated by purchase data set out in Figures 4.3 and 4.4 below."

You'll see that over the page. It's particularly clear in relation to Boots, where you see the spike, so the table is showing the number of NRIM packs purchased by Boots on the vertical axis over time, and there's a spike in the number of NRIM packs purchased in December 2013, of course the guidance came out in November 2013, but immediately following that, you'll see the drop. Lloyds is actually a flatter one, but you'll see the numbers of NRIM products decrease after the MHRA guidance is issued.

So there's corroboration of the section 26 replies

of Boots and Lloyds.

Then if we can look at NRIM's position and what it thinks the impact on it was of the guidance, that's paragraph 4.147. Perhaps I'll just ask you to read that paragraph to yourselves.

You'll see it's effectively making two points. After the MHRA guidance, it failed to gain any new customers that would be prepared to purchase significant volumes of the product, and secondly, they actually shelved the development plans for 25mg, 50mg and 300mg, because of the effect the MHRA guidance was having on the sales of 100mg. As you'll bear in mind, when we look at the data as we go through this, because of the fact that Boots and Lloyds in particular were prepared to dispense NRIM tablets for the period of April to November 2013, that meant that some patients did become stabilised on the NRIM product, which means that following the MHRA guidance, they continued to be supplied with the NRIM product because that was continuity of supply. So that's why it's not suddenly NRIM disappears from the market. There is then a body of stabilised patients and that's what you see in the figures.

PROFESSOR WATERSON: Can I just come back to something you said just then Mr Hoskins? You said because of the effect on 100mg tablets, they decided against

developing -- sorry, 100mg capsules, they decided not to introduce other sizes. I don't see where it says "because of that".

MR HOSKINS: Well the sentence I take that from, is you've got the first bit "NRIM has failed to gain any new customers", then they say, "NRIM also confirmed that following the publication of the MHRA guidance, it discontinued its development."

My submission is it's a natural reading, the reason why they say "following the publication of the MHRA guidance" is because that was the causative factor that led to the discontinuance, it's not simply put down as a marker as to when they discontinued, otherwise they'd simply have said, "late 2013 we discontinued." It's intended to indicate that it's because of the MHRA guidance they discontinued.

MR LOMAS: I think the causation comes from the direct quote at the end of that paragraph, doesn't it?

MR HOSKINS: Yes, it does.

THE CHAIRMAN: Mr Hoskins, for the patients that are stabilised on NRIM's products, NRIM is in a sense in the same position as you say Flynn is?

MR HOSKINS: Yes.

THE CHAIRMAN: Captive --

MR HOSKINS: It has a captive body of patients, absolutely.

THE CHAIRMAN: There is no suggestion that NRIM is occupying a dominant position of any kind?

MR HOSKINS: The market shares are nowhere near enough.

THE CHAIRMAN: Sorry, but --

MR HOSKINS: I see, in relation to its market?

THE CHAIRMAN: Yes.

MR HOSKINS: That's --

THE CHAIRMAN: Are you putting to us that the market is a narrower one than the one in the decision, which is of the dominant position is occupied over those patients who are stabilised on the branded product? Is that what you're saying?

MR HOSKINS: No, the market is defined as the manufacture and distribution of the Pfizer manufactured Phenytoin sodium capsules, so NRIM falls outside. So if you say to me, "Is it possible that NRIM is in its own market?" Answer, it may be. I'm not going to -- this is not the CMA's official position. Is it possible it's in its own market? Yes. Is it possible that its prices could be unfair if one were to look at them? Answer, yes.

THE CHAIRMAN: That does follow from your --

MR HOSKINS: It's possible, yes, but I'm not making any, not --

THE CHAIRMAN: -- (overspeaking) -- I'm just saying that does follow, doesn't it?

MR HOSKINS: Yes, it does.
THE CHAIRMAN: Very strange sort of market, isn't it?
MR HOSKINS: That's increasing -- you see that increasingly in pharmaceutical markets and you'll understand that this is a very particular market because of NTI, non-linear pharmacokinetics, and the continuity of supply principle. Once a patient is stabilised on the Pfizer manufactured product, they're supposed to stay on it. As we'll see, that's what happened in practice, even the doctors often wrote open prescriptions, the pharmacists were actually far more rigorous in complying with continuity of supply.
THE CHAIRMAN: Do you have any idea why competent, highly qualified, medical practitioners receiving guidance from a government authority on this should disregard it?
MR HOSKINS: I don't think it's actually a question for me. It's not one I can fairly answer.
THE CHAIRMAN: But it is one that comes out of the facts of this case, doesn't it?
MR HOSKINS: Absolutely. I mean, the decision, and my submissions, are based on an acceptance of the fact that 90 per cent of them did disregard the guidance.
THE CHAIRMAN: Well you have asked us to look at the dispensing stage rather than the prescribing stage.
MR HOSKINS: That's right, because you have to look at that,

because when you're looking at competition in the market, you're looking at what the patients received. I'm not saying --

THE CHAIRMAN: I remember from my pharmaceutical work, often it was said that the customer is the prescribing doctor, but not in this case it would have been.

MR HOSKINS: I think if there was -- I don't want to use the word "continuity" -- if doctors and pharmacists had the same practice, for example, if prescribing doctors all complied with continuity of supply and the pharmacists all complied with continuity of supply, there is not a problem. You don't have to ask yourself the question "Do I have to look at both stages?" It is because there is a disjunct in the approach to the guidance between doctors and pharmacists that you have to look at both. Clearly, if one were to just look at doctors, one would not get an appropriate picture of competition, such as it is, between NRIM and Pfizer phenytoin.

THE CHAIRMAN: And prescribing doctors, of course, have a further objective, which is to encourage generic prescriptions so far as possible because that's thought to be consistent with lower prices; yes?

MR HOSKINS: That is correct and that's why it is quite striking, of course, because pharmacists, the way they are encouraged as well is similarly to prescribe

generics where possible because then they get a bigger margin themselves in relation to the reimbursement price.

THE CHAIRMAN: Particularly if it is a parallel import.

MR HOSKINS: Well, parallel imports and also in relation to NRIM and Pfizer because, as we'll see, the prices almost -- there are a few limited exceptions -- Pfizer prices are always higher than NRIM, so actually the commercial incentive on the pharmacies was very much to give NRIM, but they didn't.

THE CHAIRMAN: Well some did from time to time.

MR HOSKINS: I use sufficient competition, I've accepted that there was switching, absolutely, but the very strong --

THE CHAIRMAN: We're not in a binary situation, as you have had said.

MR HOSKINS: Exactly. I'm not trying to take us back into a binary situation.

THE CHAIRMAN: We know where that fallacy leads us.

MR HOSKINS: It is actually quite striking, then, that you have pharmacists with a clear commercial incentive to distribute NRIM, but they don't. That's why I simply say you have to look at both, doctors 90 per cent open to prescriptions, fine, but the practice on the ground with pharmacies was clearly very different.

PROFESSOR WATERSON: Are you talking about the whole period here, or just after November 2013?

MR HOSKINS: In relation to what particular point, sir?

PROFESSOR WATERSON: In relation to what pharmacists did.

MR HOSKINS: Well, the evidence is eight out of ten followed this practice throughout the period, Boots and Lloyds didn't between April and November 2013, but did thereafter. So I make that distinction. We'll look at some more figures on prices and volumes over the whole period. I'm coming to that.

MR LOMAS: Are you going to pick up your SSNIP test point?

MR HOSKINS: I am.

I'd like to deal with the section 26 notices now because a lot was made about that in opening. Can I show you what Pfizer said about them in their skeleton arguments. So it is Pfizer's skeleton at paragraph 112.

Very strong words were used, they took you to snippets from Asda, you'll see a quote there, I'm going to go through these, but I'll set it in context. There's a quote from the Asda section 26 notice, there's a snippet from the Superdrug one, the words, "Whatever nominated wholesalers were able to supply as a generic product."

Then there's a reference to Co-op with no quotes. There's a reference to Day Lewis with a couple of

limited quotes, reference to Rowlands, reference to Tesco with some limited quotes.

It has said the CMA has greatly oversimplified the picture, it has cited from the section 26 statements in a selective and partial fashion. Indeed, in relation to Asda, so paragraph 112A, final sentence:

"Pfizer submits this is a clear and unfortunate case of confirmation bias."

So strong words. As I'll show you, completely unmerited. Because what we did then in our skeleton argument, if you pick it up at page 17 and over the page at 18, is we responded to each of these allegations, and we are putting them in context. I'd like to go through some of these responses. Sorry, I'm not going to read you the section 26 notices, but the obvious point is you can't take snippets, you have to look at them all as a whole, and there will inevitably be in some of them statements that point one way and statements that point the other, but the question is, on balance, what is the gravity of evidence in the section 26 notices? I'm going to show you some excerpts which I think will clearly show they confirmed continuity of supply.

Let's take Asda first, bundle I, tab 4. I'm afraid it hasn't got the heading on it, but it's the Asda section 26 response.

What's important to note, if you turn over to page 2, is the section 26 notices at various sections, and one of them you'll see "B". Purchasing practice for capsules", that's page 2. Then page 6, there was a section on prescribing practice for capsules, and then on page 9, there's a section on dispensing practice for capsules.

Now what is most important in our submission is the dispensing practice. Because again, as I think Mr Lomas referred to in one of his questions yesterday, there is a potential difference between purchasing products in and actually dispensing them. So there is a distinction, an express distinction is drawn in the notices, and what actually Pfizer did in its skeleton argument was it picked up snippets from the purchasing section. So, for example, page 2, purchasing practice, the quotes that Pfizer put to you in its skeleton is the third last paragraph on the page:

"Unless a prescription requires supply by a specific manufacturer supplies are at [✂] discretion (having regard to its own stock levels) as to whether it supplies Asda's pharmacies with Flynn or NRIM manufactured phenytoin sodium hard capsules."

That's the purchasing practice, but then the dispensing practice; you see it at pages 10 and 11.

Question:

"Please identify and explain the various options."

Then in blue, the reply:

"The Asda in-store pharmacists operate as independent clinicians" --

Sorry, is blue confidential?

Sorry, I'm not allowed to read this out apparently. I'm told it is confidential to Flynn, which seems -- I'll just check.

THE CHAIRMAN: This must be a confidentiality issue that arises within the CMA in its evidence gathering.

MR HOSKINS: I can read it out. It is just because it was in blue.

THE CHAIRMAN: You need to have cleared this with Asda before you read it out.

MR HOSKINS: It has been cleared. It was me being cautious, sir, because the colour blue rings alarm bells.

THE CHAIRMAN: It will certainly weaken your presentation if you can't read it out, I would suspect.

MR HOSKINS: I'd ask you to read it to yourselves, sir, but I don't apologise for being cautious, obviously, on confidentiality. Safety first.

So:

"Asda in-store pharmacists operate as independent clinicians."

Then the recognition:

"In line with MHRA guidance, the options available are determined by what is stated on the prescription because it might specify a particular manufacturer's product and what products Asda has in stock."

So it is very fair context. But then you'll see the next three bullets what they do:

"if the prescription specifies a particular manufacturer, the pharmacist will dispense the requested manufacturer if it is in stock."

We know that only happens in 10 per cent of cases.

"If a prescription is written generically, but a GP indicates that the patient would like a particular manufacturer's product, this is taken into consideration by the pharmacist, in accordance with drug guidance. If it is not in stock, the pharmacist will follow the same procedure set out above (i.e. contact [✂])".

You'll see that's the last two sentences of:

"If the particular manufacturer is specified but not in stock, the pharmacist will contact [✂] to see if it has the manufacturer's product brand in stock and if it can be delivered the same day. If this is not possible, the pharmacist will refer the patient to another pharmacist."

That's the procedure referred to.

Then the third bullet, and this is obviously the most important for our purposes:

"If a prescription is simply written generically, the pharmacist will ask the patient what they have previously used as regard will need to be given to bio-equivalence concerns. If it is not in stock, the pharmacist will follow the same procedures set out above."

Having set that out in our skeleton argument --

THE CHAIRMAN: If it contacts [✂], then it's presumably following its purchasing practice.

MR HOSKINS: Well it contacts [✂], this is reading from the end of the first bullet, "To see if it has the relevant brand in stock, but if it doesn't the pharmacist will refer the patient to another pharmacist."

So even in that context it's not, "If we go to [✂] and [✂] don't have the right product, we will just give the other product." It is not that. It's, "We will send the patient to another pharmacist so they can get" --

THE CHAIRMAN: Where does it say that?

MR HOSKINS: First bullet, the last two sentences.

THE CHAIRMAN: Okay.

MR HOSKINS: "The pharmacist therefore will contact [✂]."

THE CHAIRMAN: Thank you.

MR HOSKINS: Tellingly, in Mr Brealey's opening remarks,

Asda didn't feature, because it was a bad point.

MR BREALEY: I don't accept that at all.

THE CHAIRMAN: I think we're seeking the truth here, not --

MR HOSKINS: Mr Brealey and I have known each other long enough for these not to wound, I hope.

Superdrug, then, I/6 and I/7.

MR BREALEY: Are we going to the third bullet, "If a prescription is simply written generically," so:

"So if it is written generically, regard will need to be given to bio-equivalence concerns". We can do this in closing, but the first bullet obviously is if the prescription is by brand and the third bullet is generic:

"The pharmacist will ask the patient what they have previously used as regard will need to be given to bio-equivalence concerns."

Clearly, if I had done this in opening, we would look to Professor Walker's evidence which says there is no bio-equivalence concern, and the pharmacy may actually, if it is generic, do one or the other. Also, and I will -- this is the only --

MR HOSKINS: I think I would rather Mr Brealey did this in closing, to be frank.

MR BREALEY: The only reason I get up is because I was told that I didn't refer to this because it was a bad point.

MR HOSKINS: Still to be dealt with in closing, I think, please.

THE CHAIRMAN: As I say, I'm not really bothered who made good points or bad points. I want to get through this.

MR HOSKINS: My submission is it is a bad point for the reasons I have explained.

THE CHAIRMAN: Right, can we move on, please?

MR HOSKINS: Absolutely.

Superdrug. This is one where there was probing, so you first of all have I/6, this is Superdrug's response to the section 26 notice on 17th June 2014. Again, you'll see the pattern, I hope you can read this, they're quite small.

First column, question number, there's: "B. Purchasing practice for phenytoin sodium hard capsules". I want to go over the page in that column to "D. Dispensing practice" and you'll see answer 9.ii or row 9.ii. Final column:

"Please explain how you decide which product to dispense."

What I'm going to do is highlight and ask you to read them because it is going to be quicker than me reading them out. So if you could read 9.ii.

THE CHAIRMAN: You're not going to provide a copy in larger script, are you?

MR HOSKINS: I think that is the copy in larger script. I think we can do a bigger one.

THE CHAIRMAN: I can manage.

MR HOSKINS: You'll see again the reference to the need to check what product the patient is stabilised on, and the steps that are taken to ensure that that product is then dispensed.

9.iii, the factors that you take into account:

"Availability, cost, patient request and doctor's request. The pharmacist would also take into account any reasons for clinical continuity on a specific generic or brand."

So that's if you're stabilised on Pfizer phenytoin, you stay on Pfizer phenytoin.

At 10.i:

"State your current policy and explain how that was decided on."

If you could read that, please. You'll see again the steps that are taken to ensure continuity of supply. You'll see the same sorts of points were made in 11, row 11. If you could read those, please.

PROFESSOR WATERSON: That's cut and pasted over, isn't it? It's the same text.

MR HOSKINS: There is a degree of repetition.

Then 12 is the last one, which is where there is

actually a closed prescription, but again you'll see the steps that are taken to make sure continuity of supply on a particular brand is observed. So if I could just ask you to read 12.i at the top of the next page.

PROFESSOR WATERSON: I wonder whether you can help me, Mr Hoskins. On the table in green, which I think we're not allowed to read out, which immediately follows that, where there is an oddity in the final row.

MR HOSKINS: I'm going to come to these figures for Superdrug, whether it is these exact figures, but we have, for example, Alliance data, and I'm going to come to that to show you -- because the point is made including in relation to Superdrug -- that there was switching at certain dates. I must admit I haven't focused on this particular table, but I am going to take you to monthly figures for Superdrug, albeit from a different place, if that's okay.

PROFESSOR WATERSON: Yes, I wondered what -- okay. Yes.

THE CHAIRMAN: Does that mean you are going to deal with Professor Waterson's point?

MR HOSKINS: I am, but through another set of data. Absolutely, I'm going to look at Superdrug's monthly figures.

THE CHAIRMAN: Through another set of data?

MR HOSKINS: Yes, and if that doesn't satisfy, obviously

you'll come back and let me know.

Then there was probing, there was probing of Superdrug, and we have the next section 26 response, tab 7. This is what was quoted by Pfizer in its skeleton:

"1. Please explain why Superdrug purchased NRIM's Product in the four months identified in your response."

So this is a purchasing point, not a dispensing point. This is the only sentence in relation to Superdrug that's cited in Pfizer's skeleton. It's in the second column, row one:

"We purchase whatever our nominated wholesalers are able to supply us as generic product."

That's the only quote Pfizer put forward, but then you'll see:

"Criteria will be based on availability, on the nature of how the prescription is written, cost and patient requirements."

Then you get the specific treatment of dispensing as opposed to purchasing.

"Please state and explain the circumstances under which Superdrug would dispense NRIM's product."

Well, look at 2.i(b). "The only time NRIM would be dispensed is where" --if you could read that, please.

Then similarly, 2.ii:

"Would Superdrug dispense phenytoin sodium hard capsules from a manufacturer other than the manufacturer's product that a patient is currently taking?"

And you'll see the answer. So it does happen. I'm not in a binary world. That's why I want you to see all of these.

"4. If a new manufacturer was to start supplying its phenytoin sodium hard capsules in the UK, would Superdrug consider purchasing and dispensing that product?"

And you'll see the answer given there.

The idea that there was some sort of superficial section 26 sent out by the CMA and then it just grabs the sentences that help it is not fair. There was probing and you'll see, I hope, I'm showing you, admittedly myself, excerpts, but you'll see the weight of gravity is very much in favour of continuity of supply.

Tesco, that's at I/60. Here Pfizer put two quotes in its skeleton argument. The first one is on the first page, you'll see under the heading, "Purchasing Practice", so you have the same point again. In the third paragraph under question 2, the second sentence is:

"We do not generally request any particular

manufacturer's products."

That's what is cited by Pfizer, but that's in relation to purchasing practice.

The other quote you're given by Pfizer is over the page under "Prescribing practice". Second paragraph, the final sentence, they take out the words:

"We would anticipate (but are unable to verify) that prescribers would note the variant required."

What Pfizer is silent on is the whole of section D, dispensing practice. But if I can ask you to read question 9 and the three paragraphs under that, please.

Then question 11, again, there's a degree of repetition, the same points are made, but continuity of supply is being confirmed and reinforced.

THE CHAIRMAN: The quote in the decision comes from question 11; is that right?

MR HOSKINS: I'll need to double check. I'm showing you more than is in the decision, sir.

THE CHAIRMAN: 4.118.

MR HOSKINS: Yes, that looks correct, yes. Then you can also look at question 12, because again a similar point is being made.

There's not just diminishing returns within these documents, there's diminishing returns for me for

carrying on reading them out to you. I don't want to use my time doing that.

If I can tell you that the Rowlands one is at I/56, the Co-op one is at I/34, day Lewis is at I/37. There was a new one that wasn't in Pfizer's skeleton, that was Morrisons. You've seen that at I/46. I'll take you briefly to that one because you weren't shown, I don't think, all the relevant passages in relation to that. I/46. This is the Morrisons' response. I apologise, I can't remember if you were taken to this, but if you can note please in particular questions one and two, and the answers there, two in blue.

MR LOMAS: I think we were taken to them.

MR HOSKINS: You have seen that.

THE CHAIRMAN: We've seen them.

MR BREALEY: Also tab 45.

MR HOSKINS: As I've said, I don't suggest that every single sentence in every single section 26 notice points one way. But what I do say is that when you read the section 26 notices, it is quite clear that they confirm the continuity of supply principle is generally followed by these pharmacists.

MR LOMAS: Mr Hoskins, how do you deal with the point that was made in opening by the two applicants that you would see that, wouldn't you, and that you would expect to see

at least a degree of systematic bias in there because pharmacists are not going to turn around and say formally to the CMA that they weren't following Government guidance on what to prescribe?

MR HOSKINS: They don't have that interest, with respect, because, as has been said, it's only guidance. I don't accept that because there is guidance and they will want to say "we follow it," it necessarily follows that they have distorted their answers. Particularly, remember, this is a section 26 notice. So there is a penalty for false and misleading information, and also remember, for example, in relation to Boots and Lloyds, I've shown you that the position is corroborated by data that was obtained by the office.

We'll see, there's data available to, in relation to the other section 26 respondents. I believe that one of the reasons why Boots and Lloyds, it was picked up on, was it became obvious in relation to Boots and Lloyds that there was a problem with them in relation to continuity of supply because of the data that the CMA had, and that's why Boots and Lloyds were -- that's why there was probing. So the officer did not simply take them at face value, it had data and where it thought there was an issue, it followed up, and you'll see that in the section 26 notices. But I certainly don't accept

you can simply say all of these ten companies signing a formal section 26 notice were just saying what they thought wanted to be heard.

MR LOMAS: The other point that's made is of course that these are responses that are synthesised by executives or lawyers from what their own guidance is, and from whatever enquiries they made internally, we know not what, and then put forward. They may or may not accurately reflect what happens at the counter in a specific pharmacy.

MR HOSKINS: I think at least two, and I'll apologise if it is three, but at least two of the panel have, I imagine, hands-on experience of responding to these sorts of notices and will know the seriousness with which companies take these notices. I'm not saying in all cases everyone provides a perfect response, but generally speaking, if you're a reputable company, as we have here, and you get a section 26 notice from the CMA, you swear a bit because it is a lot of work, but my God you do the work and make sure it is as accurate as possible.

THE CHAIRMAN: I'm happy to say that my overlap with section 26 was fairly brief.

MR HOSKINS: Indeed.

MR LOMAS: I wish I could say the same.

MR HOSKINS: But that's the practice. They're taken very seriously.

THE CHAIRMAN: But your point, overall point, is that the decision takes various extracts from these notices. Mr Brealey has quite properly had a look at some other extracts and what you're saying is that we should look at the whole response, see what it says in the round, and weigh it along with other evidence.

MR HOSKINS: Absolutely.

THE CHAIRMAN: Thank you.

MR HOSKINS: Can I deal next with the Alliance data. You actually have the Alliance data at I/1, tab 17, but there are a lot of spreadsheets and I'm not going through it in detail, but you have it there.

THE CHAIRMAN: Professor Waterson has no problem with this kind of thing.

MR HOSKINS: I'm sure, but I'm not sure you want me to spend the next hour going through that spreadsheet. I think all the parties have extracted numbers from it and that's certainly the way I intend to proceed, but I give you the reference.

Now what the appellants say, this Alliance data is data from one wholesaler, Alliance, and what they say is: well look, if you look at the Alliance data, then that shows that Morrisons, Superdrug and Walter

Davidson did indulge in switching from Flynn to NRIM. That's what they say.

Now there's number of problems with that submission. I said I'd show you the figures on that, but it is in a different place. Quite a good place to see it is Flynn's reply, bundle A, tab 5.

These are monthly figures for each of the companies. A number of packs. Just the 100mg. Their line states it actually covers all the strengths, this is just 100mg, but you might want to keep that open while I'm making these submissions.

First of all, even if it is correct that this data showed switching by these three companies, and I'll show you why it doesn't, but even if this shows switching, you need to put it in context. The figures in relation to the period May 2014 to August 2014 for all strengths, so this is not limited to these Flynn figures, this is a synthesis of the Alliance data itself, we set it out at page 21, paragraph 54 of our skeleton argument.

Morrisons, in that period --

THE CHAIRMAN: Do you mean -- (overspeaking) --

MR HOSKINS: I'm so sorry, page 21 of our skeleton argument, paragraph 54, and this is all strengths and this is just a summation of the figures one finds in the Alliance data spreadsheets.

Morrisons purchased a total of -- sorry, I'm not allowed to say that. The green figure of the product and the product is Pfizer manufactured phenytoin sodium capsules, and NRIM, so both combined out of, you'll see, the total Alliance sales. Morrisons is a drop in the ocean.

Superdrug, you'll see the same --

MR LOMAS: I have one question on this and I'm sure the answer is somewhere, which is, what percentage of the total market was actually being supplied by Alliance?

MR HOSKINS: I don't know the answer to that but I'll find out if we can find the answer.

So you have the Superdrug point. Walter Davidson we haven't put figures in, because if you look at the Flynn annex of Walter Davidson, again I'm not allowed to read out their figures. So it's bundle A, tab 5, page 34. You will see the amounts that Walter Davidson is dealing in.

Bundle A, tab 5, page 34, this is the annex to Flynn's reply. You'll see the sorts of numbers we're talking about. If Morrisons and Superdrug are small, Walter Davidson is a molecule.

Also, what's happened, of course, is that the appellants have given you three companies: Morrisons, Superdrug and Walter Davidson, but the evidence that one

gets from Alliance for the other pharmacies other than Boots and Lloyds, because we know they switched, but for the other pharmacies, shows the opposite. It shows there wasn't switching. So we've set that out in our skeleton argument page 21, paragraph 56. So if you look, for example, at Co-op, you'll the number of NRIM capsules purchased by Co-op against the number of Pfizer capsules. Do the same for Rowlands, do the same for Day Lewis, do the same for Asda. Again, what you have, it's the same problem for section 26 notices, is the appellants take some factors which they say point the way that helps them, but they just ignore the rest. It's all about the context and the evidence in the round.

Several pharmacies made no purchases of NRIM from Alliance at all. We set this out at paragraph 57 of our skeleton, that includes Tesco and Sainsbury's. The third point is that what Flynn says, Flynn's reply, paragraph 11, says this data shows switching from May 2014 from Morrisons and Superdrug. But what happened in May 2014? Flynn switched to a reduced wholesaler model, as a result of which it no longer supplied Alliance with the Pfizer product at all. No mention of that in the appellants' submissions.

So when one looks at the Flynn figures, bundle A,

tab 5, page 33, you see the sudden switch in the way the figures go because NRIM suddenly starts appearing, it coincides exactly with Alliance no longer having the Pfizer product.

That's not in itself evidence of switching; it's evidence of Alliance no longer receiving the Pfizer product.

MR LOMAS: I understand that, and I was interested in looking at that. The supply wasn't available, but the demand must be out there from patients for the NRIM product for these purchases to have occurred. So --

MR HOSKINS: Remember the section 26 notices where a distinction was made between purchasing and dispensing?

MR LOMAS: Yes.

MR HOSKINS: At least some of the pharmacies said, "Well actually, we were given what we were given by the supplier." So your point about there might be a difference between purchasing and dispensing, no doubt over time, if they found they'd a great stock of NRIM capsules they couldn't get rid of, someone would look at it, but there is a potential disjunct between the purchasing and dispensing, one simply cannot assume that the difference in purchasing numbers that one sees because of their reduced wholesaler model being introduced equals switching. Because, as we also saw

from section 26 notices, what would happen, according to the pharmacies -- some of which are cited here -- which gave section 26 responses, they wouldn't simply when the patient came in, because they had a big shelf full of NRIM, give NRIM. They would ask the patient, they would check the records they kept on the patient to see what they were stabilised on. You cannot simply leap from purchasing to --

MR LOMAS: But they must have anticipated some demand for NRIM so that when Flynn could not be supplied, they were happy to purchase NRIM. They're doing it because they think they can on-sell it.

MR HOSKINS: That may be the case. I accept that. There is something going on which means they're purchasing NRIM. My point is you cannot then equate that, because what you don't know is what is then happening in the rest of the market. For example, you're absolutely right, because the demand from patients for NRIM and the Pfizer products should actually stay the same because they're stabilised, subject to the new ones coming in. So this is speculation on my part, but I am speculating because it shows why you can't draw the conclusion that is sought to be drawn from these figures that these three pharmacies buy in the NRIM product, find they're left with it because their actual pharmacists wouldn't

dispense it on the ground, and then the numbers are reduced later.

MR LOMAS: But there is no evidence of that.

MR HOSKINS: No, absolutely. My point is simply that what the appellants do is bring you this evidence and say, "That shows switching." My point is you cannot jump from this to say that it inevitably shows switching.

MR LOMAS: It might just show bad purchasing decisions by the --

MR HOSKINS: Indeed. That's a possibility.

THE CHAIRMAN: Your market definition is just distribution. It covers all these stages: dispensing, purchasing by pharmacists, dispensing by pharmacists.

MR HOSKINS: It does, but the pharmacists are only reimbursed when they dispense the product, not when they purchase the product. So I'd say you have to look at the whole chain.

THE CHAIRMAN: Yes, you do have to look at the whole chain, not just the final stage of it.

MR HOSKINS: I understand that. Again, I am not dying on the stake on any binary points. I'd burn, and burn very hotly and white, if I did that. I mean, that's not --

PROFESSOR WATERSON: That's just speculation.

THE CHAIRMAN: A picture that is very hard to contemplate, Mr Hoskins.

MR HOSKINS: You have the point. Even if you were to say "Well this is some evidence of switching by these three companies", I've shown you the figures for all the other Alliance customers, and I've shown you the significance of these three companies to Alliance. It's all about the context.

THE CHAIRMAN: So your position is there is some switching, but it is not sufficient?

MR HOSKINS: No, I'm not -- well my case generally, on Boots and Lloyds, is that there clearly was some switching. In relation to these companies, I'm not even accepting that there was clear evidence of switching. You can present it with this evidence. I've explained why it cannot simply be taken, yes, this is evidence of switching. It may indicate that switching took place. I'll put it no higher than that. But absolutely I'll go back, look at it in the round against all the Alliance data, look at it in the round with the section 26 notices from these same companies, and look at it in the round with the purchasing price volume data.

The Kantar report I am going to leave to cross-examination.

Flynn's mystery shopper made a fleeting appearance, paragraph 63, it was one event and there was only one other event when someone tried to buy online and the

opposite happened. I'm not going to waste any time on that.

Can I come to prices and volumes, what is the evidence on prices and volumes. I'm at page 24 of our skeleton argument. Now, if there was sufficient switching between NRIM and the Pfizer product, you would expect to see an inverse relationship between prices and volumes. That's what you'd expect to see in a competitive market. You'd expect to see competing on price, you'd expect to see the prices zig-zagging against each other like that, and you'd expect that the result of that zig-zagging of prices would be the volume switching and they'd be constantly reacting to each other in order to preserve their position in the market. As we'll see, that is absolutely not the picture one gets.

You have the significant dates well in mind. What we've done, because we've got various sources and we've given some of the references for some of those at the bottom of page 24 of our skeleton argument, but on page 25 we've produced a graph, which I hope is helpful, because you have prices and volumes on the same graph.

At the top, you have the grey, this is all 100mg, the grey is Flynn's 100mg average selling prices. The sort of faint orange is NRIM's average selling prices.

Blue, Flynn volumes, red, NRIM volumes. Obviously what you need to do is read across from left to right.

Just to identify what the sort of relative periods are, the first periods, you see the little -- let's take it as 1st October to 1st February, 2013. There wasn't any competition. NRIM isn't in the market at that stage.

Then the second sort of chunk is after NRIM entry but before the MHRA guidance, so that's when we know that Boots and Lloyds were not following continuity of supply and they were NRIM's main customers.

Then the third block is after the MHRA guidance is published and you'll see there is still some volatility thereafter, as one might expect, in relation to prices and volumes. Then you have the final period, which is when everything settles down and you get prices flatlining, and there's a degree of sort of jaggedness in the volumes, but generally speaking they stabilise. I'll come on to make that point good. But those are the periods.

Now if you read across, if you're looking at prices, there's remarkably little competition in prices, and we know the history, and I'll come to deal with that in a minute. There is a Flynn price drop about a year

after NRIM's entry. The Drug Tariff price has then changed and as a result, because it is referenced to the Flynn product, as a result of the Drug Tariff changing, NRIM has to drop its price; otherwise nobody is going to make any money on its product.

That's what you see in prices, and then you see flatlining. That's very important, because there is no competition on prices in that period. What happens is that Flynn stays at its level and NRIM just stays five to 10 per cent below. There is a dispute on the evidence with CRA, and I'll deal with it in cross-examination, but this is not giving any surprises away. Five to 10 per cent is the sort of magic level that's used in the SSNIP test, to test the degree of switching.

So throughout this period there's a five to 10 per cent difference in prices. As we see from the graph, that comes from other sources, but I don't think that's in dispute. It is five to 10 per cent difference. But look at the effect it has on volumes.

If this was a competitive market, what should be happening is you should be seeing significant shifts to NRIM from Flynn, and that didn't happen.

In relation to the volumes, I'll come to that separately because both the CMA and Pfizer say that

volumes stabilised in that final fourth period, if I can call it that. Flynn suggests otherwise, but I'll deal with that separately.

But you get the point that one is not seeing competition in the sense of a competition on prices between the products leading to shifts in volume. You just don't see it.

MR LOMAS: Mr Hoskins, you moved quite quickly and glibly over the period between the MHRA guidance being published and the restricted wholesaler model, which is a 4 to 5-month gap, in which there appears to be quite a lot of volatility on volumes between Flynn and NRIM, but after the pharmacists have said they're observing the guidance.

MR HOSKINS: Yes.

MR LOMAS: I wondered, that seemed an odd feature of the graph, and I wonder if you could explain what's going on there.

MR HOSKINS: I can only speculate because I don't have the actual position, but I think what one sees in all of this is there is a degree of time lag in the figures certainly. There's a time lag also in terms of when things are purchased and when things are dispensed. I think that was a point you made, and we've made it elsewhere in the skeleton.

I think I can't give you a definitive answer. I do want to make specific submissions on the Boots-Lloyds period and that would then encompass, I think, I would say, insofar as there was an effect in that period, any sort of hangover you see in that third period is going to be related to that.

The final point I'd make is that insofar as one does see some relationship between prices and volumes, I go back to the legal point I made at the start, which is the CMA's case is not binary. It is not that there was no competition on prices or there was no switching. The CMA section 26 notices, for example, covered the ten major pharmacies, 50 per cent of the market, it was 85 per cent, I think, of NRIM's customers, but it is not complete. I'm quite happy to live with there may have been some price competition, there may have been some switching, but my point is you have to step back from that, and you're looking at the big picture.

MR LOMAS: In relation to this period, and I hesitate to use the word "noise" because it has various technical connotations, but you would be saying essentially what you're seeing in that 4 to 5-month period is a process of stabilisation of the market as it responds to the MHRA guidance?

MR HOSKINS: I would say that and I think there is a problem

with that as well, because what is odd is that in the period Flynn drops its prices, there's not a sort of complete parallelism between the period at the time when it first drops its price, so if we're following this sort of orange line, you'll see when the step comes, there is about a month or two months later an increase in volumes, but they're not immediate, which does suggest there is some sort of delay of some sort playing in here. I'm quite happy to rest with yes, there was some competition, yes, there will have been some switching, but not enough is my point.

The big concrete example, concrete evidence, we have of switching are Boots and Lloyds. But you have the point that that was a period of eight months out of a total infringement period of 3 years ten months. I think it is now common ground, certainly with Flynn, you have to look at the period as a whole. You cannot just look at snapshots and that's clearly right. We actually cite the AstraZeneca case, it is the top of page 26 of our skeleton argument. It is authorities bundle C/2, tab 32. But I don't think I need to take you to that now because certainly Flynn have accepted you're not looking at snapshots; you're looking at the longer period. But if you need authority for it, that's what the CFI did in AstraZeneca.

THE CHAIRMAN: I suppose this is a pedantic question: is there any difference between the period of the infringement and the period in which your relevant market definition stands up or doesn't?

MR HOSKINS: There is a difference in the sense that data was available until, I think it was June 2016, and the analysis is done on that basis, but the infringement is found up until the date of the decision, which was early 2017. I'm sorry, December 2016. So there is a gap at the end. But no point has been taken on that by Pfizer or Flynn.

THE CHAIRMAN: Do you want to stop there for ten minutes?

MR HOSKINS: If you want me to stop, I'll be happy to stop for ten minutes.

(11.27 am)

(A short break)

(11.38 am)

MR HOSKINS: Thank you, sir.

THE CHAIRMAN: Are we still in the relevant market?

MR HOSKINS: We are, I'm afraid, but not for too much longer. I plan to sort of do a lot of the relevant market dominance now, I'll be less heavy on the abuse stuff because it is more dependent on cross-examination, if that gives you some comfort.

THE CHAIRMAN: My comfort is quite irrelevant.

MR HOSKINS: You say that, but not entirely. It is my job to keep you happy at least.

THE CHAIRMAN: I don't think so.

MR HOSKINS: I think I will take you to AstraZeneca, because although we have heard Flynn's position, I'm not sure it is necessarily going to be common ground with Pfizer, so I'll take you to it quickly. That was authorities bundle C/2, tab 32. AstraZeneca was a pharmaceutical case. If I could ask you to turn to page 9 of the judgment, C/2, volume 2.

THE CHAIRMAN: -- (overspeaking) --

MR HOSKINS: I see. Sorry. Tab 32, page 9. If I could ask you to read paragraph 31, and the first five lines of paragraph 32, you'll see what the relevant argument was: essentially that there had been a failure by the General Court to look at the developments over time when assessing the market. The allegation was that the General Court had just looked at a particular period in time, i.e. the end of the period, and had not taken account of events throughout the period. And that was the dispute.

Then the court over the page rejects that, on the basis that the General Court did look at evolution over time, so we see that at paragraph 38, if you could read that, please. Then paragraph 40.

Then the final sentence of 41:

"The General Court thus took account of the entirety of the period ... to conclude ... that during that period PPIs and H2 blockers were used differently."

Finally, 43:

"Moreover, the General Court carried out a detailed analysis of the evolution of the substitution process observed."

The complaint was failure to take account of the whole period and, sir, no, it did. I appreciate that's not necessarily the court saying, "You must look at the period", but it would be very odd if it were not necessary to look at the whole of the period, the court would simply have said that in answer. But there's no sense that you shouldn't look at the period.

Clearly, events within the period are relevant and have to be looked at, as both Flynn and we say you have to look at the events in the context of the whole period.

THE CHAIRMAN: Yes, I don't think there is any doubt you have to look at events in the whole period.

MR HOSKINS: Of course.

THE CHAIRMAN: I think the query, if there is one -- I'm not sure whether this takes us anywhere -- is that if -- how can I put this? If the CMA was unable to sustain the

argument that Pfizer and Flynn were dominant at the commencement of the period, then that affects, surely the period in which you can find an infringement? I mean, I'm not sure AstraZeneca really changes that.

MR HOSKINS: No, the reason for taking AstraZeneca is really a prior point. We have the infringement period and you have the question of what is the market definition for that period, and as you'll see in the decision, there's actually an alternative that the CMA puts, in case the Tribunal were to take the view that there were actually different markets.

THE CHAIRMAN: I agree.

MR HOSKINS: But it leads to the conclusion you put, sir.

THE CHAIRMAN: You can do the same thing over 10 years, but if it's not characterised as an abuse of a dominant position for a year and a half at the beginning, then it is not an infringement, even though it is the same behaviour. That's the conundrum. I'm not saying we're in that situation, I'm just saying that's the query.

MR HOSKINS: I will come to dominance and make my submission that they were dominant, but that's jumping slightly ahead.

THE CHAIRMAN: I'm sure you will.

MR HOSKINS: The next point in this section on prices and volumes, I'm at section 26 of our skeleton argument,

paragraph 72, and that is the price reduction point. NRIM launched its 100mg capsule in April 2013. The NRIM price was lower than Flynn. Pfizer didn't reduce its price until February 2014, although it backdated it to January 2014, and Flynn did not pass on that lower cost by reducing its own prices until April 2014, a year after NRIM's entry. And there was no backdating.

I need to deal with that more in cross-examination because there is evidence about the reason for the timing, et cetera, so I'm not going to say any more about that, but you have the big point; it took them a year to react in terms of prices to NRIM's entry and that's the high level point.

The next point on this is a volumes point. Because it is common ground between the CMA and Pfizer that NRIM's sales volumes did not increase significantly after June 2014. You will see that from the table I showed you at paragraph 68 of our skeleton argument. It said they were jaggy, but the CMA's position is relatively stable, but that's also the position of Mr Ridyard, if I can show you his report. That's at bundle D, tab 7, page 13. You see the bottom of page 13, Mr Ridyard says:

"Evidence on sales trends and volumes switching."

He then sets out some conclusions from the figures

he sets out. It's on page 14, it is the last two bullets that make the point:

"After the MHRA guidance was issued in November 2013, the data below indicate that NRIM's share did not continue to increase."

Then the final bullet:

"In the last two years, the shares of Flynn, NRIM and PIs [parallel imports] appear to have stabilised at approximately one third each."

The point is that it is common ground between us and Pfizer's expert that NRIM's sales volumes stabilised in the period, you could say after June 2014. Mr Ridyard actually goes a bit further, in November 2013. But that's the point. Flynn doesn't agree with that.

MR LOMAS: Just for clarity, does the CMA accept the parallel imports derived figure of about a third of the market, or are you not comfortable with that?

MR HOSKINS: I'm not accepting that. I am going to deal again with parallel imports, I'm going to come in in cross-examination, so I'll mention it in passing, but no, we don't accept it.

THE CHAIRMAN: They're in your relevant market, anyway.

MR HOSKINS: They are, absolutely.

So what do Flynn say? Well you've heard Ms Bacon's submission. They say that NRIM's sales increased over

time. You see that in Flynn's skeleton. Actually, let's take it from its notice of appeal, let's go to bundle A, tab 2, paragraph 125. Because Flynn saw the position now, you remember the graph that was handed up by Ms Bacon drawing a line from the start to finish to say ever increasing, but look at the actual figures. What actually happened in the market -- and this is taking Flynn's own figures -- again I'm not necessarily accepting the accuracy of these, but let's take Flynn's own figures for the purposes of this debate. Let's take the table for a 100mg dose, so that's the second one on page 38. You get NRIM at [✂], [✂] in 2013, they spike to [✂], but look that what happens thereafter.

Oh I'm sorry, that was confidential and I'm sorry. I think that's the only figure that's confidential in this table.

MS BACON: No, I think all of the figures are.

MR HOSKINS: That's fine, I'll -- I'll be far more careful.

THE CHAIRMAN: We can read the figures.

MR HOSKINS: Exactly, I'm so sorry.

You have the Q4 figure, you'll see what happens in Q1 of 2014, you'll see what the figure is for Q2 of 2014, and then you'll see the relative stability along the line, except arguably when you get to Q2 2016. As Ms Bacon fairly said, that in itself was a spike. You

remember the graph she handed up showed that was a spike and it returns back to what then appears to be the normality.

So even on Flynn's own figures you get the stability point. It's probably even more pronounced if you look at, as one should, because the market is all doses, so that's the first table on that page. If you look at the NRIM figures again, you'll get a spike, Q4 2013, you get the effect immediately following in the quarter Q1 2014, then the stability really kicks in Q2 2014 and follows throughout.

It's important when you're talking about market shares, as we will do, it's not just the market share for 100mg which are relevant, because the market is defined as all of them, and I ask you to look at Flynn's market share for all the strengths. You'll see the figure and what it consistently is in the first table.

Really, we say Mr Ridyard is right, stability in that period. We say that the Flynn method of just simply taking a line from the beginning to the end actually doesn't help at all, because the trouble is you have the period when Boots and Lloyds were not doing continuity of supply. As I explained earlier, what that means is that there then becomes a cohort of patients who are stabilised on NRIM and have to get NRIM. That is

not a helpful way of looking at it, just drawing a line from start to finish and saying it goes up, because it masks the truth, as I've shown you from their own figures.

PROFESSOR WATERSON: I believe yesterday we were discussing that in relation to Flynn's submissions, and we -- I think you suggested, Ms Bacon, that we would -- that you would provide the regression lines for the later period.

MS BACON: Yes. I'm going to be speaking to our economists about that. As I pointed out, the problem is that we don't really know which point to take as being the starting point for the later period, as in which point of sales because you see the volatility on the graph. So I can't simply take, say for the NRIM figure, I can't just take a single data point as to the amount of volume that it supplied in, say, April or May 2014, because that will be masked by -- that will not show the volatility of the figure. So I want to talk to our economists to see the best way of doing that, and it may be we have to have a short witness statement explaining the basis on which they've done it, but I'm going to deal with that.

PROFESSOR WATERSON: Thank you.

THE CHAIRMAN: I'm sure the preferred approach would be to

give us as many regression lines as you think would be relevant, and Professor Waterson will decide which one convinces.

MS BACON: Yes, that is what I propose to do at least with a few alternative --

THE CHAIRMAN: -- (overspeaking) --

MR HOSKINS: We've had a go. That's the answer we got. Let's see what Flynn come up with.

THE CHAIRMAN: We have a witness statement to that effect?

MR HOSKINS: I can give you one, but I don't think you want one. Let's wait and see what Flynn come up with, but we've had a go and it comes up --

THE CHAIRMAN: It comes up -- (overspeaking) -- in the evidence.

MR HOSKINS: There's a point on the Co-op, but it's really very minor. We deal with it at paragraph 83 of our skeleton argument. Even if it is right, which we say it is not, for the reasons we give in the skeleton, it is a peripheral point because it is one purchaser, and it is only for a period of September 2013 to April 2014. I'm not going to waste any more time on it, unless you have any more questions.

THE CHAIRMAN: I think you should move on.

MR HOSKINS: That's what I wanted to say on market definition, so I'm moving onto dominance now.

Now, of course, when you get to dominance it is on the basis that NRIM is not in the relevant market. Beyond that, NRIM are out. So the markets are --

THE CHAIRMAN: It is not a binary case, but they are not in the market?

MR HOSKINS: By this stage they're not, because if I've won my non-binary case on market definition, it definitely becomes binary. They're not in the market.

THE CHAIRMAN: You'll come back to that.

MR HOSKINS: The market I'm looking at in terms of dominance is manufacture of the Pfizer product for distribution in the UK, distribution of the Pfizer product in the UK.

Now, take a step back, and it will be highly surprising if Pfizer was not dominant in the manufacturing market, that way defined, and Flynn was not dominant in the distribution market as defined.

We have to deal --

MR LOMAS: Technically with the one caveat which is the size of parallel imports for Flynn?

MR HOSKINS: It is, although there's an argument, which we may have to come to, I don't think it arises because of the question of whether parallel imports themselves impact on dominance or not, and it's the same company. I'm not going to go there just now. I'm going to keep a (inaudible) level. But certainly, parallel imports,

I think we have to take account of in the market definition area.

The market shares, and here I am conflating parallel imports and the direct sales, but actually in terms of Pfizer's market share, it's 100 per cent in the UK. Query to the extent which you have to take into account parallel imports in relation to that. But of course we know from -- this is paragraph 87 of our skeleton argument, it is the classic case, we've cited AstraZeneca. If you're between 70 and 80 per cent, that in itself is a clear indication of existence of a dominant position.

Pfizer is at the sort of level that you are going to have to come up with something incredibly convincing to shift the finding of dominance. And equally, Flynn's market share, I showed you even on their figures, in the first table of their notice of appeal, paragraph 125, I showed you what the figures were. These are our figures between 64 per cent and 90 per cent, and again, you've got Akzo, you all know this, 50 per cent is a very large market share, very large market shares are in themselves, and save in exceptional circumstances, evidence of existence of a dominant position.

So there are market shares, I mean, I'm not saying

that gets us entirely home, but it gets us very close to home given the scale of them in this case.

You have then, secondly, our skeleton argument, page 33, the pricing and profit evidence. And I made the point about the before and after comparison, dramatic increase in prices, sustained over time, with no corresponding dramatic effect on volume over time.

You also have, as the decision recognises, if you accept the classic United Brands analysis, the cost plus analysis, you can then refer to that to confirm dominance. That's United Brands itself. And that's not really surprising because what the court has said in United Brands, paragraph 68, we've set it out at the top of page 34:

"It may be advisable to take account if need be of the facts put forward as acts amounting to abuses without necessarily having to acknowledge that they are abuses."

So what they're saying is if you think they have made excessive profits without objective justification, that can be taken account of when you're looking at dominance. That's not surprising, that must be right, because the whole point of dominance is you're assessing the extent to which an undertaking can act independently of a rival.

THE CHAIRMAN: I think I would take issue with that. I think, Mr Hoskins, the right way to put it is high profits without --

MR HOSKINS: That's --

THE CHAIRMAN: Because excessive profits is part of the value judgment of the abuse finding. I think we must be careful with that.

MR HOSKINS: I'm happy with that. I think that's correct. You're right to pick me up on that. It is more accurate.

The next point on dominance is the extent of existing competitors, paragraph 96 of our skeleton. We've cited from France Télécom, even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market.

THE CHAIRMAN: Doesn't rule it out.

MR HOSKINS: No.

THE CHAIRMAN: That's quite a low statement.

MR HOSKINS: I understand, but it is also quite high, as lively competition doesn't rule it out, and all points in between. It means the fact that there is some competition doesn't mean you're not dominant.

THE CHAIRMAN: I know, but this is the danger of taking pronouncements from different cases in different

situations which are dealing with different infringements. I mean, okay, they point us in that direction, but they don't compel us to the view that --

MR HOSKINS: I entirely agree, sir.

THE CHAIRMAN: It is just part of the overall jurisprudence context -- (overspeaking) -- any higher than that. Same comment as I made in relation to Sirena.

MR HOSKINS: I'm perfectly content. I'm not taking you, for example, to France Télécom to say you're bound by that, I'm simply taking you to the point you probably don't need authority for, but the fact that there is some competition doesn't mean that the company is not dominant and you have to look at the facts of the case. I am very happy with that.

In fact, in this market definition, as Mr Lomas has pointed out, the only competition that Flynn and Pfizer indirectly faced was from parallel imports. We've set out our sort of headline points on parallel imports in the skeleton, paragraph 97, and again, that's the point I'm going to go to in more detail in cross-examination, but you have our main points on the parallel imports there.

The main points, just to summarise, are there was no guaranteed supply, and the supply was fragmented. So when you're looking at, for example, someone with a very

large share of the market, if their next competitor has also a very large share of the market, that may not be dominant. But if you have someone with a very large share of the market and then lots of people with small shares of the market, that is an indicator of dominance, and that's the point we make on parallel imports.

THE CHAIRMAN: Parallel imports come from numerous middle men buying in Greece or Spain genuine Pfizer product, bringing it into the United Kingdom, repackaging it, re-labelling it. We don't have very much information about this.

MR HOSKINS: No, we don't have the evidence. I am not in a position to give it.

THE CHAIRMAN: We just call them parallel imports.

MR HOSKINS: That's right.

THE CHAIRMAN: And they're a number in a table.

MR HOSKINS: That's right.

THE CHAIRMAN: Perhaps that might come out in cross-examination.

MR HOSKINS: It might do. I hear the point, but I am not in a position to give you --

THE CHAIRMAN: Well it is nice to know what we're being asked to dismiss.

MR HOSKINS: Absolutely.

THE CHAIRMAN: If you know what I mean.

MR HOSKINS: I understand. I understand.

Again, you'll recognise these headings are all the classic indicators or questions you asked in relation to dominance.

The next one, page 36, potential new entry, and we've dealt with it there. That's not really, nobody has really pushed back on that very heavily, the new entrant point, yes, and NRIM came in. But I showed you the evidence as recited in the decision from NRIM saying, "After the MHRA guidance, we didn't get any new customers and we stopped developing 25, 50, 300mg." We make the point it is very unlikely anyone else was going to come in in that sort of context and then we come to the --

THE CHAIRMAN: Sorry, so you think it is the discouraging stronger guidance issued in 2013 --

MR HOSKINS: It is not the only point.

THE CHAIRMAN: Isn't there a point about the data that you need to get a market --

MR HOSKINS: Absolutely. That's the general point. We say market entry is going to be unattractive in any event where you've got Pfizer and NRIM already in there, and that applies for the whole period.

Then the point I've just made is, as you quite correctly pointed out, more directed to the end of the

period after the MHRA guidance, it becomes even less attractive, it becomes less difficult.

THE CHAIRMAN: Otherwise the high price prior to the CMA's decision would encourage new entry, wouldn't it?

MR HOSKINS: It would, correct, but you still have the problem of continuity of supply.

THE CHAIRMAN: Which we say is a funny market because if you can once get customers, then you can keep them.

MR HOSKINS: You have, but getting them is the difficulty because of continuity of supply and we've seen that eight of the ten -- it's like an advert -- eight out of the ten pharmacies surveyed said they followed continuity of supply throughout the period.

THE CHAIRMAN: You haven't mentioned the hospital supply context.

MR HOSKINS: We mentioned it in the skeleton argument and it is tiny.

THE CHAIRMAN: It is another way in, isn't it?

MR HOSKINS: Yes, I am going to ask questions on that in cross-examination. It is not significant in the context of the market, but I'll deal with that in cross-examination and take the witness to the figures.

THE CHAIRMAN: All right.

MR HOSKINS: Countervailing buyer power obviously is the big point that's put against us. Now if you've ticked all

the other boxes, countervailing buyer power is really going to have to be very exceptional to counteract all the other elements we've seen, but what do we have? Well, I take on board the chairman's point about being careful about case law, but having said that, I think there is a good indication of how you treat countervailing buyer power in National Grid. If you go to authorities bundle A/2, tab 7. I'm sorry, I may have the wrong reference. Give me a second. Seventeen, page 21. This is the CAT in National Grid, and it cites with approval the previous Tribunal judgment in Hutchison 3G. If I could just ask you to read the quote that's being approved.

THE CHAIRMAN: Sorry, what page is it?

MR HOSKINS: Page 21, paragraph 60. It makes what I hope is an obvious point. It is not just the question "is there buyer power?", the question is "how much buyer power and how effective is the buyer power?"

In our skeleton, page 36, the decision finds that neither the NHS, including CCGs, nor the DH, had sufficient countervailing buyer power for three reasons. Top of page 37, it's a point that has already been raised by the chairman, the structure of the NHS means it is difficult for it to exert buyer power over Pfizer and Flynn. It is the classic disjunct between who

prescribes, who dispenses, who pays for the product. It is well-known.

CCGs have no choice but to purchase the product, that's another element of that. But in the third point the CMA said:

"The DH does not have power to regulate prices of Phenytoin's sodium capsules."

That's the point that the appeals are focused on, not on the other two.

So we really are for countervailing buyer power just looking at one limb of the hydra.

I hope I'm not being flippant when I say our submission is, I don't think it is actually necessary, I am not saying you can't do it, it is not necessary to reach a definitive position on the exact nature of the DH's powers, although we did make submissions on that in the detailed appendix to our defence. We'll put our, you know, shoulder to the wheel again when it comes to closing in terms of legal submissions. But the problem with the appellants' approach really is that they haven't looked at the most important question, which is that even if the DH did have power to regulate the price of products in some way -- I'm not necessarily accepting that, but let's accept that for the moment -- did it sufficiently constrain Pfizer and Flynn, which is an

absolutely essential part of the test?

Now what we know is that the DH didn't exercise any legal powers in order to regulate the price of the product. That's quite clear. Pfizer, in its skeleton, paragraph 166, we've set out the quote in our skeleton at 101B, say:

"It is fair to say that the DH itself was somewhat hazy on the scope of its powers."

You've seen that in the opening submissions where the DH actually changed its mind on certain aspects of its powers. It certainly wasn't clear that they had this button to press, and they could go to it. It was, as Pfizer accepts, there was, even on the DH's part, it didn't quite know what it could or couldn't do.

If I could show you the Government position on the new legislation, because the submission made to you was that the new legislation was a clarification of what was always known about whether you could exercise a section 34 power to adopt secondary legislation to control the price of generics if someone was a member of the PPRS.

Now, I take it from the decision, because we set out a quote there, it is decision paragraph 3.158. So we see this is effectively a Hansard point. Now I'm not making the submission at the moment that you should have

regard to this in order to interpret the legislation. I will make that point in closing, but for the moment I'm taking you to this to show you the uncertainty about the legal position. Because what the Secretary of State said in Parliament in relation to the new legislation is, if you pick it up, there's a quote on page 78 about halfway down the first paragraph:

"My Department has been working closely with the Competition and Markets Authority to alert it to any cases where there may be market abuse and provide evidence to support this, but we also need to tackle it within our framework for controlling the cost of medicines and close the loophole of de-branding medicines." And the crucial sentence: "Although the Government's existing powers allow us to control the price of any health service medicine, they do not allow controls to be placed on unbranded generic medicines where companies are members of the voluntary PPRS scheme."

What the Secretary of State is saying is that the Government's position is not that this legislation was being brought in to confirm the previous position, but it was being brought in to amend the previous position, because there was a problem with the previous legislative position. Because if you're a member of the PPRS, there was not a power to regulate the price of

unbranded generic medicines.

Now we say clearly, when you're talking about whether any power was sufficient, regardless of what the true legal answer may be, and you've heard some submissions on that, we've made written submissions, it's quite clear that the legal position was unclear, if I can put it like that. That must be a relevant factor.

THE CHAIRMAN: In the future, according to this, it will be clear.

MR HOSKINS: Yes, because legislation has been brought in to deal with the problem. We are told clearly, lawyers can always come up with arguments, but it is legislation which attempts to --

THE CHAIRMAN: I'm just taking the Secretary of State at his word, not necessarily always -- (overspeaking) --

MR HOSKINS: I'm not trying to do myself out of a job in any future case.

Now there's also the proof in the pudding point which is well, what happened in this case? Pfizer and Flynn say, "We were worried that the DH would regulate us." Well I took you at the start to the before and after comparison. It didn't stop them raising the prices by the order of magnitude that we saw. You really have to ask yourself: is it credible to say there was sufficient countervailing buyer power for a company

or companies to raise the prices of this product overnight with no objective justification in terms of innovation, et cetera, as I took you to? It's really hard to see how they can run the argument in the face of that evidence. It just doesn't stand up to the facts.

MR LOMAS: I think it was said against you on that, that that was one reason why they priced it below the tablet reference price, but I'm sure you'll come onto that later.

MR HOSKINS: I'll deal with it. I'm going to ask questions on this in cross-examination, but the point I make is still a good one.

MR LOMAS: The key point you're really making is that countervailing buyer power is a question of fact, not a question of legal potential or indeed subjective view from Flynn; it is a question of fact as to what happened.

MR HOSKINS: It is, whether what was the effect in practice of countervailing buyer power. It is a legal question as well in this case, but absolutely the question of sufficiency is not a pure legal question. You need to look at the facts.

THE CHAIRMAN: Do you regard the Department of Health as equivalent to a sectoral regulator with price regulation powers?

MR HOSKINS: No, no. It is what it is. You'll have submissions on it. But it's not Ofwat, it's not Ofgen, clearly not, from the legislation we've seen. It is not in that category. In a sense, it is a misnomer to call it a sectoral regulator if that is intended to connote it is on a par with people like Ofwat or Ofgen, et cetera.

Briefly that's all I wanted to say on dominance, and then I need to deal very briefly with alternative market definitions. I think this is really -- the challenge to it has largely folded away, because Flynn challenged the original market definition in its notice of appeal on a number of reasons and we deal with those at paragraph 107 of our skeleton argument.

What you then find in Flynn's skeleton argument and the submissions is actually saying, "What you should do is look at the period as a whole," so we don't need any alternative market definition. That's our primary submission. I've made submissions to you about what the market should be, looking at it as a whole. But if you decide against me that actually this market changed over time, so there was one market up to the MHRA guidance and a different market thereafter, you would have to go to the alternative market definition, and then we have our submissions, rather our findings in the decision,

that Flynn and Pfizer were still dominant even if you take a separate market definition for where when NRIM came into the market, and that now is not effectively challenged.

The dominance finding in the alternative market definition.

MS BACON: No, we do challenge it.

MR HOSKINS: Well I don't know what the grounds are on which it is challenged now, but I'm quite happy to -- you have our submissions, you have the findings of the decision, you have them here and Ms Bacon will point them out.

THE CHAIRMAN: -- (overspeaking) -- your position is that the companies are dominant either way; is that right?

MR HOSKINS: Absolutely.

THE CHAIRMAN: For the whole period?

MR HOSKINS: Yes. For the whole period, or if you take an alternative period, if you find an alternative period.

THE CHAIRMAN: Well we'll deal with that later.

MR HOSKINS: The finding for dominance in the alternative period we've set out at paragraph 106 of our skeleton, if you need to go to it, you have it. It may be that what Ms Bacon's intimating is that the arguments that we've dealt with at paragraph 107 of our skeleton argument are still live and, if that's the case, fine, there's the answer to those points.

MS BACON: Well I think I really do need to know what his position is before I come to do my closings. My understanding is that he says that if NRIM -- it does form part of the relevant market definition, then for the period after November, he does not say that Flynn is dominant.

MR HOSKINS: No, I say it is still dominant. That's what the decision finds.

THE CHAIRMAN: I think he says you're dominant whatever. That gives you something to aim at, at least.

MR HOSKINS: I'll finish with market definition and dominance, unless you have any other questions on the topic, and I'm moving into the second part of the submissions which is the abuse.

So here we're in a position, the market is defined, Pfizer and Flynn are dominant, has there been an abusive pricing practice?

United Brands you have, we've set it out in summary at page 41 of our skeleton.

Paragraph 253 of United Brands -- sorry, I should say I'm going to start by going through the legal framework for all the elements of the abuse, and then I'll move onto the analysis of excessive and unfair, so now I'm just doing the law, what is the law.

Paragraph 253 United Brands:

"Other ways may be devised of selecting the rules for determining whether the price of a product is unfair."

So you have the seminal United Brands, let's call it the cost plus approach for shorthand, that covers a multitude of sins, but you have that --

THE CHAIRMAN: Seminal United Brands is economic value.

MR HOSKINS: Yes.

THE CHAIRMAN: Right?

MR HOSKINS: Done through this way, yes. Absolutely. Done through this two-stage test with the excessive limb and the unfair limb. That's what I'm referring to as the seminal test.

Can I show you Albion Water because it shows you what it describes as the United Brands test, and it gives you some examples of the alternatives to the United Brands test? So let's go to authorities bundle A/2, tab 15. This is Albion Water. If we go to paragraphs 14 to 21, so the seminal judgment in this area of the law, you'll see where I've nicked the word from, is United Brands. That can really be disputed as a suggestion that AKKA is --

THE CHAIRMAN: You're not following my revised nomenclature, Mr Hoskins; is that deliberate?

MR HOSKINS: AKKA is shorter than Latvian Copyright if you

can live with it.

THE CHAIRMAN: I can't.

MR HOSKINS: Ah, I'll do my best. Months and months of learning I'll have to unlearn.

Then it sets out the passages from United Brands, but what's interesting with Albion Water is over the page you then get a recognition of some of the alternatives to the United Brands test. So what we're not looking at here is alternative ways of looking at the excessiveness limb of United Brands, or alternative ways of looking at the unfairness limb of United Brands. We're looking at alternative ways of determining whether there is an abusive price. So ways other than United Brands.

First of all, paragraph 18, a reference to Napp. This is a flavour we've seen in the submissions.

"In Napp the former DGFT attached importance to whether the price was above that which would exist in a competitive market, in circumstances where there was no effective pressure to bring prices down to competitive levels."

So that is one alternative to the United Brands approach.

A second alternative, paragraph 19:

"Another way of assessing whether the price charged is unfair is by reference to what is charged for the

product in question in a comparable competitive market."

The quote there is Bodson which is the French funeral services case, but again this approach, this alternative to United Brands, is the one you see in the collective society cases again and again. Indeed, in the Latvian Copyright case itself, in the court's judgment. Because that's indeed what the reference was all about.

Then finally, a confirmation of the United Brands alternative if you like:

"In this judgment, the Tribunal follows the approach set out in United Brands. The ECJ identified several steps to establishing an unfairly high price which may be summarised as follows: an analysis of the costs incurred; a comparison of those costs with the price charged and an assessment of whether the resulting difference, i.e. the profit, is such that the price charged is excessive."

We've referred to those two questions as the excessive limb of United Brands.

Then:

"An assessment of whether the excessive price bears no reasonable relation to the economic value of the product or service supplied and is an abuse of dominant position, with the consequence that it is either unfair

in itself or [and all these cases use the word 'or', you'll understand why I emphasise that because I'm going to come to that later] or unfair when compared with competing products."

That's what, when I talk about classic United Brands, I'm referring to that test. But it is quite clear there are alternatives, entirely freestanding alternatives, to United Brands that can be acceptable.

PROFESSOR WATERSON: Can I just check my understanding. I am not a lawyer, as you know.

MR HOSKINS: That's probably an advantage.

PROFESSOR WATERSON: A, B and C are all necessary.

MR HOSKINS: For the United Brands test, yes.

PROFESSOR WATERSON: Yes. Within C, either one or two is sufficient.

MR HOSKINS: I think yes, one or two is sufficient. I am only hesitating because it is whether it is within C, because --

PROFESSOR WATERSON: Well, after having gone through A, B and C?

MR HOSKINS: Yes, absolutely. Our submission is either one or two is sufficient, i.e. you don't need to satisfy both.

MR LOMAS: Can I just understand what you're saying philosophically or jurisprudentially on this topic? You are saying, as I understand, that Napp or Bodson or

Pompes Funèbres represent what? A particular application of United Brands to their particular facts, or a jurisprudentially different way of applying the prohibition against excessive pricing under article 102?

MR HOSKINS: The latter, because certainly in relation to the copyright cases --

MR LOMAS: They weren't based on United Brands, these two cases?

MR HOSKINS: I'm hesitating for Napp because it may well be there's some conflation of that. But if you look at Bodson and look at what the CAT says about it. It says:

"Another way of assessing whether the price charged is unfair in terms of paragraph 253 of the judgment in United Brands, and 253 of United Brands as we have in a previous page, is:

"Other ways may be devised of selecting the rules for determining whether the price for a product is unfair.""

For example, if you did have a case where you couldn't do cost plus, it doesn't mean that the excessive pricing part of the treaty can never be applied. You can apply a different approach to what I've called the classic United Brands test, so yes, I do submit that it is possible to establish an abuse other than by the particular formula laid down by United

Brands.

THE CHAIRMAN: United Brands does several things, apart from being a case about pricing bananas, but in relation to excessive pricing, it puts down principles about looking for economic value.

MR HOSKINS: Yes.

THE CHAIRMAN: Then, because of the circumstances of United Brands and what the Commission had done, it moves into costs and a reasonable rate of return.

MR HOSKINS: Yes. Sorry, the approach is always underpinned by the explanation, the finding in United Brands, about the nature of an excessive price being related to economic value.

THE CHAIRMAN: Yes.

MR HOSKINS: Those general considerations always apply. The distinction I'm trying to draw is the fact that, as United Brands recognises, there are different methodologies for making good the philosophical nature of an excessive price. One of the ways is the classic United Brands test, another is --

MR LOMAS: By classic, you mean costs plus?

MR HOSKINS: Exactly.

MR LOMAS: I see -- (overspeaking) -- narrowly to costs plus and then saying there are broader interpretations?

MR HOSKINS: That's right.

MR LOMAS: I see.

MR HOSKINS: I'm not sweeping away the statements in United Brands as to the fundamental nature of an excessive price, but I am distinguishing the methodology by which you can establish --

THE CHAIRMAN: I think the way you presented the Albion case to us does not quite bear that out. Maybe you didn't intend to, but as I understand, the Tribunal set out United Brands as covering the broad space of excessive pricing in comparison to economic value, and then reviewed various ways in which economic value is ascertained.

Then, when it says the approach followed in United Brands in paragraph 20, it doesn't mean that United Brands only provides for costs plus analysis, it says in United Brands it opted for a cost plus analysis because the Commission hadn't done one.

MR HOSKINS: I think we're all on the same page --

THE CHAIRMAN: -- (overspeaking) -- yes. Good.

MR HOSKINS: For example, go back to page 5 of Albion Water. Paragraph 250 of United Brands, is not -- you can't chop and change that. That stays.

THE CHAIRMAN: Against, I mean in argument from the appellants, 249 and 250 were put as the starting point of the whole argument.

MR HOSKINS: Yes, absolutely.
THE CHAIRMAN: Nice to agree on the principles involved.
MR HOSKINS: That's right. That's why I'm doing this exercise.
THE CHAIRMAN: But as always, it is important to see these very significant pronouncements of these very important courts in the context of the cases as they were made, including in relation to Albion Water, which has a context too.
MR HOSKINS: Yes.
THE CHAIRMAN: A context slightly different from the one we're looking at.
MR HOSKINS: Yes.
THE CHAIRMAN: But no doubt --
MR HOSKINS: I hope as a result of this exchange, what I'm trying to convince you of is the fact that, given the nature of excessive pricing as defined in United Brands, there are different methodologies for establishing whether there has indeed been excessive pricing. One of them is the two limbs of United Brands, but there are others. You don't have to tell me whether I've convinced you, but that's what I'm trying to convince you.
THE CHAIRMAN: I'm certainly not going to tell you that, Mr Hoskins.
MR HOSKINS: I wasn't even fishing for it.

MR LOMAS: As a matter of interest, why do you not refer to the Advocate General in the Latvian --

MR HOSKINS: I'm coming to that.

MR LOMAS: Right, okay.

MR HOSKINS: Absolutely. That's exactly where I'm going.

THE CHAIRMAN: Are we still on Albion Water?

MR HOSKINS: No, we're going to the Latvian Copyright case, so that's authorities bundle C/2, volume 2. Tab 39. I'm told you might not have the same version. It's tab 39 in C/2. I'm sorry if I'm slightly out of kilter.

PROFESSOR WATERSON: We have C/3.

MR HOSKINS: Okay. I'm going to start with the Advocate General, but of course what neither Pfizer nor Flynn took you to was the court in AKKA, which was somewhat telling, but I will take you to the court, but let's go to the Advocate General first.

First of all, paragraphs 15-22, the problem, if I may respectfully say, with the Advocate General's opinion, is that he takes United Brands as being a two-limb test, i.e. excessive and unfair, but then what he does is he takes some of the alternative methodologies that I've identified for you, in particular the copyright-type cases where you compare with other geographic markets, and he puts them into the

United Brands excessive and unfair limb test. That's the problem.

This is why we've been having all this debate, I think, because I'm afraid -- I'll come to the court and show you that's not what the court does, but that's the problem with the Advocate General. He tries to, as Advocate Generals are entitled to do, and you can see why they want to do it, he is trying to bring it all together and put it under one rubric, but the court doesn't follow him. So what you have, you see this in particular at paragraph 17, he says:

"The first step in the analysis" -- sorry, I should say 16 -- "is United Brands".

"The first step in the analysis" -- he's talking about the United Brands analysis -- "is to determine whether there is an excess."

Then at 18, he says:

"The Court has acknowledged that there may be different methods of determining whether the price is excessive. For example, when possible and appropriate, a comparison can be made between the sale price and the cost of production."

That's the classic United Brands test.

But then over the page at 19, he brings in the sort of copyright cases but as a first limb excessive case,

and that's not the way, for example, Tournier and all those sorts of cases deal with it. Then he says:

"Once it has been ascertained, by virtue of one or more of those methods, that a significant difference exists, you have to look at whether it is unfair."

The test he gives for unfair is the no objective justification, which one finds in some of the case law, in particular the collecting society cases, but you don't find, for example, in United Brands. It's not put that way; the second limb of United Brands of unfairness is not put as an objective justification point.

THE CHAIRMAN: Objection justification has sort of emerged as a concept well after United Brands, didn't it, in general 102 jurisprudence?

MR HOSKINS: It certainly becomes a stronger feature of 102. I'm not sufficiently --

THE CHAIRMAN: You're going to find me a case from the 1960s --

MR HOSKINS: Exactly. Well, Mr Bailey is beside me, if anyone can find one, it will be him. Objective justification has always been a part of it, but I accept it has become a stronger part.

THE CHAIRMAN: Not so explicit.

MR HOSKINS: I accept. I understand.

THE CHAIRMAN: Unlike the justification point you just

mentioned.

MR HOSKINS: Possibly. But I think also you do find that two-stage approach of comparison with geographic markets and objective justification in the copyright cases.

MR LOMAS: I do think this is forensically and analytically an incredibly difficult point on the authorities, but is not the key issue that in paragraph 21, the Advocate General is essentially equating the concept of an abuse of market power with the idea of fairness? However you measure it with fairness. You've gone through an economic exercise to distinguish or to identify if there is a significant and persistent difference between a reference price and the actual price, you're moving to limb two, and at that stage he's introducing the concept of abusive behaviour as a way of measuring whether, for the purpose of United Brands limb two, something is fair or unfair.

MR HOSKINS: That's certainly one way of looking at it, but he does it through a particular rubric of paragraph 22, where he sort of ties unfairness and that notion of abuse to the existence of a valid justification or not.

THE CHAIRMAN: As you say, he's the Advocate General. It's his job to try to make sense of the existing jurisprudence.

MR HOSKINS: It is, but I'll show you that the court doesn't

follow this route. You've not seen the quote.

THE CHAIRMAN: Well I have.

MR HOSKINS: Of course you have. You have not been shown it by the appellants.

But even on this Advocate General's terms, paragraph 36 -- I'm sorry, no, I'm going to take you to the court now.

MR BREALEY: Well it is an important paragraph.

MR HOSKINS: Well we've already been to it, you've taken the court to it.

Can we go to AKKA, the judgment, you've already got it, but I've got it behind the blue paper. The real crux is paragraphs 35-38. The court says, at 35:

"The abuse of a dominant position within the meaning of that article might lie in the imposition of a price which is excessive in relation to the economic value of the service provided."

Now, part of the problem with these judgments, and you see them a lot in the unfair pricing judgments, is "excessive" is used in two ways. It is used sometimes as shorthand for an abusively high price and it is used sometimes to refer specifically to the first limb of United Brands. And you actually see the court doing that here because in our submission, paragraph 35 is using "excessive" to refer to the notion of an abusively

high price, but then in 36, you see it's used in the specific context of the first limb of United Brands.

"In that regard, the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is in the affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products."

What the court does in paragraph 36 is in a sense just sets out and reaffirms the existing United Brands test for excessiveness.

THE CHAIRMAN: The language of this proceeding was presumably English? Does anybody know? I'm assuming it was.

MR HOSKINS: Well it is a reference from the court, so the language would be that of the -- it says original language English. I'm told it is original language English. But that is the AG's opinion. But the practice of the rules and the procedure in the court are --

THE CHAIRMAN: Of course, judgment would have been in Latvian.

MR HOSKINS: Yes.

THE CHAIRMAN: The Advocate General's opinion would be in

English.

MR HOSKINS: That's right. I was going to make the point that in a case -- this a reference and the language of the case is the language of the referring court.

THE CHAIRMAN: You're quite right.

MR HOSKINS: So it will be Latvian.

THE CHAIRMAN: We're fine tuning translated language, then.

MR HOSKINS: We are, but one comes up against this again and again in court judgments. But it is not just in the Latvian Copyright case that one sees this mixing of language where it says "excessive", used to mean abusive unfair price, and can also just be the first limb of United Brands. It's something one sees quite often.

So 36 is the classic United Brands test. Thirty-seven.

"Nonetheless, as observed in essence" -- so it is not just a "Yes, we're picking the Advocate General in 36 saying it is all right, we're saying in essence what he said in 36 was right" because what the courts --

THE CHAIRMAN: What do you think "in essence" means in that context?

MR HOSKINS: I'm about to tell you because the court tells us. It says:

"As the Court has also recognised, there are

other methods by which it can be determined whether a price may be excessive."

That is what the court is agreeing with.

So the Court of Justice is saying --

MR LOMAS: In that paragraph "excessive" means first limb excessive, not portmanteau excessive.

MR HOSKINS: No, our submission is it means the whole thing because you're going back to paragraph 253 of United Brands. Do you want to go back to United Brands to see this in context? So United Brands. Let's look at them together side by side. United Brands, authorities bundle C/1, tab 3, page 301, so 248:

"The imposition of an unfair purchase or selling price is an abuse."

249:

"Advisable to ascertain whether dominant undertaking has made use of the opportunities in such a way as to reap trading benefits it would not have reaped if there had been normal competition."

250:

"In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."

Those things are constant in all abusive pricing cases. I mean for high prices. All constant. They

never go.

251:

"This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's cost structure. The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."

So that's one methodology to ask whether a price is abusive.

THE CHAIRMAN: Can you tell us what the word "therefore" tells us there, at the beginning of 252? Court judgments can be very cryptic, can't they?

MR HOSKINS: They can, I agree.

THE CHAIRMAN: Stating the obvious. I mean, does it mean because this is one way inter alia of determining objectively the excess, the question, if you're going down that route, is that.

MR HOSKINS: That's my --

THE CHAIRMAN: 252 follows from, if you like, is one application of -- (overspeaking) --

MR HOSKINS: Absolutely. That's my submission to you, sir.

THE CHAIRMAN: Right.

MR HOSKINS: So when we go over the page to 253:

"Other ways may be devised - and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is unfair."

That means that there are other ways, other than the classic United Brands two-limb test, to establish whether the conditions set out at paragraphs 248 to 250 of United Brands are satisfied.

MR LOMAS: Sorry, other ways other than the two-limb test, or other ways other than the cost plus starting point?

MR HOSKINS: Our submission is other ways than the two-limb test.

Can I give you an example of the collective society cases? Because what happens there is there are references to prices in different geographic markets, but there is not a cost plus analysis. There are clearly cases in which an abusive excessive price has been established without either limb of United Brands being done in that technical way.

THE CHAIRMAN: Pity the Court of Justice didn't tell us what other ways economic theorists have come up with.

MR HOSKINS: Indeed. The Advocate General does, but then he puts them all into the first limb of United Brands and that's the problem.

THE CHAIRMAN: Yes, that's why he doesn't get a mention.

MR HOSKINS: Our submission is -- just step back from the law for a minute, which is sometimes a good idea. Are we saying that the only way you can establish an excessive price is if the two limbs of United Brands are satisfied? Cost plus and unfair. And the answer must be --

MR LOMAS: Sorry, cost plus and unfair or excessive and unfair?

MR HOSKINS: Excessive and unfair, but excessive in the way --

MR LOMAS: Excessive may or may not be calculated by reference to a cost plus test.

MR HOSKINS: I agree. I'm going to finish this off by making submissions about how you can use comparables within the United Brands test. But what I want to try and establish is that there are ways other than the United Brands tests that can indicate an abusive price. For example, a comparison with similar products in other Member States.

Let's finish this submission because it may well be at the end of it, there's not that much between us, or it becomes clearer what I'm trying to say. I have more to say.

THE CHAIRMAN: There is nothing between you and us at the moment, you are making your submissions -- (overspeaking) --

MR HOSKINS: Absolutely, I'm not trying to be antagonistic. Sorry.

THE CHAIRMAN: No.

MR HOSKINS: Our submission is if -- let's put United Brands away. Let's go back to AKKA in the Court of Justice. I was at paragraph 37, and I'd made the point, we had the exchange about whether "excessive" there meant excessive first limb United Brands or abusive. And then you have 38:

"According to the case-law of the Court, a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid. It is apparent from the case-law that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that

difference must be regarded as indicative of an abuse of a dominant position."

Not of excessiveness, but of an abuse. That's why I make the point that, cases like Tournier, Lucazeau, it is a genuine freestanding alternative to the United Brands test, that's my submission. I say the Court of Justice here actually confirms that.

THE CHAIRMAN: The focus of this case is different because this is a case about comparison of copyright fee levels in different Member States, so of course the court is going to look at that.

MR HOSKINS: Absolutely.

THE CHAIRMAN: It has, if it is a dilemma, it has the dilemma of the fact that the leading case on the area is a case that went with costs plus instead of comparison with other Member States' prices. So --

MR HOSKINS: I'm going to come to the --

THE CHAIRMAN: I'm sure you're going to get to that, but that's the context for the -- (overspeaking) --

MR HOSKINS: Absolutely. So the point I'm putting to you now is that the case law establishes that there are alternative ways to establish an abuse other than the two-limb United Brands test. That's the submission I am making at the moment.

THE CHAIRMAN: Okay.

MR HOSKINS: And I absolutely agree. I will come to indicate what I say are -- because we say there is an alternative in this case -- but you know we rely on costs plus in any event, or the classic United Brands in any event. So I'm going to bring all that together. But the submission at the moment is that the case law establishes, see paragraph 253 of United Brands, see the copyright cases, see paragraph 38 of the Latvian Copyright case in the Court of Justice, that you can establish an abuse other than by the classic two-limb United Brands test. That's the submission I'm making at the moment.

MR LOMAS: I'm just unclear; are you saying that's the analysis that's contained in the decision?

MR HOSKINS: The decision has -- I'm going to come to that. There are two bases we rely on to say that there is an abuse here, and I'm going to come on to that.

So at this legal level, we say the case law remains the same as the result of the Latvian Copyright case. It is not that the Advocate General has changed the law. He clearly has not, when you go to the Court of Justice. The principal test for establishing an abusively high price is the classic United Brands two limbs. That remains the case.

But our submission is there are, however, other ways

in which abuse can be established. What's quite clear from this, and hopefully from the submissions I've made, is there is no legal obligation on an authority to consider comparators as a prerequisite to a finding of abuse. It might refer to them, comparators might be relevant, but there is no legal obligation on the authority to have regard to them in order to come up with a proper finding of abuse.

Just very briefly in passing on this, Mr Brealey submitted that the Court of Appeal in Attheraces is authority for the proposition that it is necessary to look at comparators. Remember he showed you Mr Roth's argument, as he then was. But the court, well, it said it accepted Mr Roth's submissions. There is absolutely no mention at all of comparators in the Court of Appeal's analysis and conclusion on excessive pricing at paragraphs 203 and 218. This is too important a point to try and say the Court of Appeal has somehow decided this issue when it hasn't made any mention of it at all in its actual reasoning or conclusion.

I think we probably -- let's keep AKKA out, because now I want to go on to well, how do we use the tools that we have in this case? What are we going to do with them?

Let's go back to the Advocate General in AKKA,

paragraph 54.

THE CHAIRMAN: You've lapsed back into your --

MR HOSKINS: I'm sorry, the Latvian Copyright case.

THE CHAIRMAN: I can see it is difficult for you.

MR HOSKINS: All my notes say AKKA but I'm trying my best.

THE CHAIRMAN: You're trying to change it, Mr Hoskins.

MR HOSKINS: I'm sure my juniors will thank you for that.

No lunch.

Paragraph 54, so even with the Advocate General's pretty expansive approach, as we've seen, what does he say should be done? Paragraph 54:

"Regardless of the specific situation in a given case, the methods applied and the other indicators examined must give the authority a sufficiently complete and reliable set of elements which point in one and the same direction: the existence of a difference between the hypothetical benchmark price and the actual price charged by the dominant undertaking in question."

But the words I want to emphasise are "a sufficiently complete and reliable set of elements".

The Advocate General, even the Advocate General, doesn't say there is an obligation on the authority to take account of comparators in every case. So "sufficiently complete and reliable set of elements".

I'd like to go back to Albion Water because this

theme is also dealt with there. That's authorities bundle A/2, tab 15. I think we can put the Latvian Copyright case away now.

If I could first of all ask you to turn, please, to paragraph 72 on page 25.

PROFESSOR WATERSON: Which bundle was this?

MR HOSKINS: I'm in authorities bundle A/2, tab 15. It is page 25. So it picks up the point I've been making submissions on this morning, the Tribunal says:

"We are conscious, however, that in determining the lawfulness of an access price, [so the existence of an abuse in itself], there may be a number of different approaches which a regulator, exercising its" --

I'm sorry, page 25.

THE CHAIRMAN: Tab 15.

MR HOSKINS: It is the top of page 25.

MR LOMAS: Yes, I see, top of page 72. Yes.

MR HOSKINS: This makes good, in my submission, the point I've just been making submissions on:

"We are conscious, however, that in determining the lawfulness of an access price, [so not just the excessive part of United Brands, the lawfulness of an access price], there may be a number of different approaches which a regulator, exercising its concurrent powers with the OFT, could reasonably adopt in arriving at its

decision. There may well be no single 'right price'. To that extent, the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable and which might have resulted in a resolution more favourable to its case."

THE CHAIRMAN: This is all about standard of review.

MR HOSKINS: It is. I want to make clear, I'm not asking you to adopt a judicial review approach in this case, because that would not get me very far. Even if you were to fall for it, which you would not, we'd all end up in the Court of Appeal.

What I am asking you to take from this is two things. First of all, the point I made that there are alternative approaches to establish the lawfulness of a price, not just excessiveness, and also that what the authority has to do is to rely on appropriate and reliable methodologies, even if there might be other things it could have looked at.

I'm going to come on to what we do with the appellants' comparators. I'm not pushing them to one side.

But there is no legal obligation to look at

comparators in order to find an abuse.

Then paragraphs 193 and 194.

"It was common ground between the parties that, in dealing with the first question" -- and this is actually the excessiveness limb of United Brands -- "the 'extent' of the excess in any given case involves a proper degree of discretionary judgment by the decision-maker."

And here you're the decision-maker.

194:

"Thus the first United Brands question requires us to exercise our judgment" -- the CAT's judgment -- "as to whether the relationship between the disputed price and the the relevant costs is excessive or not."

THE CHAIRMAN: Having decided to adopt the classic United Brands approach?

MR HOSKINS: Yes.

Now, in this case, we rely on the classic United Brands analysis in the decision, but we also rely on the before and after comparison. Now, how do we rely on them? Well, first of all we rely on our economic analysis of excessiveness to establish the excessiveness limb of United Brands. We also rely on the before and after comparison for the product to establish excessiveness.

There is no legal obligation to consider

comparators.

We also rely on the before and after analysis as an independent indicator of abuse. So we have our cost plus -- sorry, we have our classic two-limb United Brands analysis, we also have the before and after analysis, and we say that is acceptable in itself to establish an abuse.

THE CHAIRMAN: Can you point us to the part of the decision which relies on the before and after analysis as an independent indicator of abuse?

MR HOSKINS: I can. What I'd rather do is give you a comprehensive note of the paragraphs because it is more than 1 paragraph. We've done the exercise.

THE CHAIRMAN: What you've found that you did, or you always did? I mean, you've analysed the decision and found that it does rely on that.

MR HOSKINS: I'll give you the paragraphs of the decision that show that the submission I've just made is one I can make.

Sir, the position is that we have put this point in our defence, up front in our defence, with a light shined on it and in the skeleton argument, and no point has been taken on admissibility, but I'll give you the paragraph.

THE CHAIRMAN: You've just shone another light on it,

I think.

MR HOSKINS: In any event, sir, even if -- well, we'll give you the paragraphs. Even if you were to come to the conclusion that that was not set out in the decision as a freestanding ground, you would be entitled, having heard the evidence on the matter, to come to the conclusion either that it was sufficient in itself to confirm the decision, albeit in this scenario on another basis, or you would be entitled to rely on it on the basis that it corroborates the classic United Brands analysis. That would be within your jurisdiction, even if you're against me on the point that it is open to you -- it is dealt with in that decision --

THE CHAIRMAN: This follows from it being an appeal on the merits; yes?

MR HOSKINS: It does. And indeed I think you'd find the authority for that would be in cases like the football shirts and/or toys. I think it's football shirts particularly where sir Christopher Bellamy made the point --

THE CHAIRMAN: I don't think we need the authority.

MR HOSKINS: You get to the position of I make the submission, it shows a freestanding test for abuse, or it corroborates the cost plus for abuse. And I make those arguments to you as the Tribunal dealing with it

on the merits.

THE CHAIRMAN: That's a very good moment to stop. Thank you very much.

(1.00 pm)

(The Short Adjournment)

(2.00 pm)

MR HOSKINS: Good afternoon, sir.

THE CHAIRMAN: We're about to put Albion Water away, is that right?

MR HOSKINS: I think it is safe for the moment. I was in the middle of trying to establish the legal framework, or at least set out our position on the legal framework. I got to the stage where I made the submission that there is no legal obligation to consider comparators, and the CMA's position in this hearing and indeed in the decision, is that none of the comparators proposed by the appellants are appropriate and/or useful. It is not correct to suggest that the CMA ignored the comparators that were put forward by the parties during the investigative procedure. They were not ignored, they were taken account of, but found to be inappropriate and/or not useful.

That approach is unimpeachable as a matter of law because there is no obligation to take account of comparators. Now, that doesn't mean that before this

Tribunal, the comparators are irrelevant, because the appellants are entitled to come to the Tribunal, as they have done, and say, "We have these various comparators and we think they show, for example, not excessive".

I'll come on to the second limb of United Brands, that's different. But if they come and they give you a comparator and say, "This shows not excessive", that's evidence and it is for you to take account of that evidence and you have to take account of it in the round. But there is no legal obligation on an authority to take account of comparators. But here we did, and we rejected them.

I think this has probably got more heat and light than it deserves, but I think it is important, and I hope it has been useful for me to set out clearly what our position on the law is.

Just so there is no misunderstanding about the framework of the CMA's case on abuse, let me make it quite clear that the CMA's case is based on a classic United Brands two-limbs analysis. That is the principal basis we rely upon, and that is the principal basis in the decision.

Now, there are a number of possibilities, so classic United Brands, two limbs, corroborated by the before and after analysis. So, two different ways of establishing

abuse: United Brands two limbs, plus corroboration by before and after.

Within the classic United Brands test, the CMA's principal position is the cost plus analysis that it set out in the decision. But again, the finding of excessiveness is corroborated by the before and after analysis. Now we're getting probably to extremities here, but logically and legally, if the CAT were to find, contrary to our primary case, that the cost plus analysis was not sufficiently clear to establish excessiveness, it would be open to the Tribunal to rely solely on the before and after analysis to establish excessiveness.

THE CHAIRMAN: Sorry, excessiveness limb one?

MR HOSKINS: First limb of United Brands, this is now purely United Brands first limb.

So we're primarily relying on before and after for corroboration of first limb excessiveness, but it is an alternative ground that you could rely on.

In relation to the second limb, before and after is one of the factors that the decision relies on to establish unfairness. I'll come onto the alternative dispute about unfair limb.

Finally, the point I raised just before lunch, if the CAT were to reject in its entirety, or say it is not

made out, the CMA's classic United Brands analysis, it would be open as a matter of law for you still to find that there was an abuse on the basis of the freestanding before and after analysis. I want to make it quite clear so nobody gets over-excited to my right, that is not the CMA's primary case. It is the endpoint only after the Tribunal have rejected a number of other scenarios.

Hopefully that's a useful exposition of the law and a schema of what the CMA's case is on the law, and how one can use cost plus analysis and the before and after analysis within that different frame.

THE CHAIRMAN: You're going to give us a paper on this.

MR HOSKINS: You asked for where the decision deals with before and after, and that's something we're certainly going to give you. I've discussed it with Ms Bacon. She's very keen to take an admissibility point and I've said that's fine, she can take it in closing. Mr Brealey is, I'm sure, in the same position.

MR BREALEY: Absolutely, I agree.

THE CHAIRMAN: She is going to say you have shifted your ground and you're going to say you haven't?

MR HOSKINS: Well you only get there in the last point, and even if she is right, let's say she is right, that it wasn't put in the decision as a freestanding legal

point, you're going to get my football shirts point, which is having heard the evidence and given that this evidence has been in the case throughout, you are, as a Tribunal, entitled to find that in any event if that's where you wish to go, sir. I don't actually think admissibility will take us anywhere, but we'll give you the paper, and Ms Bacon will make her point.

THE CHAIRMAN: We will hear everybody on that, I'm sure.

MR HOSKINS: Can I go to our skeleton argument at page 42 because I took you to in my opening remarks, I referred to the passage in Sirena, which --

THE CHAIRMAN: I wasn't bowled over by that, I have to say.

MR HOSKINS: I see that. You say it was very old. Albion Water makes the same point, and it is less old. I told you to put it away, but now we are going to it.

I didn't have enough foresight, I'm sorry.

A Court of Appeal judge once accused me of giving him a bad back by referring to too many authorities, so I apologise for that.

Authorities bundle A/2, tab 15, paragraph 225. I absolutely take on board your cautionary words about taking things out of context, et cetera, but I did make submissions before lunch to show that you can have freestanding alternatives to the United Brands two-limbs test. We say this is one of them, obviously high prices plus no

objective justification, and the same point is made by the Tribunal, paragraph 225, four lines up from the bottom:

"In our view, the Authority was correct to observe that neither Scandlines nor Attheraces 'excludes the possibility that, in the absence of relevant non-cost-related factors, the very excessiveness of a price could be sufficient to establish that the price bears no reasonable relation to the economic value of the product/service being provided'."

In terms of United Brands recognises you can have other approaches, Sirena and Albion Water, too, both support the submission that one of those approaches is obviously high price, is very high price, plus no objective justification.

MR LOMAS: You would say that's a reference to paragraphs 249 and 250 of United Brands?

MR HOSKINS: Yes, and 253. I'm only hesitating because 253 is express reference to alternatives, but yes, sorry, that is giving effect to the basic principle of United Brands in 249 and 250.

You see the language there, the language used of economic value, et cetera.

THE CHAIRMAN: Just remind me what a non-cost related factor is in English? That means?

MR HOSKINS: I think that is when we come to economic value, because in the classic United Brands case you'll have the analysis of costs and then you'll have to consider whether any non-related value has to be taken account of before you can find it is abusive.

THE CHAIRMAN: So nothing to do with costs.

MR HOSKINS: It is to do with economic value, sir.

THE CHAIRMAN: Okay.

MR HOSKINS: Can I come to the unfair limb, this is page 43 of our skeleton argument because here there is an unfair element to certain types of comparators because you've seen the language of the cases, all of them, the United Brands, the Latvian Copyright case, Albion Water, the unfair limb is always stated to be if a price is unfair in itself, or when compared to competing products. It is quite clear on its face that they are intended to be alternatives. And the decision is based on a finding that the post-September 2012 Flynn prices were unfair in themselves. That's the basis of the decision.

Now, whether this is going to have the same stress on it, given the legal submissions I've made, which says that comparators can be relevant to the first limb of United Brands excessiveness, I don't know. But we still maintain the position that the law on the unfair limb is clear that an authority is entitled to find the second

limb is satisfied on one or the other of these bases. It is not required to show that both are satisfied.

The first point, I've just made it really, is the case law makes it clear that the two parts to the unfair limb are genuine alternatives. That's the language, it is an "or". You see that all the way back to United Brands, paragraph 252. It has always been that way.

The Athens Airport case, it is the same literal point, but let's look at it. It is authorities bundle C/2, I don't have the same numbering as you, I'm afraid. It is tab 27. I mean it makes the point, but it makes it expressly: United Brands uses the word "or" and therefore the unfair limb does not require cumulative application of those criteria. It is paragraph 47 of the judgment. If I could ask you to read that.

I understand the point that's made that this is a different context, et cetera. Yes, it is a different context, but the legal point is always the same.

I'm now going to get shot because I need to go to Albion Water again. I'm sorry.

THE CHAIRMAN: I still have it.

MR HOSKINS: Fantastic.

THE CHAIRMAN: You're safe.

MR HOSKINS: Authorities bundle A/2, tab 15, page 79, paragraph 251:

" Dŵr Cymru submitted that, if the Tribunal were minded to conclude that the First Access Price was unfair, it would be incumbent on the Tribunal to revisit the issue of whether it was unfair in comparison to competing products before drawing any conclusions."

Then, 255, the first reason given for that being rejected:

"Paragraph 252 of United Brands refers to a price which is unfair, either 'in itself' or 'when compared to competing products' - an alternative, not a cumulative, requirement."

In our submission, it is quite clear on the law that the second limb of United Brands is a genuine alternative.

Can I deal with economic value?

THE CHAIRMAN: Before you do that, Mr Hoskins, I can understand why you say on the authorities that the two limbs of unfairness are alternatives in the sense that an NCA can succeed by relying on one alone. Does it follow from that, in your submission, that it is an unfettered choice for the NCA? It can simply choose one in isolation and ignore the other, and ignore any, if there were any, prima facie evidence that the practice was not unfair on the other limb?

MR HOSKINS: If the authority makes out the limb it has

chosen, and if the Tribunal is satisfied that one of the limbs is fulfilled, then that should be a finding of abuse. Then the second limb is satisfied. That's the way I put it. So if you hear the evidence and you're satisfied that the unfair in itself alternative is fulfilled, then the proper legal conclusion is second limb fulfilled.

THE CHAIRMAN: You would say for that because you've chosen the first limb, we are obliged to exclude comparators because comparators are only mentioned in the second limb?

MR HOSKINS: Correct.

THE CHAIRMAN: Okay.

MR HOSKINS: Well, comparators to competing products, to other products, not to the same product. It is not excluded by the language.

THE CHAIRMAN: Yes. What are we to read into the second sentence in paragraph 255 of Albion Water II? Why do you think the Tribunal found it necessary to refer to other ways of determining whether the prices are unfair?

MR HOSKINS: This is as a complete alternative to the United Brands two limbs. Paragraph 253, in my submission, is the paragraph in United Brands that says you can establish an abuse by entirely alternative means.

THE CHAIRMAN: When the Tribunal goes on secondly, thirdly,

fourthly, fifthly, is it operating within United Brands or outside of it?

MR HOSKINS: It's a bootstraps argument. The first point the Tribunal makes in Albion Water is if one of the limbs is satisfied, that's enough for unfairness. It then goes on, in any event, to deal with the comparators, but that is obiter because it was not necessary to do so, given paragraph 255.

THE CHAIRMAN: That's your submission.

MR HOSKINS: It is.

THE CHAIRMAN: Can we have a mutual understanding to put the case away now?

MR HOSKINS: I'm going to come back to it in the not too distant future. I'll leave it up to you.

Economic value. This is page 46 of our skeleton argument. The short point here, the core point here, is, as we saw in United Brands, it is necessary in considering whether a price is abusive to determine whether a product has any relevant economic value above and beyond purely cost-related factors. There is no single correct measure of economic value; it is a matter of judgment on the facts of the particular case. I'm not going to look at it now, but we give the reference to Albion Water, I don't think that's going to be controversial. Pretty much all of the things you have

to decide are matters of judgment by definition. I'm not sure it gains much from authority.

THE CHAIRMAN: No.

MR HOSKINS: Now, probably the best example, I think, of additional economic value, is the value of the right to broadcast football matches. It is one that I think appeared in Bellamy and Child quite a long time ago and you see reference to it in case law as well. Because the cost to clubs of providing the product which is a licence to enter the stadia and film a match, is far outstripped by the licence fees charged to broadcasters. As we know, those prices just go up and up and up. It doesn't cost the clubs billions of pounds to allow someone to come up and set up some cameras in their ground.

The justification for that is the value of the right to broadcast football matches to television companies is sufficiently valuable to the television companies to justify the prices which are demanded by the clubs. And that's the sort of best -- it is almost an extreme example, but it is a real example of, on one hand, the cost of providing a service, and the price charged and the economic value which justifies that price.

But we know that the economic value of a product is not simply what a dominant undertaking's customers are

willing to pay. That's not going to be controversial, footnote 174 of our skeleton argument, Attheraces, paragraph 205. Now that observation is particularly apposite in a case where the customer has no real choice when purchasing the product in question, and for that, we rely on Advocate General Jacobs in Tournier, which is again often cited in the context of this discussion in textbooks, et cetera.

Let's go to the opinion itself, because this is obviously a very important point. Authorities bundle C/1, tab 9. If we can pick it up at page 2541 in Advocate General Jacob's opinion: "The issues before the Court" at the bottom of the second column, paragraph 18. We're at page 2541.

"The questions put by the national courts are highly complex but in essence seek the guidance of the Court on the following issues:"

The one we're concerned with is number 4 on page 2542:

"The criteria to be applied by the national courts in determining whether the royalty required by Sacem [the collecting society] for the public performance of sound recordings by French discothèques is excessively high and therefore abusive within the meaning of Article 86."

Then if we go to page 2557, you see Sacem had proposed certain criteria to justify its prices.

This is paragraph 64. Sacem rejected the comparison with the level of royalties charged in other Member States, and the other criteria mentioned by the national courts. It proposed certain other criteria including the importance of music to the discothèques.

You'll see the point being made there, if you go to a disco and there's no music, you're not going to stay very long. It's absolutely fundamental to that economic operation.

Paragraph 65 is the crucial one:

"The criterion of the importance of music to the business in question is superficially attractive, since it appears only logical that those who need music more should be prepared to pay more for it. However, it appears to me that the usefulness of the criterion breaks down in a situation where a given category of users is completely dependent for its functioning on the supply of music and where because of the absence of competition that category must, in effect, pay whatever price is required of it."

This is the situation of the French discothèques and

1 we say that's the position of the NHS, the CCGs, the
2 patients, the composites of the customers of Flynn.
3 THE CHAIRMAN: Was that observation by Sir Francis Jacobs
4 accepted by the court?
5 MR HOSKINS: It is not dealt with by the court, there is not
6 an express reference to it. This is an Advocate
7 General's opinion.
8 THE CHAIRMAN: It is not contradicted?
9 MR HOSKINS: It is not contradicted.
10 Immediately you'll see why we rely on that in the
11 present case.
12 MR LOMAS: Is the effect of your submission, Mr Hoskins,
13 that if you start with the position whereby there's
14 a certain value to the buyer, and therefore your
15 economic value progressively goes up the further that --
16 the greater that value to the buyer becomes, and then at
17 a certain point, based on this citation, there is a need
18 for the buyer, whether it is music for a discothèque or
19 a drug for someone who is stabilised on it, and at that
20 point the economic value plunges back to zero, it is,
21 if you like, a catastrophic event, you get to a point
22 where your need becomes so great that the addition to
23 your economic value to reflect that demand criteria just
24 evaporates.
25 MR HOSKINS: Because the language used by Advocate General

Jacobs is it is completely dependent. I accept that you're right, insofar as a product or service is needed by a buyer, because it has an economic value to the person, to the buyer, then that can justify the higher price. And that's a way you can see through competition, well, what it's actually doing is distributing the benefits at the end of the chain because clearly the person at the start of the chain should have a say in that. But when there is complete dependency, any notion of competition breaks down, and that's what Advocate General Jacobs -- that's the basis of this. You cannot then look to the value to the buyer because they're not exercising an economic choice.

If that's the case for French discothèques, you can choose whether to set up business as a discothèque or not, but when you're a patient with epilepsy, our case is even stronger than this, because what is your choice other than taking the product you are stabilised on? It is the risks we've seen in the evidence.

THE CHAIRMAN: You discount the therapeutic value entirely because the patient has no choice?

MR HOSKINS: You don't ascribe any economic value to it.

THE CHAIRMAN: You don't ascribe economic value to the therapeutic effect because the patient has no choice.

MR HOSKINS: Yes.

THE CHAIRMAN: Okay.

MR HOSKINS: Yes. Normally, in a situation like this -- and we'll come onto it in Pfizer's ground 4 Attheraces -- and I don't want to pre-empt it, I will flag it up, we'll come to it when we come to it. But, for example, in Attheraces, you have the idea of televising rights, albeit to the bookmakers, but at each stage of that chain there was competition, and of course what we don't have in our case is competition at every stage of the chain, but I'll come to that when we deal with Pfizer's ground 4. I just want to flag up that we're not in a normal situation where there's competition at each stage of the market, and your idea here is who takes what share and to what extent should the law interfere with that. We're in an extreme case of complete dependency and a lack of competition. But I'll come on to Pfizer's ground 4.

Albion Water II. Authorities bundle A/2, tab 15, paragraph 225.

It's the first eight or so lines at page 70, paragraph 225.

What this is confirming is that in each case, of course you must look and see whether there is economic value, but it is possible that, having conducted your analysis, you conclude there is no economic value.

Therefore, the test of excessiveness depends solely on a costs based analysis. That's at 225. You see the same point being made, and indeed, this was the position in Albion Water, there was no economic value. 264 and 265. Paragraphs 264 and 265.

PROFESSOR WATERSON: I'm getting confused. Do you mean there was no other representation of economic value rather than there was no economic value?

MR HOSKINS: There is no legally relevant economic value.

PROFESSOR WATERSON: Legally relevant. Okay.

MR HOSKINS: 264 and 265 is just the application of the statement of principle I took you to in 225. In this case, there was no economic value, and therefore excessiveness was based entirely on a cost based analysis.

So where does this take us? As we say at paragraph 135 of our skeleton argument, a failure to take account of any relevant economic value would clearly constitute an error of law, but if there is no relevant economic value above cost plus, then of course it doesn't need to be taken into account. I mean, it's stating the obvious.

On the question of unfair in itself, so this is the second limb of United Brands, and it is the unfair in itself alternative, this is page 48 of our skeleton

argument. The question of whether a price is unfair is a matter to be looked at in the round, again it is Albion Water but I'm not going to ask you to pick it out again. It is a matter of judgment, having regard to all of the circumstances of the individual case. That's not going to be controversial.

In order to be abusive the difference must be both significant and persistent. The difference must persist for a certain length of time and must not be temporary or episodic.

That comes from the Latvian Copyright case. But clearly we'd say if the differential is found to be excessive, it was significant and persistent, so we'd satisfy that part of the Latvian Copyright case.

Then paragraph 138, it is Albion Water again. What happened in Albion Water was that certain factors were taken into account by the Tribunal in determining whether there was unfairness or not, and those were the competitive conditions in the market and factors establishing a dominant position, for example, barriers to entry. That's paragraphs 266 and 213.

The fact that the relevant market was not capable of functioning in a manner that produced or was likely to produce a reasonable relationship between the price charged and economic value of the products supplied, and

that's paragraphs 269-270, and the interests of the end customer, was also relevant, paragraph 271.

So there was the paper mill that wanted to get the water for its business and its interests were taken into account in assessing unfairness. But we've given you the reference to those and that's just a particular illustration of Albion Water of the sort of factors that were taken account of.

THE CHAIRMAN: That's an illustration. Albion Water is an illustration.

MR HOSKINS: Yes, of the sorts of factors, but we for example rely on the interest of the end customer in the decision, the NHS, and that's legally relevant, but it was taken account of. Interests of the end customer in Albion Water. Albion Water is an illustration, absolutely.

MR LOMAS: I don't want to become too cartesian about this, but you cited the significant and persistent test from the Latvian Copyright case, but you cited it in reference to the unfairness limb two. I thought the point you were making earlier was that Wahl had taken those things and applied them to limb one. I suspect there may be common ground that significant and persistent probably applies across the piece, but I just wanted to check where we were.

MR HOSKINS: This actually comes up in the court's judgment. Shall we go to it? Is that the best thing?

MR LOMAS: Yes.

THE CHAIRMAN: This is where the court accepted the Advocate General's --

MR HOSKINS: Well let's go on to it. Authorities bundle, I think you have C/3, tab 39, and it is paragraphs 55-56 of the court's judgment, which is where what it's actually doing is applying the alternative to classic United Brands, which is what I've called the copyright society's approach. I would ask you to read 55 and 56. So it is not actually in the United Brands two-limb test at all, but I am accepting that for unfairness to be established, those criteria would have to be fulfilled, although they're not actually put in the context of United Brands in this case. Because clearly, a differential, an excessive price that was merely fleeting, would not be unfair.

You may want to keep Latvian Copyright out. The final point on the law, just to complete this journey, is reference to comparators, because you have my point the legal obligations refer to comparators, but when you come to look at the comparators proposed by the appellants, there are certain criteria they have to meet. We've dealt with this in our skeleton at

pages 49-50.

The first point is it's quality not quantity with comparators. It's not the case, as I think sometimes the impression is given by the appellants' submissions, that you must look at as many comparators as possible. Clearly there has to be an element of what is the quality of the comparators.

You may ascribe different weight to different comparators. So it is not again, we're not in a binary situation necessarily. You might look at some of the comparators and say, "Okay, they're not wholly irrelevant, but actually we're not going to give much weight." But it is quality not quantity, and it is not simply the case that if you can come up with ten comparators and eight of them point one way and two point the other, the eight must win. Because if the two are of a sufficiently high quality compared to the eight, the two win.

In relation to judging the quality of comparators, you have the case law, we've summarised it at paragraph 143. I don't think this is controversial:

"Comparators must be selected in accordance with objective, appropriate and verifiable criteria."

Then the point at B which comes out of cases like Scandlines, Albion Water, Latvian Copyright. I think

these are common ground.

I'm sorry, that was --

THE CHAIRMAN: It was common ground on the principles, maybe.

MR HOSKINS: On the principles, of course. I'm still in the legal --

That's what I wanted to say on the law. I wanted to set out the whole framework and I hope that's been helpful.

Now I'm moving into the classic United Brands test, the first limb, the excessive limb. You heard my submissions from earlier about how you can use the comparison over time in this limb to corroborate the costs approach or as a freestanding indicator of excessiveness, if need be. But in relation to the cost plus approach, we picked this up at page 53 of our skeleton argument, we've reproduced some tables from the decision there which are confidential, so I won't blurt them out this time.

You'll see this is the CMA's analysis, but if you look at the degree of Pfizer's excesses, so that's at the top of page 54 of our skeleton argument, unfortunately it is chopped in half, but you'll see the sort of percentage excesses that are there, you'll see in particular the excesses on the 100mg, the 300mg, and

then you look at the findings on Flynn's excesses, maybe a forensic point, but you'll understand probably why Pfizer doesn't run this point as hard as Flynn does because certainly on 100mg and 300mg, the excess is so great that if you chip away at the edges it doesn't get Pfizer anywhere, and that's why the real heat and light in this bit of the case is between us and Flynn.

153 is important, because as well as looking at Flynn's excesses by way of percentage, there is also the absolute excess. I'll come onto that a bit more, but you'll see the figures are confidential as to the value of Flynn's absolute excesses and the extent of them.

If I can deal next with the common costs issue. I'm not going to try and pre-empt the cross-examination, but I want to set a framework. The decision, as you know, allocates indirect costs to the product on the basis of sales volumes. That is not challenged at all by Pfizer. This issue is only challenged by Flynn, and they have the argument that a revenue-based approach should have been adopted.

If you go to our skeleton argument at paragraph 163, I think it is quite a useful way to see what the result in simple terms of the volume based approach is. Again it's confidential so I can't read it out.

Paragraph 163, but you'll see what the sort of rough end

result is, and our submission is that is not something that should cause alarm. It looks like a pretty reasonable place to end up.

There's the problem of circularity on revenue-based approaches. As you've seen, using a revenue-based approach in excessive pricing cases is inherently problematic because of the circularity problem. If you have a problem with an excessive price and it is drawing common costs to it, that may make it look as if it is justified, but that's only because of that circularity problem.

The risk of circularity in a revenue-based approach is accepted by Mr Williams, who is Flynn's expert on this matter. If I can ask you to look at the joint statement, Mr Harman and Mr Williams, that's in bundle F, tab 5. It's point 2.2 of the joint statement. The bottom of page 9, the proposition, the question is:

"Does the use of a revenue based approach in cases of potential excessive pricing risk a 'circularity bias'?"

You see Mr Williams's position is that he agrees that it does. Then he explains his position.

"RW accepts that in theory there is a risk of circularity bias arising from the use of a revenue based allocation in excessive pricing cases. He believes that his sensitivity analysis adequately addresses this

concern, and that the circularity risk is not a rationale for discarding a revenue based approach."

The way that Ms Bacon put it yesterday was he does these two sensitivity analyses to show that in this particular case there is not a risk of circularity. That's the way she put it.

There's a problem with both those, he calls them sensitised cost allocations.

The first one, second Williams, bundle D, tab 12, page 13. It's not got a neat heading, but paragraphs 49-60, effectively Mr Williams sets out the analysis that he has referred to as the first sensitised cost allocation. This is where you find it.

If you look at the table at paragraph 58, analysis of profitability on total portfolio. And again, I'll tread carefully because of the confidentiality. You see the third row of that, "Allocate common costs", and he gives a certain amount. I'll come back to that figure, but he allocates within this sensitised allocation the total amount of costs that he treats as common, and allocates across the products that figure in the third row. This analysis, just so we've got all our ducks in a row, applies a reasonable return on sales figure of 8.79 per cent. And that's based -- that takes in a margin of tolerance. You see that at paragraph 52(c)

in footnote 16.

The second sensitised cost allocation, still in this bundle, next tab, tab 13, also at page 13, table 2, so this is the second sensitised cost allocation, you'll see the third row, "Allocate common costs of ..." then you'll see a figure in blue.

I'm looking at the first column, third row, "Allocate common costs of ...", you'll see it's the same figure as the one I showed you, hopefully, previously.

THE CHAIRMAN: Isn't this covered by answer 2.3 by Mr Harman in the joint statement? Aren't we there already?

MR HOSKINS: That's where I'm headed toward. I want to set it out. I wanted you to see where they were, I want to show you what the basis of them was.

THE CHAIRMAN: You drew attention to the first question, they go on to consider, "Do the approaches adopted by Mr Williams using his sensitised methodologies remove the risk of circularity bias."

And then you go on to exactly what you've been saying.

MR HOSKINS: That's exactly the point.

THE CHAIRMAN: So that's going to come out in the evidence, presumably.

MR HOSKINS: This is complicated stuff. Ms Bacon, I think, did a very good job in setting up the framework and

I just want to make good some of the points in that because there are some extra bits to the framework which we haven't had yet.

THE CHAIRMAN: Mr Williams, I don't want to put words into his mouth, but presumably would not dispute the fact that the figure you've referred to is in his methodology.

MR HOSKINS: Correct. He has another answer when we get to him, but I just want to show what the issue is between us on this.

THE CHAIRMAN: Okay. All right.

MR HOSKINS: The figure that's been used for common costs in both these sensitised allocations is the one I've shown you. The problem with it is that it is made up of some that are genuinely common costs, and some that are actually costs which are directly attributable to products, are not common costs. Again, that is accepted by Mr Williams, at paragraph 4.2 of the joint statement. That's F5, 4.2:

"Is it appropriate to treat sales and marketing expenditure as common costs in the assessment of Flynn's prices?"

Mr Williams says:

"The inclusion of costs which both GH and RW agree are attributable to products other than Phenytoin appears at

first instance counter-intuitive. The costs in question, which principally relate to sales and marketing expenses on Flynn's non-Phenytoin brands, amount to ..."

Then he gives a figure.

You'll see that the figure he has used for attributable common costs in his first and second sensitised costs allocations are, in fact, roughly double what the true common cost figure is. Of course, increasing common costs in that way serves to reduce the excesses then indicated in the sensitised allocation analyses. You will see the points I'm going to make, you'll see where it goes. Those are the sensitised costs allocations, we'll say neither of those removes the circularity problem.

What he does is having -- this has been an iterative process between the experts -- is he comes up with a corrected common cost analysis and I want to show you where he ends up. I think you've seen it but I want to show you how this all fits together. We're still in bundle D, the third report of Mr Williams at tab 13, paragraphs 54-59. You were shown these by Ms Bacon. Now, what he has done here is he has gone to genuine common costs. You'll see that paragraph at 54(a) on page 17, so he's now using the proper common costs figure.

What he does now is rather than using the

8.79 per cent return on sales figure that he did in the sensitised cost allocations, he uses a 21 per cent figure. So, if you like, what's been taken away from him by the correction on common costs, he then takes back by using a higher figure and obviously there will be submissions made to you about the appropriateness of a 21 per cent figure.

I wanted to show you, those are the three sort of centrepieces of Mr Williams's analysis. First two, don't use common costs, solely common costs, third one, depends on a 21 per cent loss.

Page 59 of our skeleton argument. You'll have seen, I referred to it earlier in the week, that Mr Harman has performed his own crosschecks, and just to make clear the bases he's done them, they're based on the correct common costs figure, which I'm not allowed to say but I showed you the figure, and a 6 per cent reasonable ROS that he has assumed, and then excesses are calculated. So really where the experts come down is six against 21. There are different arguments, but actually that's the crux of it.

That takes us then to what is the reasonable rate of return that should be applied. I'm at page 60 of the skeleton argument. The decision sets a reasonable rate of return based on the ROS method. Paragraph 177 of our

skeleton argument is an important paragraph because it sets out what the CMA's understanding is of what we're trying to do here. Why are you applying a ROS? What are you looking for when you talk about a reasonable ROS? Our position is that:

"In a competitive market, an undertaking expects to earn sufficient profits on an activity to provide a sufficient return to its investors. Indeed, the Commission has noted that if a company wants to cover the cost of capital it is legitimate for it to do so."

You'd have thought that was fairly obvious.

"The purpose of a reasonable rate of return is therefore to acknowledge that a company requires a financial incentive to supply a product, as a return on capital invested and/or as a reward for bearing any risks associated with supply."

:

"As a corollary, the reasonable rate of return does not identify the maximum return a company is permitted to earn on a product."

But the really important part of that is the penultimate sentence:

"The purpose of a reasonable rate of return is therefore to acknowledge that a company requires a financial

incentive to supply a product."

That's what the CMA's looking for when it talks about a reasonable ROS.

Now let's look first of all at how the reasonable ROS is identified for Pfizer and then we'll do it for Flynn. Because you would be forgiven, from the submissions so far, for thinking it is just taken from the PPRS and that is not the case.

Let's take it for Pfizer. The decision finds that a ROS of 6 per cent is a reasonable rate of return for this product for Pfizer. I'm going to emphasise this throughout, we're not talking about a reasonable rate of return for Pfizer generally, we're talking about a reasonable rate of return for phenytoin sodium capsules. It's a product specific reasonable rate of return. If we can go to the decision, we pick this up at paragraph 5.86.

We see the heading. I should say, this is a section dedicated solely to Pfizer. You see that on page 305 the heading "Establishing a reasonable rate of return for Pfizer", so this is all Pfizer specific.

Paragraph 5.87:

"There is no directly applicable and generally accepted industry benchmark within the UK for what is a reasonable rate of return for manufacturers of generic

drugs. However, the CMA considered the following possible benchmarks: Pfizer's internal ROS, the allowable ROS under the PPRS and other companies' ROS rates."

First of all, 5.89, Pfizer's internal ROS:

"In respect of Pfizer's internal profit margins, Pfizer submitted data to the CMA that showed in the years 2009 to 2013…"

I don't think this is confidential because it is not marked up. Someone shout if it is.

"... it had a ROS of 0 per cent, 2 per cent, minus 42 per cent (i.e. a negative ROS), 4 per cent and 5 per cent respectively across its UK business as a whole."

You see the explanation for the minus 1 in that year is because there was a -- oh, it's confidential. You'll see the explanation at footnote 939.

Then the decision goes on:

"The CMA has taken account of Pfizer's submissions that phenytoin sodium capsules were loss-making during some of this period and has adjusted these figures to remove Pfizer's revenue and costs for phenytoin sodium capsules. Based on these calculations, Pfizer's yearly profit margins across the rest of its business from 2009 to 2013 ..."

Then there's confidential, and you have the figures.

Then 5.90, it says:

"The CMA considers that these figures are informative", and 5.91 explains why.

"The CMA considers that a reasonable ROS for the calculation of Cost Plus for Pfizer's Products should not be materially higher than the returns Pfizer earned across its UK business as a whole, because: phenytoin sodium capsules are a very old drug which have not undergone any recent development or innovation by Pfizer which required any investment that the CMA has been made aware of; and Pfizer's supply of Pfizer's Products involves very low risks since there is an established and sizable base of stabilised patients who, due to the principle of Continuity of Supply, will continue to be treated with the product."

You will see that's a recurring theme. I'll come back to that in cross-examination and closings.

Pfizer hasn't disputed the figures that are here. So that's the first point in the decision. You look at what Pfizer's internal ROS is, and you are looking at phenytoin, specifically because of its characteristics, should have a lesser figure, and we'll deal with that in a lot more detail.

The second point in relation to Pfizer is at 5.93, which is the allowable ROS under the PPRS. 5.93:

"The appropriateness of a rate of return around Pfizer's ROS is confirmed by reference to the reliable ROS under the PPRS. Pharmaceutical companies are allowed to earn a ROS of up to 6 per cent on their portfolio of branded products with the PPRS."

5.94:

"The CMA recognises that there are limits to the PPRS ROS rate of 6 percent as an indicator of a reasonable rate of return."

You'll see over the page:

"The CMA recognises that the purpose of the PPRS is to control pharmaceutical companies' profits on their portfolio of branded products."

You'll see the recognition of the arguments that are being made.

5.95:

nonetheless, useful and informative for the reasons given below.

I'd like to highlight a couple of those reasons, you've probably read them already. 5.97. You'll see the point made again is specific to the nature of phenytoin sodium capsules. So it is a specific consideration of the reasonable ROS for the product, set against a PPRS figure for branded figures and we have here a long off-patent generic product.

Then at 5.99, there's another factor which is just by looking at a 6 per cent ROS rate as against Pfizer's internal target rate below which it puts a product under review. So when it starts to think a product is not performing sufficiently well and needs to be looked at.

So those, I'm not saying those are all of them, there's more in here, but it's not simply the PPRS, which is the impression you might have. Indeed the PPRS isn't given even as the primary reason for adopting 6 per cent ROS. 5.102 is also important, because sometimes it says if 6 per cent ROS is a reasonable rate of return, therefore that must be the case across the whole industry, and that's simply not the case, because the 6 per cent ROS has been identified as suitable for this particular product with the characteristics that I've identified, and indeed which are not disputed.

So this sort of in terrorem argument, the whole industry will be in turmoil, because of the 6 per cent, is a false hare, and that's explained explicitly at 5.102. This is a reasonable ROS for phenytoin sodium capsules.

Flynn, if we pick that up, decision paragraph 5.154.

MR LOMAS: Before you move onto Flynn, later that section, the CMA looked at other companies' ROS rates and

rejected them as irrelevant, on the basis that it wasn't clear that there was a consistent basis across the companies, or I think that the products were comparable.

MR HOSKINS: Yes.

MR LOMAS: But that wasn't a concern you had when you looked across Pfizer's portfolio.

MR HOSKINS: The reason why -- it's a point I want to raise in cross-examination. I understand the sensitivity. I'm not trying to be coy, I just --

MR LOMAS: Okay, well you had a point --

MR HOSKINS: We have an answer to it. It will come. It is clearly a question we have to answer. It is front of my mind.

The Flynn position at 5.154, so again, this is the equivalent section for Flynn. You'll see the heading at page 322:

"The CMA's assessment of whether Flynn's Prices are excessive".

It begins at 5.154:

"Establishing a reasonable rate of return for Flynn."

If I could pick it up at 5.160, I think it is very important to understand that what the CMA has actually found for Flynn is not as such that 6 per cent is

a reasonable rate, it has found that a 6 per cent rate for Flynn would be different language used. First of all, very conservative. If you pick this up at paragraph 190 of our skeleton argument, we give the references. The 6 per cent ROS for Flynn is described as very conservative, very generous, and a generous upper bound. So I make that quite clear, we're actually saying, Flynn's getting more than it should by a 6 per cent ROS rate; that's our position.

5.160 is an indication of the point I've just made. You'll see the reference to the conservatively, et cetera. 5.162 says:

"The rate of return should take into account the following facts."

So again we're doing a product specific analysis of the reasonable ROS. It is not a ROS for Flynn generally; it is not a ROS for generic companies generally; it is a ROS for this product with those characteristics.

5.164, you'll see the point about other comparables. It's saying that:

"In relation to Flynn's internal ROS and other companies' ROS rates, insofar as they do provide a helpful comparator (which for the reasons given below, the CMA has approached with caution), they suggest

a higher ROS than six per cent. However [then there are particular factors taken into account], the nature of the activities that Flynn undertakes, the nature of the drug in question and the prices at which phenytoin sodium capsules are supplied to Flynn all point to a lower ROS than 6 per cent. Weighing up all of these factors in the round, the CMA has determined for the reasons set out below that a 6 per cent figure represents a reasonable, albeit very generous, ROS for the purpose of calculating Cost Plus for Flynn's Products."

Capital P, which is phenytoin sodium capsules.

THE CHAIRMAN: Do the three bullet points in 5.163, is there any priority there, or are they of equal ranking?

MR HOSKINS: Well I think it's fair to say the allowable ROS under the PPRS is given more weight in the decision than the other two are, which are given limited weight, if any, very limited weight.

THE CHAIRMAN: In the three bullet points in relation to Pfizer, the PPRS comes second, not third. Is there any significance to be attached to that?

MR HOSKINS: There can't be for reasons I have described.

THE CHAIRMAN: So we can't attach any significance?

MR HOSKINS: No, the first two are downplayed, you'll see

from the paragraph I've just shown you, in 5.164, Flynn's internal ROS and other companies' ROS rates. They're not dismissed entirely, but it's said that insofar as they're relevant, treat it with caution. Whereas the PPRS has given one of the specific points in the substantive analysis which follows. Again you'll see the point, the suggestion that comparators were ignored is simply not right. They were weighed in the round.

5.165, the nature of phenytoin sodium capsules. You're beginning to see this point, it recurs throughout the decision, I don't need to read it out.

"The activities undertaken, and the risks incurred, by Flynn", again you'll see very importantly at 5.166:

"The underlying purpose of a rate of return is to provide an appropriate reward for the costs and risks a firm incurs in the supply of a product. A reasonable return will therefore reflect the level of investment and risks incurred in order to sufficiently incentivise a company to undertake the activity."

That's the core of what we're looking for.

5.167:

"Flynn performs a nominal role, incurs little, if any, risk."

5.168 shows the activities which are undertaken by

Flynn and, as you'll be aware, of course all the manufacturing continued to be done by Pfizer, Flynn made the fortnightly orders, and sourced out distribution, et cetera, but the table sets them out and Mr Davies has been put up against that. We'll cross-examine him on that.

5.172:

"Flynn also incurs very little financial risk in relation to the role it performs in the supply chain."

Then there is -- it's a decision, so it is not chapter and verse, but there is a relatively detailed discussion of the specifics of the financial risk. It is confidential, so I can't read it out. Can I ask you to read, please, paragraphs 5.172 to 5.178. (Pause)

So we see the nature of the analysis that has been done, paragraph 5.174 is the one I shall ask you to read, but I can refer to it. Again, it is very product specific, it is the supply point, et cetera, in relation to the particular product.

Then there's another section that begins 5.183, the heading is: "Flynn's rate of return in absolute terms". The point was made by Ms Bacon "well, there is no figure other than six, it must have come from the PPRS" and that is, with respect, not right, as we see from this section.

5.183:

"It is relevant to consider the high supply price which Flynn pays to Pfizer. This is because a higher supply price means that any given percentage ROS translates into a higher absolute return for Flynn."

What has been done in this section is we're looking at the absolute return to Flynn.

5.184:

"Table 5.15 below sets out a ROS of 1, 2, 3, 4, 5 and 6 per cent would provide Flynn in absolute terms. Because of the high supply price which Flynn pays to Pfizer, a 6 per cent ROS would provide Flynn with a return in absolute terms of [blank] in the dates."

Then you have the table which sets out what the absolute returns would have been at a ROS of 1 per cent, 2 per cent, 3 per cent, 4 per cent, 5 per cent and 6 per cent. You see the confidential figures.

5.186 puts the 1 per cent in context by comparing it to what sort of absolute return Pfizer would have got in the period. Bear in mind Pfizer is carrying out the manufacturing, et cetera.

What we say, what the decision says, is that this shows that even a 1 per cent ROS would have been a more than sufficient financial incentive for Flynn to supply this product. It doesn't even need 6 per cent to have

an incentive to commercialise this product.

The next section, "Flynn's internal ROS", is one that's dismissed.

5.188:

"For the reasons set out below, the CMA considers that these internal ROS figures are not informative."

Given the time, I won't dwell on that now.

"Other companies' ROS rates" again, 5.194:

"The CMA does not consider that it would be appropriate to rely on those other companies' margins", and then reasons are given.

Then one comes to the PPRS. 5.199.

The allowable ROS under the PPRS is not the sole or even the determinative reason for adopting a 6 per cent ROS figure for Flynn. The decision is quite explicit about that. 5.199 refers to the PPRS. 5.200 recognises that there are limitations in referring to it, and 5.201 says it has some probative value.

5.203 makes the point you're familiar with, and I'll come back to it in cross-examination, and closing submissions.

But with respect to Ms Bacon she really approaches this looking through the wrong end of the telescope. She starts with this point in the PPRS and says, "This

is the only point." And she does that, taking you to the statement of objections. Well, it's still a 6 per cent ROS. It wasn't in the statement of objections. I'm sorry, you have to look at what the decision says and whether it justifies a 6 per cent ROS.

THE CHAIRMAN: I think the decision says what you've just read out, which is it's the closest the UK comes to an agreed industry standard for returns, and I think she took issue with --

MR HOSKINS: It is, but my point is the 6 per cent ROS for Flynn is not solely based on the PPRS.

MR LOMAS: Just to pick up on that, you were saying, I think, that of the three factors, it was the one that was weighted most heavily.

MR HOSKINS: No, no, I'm sorry, because the other factors, I made a mistake if that is the case. The other ones were Flynn's internal ROS and other companies' ROS rates. So, for example --

THE CHAIRMAN: I asked you whether the bullet points reflected any order of magnitude.

MR HOSKINS: Yes, within those three bullet points, the PPRS point is more important than Flynn's internal ROS and other companies' ROS rates, but for example, the absolute margins point is not in that -- in those bullet points. That's not a complete list of the reasons in

the decision for finding a 6 per cent ROS.

MR LOMAS: Okay. But of the three ROS rates that you've put out in 5.163, I think you place greater reliance on the PPRS -- (overspeaking) --

MR HOSKINS: The decision clearly does so.

MR LOMAS: Yes. Now my question was picking up on what was being submitted yesterday by Flynn. Has the CMA considered sufficiently whether that 6 per cent figure, given the way it applies in the PPRS, captures the right level of profitability given the transfer pricing adjustment that we were taken to yesterday?

MR HOSKINS: Yes, I'm going to come to that.

THE CHAIRMAN: -- (overspeaking) -- means the authority, not the permission.

MR LOMAS: Sorry.

MR HOSKINS: I'm going to deal with it in cross-examination and I'm going to deal with it in closing, but these are really points for cross-examination.

MR LOMAS: Thank you.

MR HOSKINS: We do make the point that we have the 6 per cent figure for Pfizer, we have the 6 per cent figure for Flynn, and I've shown you the absolute margins section of the decision, because Pfizer is, of course, a company which predominantly produces branded goods, and you've seen the rates it has and the ROS rates that

it has which are not challenged by Pfizer, and you're looking at Flynn. So it's not a completely free floating issue about how do you plug Flynn into the PPRS because we have Pfizer figures, as a comparison.

But I do stress, the PPRS point is not the sole or even the determinative reason for the 6 per cent ROS rate for Flynn, and I would emphasise the absolute margin point, the returns that Flynn actually gets on 1, 2, 3, 4, 5, 6 per cent, given the approach we've adopted to what you have to ask yourself to identify a reasonable ROS, it's to come up with a reasonable return to a company to incentivise it to produce or sell the product.

I emphasise that point.

The point I'm making in relation to Flynn's submissions is you would think that the PPRS was the sole and determinative reason. I hope this quick trot through shows that is clearly not the case.

THE CHAIRMAN: There are lots of reasons, and we shall look at them all very carefully.

MR HOSKINS: Indeed, but you didn't need me to tell you, but I did want to point out, that contrary to the impression given, there are lots of reasons.

THE CHAIRMAN: Yes.

MR HOSKINS: Then 5.210 is the conclusion and you get the point that 6 per cent ROS is actually very conservative

for Flynn, and 5.212 deals with the in terrorem point. The 6 per cent ROS is specific to the product phenytoin sodium capsules. This does not in any way set a standard for the generics industry.

There are other comparators put forward, like gross margins and product contribution. I'm going to deal with them, again they're cross-examination material and, at the end of the day, you'll hear submissions from Flynn and from us as to how valuable those comparators are, but I'm not going to pre-empt that now.

I've got one more topic to deal with, which is submissions on the unfair limb, Mr Bailey has some quick submissions on penalties, but that would be a good place to break.

THE CHAIRMAN: Yes. Were you planning to finish at 4.30?

MR HOSKINS: I may do.

THE CHAIRMAN: That's fine.

MR HOSKINS: Maybe before, but I'm touching wood.

THE CHAIRMAN: Shall we break then now for ten minutes?

MR HOSKINS: Thank you.

(3.14 pm)

(A short break)

(3.28 pm)

THE CHAIRMAN: Before you go on, Mr Hoskins, we've had a reply from the Government Legal Department. Things move

quickly when the administration is involved. I think the gist of it is that we are content for the daily transcript to be provided to the Government Legal Department, essentially for the reason that we've asked them to be ready to put forward a position if they feel that the Department's interests are involved in relation to any description of their affairs in the course of these proceedings, so it is only fair that they should see what the issue is.

Could we leave that to you because I think technically you are all producing the transcript, or one of you is? But could it be made absolutely clear that this is the uncorrected version of the transcript, it is not the version that will go on the CAT's website eventually, it is subject to comments, corrections, clerical alterations, but it is for the specific purpose of enabling them to observe what's going on.

MR BREALEY: Mr O'Donoghue reminds me it should be the non-confidential version.

THE CHAIRMAN: Is there a confidential version? Do we have a confidential version? Until we go confidential, until we go into camera, there is no -- I think we've all agreed that we're going to try to avoid that.

MR BREALEY: That's what I thought.

THE CHAIRMAN: Everybody happy with that? I think it is

down to you, Mr Brealey, to see to that?

MR BREALEY: We can sort it out.

THE CHAIRMAN: I'm a bit unclear who is compiling the transcript. I know that it is in expert hands, but --

MR BREALEY: We get it --

THE CHAIRMAN: Somebody is paying for it. I'm not sure we are.

MR BREALEY: We'll ask Opus to forward it to them.

THE CHAIRMAN: You received the letter from the Government Legal Department, did you?

MR BREALEY: We did, yes.

THE CHAIRMAN: Well in that case, you should deal with it. Thank you.

MR HOSKINS: The final topic I would like to address you on is the second limb of the classic United Brands test. The first option; unfair in itself. This is page 72 of our skeleton argument. That gives rise to two principal issues. First of all, what is the economic value of the product? I'm dealing with it here, but economic value is sometimes dealt with in the first limb in cases and sometimes in the second limb, and sometimes in the middle. I hope I'm not going glib, what is important is that it is dealt with. It doesn't necessarily matter where it is dealt with.

THE CHAIRMAN: I would never accuse you of being glib,

Mr Hoskins.

MR HOSKINS: Very kind. Economic value, and then the question whether Pfizer and Flynn's prices are unfair in themselves.

First of all, economic value. Now, as you know, the decision finds there are no non-cost related factors to increase the economic value of the product beyond the cost plus, as it's defined in the decision. There's a slight oddity because we have the submissions where there came up a lot of the comparators that were put forward and certainly the tablets comparator was put forward under this heading. They said, "We're relying on tablets to show not unfair in itself". I imagine they may well persist on that, but they may say, "Given my submissions on the law earlier, actually we will bring tablets into the excessive limb". It doesn't really matter --

THE CHAIRMAN: I think they submitted that yesterday.

MR HOSKINS: That's fine then.

I need to deal with tablets, whichever limb it's in, but you have our primary submission in relation to this, that the unfair limb are genuine alternatives because of the case law. We actually put a reason why that makes sense at paragraph 220, so this probably should have been in the legal section.

Why is it an alternative? Well, in accordance with logic, we say in a case such as this, because of a similar situation in which both the products and Teva's tablets were thought to be potentially excessive. If unfairness could only be established by a comparison between products, it would not be possible in practice to demonstrate that either the price of the product or Teva's tablets were unfair.

So Flynn and Pfizer point to the Teva tablet price and say, "We charge a bit less than them, so we can't be unfair". And Teva would say, "We charge not that much more than them, so we can't be unfair."

So it makes sense, the legal test as set out, for those to be alternatives. It makes sense. You can see in this case that you should be entitled, you should be able, to establish an abuse, unfairness, by the test of unfairness in itself.

PROFESSOR WATERSON: I'm not sure -- I think I see a gap there, in the sense that I see your point, that just by comparing these two, then if they were both high, it's a bit like comparing people's salaries and saying, "Well his salary is high and my salary is similar to his, and therefore my salary isn't high."

I see that point. But then there are other alternatives, and this is -- this could be one of

a range of alternatives. Therefore, it doesn't seem to me necessarily the case that you should then move immediately to unfair in itself.

MR HOSKINS: This point is not a hard edged legal point or economic point, it simply shows that in this case, in my submission, there was a practicality in what you say is in fact the correct legal position of the either/or. Because, of course, the comparator that is pushed hardest and said to be the most suitable comparator for this part of the case is tablets.

THE CHAIRMAN: But you're sort of saying that the legal position accords with logic.

MR HOSKINS: Yes.

THE CHAIRMAN: Therefore, it is a better legal position than a legal position that doesn't accord with logic.

MR HOSKINS: I'm saying that in the context of this case, the legal position, as we submit, has an attractive practicality about it. Because otherwise you would end up in a position, as has been put to you, tablets can be taken into account for unfairness, have to be taken into account for unfairness, and because we benchmarked a tablet, we must ipso facto be fair, and they were -- (overspeaking) --

THE CHAIRMAN: -- (overspeaking) -- often put to us that don't accord with logic.

MR HOSKINS: I accept that as well.
THE CHAIRMAN: -- (overspeaking) -- too.
MR HOSKINS: Sometimes the law is an ass, and we all know that, but a bit of logic doesn't do any harm or practicality doesn't do any harm. I don't put it any higher than that. It is not a hard edged legal or economic submission, it is an observation.

Let me deal with Teva's tablets as a comparator. This is at page 74 of our skeleton argument. The decision finds that Teva's tablets were not an appropriate benchmark.

The first point is that the Teva's tablets were not in the same market as the product. What does that mean? If they're not in the same product market, they're not a sufficiently close competitor of the product to constrain Pfizer's and Flynn's behaviour. Now it is quite right, see Scandlines, the fact that something is not in the same product market doesn't mean you can't look at it as a comparator. But clearly, the value of a comparator will be lessened the further removed it is from the focal product, if I can put it like that. It is a bit of an inelegant way of putting it.

MR LOMAS: You seem to be applying that, Mr Hoskins, as a binary test. It is in a different market, therefore we can exclude it, rather than going to weight --

MR HOSKINS: No, it is a weight point. I want to make it as a weight point.

MR LOMAS: Okay.

MR HOSKINS: The Kantar survey I'm going to come to, and Mr Goosey's survey, particularly in the context of competition between NRIM and the Pfizer capsules, but actually it also deals with switching between tablets and capsules. I'd like to show you what that shows, subject to all the caveats about the submissions I'll make about it later.

The Kantar survey, bundle D, tab 6, page 13. So D, tab 6, page 13. Question five. Now what this is looking at is the question of switching between capsules as a whole, so not specifying NRIM or Pfizer/Flynn capsules. So Phenytoin capsules as a whole and tablets. You see the question:

"If you are provided with a prescription" -- so this is to pharmacists -- "if you are provided with a prescription for 'phenytoin sodium capsules', and the prescription does not specify a particular manufacturer's brand of capsules, what would you do?"

The answer is none of them would give tablets in that circumstance, to be weighed in the round, et cetera, et cetera, but it does give an indication of a real lack of switching between them at the pharmacy

level.

The second point on tablets, paragraph 224 of the skeleton, is that the nature of tablets suggests that it is not going to provide a reasonable indication or is not going to -- yes, provide a reasonable indication that there is -- or a reasonable relation between price and economic value. That's a bit convoluted. It is not a good comparator, because it is not a product itself, for example, that is in a fully competitive market. That's another way of looking at this.

The reason why that is the case is that tablets also have an NTI, non-linear pharmacokinetics, and are also subject to continuity of supply, and that's not in dispute. I showed you earlier, when I -- there's a little extract from Professor Walker's evidence, and for example the guidance doesn't specify phenytoin sodium capsules and tablets, it is just phenytoin sodium generally, and they have the same characteristics, that's not going to be in dispute.

The nature of the tablets indicates that they will also not be subject to effective competition. I'll come on to the point of whether we have to prove they are excessively priced or not, but I simply make that point that they have these restrictions, the same way that capsules do.

The other, of course, implication of those characteristics of tablets is that just like the Flynn/Pfizer capsules, there is a captive audience. If a patient is stabilised on tablets, they should remain on tablets, for all the implications we've investigated earlier today. So that's another reason why they are not a good indication of economic value, they suffer themselves from the same restrictions.

The third point, paragraph 225 of the skeleton, is what happened on the pricing on Teva tablets, because we know that there was the regulation that controlled prices. That was removed, that came off the statute book, and the price of Teva tablets rocketed. So we've set it out, 225:

"Between April 2005 and December 2007, there were a series of significant increases in the Drug Tariff price of Tablets, such that the price increased by 6,584 per cent."

There was then a reduction, and we're obviously going to have to deal with that in the cross-examination about the surroundings. Teva brought it down, but even at that stage the price that was charged following the reduction by Teva was still 1,665 per cent higher than it had been prior to April 2005.

We say there is clearly a problem in, if we're

looking to see whether there has been excessive pricing here, in looking to a product which has also had such extreme price increases. That should set alarm bells ringing on comparability.

The way it has been put against us is: "Well, you have to conduct a full investigation and show that tablets are priced excessively before they can be knocked out as a relevant comparator". In our submission, that's clearly not correct. The question for the Tribunal is not "Are Teva's -- was Teva's price for tablets excessive?" But rather, "In all the circumstances (as I've described) are Teva's or is Teva's prices for tablets an appropriate comparator?"

You can reach a conclusion that Teva's tablets are not an appropriate comparator without having to conclude that they themselves were excessive, and that's the approach the CMA has taken and that's the approach we invite you to take.

There's the point that's been made a few times, this is paragraph 227 of the skeleton argument, that somehow the DH was content with or sanctioned or endorsed the price of Teva tablets, contested by us. I'll come to that in cross-examination. But even if it were correct that the DH had been content with or endorsed them, that would not be a defence under article 102.

The reason for that is the case law we refer to at paragraph 227d of our skeleton argument. It is the Deutsche Telekom case. I'd like to take you to that. It is authorities bundle C, tab 29. I guess it is probably your C/2 or C/3, I'm not quite sure where you'll have it. If I could ask you to turn to page 9640 of the Court of Justice's judgment. It is paragraphs 81-85. I think the quickest thing, if you don't mind, is if you would read those to yourself, 81-85.

(Pause)

Eighty-four is the particularly important paragraph.

THE CHAIRMAN: This is encouragement, not prevention.

MR HOSKINS: Exactly. Whatever we do end up with as a factual finding on what the DH thought about Teva's tablets, it's certainly the case that they didn't encourage them to price at that level. Even if they encouraged them, that would not be a defence. The only time you get a defence because of state intervention is when the state --

THE CHAIRMAN: Sorry, this is a case of encouraging the appellants to commit the abuse, whereas here we're talking about the authority preventing or not preventing conduct which is characterised as an abuse.

MR HOSKINS: Yes.

THE CHAIRMAN: It is the flipside. The principle is the

same.

MR HOSKINS: Yes, that's my submission. I'd say actually our case is a stronger reason for applying this principle. Absolutely. The truth is, I think the way that -- not in this case, but the case law, is, if the state requires you to do something, that can be a defence in competition law. But if you have freedom of action, albeit within the context of a particular regulatory framework or even relations with a regulator, if you have freedom of action, that does not absolve you from the obligation --

THE CHAIRMAN: Well it is a world of multiple jeopardy.

MR HOSKINS: Indeed. That's the world we live in.

I think hopefully that deals with the point: whatever the position with the DH and Teva tablets, not a defence in law to article 102.

We have the other comparators here as well, other AEDs, et cetera. I'm going to come back and deal with them again, they're cross-examination material.

I'd like to come next to Pfizer's ground 4. This is page 78 of our skeleton argument. There are a number of themes to it, but they say in their notice of appeal:

"The economic value of the product should take account of the profits that could be made by Flynn."

The nice point made that, "Well, Flynn is not

complaining about our prices, so what's the problem?"

They rely on Attheraces to try and support this, but I will show you why Attheraces doesn't help them. Attheraces we have at authorities bundle B, tab 1. It is paragraphs 214 to -- I'm sorry. It's the wrong reference, I'm sorry.

It's tab 4, paragraphs 214 and 215. I know you'll be familiar with this, but you had the BHB organising horseracing, the rights to show the horseracing went to the ATR, to Attheraces, and they then on-licensed the rights to foreign bookmakers. So that was the chain. The point in relation to Attheraces was that the market at each stage was competitive and you get that from paragraphs 214 and 215. If I could ask you to read those paragraphs, please, you'll see the reference to competitive market in the third sentence of 214 and the final sentence of 215.

So what the court was effectively saying there was where you've got competition at each stage of the market, why should the law interfere and say, "We're going to take a chunk of the profits from this person and give it to another"? That's put crudely, but that's basically what's being said.

We're of course in a very different situation here

because the final market, the downstream market, if I can call it that, into which Flynn sold, was not a competitive market, because once you get to this stage of the case, we've established the product market, we've established Flynn's dominance, and Flynn is therefore a dominant supplier with a captive cohort of customers, and we say it is charging excessive prices in the downstream market.

Now the idea, if we've ticked all the boxes so far, that somehow you get out of the excessive pricing finding because Flynn was still making a healthy profit in a non-competitive market, it just doesn't run, it doesn't make any economic sense.

There's also another problem with it, a sort of circumvention problem, which we raise at paragraph 239, which is a dominant company could circumvent competition law by introducing an intermediary into the supply chain on the basis that it could then argue that its upstream price cannot be unfair by reference to the downstream price charged by the intermediary, and one might say that's exactly what happened in this case.

PROFESSOR WATERSON: I'm still having a difficulty, I'm afraid, with something in -- not in your case, but in Attheraces, where:

"It was incontestable that the overseas bookmakers

were paying ATR, in a competitive market, amounts which afforded it a handsome profit."

That doesn't make economic sense to me, but --

MR HOSKINS: Yes. I think it doesn't mean in a perfectly competitive market, but I take the point.

I think the point that's being made is there was competition in other markets, and both ATR and the foreign bookmakers were making profits.

PROFESSOR WATERSON: Yes, but even so, it is a somewhat competitive market, but not a particularly competitive market.

MR HOSKINS: Exactly, I understand. There was competition in the markets. Whereas here we say if we're right -- and, by definition, when you get to this argument there was no effective competition in the downstream market for Flynn.

MR O'DONOGHUE: I hesitate to rise, but the point I made in opening was that at paragraph 34 of our skeleton, we've answered each and every one of the points made. What I want to know before closing is what is their response, and we haven't had that, I'm afraid.

MR HOSKINS: That's our response, it is a bad point for the reasons I've submitted.

Can I deal finally with unfair in itself, and I can deal with that very briefly. It is page 80 of our

skeleton argument. Paragraph 243. We set out where the findings are made and we set out what the reasons are. We explain at 244 we've followed the analytical framework used in Albion Water II, and again, I accept that it's illustrative; but it's perhaps helpful to look at.

Now the grounds of appeal on this are pretty limited, to be honest, they're pretty minor, because the reasons we rely on aren't all challenged. So for example, one of the reasons we find it's unfair is the before and after comparison in the decision.

If you look at Flynn's challenges here, summarised on page 82, they don't challenge that here. They rely on the fact that Epanutin was loss-making, and I've dealt with that point. It is no longer relied on by Pfizer. It is hard to see how Flynn can rely on it.

Harm to the NHS. I've explained, I haven't shown you in Albion Water, the interests of Shotton were taken account of, and we simply say it is appropriate to do that here.

Then there is the reputational impact point. That's going to come up in the cross-examination, but these are all very minor allegations, when set against the reasons for finding of unfairness, which were summarised at paragraph 243 of the skeleton argument.

So even if -- I'll put it this way -- Flynn were to

succeed on those three points, it still wouldn't be enough to overturn the unfairness finding.

So unless you have further questions, I'm going to hand over to Mr Bailey.

THE CHAIRMAN: Thank you.

MR HOSKINS: Thank you very much, thank you.

Submissions in opening by MR BAILEY

MR BAILEY: May it please the Tribunal.

I would like to make two opening submissions in relation to penalties. They are first to briefly address the Tribunal on the legal test for deciding whether or not the CMA had the power to impose penalties under section 36 of the Competition Act. Specifically, I'll address the question of intention or negligence.

The second is to address what my learned friend for Pfizer put on Day 1 as the "elephant in the room", which is said to be that this case is not nearly as bad as a hardcore horizontal cartel. If I may, I'll deal in closing with the miscellany of other points raised by the appellants in their skeletons and opening once the Tribunal has heard the evidence before it.

I'm not sure if the Tribunal has available to it -- if I go to my first point -- the transcript of yesterday's hearing. Even if not, there are just a couple of points I wanted to sort of draw to the

Tribunal's attention.

THE CHAIRMAN: Yes, the uncorrected transcript.

MR BAILEY: If we go to Day 2, page 177. You can pick it up at lines 8 to 10. I'll just read it for everyone's benefit.

"The question, the CMA's contention, is that Flynn did know or ought to have known that its prices were unlawful. That's the threshold question."

If the Tribunal could turn over to page 178, at lines 7 to 9 we just see essentially the same point made again:

"The overall question is whether Flynn did or should have known that its prices infringed Article 102."

Then the last point I'd draw the Tribunal's attention to, further down that page, at line 15:

"Now, the legal test sets out what that threshold of foreseeability is, what's the standard."

I think the point there being is that they're saying the test is foreseeability. And then just going on:

"The latest word from the Tribunal on this issue and the relevant test is set out in Sainsbury's v MasterCard."

The Tribunal may recall that Mr Hoskins and myself both said we would like to briefly address the Tribunal on that issue.

Before I address Sainsbury's, may I very briefly just set out what the CMA understands the relevant law is here. I can summarise it in five propositions. It may help the Tribunalto have available to it the judgment in Napp, we would say that's the classic test on intention and negligence, when it comes to the imposition of penalties. Napp is to be found in authorities bundle A/1, tab 1. I'm just going to take my five propositions from this judgment. I'm on page 117 in the judgment, under the heading "Law". So the first proposition, and I don't believe this to be disputed, set out at paragraph 452, is that the CMA, at the time the director, may impose a penalty only if it is satisfied the infringement has been committed "intentionally or negligently". That is the threshold.

One can read on the last sentence of that paragraph:

"If the penalty is challenged before this Tribunal, [as in this case], it is the Tribunal itself that has to be satisfied as to that threshold."

The second proposition, and now over the page at paragraph 455, and this is an important point, is that the Tribunal has referred in the preceding paragraphs to the position in European Union law, at the time, Article 15 of Regulation 17. As the Tribunal is probably aware, giving the power to the European

Commission to impose fines in exactly the same circumstances by reference to intention or negligence. It is paragraph 453.

Then, my second proposition is that when deciding whether or not an undertaking committed its infringement intentionally or negligently, that is to be answered consistently with the principles of EU law. You see the Tribunal refer, in my submission, correctly, to the general duty under section 60(2) to apply the Act consistently with EU law.

It is for that reason the Tribunal says although the CMA must satisfy the Tribunal that the infringement is intentional or negligent, we do not need to decide which it is.

The third proposition is the meaning of "intention", and one sees that at paragraph 456. This is an important point, because this is important before I address what is said in the Sainsbury's decision. We pick it up at about five lines down, you'll see that the Tribunal says:

"It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or

Chapter II prohibition."

Pausing there, we say that's important for two reasons. First, intention does not require the CMA to show, or the Tribunal to satisfy itself, that either Pfizer or Flynn knew they were engaging in infringing behaviour. And second, contrary to the submissions that were made yesterday by Flynn's counsel, the test is not one of foreseeability. One sees that if one reads on in paragraph 456, and if you just pick it up from where it begins "While in some cases", and perhaps the Tribunal could read that sentence to itself.

(Pause).

The point being made there is in the absence of evidence to the contrary, the fact that certain consequences are plainly foreseeable is an element from which intention may be inferred. It is about inferring the intention, not the legal test itself. If I may add, Flynn correctly acknowledged that point in paragraph 231 of their skeleton argument. For the Tribunal's note, it is also set out in the decision at paragraph 7.14 on page 428.

My fourth proposition is as to the meaning of negligence, and one sees that in paragraph 457. I don't believe this to be contentious. It requires that:

"... the undertaking ought to have known that its

conduct [not the infringement, not unlawful behaviour, its conduct] would result in a restriction or distortion of competition."

Then if I may just move the Tribunal on to page 121, paragraph 466, in my submission, we have a very helpful transposition of those general principles to the specific circumstances of an exploitative abuse, and you'll see the Tribunal acknowledge there's not much guidance in EU law on this issue, and then this:

"In our judgment, it must be shown that the dominant undertaking either knew (in the sense that it could not have been unaware), or ought to have known, that it was, without objective justification [that's kind of picking up on language in some of the collecting society cases], maintaining prices above the levels that would prevail in conditions of normal competition."

So that is the test we say the Tribunal should apply in this case. We don't understand Pfizer to take issue with the five propositions that I have set out. But if I may, I'd like to just now turn to the decision in Sainsbury's v MasterCard, and make a couple of submissions in relation to its pertinence to these appeals.

The Sainsbury's decision is to be found in authorities bundle A/3 at tab 27. Yesterday we parachuted in to this decision at paragraph 321, but if I may very

briefly, I would like to just situate this in context, which clearly is a leitmotif of these appeals, context is everything.

Perhaps if one just starts at paragraph 290, you can see ... So section J of the judgment, headed "Illegality". Just to explain for the benefit of the members not familiar with this judgment, this was a private action brought in tort for damages by the supermarket Sainsbury's against MasterCard in respect of its domestic multilateral interchange fee. Fortunately I don't have to go into the intricacies of what a myth is, but one of the arguments that MasterCard advanced in defence to that claim was that actually the claimant, Sainsbury's, was indeed involved, through its own bank, in the very illegal behaviour upon which its action was based. And this is the so-called illegality defence. You can't rely on your own illegal behaviour in order to seek damages.

There's also a Latin phrase, ex turpi causa, that we don't need to dwell upon. That is the issue the Tribunal was considering in that case.

If we move on, one of the elements of an illegality defence is that the behaviour in question must amount to what is called turpitude.

Perhaps if one just notes at paragraph 299, the

Tribunal, referring to various judgments of the Supreme Court, says:

"What amounts to 'turpitude' is at a crossroads."

We don't need to get into that for present purposes, but just that the law in that area is clearly not well settled.

Moving on, perhaps to paragraphs 306 and 307, this is why we understand the Flynn appellant has referred to this judgment. You'll see that what the Tribunal does is refer to a distinction between, on the one hand, innocent breaches of competition law, and the other hand, what it refers to as negligent or deliberate breaches of competition law.

You'll see that at paragraph 306. Again, it's made in paragraph 307(2). At paragraph 307(3) you'll see that the Tribunal says:

"... precisely that distinction is drawn in section 36(3) of the Competition Act ..."

Which is the power to impose penalties.

In my submission, if we move on, at paragraph 317, the Tribunal does correctly set out the law that concerns the imposition of penalties, referring and quoting from the Napp judgment, and insofar as that is the case, we have no difficulty with this decision and its encapsulation of the law.

If I can move to my key point, which is this: yesterday you were taken to paragraphs 322 and 323. That applies a spectrum which, for the Tribunal's note, if one goes to page 193 at the top, you'll see that there's a reference to the idea of an undertaking being aware of its conduct either being clearly lawful, probably lawful, possibly lawful, wholly unclear, probably unlawful, or clearly unlawful. I realise the chairman was a member in the Cardiff Bus case which is being quoted there.

THE CHAIRMAN: I'm putting that out of my mind for present purposes.

MR BAILEY: I'm grateful.

The first point we'd make about this scale, which is both applied in Cardiff Bus in the context of awarding exemplary damages, and is also applied in MasterCard in the context of whether there is an illegality defence for the purpose of defending an action for damages, is that we say that it makes sense in those contexts to enquire into the state of mind of the undertaking as to the lawful or unlawful nature of its behaviour.

We say it's a recipe for error to introduce that enquiry into section 36 and the ability of the authority to impose a penalty. We know from the Napp judgment that it's not necessary for either the CMA or the

Tribunal to examine whether an undertaking knew that its conduct was infringing. That was paragraph 456 that we looked at.

I would like to actually make two further points, just to really make good this proposition. If I could ask the Tribunal to just go back to Napp, authorities bundle A/1, tab 1. I just wanted to show the Tribunal how the --

THE CHAIRMAN: Are we coming back to Sainsbury's?

MR BAILEY: I am not going to come back to Sainsbury's, no.

MS KREISBERGER: Sir, in that case, as Mr Bailey has clarified, he's not coming back to this authority, and I ask for this indulgence, given that this is new. This was not covered in the CMA's skeleton. I simply observe that we set out the test in our skeleton, and it's traditional to respond to the legal test, but there we are. Mr Bailey has not taken you to paragraph 318, so I would ask, when you're looking at this, you do note that in addressing the question of intention and negligence in this judgment, what the Tribunal does is pick up the wording in Napp as to what is an intentional and negligent infringement. That's why we say this is directly relevant.

So I'm just a little troubled that we weren't taken to paragraph 318, which is the key paragraph in my submission.

MR BAILEY: If I could allay those concerns while the Tribunal still has this decision available to it, the opening sentence to paragraph 318 says:

"One of the problems with effects-based infringements of competition law ..."

I omitted to mention that Sainsbury's was running a case based on both object and effect under Article 101. The Tribunal goes on to say:

"It is very difficult to say whether there is an effect of restricting competition."

THE CHAIRMAN: It can also be very difficult to say whether there is an object to restrict competition. I might leave that thought with you.

MR BAILEY: Indeed, sir.

So in my submission, that does not in any way qualify or undermine what is set out in Napp, and the well established principles of EU law which are not cited in Sainsbury's. There is no record of submissions being made about the European Union case law on penalties, nor does the Tribunal at any point in the Sainsbury's judgment discuss those EU authorities, unlike in Napp.

If I may, even with paragraph 318 in Sainsbury's, if I may just show the Tribunal just two further points. One comes from Napp and another is from an EU authority.

In Napp, the relevant paragraph is paragraph 467, so it is authorities bundle A/1, tab 1, page 122.

If one could just read paragraph 467, it is a short paragraph. What I take from that paragraph is the Tribunal applying the test as set out earlier in its judgment as to the facts that need to be established to the Tribunal's satisfaction in relation to dominance, in relation to prices well above competitive levels, and also that prices were not subject to significant competitive pressure.

Just for the Tribunal's reference, because I want to make sure we finish at 4.30, we have sought to summarise those facts in paragraphs 254 and 255 of our skeleton argument. And so we say that whether or not the CMA is able to impose penalties is not about a scale of awareness of the lawfulness or unlawfulness of the behaviour. On the contrary, it is about whether Pfizer and Flynn could not have been unaware or ought to have known that their prices were well above competitive levels, not subject to competitive pressure, and that they were dominant.

THE CHAIRMAN: So of the Tribunal's two formulations separated by 14 years, you prefer Napp?

MR BAILEY: I do, sir, because it is supported by well-established EU case law, and if I may, I would like

to actually hand up a judgment that will actually support the very point that I'm making and also deal with this question of ... (Handed).

So this is a judgment of the Grand Chamber of the Court of Justice. We already have the Advocate General's opinion in the bundles, so in terms of where it might fit into the authorities, one place, if I may suggest, would be next to the Advocate General's opinion. That is to be found in authorities bundle C/2, volume 2 -- at least that's my reference -- tab 33. So for the Tribunal, it's C/3, tab 33. I should say, in case it is said against me that this a new authority plucked out on my feet, in fact it is cited in the decision at footnote 1270 at page 428.

The factual background to this case is set out at paragraphs 15-30. In light of time, I wasn't proposing to say much about the facts other than it involved a company, Schenker, participating in a freight forwarding cartel. It received legal advice from an Austrian law firm that it was legitimate to participate in that cartel under Austrian law. The lawyers made a mistake, they didn't consider EU law, and what I'd like to just take the Tribunal to is the first question, which is to be found at paragraph 33 on page 11 of the judgment.

The Tribunal will see that the question was whether article 101 must be interpreted as meaning that an undertaking, which has infringed that provision, may escape imposition of a fine where the infringement has resulted from that undertaking erring as to the lawfulness of its conduct -- in that case on account of the terms of legal advice given by a lawyer -- or of the terms of a decision of a national competition authority.

Just two paragraphs in answer to that question, paragraph 37. In my submission, orthodox case law. Absolutely consistent with what the Tribunal said in Napp. Of course, we would say binding under section 60 of the Competition Act.

Then at paragraph 38, a very clear statement:

"The fact the undertaking concerned has characterised wrongly in law its conduct, upon which the finding of the infringement is based, cannot have the effect of exempting it from imposition of a fine insofar as it could not be unaware of the anti-competitive nature of that conduct."

So in my submission, that is supporting the fact that while the scale of knowledge of lawful and unlawful behaviour in Sainsbury's was pertinent in that case, and we have no quarrel with the exiguous there, it has no bearing on the ability of the CMA to impose penalties in

this case.

Sir, if I may just turn to the second issue, the so-called "elephant in the room". My learned friend for Pfizer said that this case is not in the same ballpark as a hardcore cartel. He also said that unfair pricing cannot be put at the cartel end of the spectrum. He even went as far as to say that, really, this is a case involving a most benign infringement. For the Tribunal's note, it was Day 1, page 160, lines 20-22.

Sir, as to this putative comparison, I'd like to make three points at this stage. The first is, we say this sort of comparison is simply uninformative. It is not helpful to compare very different types of infringement that may arise in very different situations, and seek to put forward a generalisation that all cartels are worse than abusive behaviour or vice versa. As the chairman observed this morning, context is everything.

It's for that reason we say that when the Tribunal in Eden Brown, the construction recruitment case -- I don't need to turn it up, it is cited at paragraph 286 of the CMA's skeleton -- when the Tribunal observed as to the assessment of seriousness, it must be in context, and each case is very dependent on its facts.

So of course, one can envisage cartels that are very

serious infringements; but in my submission, that does not preclude, at least in principle, serious abusive behaviour as well.

THE CHAIRMAN: In the Eden Brown case they were comparing cartels.

MR BAILEY: They were, sir. That's true.

As to the comparison, I have tried to see where in the authorities any such similar comparison has been made. The comparison was made, perhaps unsurprisingly, by Intel, which at the time had been subject to the largest fine ever imposed, now eclipsed by Google. And we have in the authorities -- I'll just give the Tribunal the reference, I don't propose to go there -- authorities bundle C/2, it may be the Tribunal's C/3, at tab 36. It will be C/3, thank you. At paragraph 1618, Intel said it was wholly disproportionate and unjustified to find it more than a cartelist that was also a recidivist in the car glass cartel.

The General Court's response to that, reassuringly, was the same as the one I put forward to you. That's not comparing like with like. You cannot compare a cartel with an abuse of a dominant position.

Now in case it is said against me, of course the judgment of the General Court was set aside last month by the Court of Justice, but that was another ground,

and so in my submission it doesn't detract from at least the approach that the court took to this issue.

The second point really arises out of the penalties guidance. For the Tribunal's note, that's at H/2, tab 30. We say that the guidance doesn't measure the seriousness of an infringement by benchmarking it against cartels. Indeed, there is no such benchmark.

At paragraph 2.5 of the penalties guidance, what the CMA says is that:

"A starting point towards the upper end of the range for the most serious infringements of competition law will include hardcore cartel activity and also the most serious abuses of a dominant position."

Now I accept of course that there is a hotly disputed issue of fact as to whether or not the conduct subject to the decision is one of the most serious abuses.

As to that, my third point is that well, we say once the Tribunal has heard all the evidence that has been placed before it, rather than an arid abstract comparison with cartels involving different conduct and industries, et cetera, we will make submissions in closing as to why we found that this was one of the most serious types of infringements of competition law.

Unless I can assist the Tribunal any further, that's

all I wanted to say in opening.

THE CHAIRMAN: Just to say, the dispute of fact is whether it is an abuse at all.

MR BAILEY: It is my understanding that both appellants also challenge the seriousness of that abuse --

THE CHAIRMAN: And moving on from that, they'd say if it is an abuse, it is not as serious an abuse as your authority says.

MR BAILEY: That's right, sir. So as I understand it, for example yesterday, you were taken to various interactions between the appellant and the Department of Health. I don't propose to address that. We have to have cross-examination of the relevant witnesses and we will return to that issue in closing.

THE CHAIRMAN: Okay. I think that's very helpful, thank you.

So we're into the evidence tomorrow, is that right? Unless you want to say something?

MS KREISBERGER: Sir, just a housekeeping point in advance of the evidence tomorrow.

THE CHAIRMAN: Yes please.

MS KREISBERGER: If the Tribunal found it helpful, we have a version of Mr Walters' two statements, and we will be hearing from Mr Walters tomorrow, that is referenced to the bundles. The version in the hearing bundle has

references to document numbers but not to the hearing bundles themselves. It may be that you've already marked up your copies, but if it is helpful, I can hand them up.

THE CHAIRMAN: I think hand up any copies that you think will assist us.

MS KREISBERGER: Thank you, sir. (Handed).

MR HOSKINS: 10.30 start?

THE CHAIRMAN: 10.30 will suit us.

MR HOSKINS: It sounds more civilised.

THE CHAIRMAN: Okay. Thank you very much.

(4.27 pm)

(The hearing adjourned until 10.30 am the following day)

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