IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1279/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 May 2018-25 May 2018

Before:

MR ANDREW LENON QC
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

PING EUROPE LIMITED Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

MR ROBERT O'DONOGHUE QC (Instructed by **K&L Gates LLP**) appeared on behalf of the Appellant

MS MARIE DEMETRIOU QC appeared on behalf of the Respondent

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Thursday, 10 May 2018

(10.00 am)

MR O'DONOGHUE: Chairman, Members of the Tribunal, good morning. I appear on behalf of Ping Europe Limited in this matter, together, to my right, with David Scannell and a new addition to our team, Tim Johnston. I have reached the stage of professional life that I need all the help I can get, so Mr Johnston is assisting us during the trial.

To my left you have Ms Demetriou QC for the CMA and Mr Ben Lask also for the CMA.

So in terms of trial structure, we have a firm plan in place. We have pretty strict and regimented timings for each day. The timetable is obviously compressed. In terms of today, I will complete the openings for Ping early afternoon and then we have Ms Demetriou. At some point tomorrow we will get to at least the two expert witnesses and then we have a week of cross-examination next week and a timetable in place for the closings.

As is unavoidable in cases of this kind, confidentiality is a perennial concern. There are general confidentiality issues where there have been markings which I hope are workable. My experience at least shows that people, obviously inadvertently, sometimes say things, but we will minimise that and I'm

sure it will never be intentional on any party's part.

There is of course a specific issue with the complainant, where there is a particular sensitivity and we are fully cognisant of that.

So, Mr Chairman, subject to anything else from the Tribunal, that's all I wish to say by way of preliminary points. I don't know if the Tribunal had anything on its ledger agenda that they wish to raise at this stage.

THE CHAIRMAN: Yes, we do have a point on the timetable. You will recall that the Tribunal proposed an amended timetable, with a non-sitting day on 24 May. The Tribunal notes the concern expressed in K&L Gates' letter of 24 April that this amended timetable would only allow half a day for Ping to reflect on the CMA's written closings before Ping started its own oral closing on 23 May.

Taking this concern into account, we direct that the written closings should be exchanged by 5 pm on Monday, 21 May. That would give Ping a full day to reflect on the CMA's submissions, which we consider should be ample.

MR O'DONOGHUE: Mr Chairman, I'm grateful. I don't know if the CMA has anything it wishes to add in relation to

that.

Opening submissions by MR DONOGHUE

MR O'DONOGHUE: Mr Chairman, in terms of my trajectory for the day, I want to start, if I may, with a number of preliminary observations. We have six points to make by way of preliminary observation. They are largely non-technical in nature because I will be coming back to the legal and other arguments in some detail. The first point is that this is a case that matters enormously to Ping. It goes to the heart of who Ping is and what it does.

Ping has consistently put the beauty and integrity of the game of golf above short-term profit. This lineage and ethos can be traced back to its founder, Karsten Solheim. Karsten took up the game of golf at the age of 42, showing that there is hope for us all yet, and unhappy with the clubs he was then using, he used his aeronautical engineering background in General Electric to design new types of clubs in his garage. That garage business grew into a manufacturing business and the company remains family-owned today.

It would, of course, have been very easy for Ping to sell out to the likes of Nike or private equity for a quick buck. The family has resisted that because it fundamentally cares about the game of golf and the ethos

of the company going back to the time of Karsten.

Now with that success, Karsten poured millions of dollars back into the game of golf by supporting golf at university level, building and funding university courses and, most notably, developing and supporting the Solheim Cup, which is the premier women's team event in global golf. He was inducted posthumously into the Royal Golf Hall of Fame. Everything that Ping does today is guided by his founding principles and the question always is: is this good for the game of golf?

That is why John Solheim, the chairman of Ping Europe, and John Clark, the managing director of Ping Europe, who are behind me today in the third row, will, save for the complainant's evidence, attend the entirety of this trial. This is something of very deep concern to the company.

Now, just to give two very vivid illustrations of this first point. If we can go to Clark 1 in B1, tab 1. It's paragraph 31, which is on internal page 7. It's the bit highlighted in yellow which is confidential, but the point which I can make, without trespassing into that, is that the company cared so much about the potential for misuse or inappropriate use of its equipment that a seven-figure sum of equipment was voluntarily destroyed.

Mr Chairman, it's B1, tab 1, paragraph 31.

Again, one has to ask oneself: why would a company do that? You are destroying valuable equipment that could be sold potentially for a profit, and the reason is the risk of misuse or inappropriate use of the products was considered to be a greater risk than the possible benefit of a quick buck.

Now, the second vivid illustration, which is also in B1 -- it's B1/1, tab J -- so these are the exhibits to Clark 1 and it's tab J -- so this is a letter to account-holders sent by Mr Clark, and it's the last paragraph which is of interest. It says:

"To some of you ['you' being the retailers] this may sound restrictive in these difficult times and will result in fewer sales for Ping. However, it emphasises our commitment to our core philosophies and demonstrates that the quality of what we do is more important than the quantity. It is a commitment for the long-term strength of the brand and we believe that the vast majority of our customers understand and support these policies, and we thank you for this support."

So, again, what comes out crystal clear is that this is a company in the market for the long term, this is a company with an unrelenting commitment to quality, and if that comes at the price of pure short-term profit,

well, so be it.

Again, one would have thought that with these two striking pieces of evidence the CMA would have had some period of introspection and said, "Well, why would a company want to do this?" These are strong contra-indications of anything remotely nefarious to do with these policies. In fact they are overwhelming indications that these policies are purely driven by quality and not by profit. These questions don't seem to have been even asked, never mind answered.

The second point is that Ping prides itself above all on being an ethical company. Integrity lies at the heart of everything it does. It is therefore with some regret that I must say this: Ping finds it a shock and a scandal that the CMA saw fit to dawn-raid its premises. The challenged policies are open contractual terms which are widely advertised across Ping's materials. There is nothing secret.

What we find particularly striking is, if one looks at the CMA's own guidance on dawn raids -- and we can hand this up to the Tribunal later today -- it's paragraph 6.36 now I am quoting:

"The CMA will usually seek a warrant to search premises where the CMA suspects that the information relevant to the investigation may be destroyed or

otherwise interfered with if the CMA requested material via a written request. Therefore, the CMA mostly uses this power to gather information from businesses or individuals suspected of participating in a cartel."

On this basis, in relation to an open, contractual, vertical restraint, a dawn raid was completely and utterly inappropriate.

The third point is that this is a case that the CMA should have had the moral and political courage to drop. The extraordinarily aggressive tactic of dawn-raiding Ping has completely backfired. Not only did the CMA not find a smoking gun, but the contemporaneous documents it did find showed beyond any serious argument that Ping's commitment to custom fitting is absolutely genuine and that the internet policy only exists to support that legitimate objective.

Now, in the same objections we had an extraordinary situation where the CMA embarked on a completely misguided attempt to suggest that the internet policy was somehow about European Union parallel trade and it is striking that that objection no longer forms part of any of the objections in the decision. It has quite rightly been dropped.

What did happen is very clear. In the old hearing before the CMA, which I attended, the evidence of

Dr Paul Wood, who is a witness in this case, completely devastated the CMA's case because, following his engineering and technical evidence, it was overwhelmingly clear what was the basis for the custom fitting policy and why the internet policy existed as a symbiotic support for that.

The engineering scientific material behind that, which I will come to -- it is extremely important -- made it completely untenable to suggest that this was anything but genuine and beneficial and that it had anything to do with anything other than supporting custom fitting.

This sort of eureka moment led the CMA to make an extraordinary volte-face because what then happened was the alternative measures paper emerged some months after the statement objections and, in that paper, the CMA accepted for the first time that the custom fitting objectives of Ping were genuine and legitimate and beneficial and that the internet policy was at least suitable, albeit they say disproportionate, to support those objectives.

So there has been a pivot in the CMA's position from a suspicion pre-dawn raid that this was akin to a cartel or a sham to an extraordinarily nuanced case which involves dancing on a pin-head about proportionality.

They have gone from one extreme to the other.

So the criticism now made of Ping is that they slightly overshot in terms of their zealousness and support for custom fitting. In my submission, any sensible government agency faced with the same situation would have decided that it had backed the wrong horse. It had simply picked the wrong case as an internet case. But such is the CMA's resolve to have a test case, to have an internet trophy case, that they have carried on regardless.

Again, I regret saying this, but Ping honestly feels like it is being bullied by the CMA. The CMA's annual expenditure is five or six times Ping's turnover in the UK of the relevant products.

Mr Clark, the managing director, has spent more time on this case in the last three years than any other issue facing the company. It has consumed the company, we say quite unnecessarily so, and there have been aggressive tactics motivated by the desire to have a test case and frankly the CMA couldn't care less about Ping.

A fourth point which is fundamental is that the CMA has persisted with a clear misunderstanding of what is Ping's product. In stark contrast to all other manufacturers, Ping does not pre-manufacture or

pre-assemble clubs, save for the question of display items, which I will have to come back to. It makes clubs to order.

The clear contractual framework and expectation is that an order will be made following a face-to-face custom fitting; in other words, Ping does not sell standard clubs. It sells a personally customised and optimised product. The benefits of this composite or joint process for consumers are not seriously in dispute and, as a result, Ping does not sell its golf clubs online.

Now, this position puts Ping in a different position to all other manufacturers because all of them pre-assemble clubs for sale in significant quantities and they also permit online selling, again in large quantities. They, by contrast, are agnostic as to whether they sell standard or custom fit clubs and equally agnostic as to whether those sales are affected in a bricks and mortar outlet or online. The fundamental difference is that Ping is only in the bespoke business, whereas its rivals mix and match and sell standard products.

We made this point in paragraph 61 of our skeleton and I am quoting that:

"Ping's composite product cannot therefore be

compared to those of competitors, in the same way that one could not compare a John Lewis suit that is capable of being adjusted, shortened and tailored, to a fully bespoke suit sold by a family-owned tailor on Saville Row."

We think that is a fair analogy.

A fifth point: if one takes a step back from this case, it is very difficult to see any intelligent competition rationale for the CMA's case. Inter-brand competition is brutal. There are more than 20 distinct brands and Nike, one of the largest corporations in the world, exited this market because it was unable to compete with the existing competition.

Now, we can pick this up. It's quite important. It's in B1/1, tab O. So it's headed "Tiger" -- "Tiger" being Woods -- "took Nike's golf exit badly", and there is a picture of him looking crestfallen. Then over the page, at the bottom of the page, is the founder of Nike, Phil Knight. He says:

"The decision was really a financial decision. It's a tough business. There's probably two or three too many manufacturers in the golf club business, and that makes it so that even if you can have a breakthrough innovation in golf clubs, well then the other factories are going to have to discount their product. So you have a hard time really making it profitable, and we really

didn't."

So one of the biggest corporations in the world entered this market with high expectations and very, very quickly found out that it was a market that was too competitive. It simply couldn't make money. It is to Ping's great credit, as a family-run company, that it managed to out-compete the likes of Nike.

In respect of intra-brand competition, again the picture is extremely strong. Ping has grown its UK retailer base from around 100 fitting accounts in 2000 to over 1,200 today, so a 12-fold increase in less than 20 years. According to Mr Holt's unchallenged evidence, 97 per cent of all UK consumers have at least two retail outlets, bricks and mortar stores, within 15 miles of their home. So the coverage is truly extraordinary and is deep and is wide and intra-brand competition in respect of Ping is therefore extremely strong.

Now, the CMA's response to these points isn't very satisfactory. On inter-brand competition they say, "Well that's completely irrelevant. It's neither here nor there". We don't accept that. In our submission, if inter-brand competition is strong, that has considerable implications for how one then looks at intra-brand competition and a fortiori so in the context of selective distribution.

The second point is an assertion -- and it's no more than that -- that online selling is important. Now we will come back to that in the evidence, as the Tribunal no doubt expects, but the first point to note is that there is uncontested evidence that there is a de minimis percentage of Ping's account-holders that even sells online. It is a low single-digit figure. The relevant question isn't whether online selling is generally of interest to retailers. The question for this case is whether online selling of custom clubs is important. Given that the overall percentage of Ping account-holders who sell online is tiny, the percentage of those who would wish to sell custom fit clubs online must be even smaller.

Strikingly, one of the CMA's witnesses, one of the largest retailers, American Golf, says that it does not sell custom fit clubs online and, at least as matters stand, does not wish to sell custom fit clubs online because it doesn't think they can be fitted properly. We will come back to that but that is a striking point.

In truth, the only real evidence to the contrary is from two witnesses for the CMA who are not Ping account-holders, and their evidence really amounts to no more than saying that, if they could increase their sales volumes, they could increase their profit and therefore online selling is important. With respect, that is

something of a truism and it involves elevating their profits over the protection of competition. We will come back to this, but fundamentally these people do not sell custom fit clubs at all and they have no interest in selling them.

The fundamental problem with the CMA's suggestion that online selling is important is that, in our submission, it is blindingly obvious that the decision will lead to Ping's current custom fit rates dropping and almost certainly significantly so. If that occurs, it will mean that consumers will end up with a less suitable product and with less choice and sub-optimal quality. In our submission it is completely unreal to pretend otherwise because the CMA cannot simultaneously extol the convenience of shopping online and then say that, after the consumer has made a decision to shop online, he or she would then be persuaded nonetheless to go to a bricks and mortar outlet and have a proper custom fitting. It's basic common sense.

Once one understands this, which in our submission is obvious, it is clear that what the decision would then entail is sacrificing Ping's account-holders at the altar of promoting e-commerce. That will actually reduce competition, it will reduce product quality and product choice very significantly. It is very difficult

to think why the two non-Ping account-holders who are giving evidence for the CMA would otherwise be interested in this case. That is their clear self-interest in this case. Now I don't criticise them for that, but that is clearly why they are here.

Now, Ping's uncontested evidence -- and this is Clark 1, paragraph 40F, which we can quickly turn to -- some of this is confidential. So it's internal page 9, part 1, tab 1 of bundle B1. So he makes the point in the middle of the paragraph which is marked "Confidential" as to the coverage of other brands at Ping retailers. Now I'm not going to read out the percentages, but it's quite small.

Then, at the end of that paragraph, he makes a very striking point in terms of the turnovers of the Ping account-holders. The point is that most of them are tiny and very, very few of them are big.

So Ping has this extraordinary nationwide coverage, but it has to be seen in the context of who these people are and what their resources are. For the most part their resources are extremely meagre because their turnover is tiny.

All of these retailers in the CMA's dystopian world, in which retailers would just provide a fitting service and then the online retail giants would swoop in and

take the sale, they are ripe for free riding. Ironically the CMA's own witness, American Golf, supports Ping at least in this respect. They see the danger of free riding, which is exactly why they will not provide the specifications to the consumer following a custom fit in their retail outlets. Other retailers, for example, admit that their bricks and mortar outlets on a stand-alone basis are loss-making.

Ironically, annex 1 of the CMA's skeleton spends 36 pages spelling out in some detail just how small most of Ping's retailers are and that there are a handful of the big boys. We find that slightly bizarre because, if anything, that supports our argument, including on free riding, so we agree with that in many respects.

What the CMA doesn't do is then draw the obvious conclusion as to: if that's true, what then is the impact for free riding? In our submission, the impact is adverse and acute and will lead to large areas of the country not having a local Ping retailer at all.

Now, a final important point -- and it's something which I have touched on, I think, in at least one previous hearing before the Tribunal -- we do wish to emphasise that Ping doesn't have some sort of antediluvian attitude toward the internet or a particular fetish for bricks and mortar shops.

As the Tribunal is almost certainly aware, Ping does sell non-club items on the internet and Ping does advertise and permit the advertising of the pricing of clubs on the retailers' websites, so Ping has a much more nuanced position to the internet.

The critical point is that the reason Ping has such deep retail coverage nationally, the 97 per cent figure I mentioned, is that that is a necessary and effective way of promoting the objective of maximising custom fitting. Custom fitting can, at least in the current state of technology, only be optimised with a face-to-face interaction between two human beings.

Now, Ping expects that with virtual reality technology and perhaps with 3D imaging there may well be improvements in technology in the future, perhaps the near future, in which things may change and it may be possible that there are virtual methods of replicating what currently takes place in a physical environment, can only take place in a physical environment, in the near future. Now, if and when that happens, Ping will of course conscientiously consider that at the appropriate time. But the critical point is that today the retail base and its depth and scope is the most effective way of ensuring dynamic face-to-face custom fitting. If the technology permits that to change, then

Ping will of course study that very carefully.

That's all I wish to say by way of preliminary remarks.

I am now going to turn to the question of what is custom fitting. I want to spend a bit of time on that because there seems to be a lot of confusion on the part of the CMA and some of its witnesses of what exactly is custom fitting and what isn't.

A first rather obvious point is that golf is a hard game. You have a thin piece of metal or graphite of varying lengths, moving at more than 100 miles an hour, with a tiny contact point at the head of the club, while the player is rotating, using more than 20 individual muscle groups and many, many more individual muscles.

There is a great quote from Lee Trevino, who is a six-time major winner, that if you're on a golf course you should hold up a 1-iron because not even God can hit a 1-iron. If anyone has ever tried to hit a 1-iron, they would testify to that.

Now, I want to go to the fitting manual which is at B1/1, tab F. First a rather banal observation, if I may: it's almost 80 pages long, so the fact that somebody went to the trouble of putting all this together is itself notable.

So in terms of how I wish to go through this -- so

if you start on internal page 5 which is headed "Irons" -- so essentially what the manual has, it has sections on irons, woods, wedges, putters, and then, within each of these types of club, there are level 1 and level 2. Then for each club there is the question of grip, which I will come back to. So it is extraordinarily detailed and specific to each club type or group of clubs.

What I want to do is, just for one of the types of club, irons, is to go through the custom fit process and the individual steps. So starting with "Irons" on page 5. So at the top it's "Irons, level 1" and step 1 within level 1 is the interview. You will see at the top of the page there are more than 10 million possible combinations for irons within Ping, and, of course, if one then extrapolates the 10 million figure across the many other types of clubs, one is in the realms of billions in terms of possible permutations. I think it's between 3 and 5 billion, depending on the type of -- on the set.

So the Tribunal will see the questions under the interview. These are preliminary questions, so, "Are you right-handed or left-handed?"; "What are you currently playing with?"; "What do you like/dislike?"; "Do you want steel or do you want graphite?";

"Handicap?"; "How far do you hit a 7-iron?", which is sort of the middle club in the range and "Ball flight" and "Trajectory", "Physical limitations" and so on.

Then the key point on the right is that these questions are a starting point. So it's to understand the player's needs, goals and current equipment.

Then over the page, step 2, is the static measurement, so under "Determine initial model" on the right-hand side, it says:

"Discuss the characteristics and benefits of each model with the player."

Then there is a chart to determine those characteristics in terms of what the player desires and what might be suitable by way of recommendation based on these characteristics. So that's the table in figure 1.

Then over the page, so it's step B within step 2:

"Determine initial colour code and length from static measurements and colour code chart."

So the critical thing here is the lie angle. The lie angle is the measurement of the angle between the sole of the club and the centre-line of the shaft.

Then underneath the picture of the club:

"Establishing the most effective colour code (lie angle) is a very important part of the fitting process as it influences shot direction as depicted."

And then:

"Ping irons can be custom fit to different colour codes to fit players of varying sizes,"

"swing tendencies ...", so swing tendency is something that is inherently specific to that individual. It is the tendency with which they play the iron. So that is inherently something which is bespoke and so on.

Then over the page is the what I would call the "measurement aspect of static fitting". There are two basic measurements. One is your height, which is what it is, but the second measurement, "wrist to floor measurement", is actually quite difficult. You see under 2:

"Establish the wrist-to-floor measurement by having the player stand straight with his or her arms hanging freely, feet shoulder-width apart, and looking straight at the horizon. (Posture is critical in establishing an accurate measurement)."

So when this is done properly, one then plots on an X and Y axis, under the colour code chart, the height and wrist to floor measurement, which then gives a preliminary indication of a colour code. So the intersection point between the height and wrist measurement yields the colour code and then at the

bottom of the page, importantly:

"If the intersection point is on the border between two colour codes, select the colour code that is most likely to achieve the desired results. For example, if the player's shot pattern with his or her current clubs is an undesirable push, fade or slice, select the more upright colour code to potentially reduce or eliminate that shot tendency."

So, again, even when one is doing something which seems on the face of it binary -- you're taking measurements and getting a colour code -- at the intersection points where there may be a straddling of or a proximity to two colour codes, one has to use judgment based on the individual's shot tendencies to make a decision. Again, that is an inherently bespoke and subjective exercise that is based on the individual who presents himself or herself physically in the shop and based on discussions with an experienced fitter.

Frankly -- and I have had one of these custom fittings -- if someone said to me, "Well, what is your shot tendency?", I would say "I tend to miss" or "I tend to hit it out of bounds".

So even the discussion about shot tendencies is not something that certainly your average punter like me can easily describe in a way that the fitter would readily

understand. So the fitter has to deconstruct what are the relevant tendencies and give some advice as to what are my tendencies.

Then, over the page at page 9 -- and, again, we're still on static fitting, so you have the height, you have the wrist to floor, the third step is the colour code based on the intersection point, and then the fourth step is:

"To establish initial club length, refer to the length row located beneath the player's height range on the chart ...", and so on.

Then the second paragraph starting with "Conversely ...", an interesting point:

" ... if the player's intersection point is right at the highlighted band, it indicates that the player's arms are longer than average for his or her height, possibly requiring a slightly shorter shaft."

So, again, this is something which is highly bespoke. You may find out for the first time in your life that your arms are a bit longer or a bit shorter than they should be for someone of your height. Again, even at the static stage, this highly bespoke circumstance gets taken into account.

Then at pages 10 and 11 we have the code charts set out in a format that's easier to read. Then on page 12

we move onto the dynamic swing test which is the critical phase.

Now, as a starting point, the dynamic fitting test is in some ways quite simple. So you will see in the diagram that what you do is you affix tape to the base of the iron head and then the consumer strikes a ball and there is a lie board where the marker tape will make contact with the board and it will make a scuff-mark on the tape to show where the impact is occurring.

So you can see that over the page at figure 10. So you may have an impact that is to the left of centre, spot on in the centre or to the right, and depending on where the swing impacts -- so, for example, heel-side impact on the left, the first column on page 13:

"In this case, select the next flattest colour code, apply a new tape and repeat the test."

Then by contrast:

"Toe-side impact on the right. "In this case select the next upright colour code, apply new tape and repeat the test."

So this really is the proof of the pudding. This is the individual consumer striking the iron and, with impact analysis, showing what type of strike is being practised. Depending on where the impact is, that can lead to further adjustments to the club type.

Then over the page at 14 it says:

"Although a mark close to the centre is desirable, ball flight always takes priority over the tape mark. When ball flight analysis is possible, always cross-check the colour code recommendation with the desired ball flight. In the cases where the fitter defaults to the static measurements, they do provide good statistical probability that the suggestions will fit most players."

Then the next column, a caveat to this:

"Over-the-top swings. Players who swing over the top or have a closed face at impact usually produce tape marks on the toe side, even with the most upright colour codes. In these cases the fitter should default to the player's static colour code."

Again under "Variations" in the middle:

"Help the player understand that clubs will be built for his or her posture, size and swing tendencies, and it is counter-productive to adjust to the club."

So, again, at each stage there is an extraordinary degree of individualisation that is specific if not unique, to the consumer in question.

Then under D -- this is a point that comes up again and again:

"The whole point of these steps is an iterative

process of elimination."

So when one moves through the individual steps, at each stage you're eliminating different options. The idea is to reduce it to two plausible options and then, by a process of elimination, to eliminate one of those, so it is highly iterative.

Then over the page at 15, "Determine initial set make-up". At the top of the page:

"Determining the longest iron a player should carry is an important part of iron fitting, to ensure consistent gapping throughout the set."

Then what you see under figure 11 is essentially a mapping of the club set according to driver swing speed. So depending on the speed at which you swing the driver in terms of having consistency or a lack of gapping across the set, there are different recommendations.

At the top of the page:

"Based on a player's driver clubhead speed and insights gained from the interview, locate the appropriate column on the chart to find the recommended option for that player."

So that's level 1. On level 2 on page 16 is ball flight analysis. At the top of the page:

"Ball flight analysis serves as the ultimate step in

refining and confirming the final combination of model, colour code [...], club length, shaft type, flex and grip size. This gives the player the best opportunity to achieve his or her desired results."

Then under A, quite simple:

"Have the player hit shots with the recommended iron from level 1."

So, again, even having been through the series of steps in level 1, there was a further proof of the pudding whereby, analysing ball flight with the recommended level 1-iron, it can be further refined.

So continuing under A it says:

"The first element to discuss with the player during the ball flight analysis is the model. When comparing models ..."

So in other words different Ping models.

" ... consider the following ..."

So, for example, launch angle.

"If the initial launch angle is lower than desired, recommend a higher launching model. If the initial launch angle is higher than desired, suggest a lower launching model."

Then over the page, "Further adjustment for distance". So, for example, some players seek more distance. So typically, if one plays on park-land as

opposed to links courses, distance may be more of a factor, whereas on links, accuracy, because of the state of the rough, could be more of a consideration. So, again, this is highly specific. It is even specific to the type of course or type of game that the consumer wishes to play.

And "Control" -- so control, for example, in the context of links play because of the conditions on the coast is very important. So it says:

"Depending on the player's ability, a fitter may recommend a more forgiving and more workable model to optimise control."

So there is always a trade-off between hitting longer but less accurately and maintaining control, in other words accuracy.

So step 1 is to refine the particular model, then step 2 under B is to refine the colour code from ball flight. It says under B:

"The second element to discuss during ball flight analysis is the iron colour code. Have the player continue to hit shots with the model selected in step A. If the shot pattern is an undesirable push, face or slice, select the next upright colour code. If the pattern is an undesirable pull, draw or hook, select the next flattest colour code."

Again, reference to the process of elimination. Then at the end of B:

"Ping suggests not deviating more than three colour codes from the player's static recommendation as a result of ball flight analysis since this may lead to adverse swing tendencies."

Then, under C, further refinement is again based on the club face impact. The objective here is to try and have a consistent impact point, rather than the wide dispersal you see at the top of figure 13.

In practical terms we see under "Considerations":

"If the player cannot produce consistent results during ball flight analysis, default to the static length recommendation."

At 19, the penultimate step:

"As the player continues to hit shots, assess the resulting trajectory and spin. Also solicit feedback on how the shaft feels (weight, flex), and the player's desired shot pattern. If launching too high and spinning too much, recommend a stiffer, heavier shaft. If launching too low and spinning too little, recommend a softer lighter option ...", and so on.

So, again, there are highly subjective, highly individual things to do with feel, weight, flex, spin, launch, stiffness, heaviness. These are things that the

consumer himself or herself needs in a two-way discussion to resolve with the Ping custom fitter.

Then under E, if we jump to page 61 -- so, the final step is refine or confirm the grip on the iron.

61 deals with grips generally and, again, multiple steps. So step 1 is measuring hand size. So it says:

"Using the player's glove hand, measure the overall length of his or her hand from wrist to crease to the end of the longest finger, A. Next measure the length of the longest finger from the end of the crease where the finger joins at the palm at B ...", and so on.

So, I mean, again one can see, for example, in relation to wrist crease, these are not necessarily straightforward things to do and there is an art or a science in doing this properly, and someone like a fitter, who does this for a living, is inherently more likely to get it right than someone like me, doing it for the first and perhaps only time.

Then over the page, step 2 -- so there is also a separate colour chart for grips in addition to the colour code for the club itself. You locate the player's overall hand length on the A axis and the player's longest finger measurement on the B axis and then look at the point of intersection between A and B.

Again, the point comes back that if there is an overlap between two colour borders, the smaller option may benefit players who want to reduce a fade or a slice and, conversely, the larger grip option may benefit players who want to reduce a draw or a hook.

Again, one can readily see how going on the internet and trying to figure all this out for yourself really is not easy or maybe even possible.

In step 2, "Determine dynamic grip size", and so on. So that is in respect of irons, the level 1 and 2 steps, and what one can see overall is that there are a large number of steps within level 1 and level 2. For each club type the steps and the dialogue between the fitter and the consumer is somewhat different. Most obviously, the difference between a driving club, a wood and a putter is night and day. That is a fundamentally different type of process.

At each and every stage we see very high degrees of individualisation, perhaps uniqueness, elements of subjectivity in terms of using judgment to select one option over another and even things which are slightly intangible, such as feel, "How does this feel to you as a golfer?". I make the obvious point that virtually none of this can seriously be said to be replicable in an online environment.

There is no serious dispute between the parties that the full extent, certainly of dynamic custom fitting, cannot, in the current state of the art or technology online, be replicated. Even with a quick canter through one of the types of clubs, in my submission, that is hardly surprising when one understands how the process actually works.

Now, if we can pick this up in the statement of Dr Wood which is in B2, please.

So Dr Wood is the engineer who gave evidence before the CMA. He's scheduled to give evidence next week, but I understand -- he's not being cross-examined, as I understand it.

MS DEMETRIOU: We have agreed that -- and I should have perhaps said this to Tribunal at the outset -- but we have agreed, subject to the Tribunal's approval, that it won't be necessary for the CMA formally to put its case to multiple witnesses where they are dealing with the same point. For that reason we don't feel the need to cross-examine Dr Wood. But if the Tribunal is concerned about that approach, then it would be as well to know that at the outset.

THE CHAIRMAN: I hear what you say and we will express any concerns we have in due course.

MR O'DONOGHUE: I'm grateful.

It's a small point, paragraph 1: who is Dr Wood? He is the vice president of engineering, he has a doctorate in applied mathematics from St Andrew's and he is the director of innovation and vice president of engineering and he reports to the chairman. So he is an engineer by profession and has a very strong background in applied mathematics.

A few other points, if I may. So under paragraph 5 you see the extent of the investments made in engineering within the company.

In paragraph 7, an important point:

"Ping's long-standing policy is not to release a new club unless it is demonstrably better than the previous model."

Then at 9, the process of feedback:

"Although improvements [...] typically come from within the engineering staff at Ping, everyone at Ping is encouraged to offer ideas. As an example, improvement ideas especially in terms of available custom options..."

You see what's written there.

"This information is integral to our continuous improvement. Because appropriate data from hundreds of thousands of previous custom fitting sessions are kept in the Ping engineering library, we have a very large database of knowledge regarding many different types of

golfers. This data is used to develop custom fitting options and tools."

Then if I can invite the Tribunal to read 10 to 12, which is highlighted in yellow and, in particular, if I can ask the Tribunal, the second half of paragraph 12 makes an important point about the dramatic improvements in custom fitting. (Pause)

We can pick up the points made in 12 again at paragraph 29 on internal page 7:

"The outcome of a good fitting should be a measurable improvement in one or more of the major performance attributes of good golf shots. In most cases this is increased distance, better distance control, better lateral accuracy [...], better lateral control and/or better ball trajectory. These measures are slightly different for wedges and putters ...", and so on.

We can pick up over the page, at 32, some examples of the particular benefits of custom fitting. (Pause)

Then at 33:

"The best golfers are also the players who are most often custom fit."

At the top of the next page you see the evidence on weekly custom fitting services, so, in other words, people who do this for a living to make money, they

think they can gain an advantage as professionals by being custom fit or refitted as often as weekly.

I'm sorry for jumping around, but if we can then go back to 23 to 28.

If I could invite the Tribunal to read those paragraphs and then I will highlight a handful of points. (Pause)

Just picking up three points very quickly. So first under 23, the last sentence:

"Each element of custom fitting can significantly affect the chances of the ball being hit properly to get the best out of the club."

And 24, there is a reference to exhibit 3, which is "Reasons to be fit every time". If we can quickly look at that. It's under tab C. It's the table.

"Why golfers should be face to face ... custom fitted every time they buy."

So the first column is "Physical changes". You may be stronger, more flexible, weak or less flexible, older, more hunched, teenagers are growing quickly and getting stronger and you may not have a disability. That's one category. Then you see in the other columns a detailed analysis of impact of the change, impact on shot and considerations for iron fitting and separately considerations for driver fitting.

Then the second category is you have had some lessons, change required following coaching, so your swing is on a different plane, you got a bit better and therefore can have a less forgiving club. Over the page, coach wants to increase hand rotation or decrease rotation.

Then in the third category on page 2 is "Change required for improvements in club technology". This is the equipment is different. Then a fourth category, you have a miscellaneous collection of other factors that may lead to changes in fitting specifications. So, for example, back to a point I made earlier, the golfer may decide to place more importance on accuracy than length. So if I have retired to the seaside, it may be that accuracy is more important all of a sudden than length, if I was previously playing on park-land and so on.

So there are a multitude of different reasons why you should be custom fit each time you purchase a set of golf clubs.

Then at 27, a point I want to spend a bit of time on is the so-called P3 documents. If we can go back to paragraph 13 of Dr Wood's statement, please. So the P3 documents are essentially engineering data sheets.

"Data gathered [...] is often collected in a concise and generalised form in a P3 document, ie a know-how

document. We have close to 2,000 of these P3 documents, ranging from design summary documents to customer observation documents, to problem-solving summaries to physics theory summaries ..."

Then he attaches in the exhibit some examples. I will come to those:

"As a result of all of this work, we use the knowledge gained from decades of innovation and custom fitting ideas as the starting point for each of our new models and related services."

If we can quickly look at some of these examples. Go to tab A, please. I should say this is confidential because it's sensitive know-how.

If I can ask the Tribunal -- you will see in the top left-hand under "Problem statement" is a statement of the technical or engineering problem or issue.

Then under the second box there is a description of the testing and analysis, the scientific method. Then there are two boxes under "Results". If, for example, one looks under the second box at the bottom of the page under "Results", it says, for example -- and I think I can read this out:

"This P3 has shown a measurable difference ...", and so on.

So there is a rigorous scientific method involving

testing to observe and test a particular parameter and to then calibrate improvements of changes as a result of that exercise. So this, for example, concerns iron lie angle effect, which is one of a very large number of potential parameters, and more than 2,000 of these types of engineering sheets have been generated by Ping over the course of many decades.

Then a few pages on, about the fifth page in, there is a further P3 iron offset versus trajectory. Again, the Tribunal can read this in some time, but the bottom left of the page under "Conclusions":

"The differences were not as high as the designs team were expecting, but generally significant."

PROFESSOR BEATH: Might I ask a question here? It is simply: is the nature of this document -- we have the P3 document, is this -- will we be told this is something unique to Ping because presumably other manufacturers do testing and design of their clubs -- is there something special about this document?

MR O'DONOGHUE: Professor Beath, I think there are two points. I will take further instructions, but there are at least two points. The first point is that Ping essentially invented custom fitting and therefore, in terms of the antecedents, the data has been building up over a much longer period of time than the others. That

is not an insignificant thing.

Ping was essentially the pioneer back to the 1960s and the other manufacturers, to the extent they became engaged on the technology side, were somewhat playing catch-up.

PROFESSOR BEATH: Okay.

MR O'DONOGHUE: The second point I think is a very important difference, which is, because Ping is the only company that insists on a purely bespoke product, this information is fed in on a much more direct and consistent basis into custom fitting than the others. So there is a direct link between the developmental side of the clubs and the manufacture and how that feeds into custom fitting. So there are certainly those two points, but I will take further instructions.

PROFESSOR BEATH: Okay. Thank you.

MR O'DONOGHUE: Thank you.

PROFESSOR BEATH: Sorry to interrupt.

MR O'DONOGHUE: No, that's extremely useful.

Professor Beath, I am reminded by Mr Scannell that at Dr Wood's statement, paragraphs 39 to 45 --

PROFESSOR BEATH: 39.

MR O'DONOGHUE: -- he does set out some of the --

PROFESSOR BEATH: Okay.

MR O'DONOGHUE: -- differences between Ping and others.

PROFESSOR BEATH: Thank you.

MR O'DONOGHUE: I next want to move to an important definition issue, which is: what is "custom fitting". We can pick this up in Clark 1, which is B1, tab 1, at paragraph 12. Mr Clark says:

"It is important to be precise when using the term 'custom fitting'. For Ping Europe 'custom fitting' only means a fitting that starts with static measurements followed by a full dynamic face-to-face custom fitting process. Anything short of this we do not regard as a proper custom fit and we firmly believe that only a full dynamic face-to-face custom fitting process can optimise our products for each consumer's individual requirements."

Then we see at 13 a sort of potted summary of the steps we have been through in the fitting manual.

Building on that definition, at paragraph 15 he says:

"The definition of 'custom fitting' that the CMA uses in the decision [...] erroneously suggests that custom fitting may also refer to a static fitting (which only involves taking physical measurements) [...]. However, static fitting in the context of Ping Europe's understanding of custom fitting is better described as 'static measuring' and it alone can never replace dynamic face-to-face

fitting. Static measurements alone do not allow the fitter to account for a number of elements that are absolutely fundamental to determine the best club for the player ...", and so on.

Then at 18:

"As an experienced golfer I would never choose to be fitted on the basis of static measurements alone. I am dynamically refitted every time Ping launches a new set of clubs because, first, I may have changed I may have gained or lost flexibility, power, swing ..."

So this is essentially the parameters we have seen in tab C to Dr Wood's statement.

If we can go back to Dr Wood on this point. We have briefly looked at this. It's B2, tab 3 and it's at paragraph 28. He says:

"Although it may in theory be technically possible to sell "customised" clubs online, such clubs cannot be classified as 'custom fit'. Given the vast number of possible combinations for customising a Ping club and the significant effect each of these has on the player's game, contrary to CMA's assertion at paragraph 4.66 of the decision, a consumer without being custom fit is highly unlikely to correctly choose the correct combination of shaft, grip and the many other components online to create a club that fits them and

enables them to play better golf, ie a Ping custom fit club."

This isn't mere assertion on the part of Dr Wood. If we go forward to paragraph 36, if I can invite the Tribunal to read that paragraph, please. (Pause)

It's really the last sentence which is of interest. It says:

"As an example, among the many changes resulting from dynamic fitting [and we see the numbers] ... golfers in this study were dynamically fitted to a different shaft than the initial recommendations of the fitter."

So you see from the figures in yellow it is overwhelmingly unlikely that the starting point of the static fit will be the same as the end point of the dynamic fit. There is a strikingly high difference.

Then over the page at 38, a slightly different point.

So just to put this in context, Ping has developed an online software tool called "nFlight", which allows some basis for analysing a shot -- it's a type of fitting software -- and Ping conducted an experiment. You will see the cohorts on the third line, a very large sample indeed of how effective the software was in terms of mapping on to the custom fit process.

In the middle you will see for these number of fittings -- you see the number, which is pretty small, so only that percentage of golfers were " ... dynamically fitted to the same colour code shaft length and shaft flex as their static recommendation".

Then he goes on to say that in fact that small percentage is almost certainly even smaller because "... there are other variables in the dynamic fitting, such as grip size, shaft material, shaft model and set make-up, which, when factored in, would result in materially less than that percentage of golfers being dynamically fitted to the initial static recommendation".

So there you have, in my submission, a huge piece of data showing that, even with the state of the art for online fitting software, you're extraordinarily unlikely to end up with a position that is anything close to the position following a dynamic face-to-face custom fitting.

As you will see, that was a study conducted based on the launch of the nFlight software in 2008. It was not a study prepared for the purposes of these proceedings and, on any view, it has a rigorous scientific method and basis.

Then, at 22, a somewhat related point. In the

middle of that paragraph it says:

"Every tournament professional on the Ping staff goes through a new fitting every time they try a new product. We keep records of every recorded change in club specifications for each tournament professional. It is expected that a tournament professional's custom fitting specifications will change each time she or he puts a new Ping model in play."

Then he gives an example of that.

So just to complete the evidential picture, we can go to bundle D, Mr Mahon of American Golf. It's at D3, towards the end, paragraphs 29 and 31.

At 29 he says:

"American Golf only offers standard fit clubs on our websites, and we have decided not to promote the sale of custom fit clubs online."

Then at 31 he says:

"Whilst I am aware that some other golf retailers do sell some custom fit clubs online [...], that is not something that American Golf is currently considering. That is for three main reasons. First, American Golf does not want to sell custom fit clubs to customers who have not been fitted using our own trained staff and the process we have developed."

Then he gives some other reasons. So they obviously

have great faith in their custom fitting process and for that reason do not want to custom fit online. We will obviously have to come back to that, but I wanted to highlight that.

In terms of the definition of "taxonomy", what is certainly clear from Ping's perspective is that where the only options available online are left-hand, right-hand, the sex of the golfer, that is not by any stretch custom fitting. That is the first point.

The second point is that, from Ping's perspective, a custom fit only includes the dynamic face-to-face fitting process. That cannot, in the current state of technology occur online.

The third point is that if, as some of the CMA's witnesses do offer, one can, through drop-down boxes, have a possibility to select product with a degree of customisation, it is overwhelmingly unlikely that that online process will result in a club that is satisfactory for the consumer and therefore Ping does not regard that as being a proper custom fit either.

So we will come back to that, but I wanted to tee up, to use a pun, how Ping sees custom fitting as a definitional issue or as a matter of taxonomy.

I now want to turn to Ping's policies. This is again in B1 and exhibits to Clark 1.

Gentlemen, this is quite a short point. I will finish that and then I think we can have a short adjournment.

So it is B1, tab 1, under H. So these are the terms and conditions. We can start at clause 11.4. It says:

"The [account-holder] shall offer custom fitting to consumers."

Then at 11.12:

"Orders placed with customised products carry a commitment to purchase and are non-cancellable."

Then 12 is the internet policy in respect of hard goods. As I indicated, it does not apply to soft goods.

In the middle it says:

"Custom fitting is very important in the process of selling hard goods in order to ensure that consumers receive clubs that are custom built to their own specifications. The seller wants to promote the opportunity for a personal conversation to take place between the buyer and the consumer prior to the purchasing decision, so that the buyer can explain the benefits of Ping custom fitting and strongly recommend that a dynamic face-to-face custom fitting appointment be arranged. Internet transactions do not fulfil this philosophy."

Then in the second paragraph there is a further

explanation for that. Importantly in the last sentence:

"Any buyer who executes sales transactions of hard goods prior to any conversation with the consumer is in breach of the seller's internet policy and risks closure of its account facilities."

The third paragraph is a somewhat different point to do with third party auction sites. Then the fourth paragraph is:

"The buyer must do everything reasonable to persuade the consumer of the benefits of dynamic face-to-face custom fit. The seller expects the buyer to be proactive in this respect, not passive."

Then over the page at clause 14, you have the dynamic face-to-face custom fit policy again in relation to hard goods.

I invite the Tribunal to read that, but I would note the last sentence:

"This policy is incorporated as a contractual term of the seller's agreement with the buyer."

Then, finally before the break, we can go back to exhibit J, which is the letter we saw a little while ago. So in the context of updating terms and conditions, these letters are sent by John Clark, the managing director, to the account-holders, so in our submission they are relevant to understanding at least

what Ping is trying to achieve and what are its expectations.

Then in this letter, the fifth paragraph, in the middle he says:

"We want all clubs to be sold using face-to-face dynamic custom fitting and to this end we will remove support and terms from account-holders that achieve an unacceptable proportion of the sales through non-face-to-face customer interactions."

So from Ping's perspective, the expectation is that the maximisation should be at or very close to 100 per cent.

Gentlemen, I am about to move on to something different, if that's a convenient moment.

THE CHAIRMAN: Yes. Thank you. Five minutes.

(11.28 am)

(A short break)

(11.37 am)

MR O'DONOGHUE: Mr Chairman, I next want to move on to your grounds of appeal. Two points, if I may. First of all the Tribunal has obviously had a very, very lengthy skeleton. Those instructing me think it's a misuse of the word "skeleton" to describe it as such, in which the grounds are covered in great detail and you also have

the CMA's document. I don't propose to repeat myself.

Second, I will not cover each and every ground, so for example on penalty, at this stage there is nothing I wish to say on that so it will be somewhat selective.

Finally, what I hope to do in the process of covering the grounds so far as I do is respond to the main points made by the CMA in their skeleton so the Tribunal is clear as to what our position is by way of response.

So if I can take very, very quickly the Charter points. Again, it's covered in great detail in the skeleton. What I want to do for the Tribunal's -- hopefully -- benefit is to underline the evidential basis for the Charter point. We can pick this up in Clark 1, which is in B1.

So a small point at paragraph 3. So the third line from the bottom:

"Ping Europe is run on a fully autonomous basis ...", which is important.

Then at 7 over the page:

"Unlike its competitors, Ping Europe does not import pre-built golf clubs or hold finished clubs in inventory."

That is an important distinction which I touched on earlier this morning.

THE CHAIRMAN: Sorry, where is that?

MR O'DONOGHUE: Forgive me, it's paragraph 7, first sentence.

Then, at 8, in terms of Ping's objectives, three lines down:

"We require our retailers to focus on selling custom fit golf clubs to every consumer."

Then, just to give the Tribunal a few more references to the same point, as paragraph 40H, internal page 10, second sentence:

"Ping Europe want and is aiming for all of its golfers to buy Ping golf clubs after being face-to-face dynamically custom fitted."

Then, at 41:

"Ping Europe's [...] business model is to sell custom fit golf clubs only."

Then the same point at 53, two-thirds of the way down:

"Ping Europe's ultimate objective of achieving 100 per cent custom fitting for its golf clubs ...", and so on.

Then at 40H, Mr Clark makes the points that a fundamental difference between Ping and its rivals is in relation to custom fitting.

Now, the reason that that matters in terms of the

Charter point we can pick up at paragraph 24. Mr Clark says:

"Ping Europe is not just selling hardware. It sells a better game, with the hardware being a means to that end. This is why custom fitting has always been part of Ping's DNA and an inseparable component of the product that we sell."

And at 28 over the page:

"Ping's custom fitting policy has been around for decades."

Paragraph 30:

"Ping has a unique product. It is the only brand on the market that insists on delivering custom fitted products to each consumer."

32, second sentence:

"Our focus is on the long-term quality performance and consumer satisfaction, which we believe can only be achieved by making sure that consumers are provided with the means to play a better game of golf. We would not put the reputation of the brand at risk by selling a product only aimed at generating sales for the company."

You will recall the point I made first thing this morning about the destruction of a seven-figure sum of stock and the idea of placing quality ahead of quantity.

Now, in terms of how the Charter point bites is an evidential matter and we can pick this up at paragraph 65 of Mr Clark's statement.

"Being forced to allow a Ping club to be sold online essentially leads to two alternatives: one, Ping either starts selling off-the-shelf golf clubs which Ping Europe does not produce. As noted above, there is no default or a standard club that is manufactured by Ping Europe and which, since the incorporation of the company, Ping does not want to sell ..."

And two:

"Ping starts allowing online consumers to choose from a much more limited number of simple variables and options to 'customise' their clubs."

At 66:

"Both alternatives would serve to reduce consumer choice, reduce quality and ultimately harm competition by forcing Ping Europe to abandon one of its key competitive advantages and release sub-optimal (ie. absent the fitting element) golf clubs on to the market. In my view the CMA is therefore essentially asking Ping Europe to offer a new and inferior type of product and to start conducting its business in the same way as its competitors."

Then at 102 it says about the decision:

"Ping Europe will need to redefine the business..."

And at 104 he says, second sentence:

"They essentially require Ping Europe to change its identity and launch a new trading business."

So that in a nutshell is the Charter point. It is that particularly in respect of Article 16 Ping would, for the first time, be forced to offer a new type of product that it has never offered, does not want to offer and left to its own devices would never offer, that is an inferior product relevant to what Ping sells today.

So I just wanted to make clear what is the evidential basis for the Charter point. In terms of our response to the CMA's Charter points, just to give you the references, it is paragraph 103 of our skeleton and paragraphs 108 to 109. This is on Article 16. Then on Article 17 it's paragraphs 110 to 115. I'm not going to repeat those points, save to note that the CMA hasn't really engaged.

Turning now to object. What I want to do with the Tribunal's permission is go through the small handful of key cases and, in the context of doing that, respond to the CMA's skeleton argument.

If we can start with Cartes Bancaires, which is in the third authorities bundle. With the Tribunal's

permission, I would like to start with the Advocate General's opinion because it puts the case in context somewhat more fully than the Court of Justice does. So this is authorities bundle 3, tab 82.

For the Tribunal's assistance -- so the "AG" at that paragraph is obviously the Advocate General's opinion. Then within the same tab you have the core judgment.

So starting with the Advocate General by way of background -- so we start at paragraph 3 -- there were essentially two issues he was considering. First, whether the General Court in that case was right to adopt a rather broad interpretation of "object". Then, second, the last sentence of paragraph 3, he says it is:

"another opportunity to refine [the] much-debated case law on the concept of 'restriction by object'."

So the point we make here is that Cartes Bancaires was a seminal case on object because it expressly intended to resolve what had been a debate as to the scope of object.

Now, I will obviously come to the Pierre Fabre case, but I make the point at this stage that Pierre Fabre pre-dates Cartes Bancaires and therefore, in terms of the resolution of the conflict, Cartes Bancaires clearly is the starting point and we say the end point.

So in terms of the underlying fact -- we can pick

this up at paragraph 5, in the middle -- there is a Cartes Bancaires card issued by a member of the grouping which can be used to make payments to all traders affiliated in the card system through any other members and to make withdrawals.

Then at 6 you will see the new rules for the card system which were challenged by the Commission. If the Tribunal can quickly look at the three subparagraphs under 6, you can see what was or was not in issue in that case. (Pause)

At 10 you can see the Commission decision, and the third indent, there was a finding of object in relation to the measures you have just seen and the Commission said:

"That object is evident from the ...(reading to the words)... activities of members that would otherwise have been subject to them."

So that was the basic object finding that the Advocate General and the court were considering. We can then jump forward to -- starting on internal page 11, under paragraph 26. So there were a series of general observations on the concept of object. I would like to pick this up, if I may, at paragraph 38, where the Advocate General talks of the need to consider the very object of the agreement in the economic context in which

it is to be applied.

"The court stated in this regard [this is the LTM case] that where, however, 'an analysis of the clauses of an agreement does not reveal the effect on competition to be sufficiently deleterious,' its effects should then be considered."

Then at 41 he picks up on the question of whether the contract had a restrictive object, could not be divorced from the economic and legal context in the light of which it was included by the parties, so context is critical.

Then at 43:

" ... it was after examining the context where the court [in this case the General Court] ruled that even though a ...(reading to the words)... restricting competition."

Then at 46, over the page -- so this is the conflict resolution point I mentioned:

"It is clear that the case law [...] while pointing out the distinction between the two types of restrictions [under Article 101, object and effect], could, to a certain extent, be a source of differing interpretations and even of confusion."

Then at 52 he sets out his mandate, which is:

"I take the view that recourse to that concept, [object], must be more clearly defined."

At 54, an important point, which I will come back to, is that the method of identifying object based on a formalistic approach, " ... which is not without danger from the point of view of the protection of the general interests pursued by the rules of on competition", so a warning against formalism.

Then, over the page at 55 and 56, an important point. So the last sentence of 55:

"it is only when experience based on economic analysis shows that a restriction is constantly prohibited that it seems reasonable to penalise it directly for the sake of procedural economy."

And 56:

" ... conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ... restrictive effects necessary for the pursuit of the main objective which does not restrict competition."

57:

"An uncontrolled extension of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden

of proof in relation to anti-competitive conduct."

Then at 58 he completes this point and he says the:

"classification as an agreement [...] by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as [...] object ...(reading to the words)... competition by object."

Then at 64 he highlights the essential criticism of the General Court's judgment, which was that they said the concept of object should not be given a strict interpretation and both the Advocate General and Court of Justice profoundly disagreed with that.

Now, in a slight digression, the Tribunal will then see at paragraph 66 and following there is a reference to the Irish Beef case. One of the points made by the CMA in paragraph 25 of their skeleton is that the Irish Beef case shows that, even if you have a pro-competitive purpose, that is only relevant under Article 101(3) and they deny -- they even go as far as

to say that if you have a plausibly pro-competitive or efficient objective, that is not part of object.

Now, just to pick up on the Irish Beef point -- I can take this very, very quickly. It's quite a simple point. You can get this directly from the Advocate General's opinion itself. So he picks up at 66 the Irish Beef case and particularly at 70 and 71.

So what Irish Beef was about was a case in which competing producers of beef collectively agreed to reduce capacity on the beef production market, so these were -- horizontal competitors collectively agreed to limit their production capacity.

As the Advocate General picks up at paragraphs 70 and 71, they pursued an objective of rationalising the Beef Industry by reducing production over capacity.

At 71:

"those arrangements were comparable to agreements to limit production within the meaning of Article 101(1)(b). Following a detailed examination of the terms of the BIDS arrangements, the court was led to conclude they had an anticompetitive object ...(reading to the words)... almost 75 per cent of excess production capacity."

In my submission once one understands that this was effectively a cartel, albeit they said a crisis cartel,

it isn't very difficult to see why that was an object. It also is not very difficult to see why that object was not pro-competitive. To suggest that that is a template or a good analogy for a vertical restraint in the present case is simply a bad point. It was effectively a cartel and the only question was, was it something which could be justified by reason of the over-capacity crisis. But certainly to suggest that it lacked an object, given that these were direct competitors and they had agreed to collectively reduce capacity to the extent of 75 per cent, it would be astonishing if that were not an object. It would be astonishing if that were considered prima facie pro-competitive. It is about as anti-competitive as one can imagine.

So that really is a bad point, if it is said that is analogous to the present case. It is anything but. So that's all I wanted to say about BIDS.

Now, returning to the Advocate General's opinion, paragraph 80, an important point. So he says:

"In the present context, [...] the measures at issue are horizontal in nature and that, a priori, they could be construed to be quite capable of entailing an object that is restrictive of competition."

So he makes the point that if one looked at the Cartes Bancaires horizontal measures, at first blush

they had a sufficiently horizontal aspect, given their content, that they were superficially capable of being an object, but the critical point he goes on to make at 82 is that that is not the end of the analysis by any stretch.

He says at 82:

"It should be examined, however, whether the General Court was justified in confirming the Commission's conclusion regarding the existence of restriction by object, bearing in mind that that conclusion must be based on an overall assessment of the content of the measures, if necessary in the light of the aims objectively pursued and the economic and legal context."

What he then does, you will see under the sub-heading at the bottom of the page, "Content", is he goes on to look at content and context in some detail.

So the essential point here is that simply by looking in a superficial manner at the prima facie wording or the prima facie context is not enough. There has to be a much more multi-layered analysis based on content and context.

Then at 93, and 95, we pick up on the essential legal errors made by the General Court. So at the bottom of the page at 93:

"The General Court also stated that 'those formulas

[so the measures we have seen at paragraphs 5 and 10] thus limited the opportunity for members that were subject to them to compete (on price), on the issuing market, with the members of the grouping that were not subject to them. The Commission concluded that the measures at issue had an anti-competitive object, consisting in impeding competition for new entrants."

Then at 95 we see the mistake that was made, three lines down:

"the General Court failed to demonstrate how, by virtue of the very wording, those measures restricted competition."

The last sentence:

"As I will show below, the simple fact that certain members of the grouping may be prompted, by reason of the enactment of the measures at issue, either to limit their issuing activities or to bear [...] costs which are not borne by other members [...] cannot be regarded as restrictive by object."

Then moving on to 115 -- so there is the claim that the General Court erred in the assessment of the objectives. Then at 116, an important point: object depends on the "objective aims" of the agreement.

Then at 121, a point which is relevant for the

present case:

"All these measures were, according to the grouping, intended to protect Cartes Bancaires' card system from the phenomena of [...] free riding."

So it was a free riding case.

Then 127, a related point:

"those measures were adopted in order to stimulate acquiring activity in respect of Cartes Bancaires cards."

So, in other words, one must go beyond the mere wording. One must look at the objective aims and one must look at the objective aims in context and including as a measure to stop the adverse effect of free riding.

Then at 130 he deals with the crux of the General Court's objections to the measures in question. He says:

"it is true that the level of fees charged or the difficulties encountered by some operators in expanding acquisition ...(reading to the words) ... appear to be objectionable from the point of view of competition."

So that is in terms of objective.

Now, critically over the page there is a third layer to the analysis under "Object", which is: what is the context of the measures in question? Now, we see at 147 and 148 that both content and context must be

considered. He says at 147:

"even assuming that it can be inferred from the terms and the objectives pursued by the measures at issue that they had an anti-competitive object, the context of the measures can weaken that conclusion. In this connection, in order to establish the existence of restriction by object, the Commission cannot simply conduct an abstract examination, in particular in the case of restriction whose character is not evident."

So both content and context are relevant and context can essentially rebut a prima facie finding of object in an individual case and, in particular, what is not correct is that the exercise should be done in an abstract manner.

Now, I can pick up on the court's judgment very quickly because it essentially endorses these points. I will then make a number of submissions on the back of the opinion and the judgment.

So if we can go to the core judgment, which is also at 82. Yes, it's the second half of the same tab. I will take this very quickly because we have seen the points. So starting at 49 -- so these are the court's general conclusions on object. The first point, object involves something which reveals:

"a sufficient degree of harm to competition that [...] there is

no need to examine their effects."

And 50, the conduct must:

"by [its] very nature [be] harmful to the proper functioning of normal competition."

In 51 this is expressed in a slightly different way again, where the conduct may be "considered so likely to have negative effects, in particular on price, quantity or quality of the goods and services, that it may be considered redundant" to prove actual effects.

Then at 53 -- this really is the critical paragraph. This is the seminal up-to-date test for object. So:

"it may be considered a restriction [...] by object ... regard must be had to the content of its provisions, its objectives and the legal and economic context of which it forms a part. When determining that context, it is also necessary to take into [account] the nature of the goods or services [in question], as well as the real conditions of the functioning and structure of the market or markets in question."

And at 57 you see the legal error committed by the General Court: It did not refer to the settled case law summarised in 53 of the Court of Justice and thereby " ... fail[ed] to have regard to the fact that the essential legal criterion for ascertaining whether coordination between undertakings ...(reading to the

words)... is the finding that such coordination reveals in itself a sufficient degree of harm to competition".

So that was the first legal error. The second legal error is at 58, that:

"the General Court erred in finding ... that the concept of restriction by 'object' must not be interpreted 'restrictively'."

At 65, a somewhat related criticism - the General Court did not explain:in what respect that wording [of the measures] could be considered to reveal the existence of restriction of competition by object."

75, again back to the free rider point:

"the General Court was entitled at the most to infer from this that those measures had as their object the imposition of financial contribution on the members of the grouping which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system. Such an object cannot be regarded as being, by its very nature, harmful for the proper functioning of normal competition, the General Court itself moreover having found ... that combating free riding in the CB system was a legitimate objective."

So the concerns over free riding were relevant in terms of this not being an object.

Then finally at 83 and 84, the point we touched on in relation to Irish Beef and in particular at 84, The Court of Justice confirms that the objection in that case was the withdrawal of competitors from the market to increase concentration.

That is a million miles away from the present case and doesn't assist the CMA in any way.

So just to draw these strands together in terms of my submissions on object. I will in this context deal with some further points on Pierre Fabre and the other cases relied on by the CMA. So the first point we make is that in our submission the CMA is guilty of essentially the same mistake as the Commission and General Court made in Cartes Bancaires.

What the CMA has done is essentially to rely on a purely literal reading of the words of the terms and conditions for Ping and say that that shows an object. We can pick this up in the decision itself, which is in A1. So it's paragraph 4.47, which is our internal page 79. So the CMA says:

"The CMA finds that the clear written expression of the online sales ban (the "content") establishes that its objective is to prohibit any sales on the internet of Ping golf clubs by UK account-holders. The CMA finds prohibiting online sales, by its very nature, 'is liable to

restrict competition' between account-holders through an important sales channel, (namely online) both within the UK and across the EU more generally."

There is a footnote reference to Pierre Fabre which I will come back to.

This, of course, contrasts with the corresponding section of the statement of, "objections", which I would like to look at very quickly. It's in bundle E, tab 6, and it's paragraph 4.82, please. It's internal page 75. So this is the point I touched on before the short adjournment. They say:

"internal documents indicate that Ping had a number of concerns in relation to its Account Holders' online sales into other EU countries at a discount to local account-holders, in particular by UK account-holders to consumers in the rest of the EU."

Now, two things: first that particular objection does not feature in the corresponding section of the decision and, second, the CMA, at least at that stage, seemed to understand that one could not simply rely on the literal wording of the clause. One needed to contextualise it and one needed to understand and ascertain an anti-competitive object as a whole, and that is also absent from the decision.

So the first mistake is that there is essentially

the same literalism in the CMA decision as the General Court and Commission were criticised for in Cartes Bancaires. You can't simply look at the words and say, "This is an online sales ban, therefore the object is to ban online sales". You have to look at the content, you have to look at the objectives and crucially you have to look at the context.

The second related submission is that the CMA's error in the present case is actually worse because the decision is not even internally consistent on this point. In the "Object" section, as we have just seen, they say essentially that the start and end of the analysis is the literal wording of the clause, that prohibiting online sales by its very nature is liable to restrict competition.

Then if one goes back to the decision in the "Proportionality" section, the CMA says something different. We can pick this up at paragraph 4.99 and turn to page 100, so quoting:

"The CMA finds that Ping's aim to promote custom fitting is a genuinely held commercial concern, reflected in its contemporaneous documents and that Ping had adopted the internet policy containing the online sales ban to support its custom fitting policy. The CMA's conclusion is that promoting a custom fitting service

in the distribution of a high-quality or high-technology product, such as a custom fit club, in principle constitutes a legitimate aim."

Then a second point at 4.113, the CMA says:

"...CMA accepts that the online sales ban is a suitable means to promote custom fitting..."

Albeit it makes the proportionality point. The further mistake made by the CMA therefore is that the concessions made in the context of proportionality have not been read across into their object assessment and one can put the point in one of two ways: you can first say that the CMA's two positions in the "Object" section and in the "Proportionality" section are fundamentally irreconcilable because you cannot at one and the same time say that the clause on its face restricts competition by its very nature because it restricts internet sales, but then, in "Proportionality" say that the same clause exists to support and is suitable to support a pro-competitive aim of custom fitting. There has to be a read-across from the concessions made in "Proportionality" to the object.

The point is the Cartes Bancaires point, that when you have looked at the true objectives in context, one cannot then fall back on literalism. One has effectively determined that the object and objective or

the purpose is different to its literal wording, so there is a disconnect between what the Commission says in "Object" and what it concedes in "Proportionality".

The second way of putting this is that even if the CMA is right in terms of the literal content, its subsequent analysis of context precludes this being an object case; so, in other words, you start with the wording and, even if it prima facie looks like something which is liable to restrict competition, the analysis does not end there. You have to contextualise it, you have to look at the true objectives in their legal and economic context and the CMA seems to have forgotten that when it comes to its object case.

In its skeleton, the CMA has tried to pre-empt these points by saying at paragraph 26 as follows:

"the aim relied on by Ping, the promotion of maximisation of its custom fitting rates, although a legitimate aim, is a commercial aim and not an aim in the general public interest or an aim that enhances competition."

With respect, we find this a very bizarre argument indeed because the CMA has, as we have seen, conceded that custom fitting is beneficial, and realistically how can one say otherwise? It can only do so by optimising the Ping equipment for the custom fitted consumers. In

those circumstances it is impossible, in our submission, to then turn around and say that it does not enhance competition or is not in the public interest, whatever the relevance and meaning that the term "public interest" has in a competition case. We simply don't understand where this public interest point comes from.

The third point which I said I would come to is the CMA is wrong to suggest that Pierre Fabre is authority for the proposition that either an online sales ban is an object or an online sales ban that is not objectively justified is an object.

Now, we have covered this in detail in our skeleton, paragraphs 142 to 145, and I don't want to repeat that. In their skeleton the CMA has essentially repeated itself and not really engaged with the points we have made, but let me make a few short points by way of clarification.

The starting point in our submission is that the present case is an object case. That is the only analysis that we are facing. On any view, the leading authority on object is Cartes Bancaires. That is a case that post-dates Pierre Fabre and, as I have shown the Tribunal, was specifically intended to clarify in a comprehensive manner the law on object which at the time of Pierre Fabre was unclear.

As I have submitted, the CMA's analysis in terms of Cartes Bancaires is clearly mistaken. In particular, in Cartes Bancaires there is not a hint of a suggestion that an object case is all about proportionality. Indeed, the opposite conclusion is clear, which is that if the objective is legitimate, Cartes Bancaires shows that it cannot be an object and that proportionality doesn't even come into the analysis. If on analysis of content and context the objective is a legitimate one, that is the end of the case because it cannot be an object and there is no effects case so there is no alternative case for me to attack.

The second point is that Pierre Fabre, of course, was a preliminary reference and, by contrast, Cartes Bancaires is a direct action in which it was clear from the Commission decision what the findings under attack were. This is key to understanding Pierre Fabre because the fundamental problem in that case which permeates the entirety of the analysis is that there was no earthly reason why cosmetic products needed to be sold by a pharmacist. That was the context of the preliminary reference and it is a critical factor to bear in mind. The products in question were not even medicinal products subject to regulation, so in other words the ban was a sham. There was no basis for it in

good faith. This, of course, drives the entirety of the case and in my submission its precedential value.

In the present case, by contrast, it is common ground that the Ping internet policy exists to support the legitimate aim of maximising custom fitting and that it is at least suitable for that purpose, albeit the CMA says disproportionate.

If anything, Pierre Fabre is an authority against what the CMA contends for. If we can pick this up in the judgment itself, starting with the Advocate General's opinion. This is in authorities 3, tab 67.

PROFESSOR BEATH: Sorry, which tab was it in authority 3?

MR O'DONOGHUE: It's authorities 3, tab 67.

PROFESSOR BEATH: 67.

MR O'DONOGHUE: So I want to give a couple of references to the Advocate General's opinion and a reference to the judgment.

If we can start at paragraph 26 of the opinion.

It is Advocate~General Mazak. He says:

"The anti-competitive object of an agreement may not therefore be established solely using an abstract formula."

Then at paragraph 30:

"An individual examination is therefore required in

order to assess whether an agreement has an anti-competitive object."

Then if we can go to the core judgment which makes essentially the same points at paragraphs 34 and 35. So essentially what the court does there is it repeats some of the cases we have seen in Cartes Bancaires in the context of object, such as GlaxoSmithKlein, and it makes the point that it is context-specific, individual and so on, the traditional test for object.

What one gets from this is two-fold: first of all, the CMA is clearly wrong to suggest that Pierre Fabre says that all online sales bans are object restrictions because what the Advocate and General Court are at pains to emphasise is that each case is individual. The assessment should not be abstract. It depends on the content, the context and the objectives of each individual case. There is no blanket rule. So that is an important point.

I do come back in this context to a second point, which is that, given the concessions which were made by the CMA in the proportionality analysis, in particular on legitimacy and suitability, it is then impossible, in my submission, based on a literal reading of the wording of the internet policy, to say that the internet sales prohibition has an anti-competitive object. One has to

factor in the concessions made in proportionality as part of the context and content of the internet policy. Literalism will not do.

So in my submission Pierre Fabre, in terms of supporting the CMA's position, doesn't go anything near as far as they would like it to.

Now, in particular, what one does not find anywhere in Pierre Fabre is a statement to the effect that an intent sales prohibition is an object. It simply doesn't say that. I think the CMA doesn't disagree with that because their position in reality is that Pierre Fabre says that an online sales prohibition that is not proportionate is an object. But, again, Pierre Fabre doesn't say that either and one needs to read it very, very carefully.

So if we can go back to the judgment at paragraph 39. It is clear at 39 from the opening statement that the court has now moved on to the question of selective distribution agreements. Then that becomes even clearer at 41, where the court recites the selective distribution case law, which is Metro and so on. It is in that context that they talk about the selective distribution criteria. Then at 42, they say the question is: "whether the contractual clause at issue prohibiting de facto all forms of internet selling

can be justified by a legitimate aim."

Then at 43 -- this is the only reference in the entire judgment to proportionality. So it says:

"However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment."

It is clear from paragraph 41 that what the court is considering there is the compatibility of a selective distribution agreement with Article 101. It is in that context and that context only that there is a single reference to proportionality.

Then at 45 and 46 there is a different point which comes up, which is Pierre Fabre refers to the need to maintain the prestigious image of the products at issue and the Court of Justice gives that a short shrift. They said:

"The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that the contractual clause pursuing such an aim does not fall within Article 101(1)."

Now, we will come to this. This particular aspect of Pierre Fabre has effectively been overruled by the

Coty judgment. That's a separate point which we will come to which doesn't matter for these purposes.

Then the critical point is if one looks at paragraph 47, which is the court's conclusion, a number of points emerge. First of all, it does not use the words "proportionality" anywhere.

Second, it repeats the Cartes Bancaires test because it says:

"where, following an individual in specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the ...(reading to the words)... that clause is not objectively justified."

So this is classic Cartes Bancaires and it really reiterates the point that it has to be an individual context-specific assessment. Literalism, abstract assessment, will not do.

Now it does, of course, use the word "objectively justified", but in my submission that is not a reference to proportionality in the context of an object infringement. It is simply a reference to the fact that requiring a pharmacist to be present to sell cosmetics was not a legitimate aim in the context of those goods. It goes no further, in my submission.

This does highlight critical difference between the Pierre Fabre case and our case because in those cases the products concerned, cosmetics, were identical regardless of the person to whom they were sold. In this case the products sold by Ping are bespoke to each individual and uniquely so.

So when one sees the words "objectively justified" in the court's conclusion, the court is not referring to proportionality being part of object. All it is saying is that the goods in the Pierre Fabre case did not objectively justify the need for such restriction so it has nothing to do with proportionality.

Of course, this isn't very surprising because -- again I do repeat the point -- in Cartes Bancaires itself, nowhere do you find a hint of a suggestion that proportionality is anything to do with object and the idea that an object infringement is something which is not proportionate is, in our submission, a surprising one because the whole point of object is that it should leap out of the page, it should be obvious, it should be plain and it should not require, in this case, a dozen witnesses of fact and expert evidence to determine object by applying proportionality. That is the very antithesis of object.

The CMA's approach to object in this case is

directly contrary to the case law. In simple terms one can look at the CMA's mistakes as follows: their first mistake was not to apply the case law on object per Cartes Bancaires and, in that context, the only questions would be: what does the clause say, what is its context and, having done that analysis, what are its true objectives? Proportionality doesn't come in to any of that assessment. That's what they should have done and haven't done.

Instead what the CMA has done is a sort of hybrid of case law on selective distribution and tried to graft that on to object. But that is a fundamentally different question because the question under selective distribution, as set out in paragraph 41 of Pierre Fabre, is whether a selective distribution agreement falls entirely outside the scope of Article 101(1) to begin with. By contrast, in the present case Ping is not saying that Article 101(1) is completely inapplicable. The only question in this case is: on the assumption that Article 101(1) could apply, is this an object? That is a fundamentally different question to the types of considerations that would apply in the context of selective distribution and the CMA, with respect, has confused and mixed up two distinct lines of case law.

THE CHAIRMAN: What are we to make of paragraph 43, then, the final sentence?

MR O'DONOGHUE: Let me quickly get that up again. It's straightforward. That is a direct cross-reference to 41. So you will see in 41 the standard Metro criteria, one of which is "Do not go beyond what is necessary", and insofar as there is a reference to proportionality in 43, that is referring directly back to 41 because it says so, but that concerns a different question. That concerns the question of whether a selective distribution agreement falls entirely outside of Article 101(1) and that has nothing to do with this case.

In this case we assume for present purposes that Article 101(1) is capable of applying. We're not trying to obtain a complete exemption from 101(1). The only question is: on the assumption that 101(1) could apply, is this case an object? When one is conducting that object analysis, proportionality has nothing to do with it. That is the selective distribution case law.

Now, we can pick this up very, very clearly from the Coty case, from the opinion of Advocate General Wahl. He makes this very point. This is in authorities bundle 4, tab 89. It's at 115 of the opinion. I will come back to Coty, but I want, Mr Chairman, to pick up on your point because it is addressed by

Advocate General Wahl. So it's on page 20, 115 and 116. It's really 116. So he says:

"Even on the assumption that it might be concluded in the present case that the clause at issue ...(reading to the words)... within the meaning of that provision."

So he is saying that there are two separate stages to the analysis. There is an anterior question as to whether your selective distribution agreement is such that applying the Metro criteria, it falls entirely outside 101. If the answer to that question is "No" or it is not in dispute, as is the case in the present case, there is then a second question, which is: well, if 101(1) could apply, is this case an object? That is a separate point for which the Cartes Bancaires criteria apply.

Now, I will come back to 118, which is the point the CMA make against us in relation to partial and absolute bans because that is important. But in the present case, as I say, the only question -- and you see this from the parts of the decision I have shown you -- is: is this clause an object? The Tribunal is not being asked to consider whether Ping's selective distribution terms and conditions fall outside Article 101(1) completely. That is not an issue in these proceedings. It is simply the clause.

The Advocate General makes clear what in my submission is clear from Pierre Fabre anyway, which is the selective distribution case law is something different to object.

So, in other words, we are fully prepared to assume for present purposes that Article 101(1) is capable of applying, so we can essentially forget the idea of being exempt under Metro from 101(1). That is not an issue in this case. The only issue in this case is object, and that is plainly and squarely Cartes Bancaires.

Now, a couple of further points. I want to pick up on the Coty judgment, which is in authorities bundle 4/89, which we have just seen. The CMA's skeleton in many ways doesn't rely on Coty very directly. It relies on Coty for a very specific point which I will come to, which is that a partial ban might be fine but a total ban would not be. I will deal with that.

Now, we have set out in some detail in paragraphs 155 to 161 of our skeleton what we say about Coty. Essentially we say it's a case that is rather remote from what we're dealing with in this case and, in particular, Coty has nothing to do with the question of an object restriction. It was simply concerned with whether the selective distribution agreement in that

case fell within the Metro criteria. So in a sense we have already seen this at paragraph 116 of the Advocate General's opinion. Just to look at the court's judgment, if one looks at questions 1 and 2 referred to the court, which are set out in paragraph 20 of the court's judgment, page 27.

So what one sees from the two questions -- I mean, these are Metro questions: do the features of this selective distribution system fall outside Article 101(1) completely? So that is a Metro question. It has nothing to do with the question of object.

We saw in 116 of Wahl's opinion that that's the point he makes. He says, "Well, this case is about Metro. Even if 101(1) could apply, there may then be a further question as to whether the clause in question is an object". But Coty is not dealing with that question as is manifest.

So it simply doesn't assist the CMA in any way and if it is suggested that Coty confirms Pierre Fabre in respect of online sales bans and object, it simply doesn't because it doesn't deal with object at all.

Now, to the extent Coty is said to be of even indirect relevance, in my submission it supports Ping's case because what the court does is effectively to reverse paragraph 45 of Pierre Fabre, where the court

said that "protecting your prestigious image is not a legitimate aim of selective distribution".

So that is the first question. You will see, Mr Chairman, for example, at paragraph 35, that the court is effectively turning its back on Pierre Fabre because they say:

"it cannot be inferred from Pierre Fabre that [it] sought to establish a statement of principle."

So what the court is very keen to do in the context of selective distribution is marginalise Pierre Fabre because they effectively just said that when paragraph 45 of Pierre Fabre says that "protecting your prestigious image is not a legitimate aim", that was only in the context of Pierre Fabre's particular image, which was unjustifiable. They are essentially saying that Pierre Fabre is a case on its own facts because of the weak nature of the aims in that case.

Again, I do make the point that it's worth remembering that both Coty and Pierre Fabre concerned the sale of the same types of products. These were cosmetics and it's not obvious, apart from protecting your brand image, why cosmetics should be limited from online sales and in particular, as I indicated, when the same cosmetic was being supplied to the same consumers. There was no bespoke element whatsoever in contrast

to the present case, which is only bespoke.

Even directionally Coty goes firmly against what the CMA is saying because it does find for the first time that a ban on internet sales, at least on a third-party platform, does not fall within Article 101(1) at all, so, in other words, it expands the scope of the selective distribution exclusion from 101(1) to include at least a partial online sales ban; so in other words it reduces the scope of application of Article 101(1) and it doesn't increase it.

Now, I said I would come back to this point. The CMA does make the point based on Coty that in Coty the Court of Justice and the Advocate General contrasted the partial ban in that case with an absolute ban on online selling.

The point we made here is two-fold. First of all, that point was only made in the context, again, of whether 101(1) applied at all to selective distribution and it said nothing about object and, in particular, it said nothing about whether a wider ban, as in this case, assuming Article 101 did apply, would then be an object because that question was not before the Court of Justice at all.

If that question was before the Court of Justice then it is clear from Wahl's opinion at 116 that the

correct analysis in that case would be to apply Cartes Bancaires. So that leads us directly back to where we started, which is that object starts and ends with Cartes Bancaires, and Coty, insofar as it said anything about online sales restrictions, was only dealing with that point in the context of selective distribution.

In a sense, when one thinks about this, it would have been quite bizarre, given the findings in Cartes Bancaires and, given that Advocate General Wahl was the Advocate General in Cartes Bancaires and in Coty, for him to turn around and then say, "Well, in an abstract or general sense an online sales ban is an object" because that would be directly contrary to everything he and the court had said in Cartes Bancaires, which is "You can't apply a literal approach. It can't be in the abstract. It has to be context-specific. You have to look at the individual objectives in each individual case based on the factual, legal and economic circumstances of that individual case". In other words, the very thing he warned against, this sort of abstract notion that online selling is always an object, that is what the CMA is suggesting in the context of Pierre Fabre and Coty and it doesn't make any sense. It runs into a head-on

conflict with everything the court has said in Cartes Bancaires, which is that it isn't abstract; it has to be entirely context-specific.

The problem for the CMA in this case is the mismatch. Again, when one looks at proportionality, there are a series of concessions as to legitimacy, benefits and suitability and all of those have been completely forgotten when it comes to the question of object. Had they been factored into object and had one applied the proper Cartes Bancaires assessment, it is manifest in my submission that this could not have been an object. Effectively in proportionality, the CMA, perhaps unwittingly, had concluded that the object was not anti-competitive.

Certainly the suggestion that object is an absence of proportionality, there is no basis whatsoever for that in Cartes Bancaires. In fact, it would be plainly contrary to Cartes Bancaires, which says that it should be something obvious based on the circumstances of the case and if one is getting into the weeds of a very, very complex, fact-intensive proportionality assessment, that is anything but object.

THE CHAIRMAN: Do you consider that there is an inconsistency between Cartes Bancaires and paragraph 47 of Pierre Fabre because, as I read

paragraph 47, what it's saying is that you do look at the legal and economic context in reaching a decision as to whether an internet ban is a restriction by object. I don't, at the moment, see a particular inconsistency between those two.

MR O'DONOGHUE: Well, sir, it reallygoes back to the point on objective justification. Sir, I agree that insofar as it summarises the object case law, it certainly uses language that is consistent with what subsequently came in Cartes Bancaires. Now, I do add the important caveats that what we get from Cartes Bancaires is that, again, it shouldn't be literal, it shouldn't be abstract, it must be individual and based on the context of the case, but it's really the words "objectively justified".

Now, the CMA's position is that when you see the words "objectively justified", that means that proportionality comes into object. In my submission one simply cannot get that from paragraph 47 because there isn't a hint of a suggestion in Cartes Bancaires that proportionality is remotely relevant to object.

So my submission is that, insofar as the words "objectively justified" call for any further analysis, all they're saying is that in the context of the aim pursued by Pierre Fabre, which was not legitimate

because of the products in question, then it was simply not justified objectively by that aim. It is not talking about proportionality in any shape or form because the only reference to "proportionality" is 43 and that is in the context of a different point which has to do with selective distribution.

But, sir, I do stand by the submission that what is certainly incorrect and -- I mean, in a sense one has to have an intellectual honesty about these cases and what the CMA has said and what Ms Demetriou will no doubt develop as well: it's all very easy and what you get clearly from this is that proportionality is part of object. In my submission that is either clearly wrong or is a very, very difficult argument to construct if one then factors in Cartes Bancaires, and their case is: well, it's all very simple. It's just about proportionality.

Apart from these two stray words in Pierre Fabre, you will not find a single other case, before Pierre Fabre or since, that says in any way or even gives an indication that proportionality is irrelevant to object. If one thinks about it for ten seconds, it would be extremely surprising if that were true.

What the CMA is trying to do is to place weight on two words in a preliminary reference, "objectively

justified" that they cannot reasonably bear. This sticks out like a sore thumb. There isn't a single other case which picks up on this phraseology in the context of object and that is the problem they have. It's not just oversimplistic. In my submission it is simply wrong.

THE CHAIRMAN: Has any court ever said that it's wrong?

MR O'DONOGHUE: Well, all we have in Coty is essentially a retreat from Pierre Fabre and, in my submission, Cartes Bancaires, which post-dates Pierre Fabre and is the comprehensive statement on object, there is nothing in there which gives a crumb of comfort to the CMA's proportionality analysis. If anything, as I said, directionally and plainly it is completely the opposite. The last thing you should be doing in object, because it is meant to leap out of the page, is having this multi-faceted proportionality enquiry.

Again, when one thinks about this, the only circumstances in which proportionality truly comes into competition assessments is under the exemption criteria. Well, that is in the context of something where you have established a restriction by object or effect or both and then you're into a different question of exemption.

Now one of the exemption conditions is indispensability, and in that context and that context

only the question of proportionality may arise, but it simply does not arise at the object stage. One way to think about this is if the same way were correct, what would be the point of 101(3) -- if all of proportionality gets shoehorned into object, there is no exemption phase.

It cannot be right that the object infringement, which is supposed to be the clearest manifestation -- it's our equivalent of per se infringements -- all of a sudden includes, based on two words in one judgment ever -- suddenly includes proportionality. For the CMA to make good its case, it would need to be able to point to something in Cartes Bancaires that gives it a hook for proportionality and there is nothing. In my submission they have simply misread the case law and tried to apply a greatest hits of selective distribution case law, which is something different to object. That is simply confused.

So there is one final point I think I can complete before lunchtime and I am on track to finish at 3 o'clock. I have half a dozen points to make about proportionality after lunch, but I will finish the object round, if I may.

So, sir, one final point. So the CMA at paragraph 39 of its skeleton relies on the Lumsdon case,

which is a Supreme Court judgment. They say -- and I am quoting -- they argue that:

"...some adverse impact on the relevant objective, even if only a minimal one. Rather, that party must establish that any less restrictive alternative would 'unacceptably compromise' the objective pursued."

So they say that when it comes to proportionality, it is incumbent on Ping to demonstrate that its objectives would be unacceptably compromised and that only that degree of compromise can lead to something being disproportionate.

Now, we have two points to make on that: first of all, the argument falls at the first hurdle because if, as the CMA now concedes, the legitimate objective is the maximisation of custom fitting, then allegedly less intrusive alternatives are simply not suitable to achieve that objective because they will not maximise custom fitting to the level secured by Ping's current policy.

So, to put this another way, where the legitimate objective sought to be achieved by Ping is the maximisation of custom fitting, the CMA's suggestions by way of alternative, they're not less intrusive alternatives, they're actually not true alternatives at all because, if they are positing a situation in which

custom fitting rates would decline, then that manifestly is not maximisation; it is the opposite.

So it falls at the first hurdle because they're actually positing a completely different aim which is not maximisation, and if your objective is maximisation and the CMA's alternative leads to a reduction or a minimisation of this objective, then it simply isn't suitable and one doesn't even get to Lumsdon. You're comparing apples and pears in terms of objectives. So that is the end of that point.

The second point, to the extent we need one, is that in any event, if one is in the realms of compromise, if anything it is Ping who should have a margin of discretion when selecting the means to pursue its objectives, so if anything the point goes in the other direction.

Now, we pick this up in paragraph 260 of our skeleton, which is an extract from the Commission's Article 101(3) guidelines. The full quotation is set out and we can -- I don't know if the guidelines are in the bundle. We can obviously make them available to the Tribunal if that would be useful. So it's paragraph 260 of our skeleton at page 97.

Now, before we look at the quotation, of course, what's striking about this point is the point

I mentioned, which is -- the question of proportionality and discretion in this context comes up under Article 101(3). That reinforces the point I just made, that it is bizarre to consider that proportionality is part of object when under Article 101(3) proportionality is part of exemption. The fact that this appears in the Commission's guidelines under 101(3) is further support for that incongruity.

So here the Commission is setting out how it will approach the question of indispensability, which is essentially the proportionality limb of Article 101(3). It says:

"the market conditions and business realities facing the parties to the agreement must be taken into account. Undertakings invoking the benefit of 101(3) are not required to consider hypothetical or theoretical alternatives. The Commission will not second-guess the business judgment of the parties. It will only intervene where it is [...] clear that they are realistic and attainable alternatives ...", and so on.

So if there is a discretion point, it is a discretion point in favour of Ping, not the CMA.

We have also given in a way references to the Streetmap judgment. It's in authorities bundle 2, tab 25. If I can ask the Tribunal to look at

paragraphs 149, 163 and 176. The essential point made there is that where a firm has a legitimate objective, it should be afforded -- particularly in relation to product design and the core of its business -- it must be afforded some direction on the basis that it has a good idea as to how to organise and run its business. It is a big thing indeed for a regulator who is not familiar with that business to intervene and in this case stand it on its head without a convincing basis, so that there is a discretion, but it is in Ping's favour, not the CMA's favour.

Sir, I can stop there and pick it up at 2 o'clock.

(1.05 pm)

(The luncheon adjournment)

(2.00 pm)

MR O'DONOGHUE: Mr Chairman, before I move on to proportionality, there was one point I wanted to pick up in the context of object, which I think ties in with some of the Tribunal's questions.

If we can start, Mr Chairman, by turning up our skeleton, paragraph 131.

THE CHAIRMAN: Sorry, whereabouts in the skeleton? Which paragraph?

MR O'DONOGHUE: 131.

PROFESSOR BEATH: 131.

MR O'DONOGHUE: The point made there is that a restriction on commercial freedom is not the same thing as a restriction of competition. We make the point, for example, in Delimitis that of course an exclusive dealing commitment as a matter of contract in a sense restricts the counterparty from dealing with others, but the mere fact of their commercial restriction would not in itself be sufficient to found an object.

In fact, the court has gone further and said that there needs to be an appreciable restriction of competition in that context. Then we cite the Latvian case, Maxima. If I can ask the Tribunal to quickly turn that up, it's in authorities 3, tab 85.

The Tribunal will see at paragraph 15 the question referred to the Court of Justice. So it asks whether "... the mere fact that a commercial lease agreement for the letting of a large shop or hypermarket located in a shopping centre contains a clause granting the lessee ...(reading to the words)... of that agreement is to restrict competition".

Then there is a recitation of the case law, including, at 16 and 18, Pierre Fabre and Cartes Bancaires. Then at 22 we see the court's conclusion:

"Even if the clause at issue in the main proceedings could potentially have the ...(reading to the words)... the latter competition on the relevant market, namely the local market for retail food."

In a sense, this case, if anything, is a fortiori relative to the presence because the effect of the clause was to restrict the commercial freedom of competitors of the lessee. It is certainly obvious that, if you have more competition in a shopping centre from your direct competitors, competition would be increased. Even in those circumstances, the court said you cannot infer from the mere fact that commercial freedom is restricted in that way, that competition is restricted and you certainly cannot infer from that that there is an object.

We pick up on that point in various other manifestations in our skeleton at 133, 134 and 135. So at 133 we make the Delimitis point, which is that because exclusive dealing benefits the supplier and the distributor in terms of security to supply, it may be that the object of that agreement is not to restrict competition.

So, again, that confirms the point that one doesn't simply look at literal wording, one doesn't simply look at if someone's commercial freedom is restricted. One has

to ascertain in the context the relevant objective or purpose and, viewed in its individual context, ascertain whether, by its very nature, it restricts competition.

At 134, Pronuptia, which is a franchising case -- now in a sense the franchising cases are even worse because, of course, the franchisee is required to obtain typically exclusive supplies from a franchisor. It is typically required to have the exact get-up as specified by the franchisor. So in many ways, in terms of a restriction on commercial freedom, the franchising example is more or less absolute. But nonetheless franchising agreements with those features are generally outside the scope of 101(1) completely. So that is a rather extreme example of how a significant restriction on a commercial freedom may not only be anti-competitive, but may be outside the scope of 101(1) completely.

Then over the page at 135 we tie this in with the present case, that if one concludes on an object analysis that the restriction at issue does not by its very nature restrict competition by object, what one doesn't see in Pronuptia, Delimitis, Maxima or any of these cases is one then subjects all of that to a proportionality assessment.

We give the example in Delimitis, well, it is

entirely possible that instead of exclusivity -- I mean, if the idea was to ensure a security of supply by both parties and to allow production planning, there is no reason on the face of it why a contractual commitment to fixed amounts of fixed quantities couldn't achieve similar rates.

What you don't see in Delimitis is the court saying, "Well, in the context of considering object, we will also subject the exclusivity provision to the lens of proportionality". One doesn't see that. It's a much more high-level assessment which has to do with the nature of restriction. So that is important because in a sense the points made against us are points against the restriction of commercial freedom. So the point is made that the retailers, because of the prohibition, are restricted from offering their services in out-of-catchment areas and prima facie that is a restriction of commercial freedom, and if there is to be a case of restriction of competition, it needs to go much further. We say that the CMA on its literal approach simply hasn't done that.

So that's all I wish to say by way of conclusion on object.

On proportionality, I am acutely conscious that a lot of this is covered in the skeletons in detail and

some of it will be contingent on the evidence you will hear tomorrow and next week. What I wanted to do was outline the essential points of Ping's case and respond to the CMA's skeleton argument.

The first point and the critical starting point is: what is the relevant objective that Ping is trying to achieve here? In our submission it is plain that dynamic face-to-face custom fitting maximisation is the objective and it is not merely promotion. It is promotion to the maximum extent possible, I have taken you to this morning to Clark 1 where this point is made abundantly clear and I will quickly give you the references again. So it's B1/1 it's paragraph 8, where he says "every consumer" should be fitted.

Paragraph 40H:

"all of its golfers."

41:

"sell custom fit golf clubs only."

53:

"100 per cent custom fitting."

Then Clark 2, which is B1/2, paragraph 15:

"all of its golfers."

Now importantly the CMA concedes that Ping's objective includes maximisation. Again, for your pen,

the skeleton argument references are 4.2, 26, 73, 80, 98 and 99.

So these are important concessions.

Now, the reason this matters is that once you understand that Ping's objective is maximisation, the case on proportionality completely collapses because, if the aim is maximisation and if, as is common ground, dynamic face-to-face custom fitting cannot be achieved online, then Ping's current custom fitting rates will inevitably decline. It is, in our submission, unreal to suggest that if consumers can, for the first time, buy Ping clubs online, that would have no impact whatsoever on Ping's dynamic face-to-face custom fitting rates.

I touched on the point this morning, but the suggestion that a consumer who is about to click on a mouse would, through the interaction with pop-ups or live chat, suddenly do a volte-face and decide that it needed to traipse down to a bricks and mortar store to make a purchase and have a custom fitting is completely unrealistic.

The CMA's archetype is a consumer who is purchasing outside of retail shopping hours and wants the instant gratification of an online purchase and he or she is probably the last person who would then be persuaded to undergo a proper dynamic face-to-face custom fitting.

In a sense one sees this very clearly from the evidence from the CMA's witnesses.

So, for example, if we go to the decision at page 35 -- Sir, I will come back to that, but the reference is to high-volume sales, which is a point made by the complainant. I will give you the paragraph number in a moment. So it is all about high volume online, according to the complainant.

One also sees from the evidence of Mr Patani and Mr Lines that these are online retailers who have one bricks and mortar shop in the entire country, so they have no interest in rolling out physical retail networks.

If they sell online, it will not be in the context of dynamic face-to-face custom fitting. The simple point is that the model of bricks and mortar retailing is the very antithesis of what they want to do. They have a different business model and they have no real interest in custom fitting because custom fitting, from their perspective, adds cost, involves time and is not what they wish to do. It is, from their perspective, a less than profitable activity.

Now, just to answer the CMA's case that, well, it is possible the consumers would try and use specifications to choose the correct set of clubs online, if we can go

back to Dr Wood's evidence, please.

So this is B2, tab 3. We saw this this morning, but it's worth remembering. So it's the second part of paragraph 28 on page 7. It's the point that:

"a consumer, without being custom fit, is highly unlikely to correctly choose the correct combination of shaft, grip and the many other components online to create a club that fits them and enables them to play better golf ie. a Ping custom fit club."

Just a couple more references. Again, we touch on this, but it's relevant to proportionality as well. At paragraph 35, Dr Wood makes the point that the static measurement -- it's the fourth line:

" ... rarely reflect what is learned following a dynamic fitting session."

I have taken you to two studies where that has been proved empirically.

Then at 46, Dr Wood makes the point -- here he is referring to the online fitting software tools, Ping's nFlight.

"Based on my experience of building the fitting logic into Ping's fitting software, nFlight, I fully recognise that the process of matching a player to his or her optimal club specifications is complex and that the best way to know if a particular custom choice is going

to help or hurt is to try it out. Shafts are a good example of this, since some players change their swing in response to a different shaft and as a result the actual ball flight resulting from a shaft alteration may be more different than that predicted by the algorithm of the fitting software."

So he makes the point that the online fitting tools, such as they are, are simply not a substitute for what one can learn and replicate in the physical world.

Now, a further point which will have to be covered in evidence is that simply relying on a previous set of specifications where there was a custom fitting is not relied on. We can pick this up in Clark 1. (Pause)

It's paragraph 18. We touched on this this morning. He does say that as an experienced golfer, whenever he statically measured -- and he says:

"I am dynamically refitted every time Ping launches a new set of clubs because first I may have changed, I may have gained or lost flexibility, power, swing speed, weight etc, and second the new clubs may perform differently. This is how we encourage Ping Europe consumers to act, each time they buy our clubs."

The Tribunal will recall from before lunch we looked at exhibit C of Dr Wood's statement, that there are a myriad number of reasons why the specifications for

an individual who was previously custom fit may change.

Just to complete the evidential picture, if we can go to the statement of Mr Hedges, please at B2/4. This time it's paragraph 15. He says:

"If Ping is to forced to sell clubs online, I expect to see significant damage to the Ping brand that could last for a generation. Golf clubs are not products that are characterised by a short life cycle. In my experience the average golfer would tend to use a set of clubs for five to ten years."

In my submission it is obvious that if the fitting occurred previously five years ago or as much as ten years ago, the suggestion that the specifications would be identical such that a refitting would be unnecessary is not realistic. None of us are the men we were ten years ago unfortunately.

Now, the CMA has no real answer to this rather obvious point, other than to revert to saying that, "Well, if other manufacturers sell clubs online, then Ping can too". That is to ignore that Ping's objective is different to its rivals. Ping's rivals are in the business of no more than promotion. Ping has a different objective, which is maximisation, and specifically it is to maximise dynamic face-to-face custom fitting which it is common ground cannot be

replicated online. In other words, even if the internet is useful for online selling of standard clubs, which Ping does not make, it is not useful -- in fact it's highly likely to be detrimental as a channel for the sale of properly fit custom clubs; in other words an environment in which a website tries to somehow replicate Ping's dynamic face-to-face custom fitting process or to utilise specifications from that process.

In a sense, the decision makes at least a partial concession to that effect at paragraph 4.222 on page 131 of A1. It says:

"the CMA finds that there is likely to be a direct causal relationship between the online sales ban and the benefits associated with custom fitting."

It's the second sentence. Does the Tribunal have that?

Now, to be fair, they want to make the point that it is a limited relationship, but there is at least some concession as to causation. The second point on proportionality is there really is no serious challenge to the evidence that Ping's dynamic face-to-face custom fit rates are materially and consistently higher than its main rivals. This is the survey evidence submitted by Ping.

We can most conveniently pick this up in Clark 1,

B1, tab 1, starting at paragraph 70. So there were two surveys, the first survey in December 2016. You see the questions. You will see under 71E, over the page, there were 1,152 accounts who responded to the first survey and you will see under D that the survey was conducted by Ping's UK sales team, 11 separate individuals.

Then the results of the survey are in paragraph 73. They're highlighted as "confidential". The Ping figure on the fourth line, when compared to the average custom fitting rate across all brands in the UK, is dramatically different.

You will see in 73 there is a reference to Titleist. We can see there is a document at B1/1, same bundle, tab S, please -- it's the last page of that document. So this is an annual report from Titleist's holding company. On the last page --

MR DORAN: Where is this, Mr O'Donoghue?

MR O'DONOGHUE: Forgive me. It's in the same bundle, tab 5.

MR DORAN: S?

PROFESSOR BEATH: S.

MR O'DONOGHUE: It's the last page of that tab at 17. So it starts "Titleist 716". So they say:

"Approximately 56 per cent of our worldwide iron sales are custom fit."

That is very consistent with the figure for

competitors set out in paragraph 71 of Clark 1. It is notable because, from Ping's perspective, someone like Titleist is probably its closest competitor in custom fitting and by Titleist's own admission its custom fit rates are very significantly below the Ping rates.

Then we move to the second survey. This is Clark 1, starting at paragraph 81. So the date is October 2017. Just to put this in context, one of the criticisms made by the CMA, quite unfairly in Ping's view, in the decision is, "Well, the first retailer survey wasn't very robust because all it tells you is about Ping and in relation to the figure you give for nationwide custom fitting rates for your competitors, that was not information that came from the same source".

So what Ping did very conscientiously was go back to the same set of account-holders and then ask a series of further questions, including, in particular, relative custom fit rates. So Ping had responded in a very diligent and conscientious way to a criticism made by the CMA in the decision.

So the date is October 2017. There were this time [redacted] responses -- sorry, I shouldn't have read that out. That's confidential. The response rate was slightly lower.

The critical figures are in paragraph 83 and you see

the Ping figure and the rival's figure and the delta between those figures.

Now, the two Ping rates in the first and second retailer survey are remarkably different and a further point made by John Clark at paragraph 73 is that the percentages observed in the first survey -- at the second sentence, he says:

"From having dealt very closely with retailers since 1997 [so more than 20 years] and from speaking to my sales team who interact with retailers every day, I have no reason to doubt the [redacted] figure shown by the retailer survey."

That is, in my submission, further comfort that the Tribunal could and should obtain that this survey is robust, is realistic and is entirely consistent. Now, one of the points made by the CMA in response to what are now two surveys are that, "Well, the delta between Ping and its rivals is not that big". There are two responses to that.

The first response, which the CMA has never responded to, is that it is almost certainly the case that both surveys overestimate rivals' rates of custom fitting and underestimate the Ping relative rate because the only accounts surveyed by the Ping survey were Ping account-holders and Ping account-holders are those with

the highest possible commitment to custom fitting. That is one of the reasons or the main reason why they are Ping account-holders, because they have demonstrated a clear commitment to custom fitting.

To take an obvious example, the businesses run by the CMA's witnesses, Mr Patani and Mr Lines, they are not included in the Ping survey data and these are two businesses that predominantly sell online and they're not reflected in any way in the Ping survey.

You will recall the data I showed you before lunch from Clark 1, which shows that the presence of competing brands within the Ping account-holders is in some cases strikingly low and it must therefore unavoidably be the case that there is a lot of retail out there that is not Ping account-holders and to a good extent, if not a large extent, sell clubs online that do not benefit from custom fitting at all or certainly do not benefit from custom fitting in the sense of dynamic face-to-face custom fitting as Ping understands it.

So in our submission the 56 per cent figure you see with Titleist, which, as I said, is Ping's closest competitor for custom fitting, is probably a more realistic figure of what the relative difference is between Ping and its rivals. So the surveys in terms of showing the delta must be a very substantial

underestimate.

Now, the second point is the figure of interest is not what the level of custom fitting achieved by Ping and its rivals is. It should be the other figure, which is the percentage of consumers who were not custom fit according to the survey by Ping and its rivals. When one looks at that delta, it's almost double because that is the relevant harm from Ping's perspective that one is trying to capture. On that metric there is a very substantial difference indeed between Ping and its rivals.

Now, as we say in our skeleton, there has been a degree of sniping from the CMA about the Ping surveys and I have responded to what I would call the "empirical points" in relation to the surveys. But the more fundamental problem is that it was perfectly open to the CMA to do their own comprehensive study and there is no evidence that other manufacturers were even contacted on this issue.

[REDACTED]

It

would have been perfectly open in any event to the CMA to undertake a comprehensive study and there is no evidence that this was done.

So the Tribunal is faced with the two surveys I have indicated. That is the best and essentially only evidence before the Tribunal and we would respectfully invite the Tribunal to have regard to that evidence and to decide the case on the basis of that best available evidence.

In the decision itself, there are really only two points made against Ping in respect of other evidence. [REDACTED]

-- and the other is in relation to a second retailer where it is said that their custom fit rates were low.

Now, just to put this in perspective, we're talking about two retailers out of a cohort of more than 1,200, so it's pretty thin pickings. Just to pick up on the second retailer -- this is at B1/1, tab T. So this is a note of a call with the second retailer that the CMA relies on in the decision. If we look at the third paragraph, so the retailer in question:

[REDACTED]

So with the greatest of respect, to suggest that this second bucket of retailer evidence from a cohort of 1,200 retailers is good evidence of anything is simply not credible. It isn't evidence at all.

Finally, the Tribunal, in our submission, can get even further comfort again that the Ping surveys are on the ball from other sources. So we can pick this up in B1/1, tab R. So these are industry studies on custom fitting. In this case it's a United Kingdom study.

THE CHAIRMAN: What's the reference? Sorry.

PROFESSOR BEATH: Tab R.

MR O'DONOGHUE: It's entitled "Overview: United Kingdom golf product attitude and usage research". Then at page 52:

"Ping remains firmly in command [...] in custom fitting."

You will see the percentages there. You will see the point I made earlier, which is that Titleist is the next best in terms of custom fitting, but it is a very, very long way down the chain compared to Ping.

So everything one sees in the studies confirmed by John Clark in over 20 years of experience is entirely consistent with what these independent public studies on custom fitting will tell you in terms of Ping's significant leadership over its competitors in custom fitting and, second, that the closest competitor is Titleist and we have seen its public data on custom fitting.

Two final points, if I may. My third point is that the CMA has fundamentally misunderstood the utility of the output from a dynamic face-to-face custom fitting. A critical point that the CMA does not seem to have understood is that there are no industry standard specifications for custom fitting in terms of the output that the consumer receives. We can pick this up in Dr Wood's evidence in B2, tab 3, paragraph 25, the third-last line in brackets:

"...(there are no industry standards for club specifications). For these reasons the vast majority of players will require different specifications from one fitting to the next."

This is picked up in more detail by some of the retailers. If, for example, we look at Hedges 2, which is B2, tab 5, same bundle --

PROFESSOR BEATH: Tab 5, yes.

MR O'DONOGHUE: It's paragraph 4:

"Any specifications a retailer may provide following a fitting will not only be brand-specific, but also specific to the club model; rather than a prescription, the specifications provided should be regarded as akin to an order form."

The same point is made by Mr Challis, which is at B2, tab 9, paragraph 4. So the critical point is that when one does a face-to-face custom fitting, that allows the consumer to purchase the exact brand and model that was fitted, but nothing else. So the CMA's model of a fungible and passportable prescription is simply incorrect on the basis of the lack of industry standard specifications for custom fit golf clubs.

The CMA makes the analogy with the online purchase of contact lenses, but the critical difference is that, unlike custom fit golf clubs, there are industry standard specifications for contact lenses so the example simply doesn't work.

The problems for the CMA, they don't just end there with a fundamental misunderstanding. If one looks at their own witnesses, Mr Mahon, bundle D, tab 3 -- we saw this this morning -- starting at paragraph 29, says that:

"American Golf only offers standard fit clubs on our

websites as we have decided not to promote the sale of custom fit clubs online."

One of the reasons given at 31 is that that was because of the difficulties of fitting online and that a custom fit was much better.

Then the third point he makes:

"... it would undermine our USP of free custom fitting, which we provide to build a relationship with customers, and to facilitate the opportunity to sell them other products to improve their game."

So in other words, at least as things stand, American Golf is not willing to hand over specifications even to those who have been custom fit because it undermines its model of custom fitting, which is essentially the free rider point, and that is the CMA's own witness.

A further problem is that it is, in our submission, unreal to suggest that a consumer who has gone through the lengthy and complex and refined process of dynamic face-to-face custom fitting would then risk going online to try and match the custom fit specifications himself or herself. We have seen this morning the custom fit process is inordinately complex and the whole point of custom fitting is that the consumer in question is willing to devote up to an hour of his or her time to go

through that process, and the suggestion therefore that the consumer would essentially forego those benefits and have a go himself or herself online doesn't seem to us very realistic.

It is worth remembering that individual irons or drivers can cost up to £800. Some of this equipment is expensive. The suggestion that you would go through that process, assemble a set that was bespoke to you and then walk out of a shop and try and have a go yourself online with drop-down boxes seems to us unrealistic. That will be something to be explored next week, but we do make that point.

We can pick this up again in the surveys, if we go back to B1, tab 1, tab R, this time on page 65 [sic]. You will see that the question is, "Which of the following impact your decision to shop in one retailer over another?", and custom fitting is one of the two top options.

Now, it is striking that the ability to shop online is not one of the criteria even included in the survey, which may itself be striking. Then at page 75 in the same document -- sorry, the reference I have just shown you should be page 60, not 65. If we then go to 74, please, "What are the main factors that influence your purchase of a new set of irons?", and number 1 is custom

fitting.

Then back to 71, a point we touched on briefly a bit earlier:

"On average, how often do you purchase a new set of irons?"

You will see that the overwhelming percentage of responses are rather long term, six to ten years, up to a third of people.

Now, the fundamental problem with the CMA's putative consumer who has had a custom fitting and then wishes to go online to try and match those specifications with the drop-down boxes on a website, if such a thing exists, is that from Ping's perspective, when it receives the order, it has no way of ensuring or verifying that the customer has been custom fit and, in other words, it would be impossible to distinguish in an online world between those who have had a custom fitting and those who have not.

We can pick this up in Clark 2 in B1, tab 2. It's paragraph 9C, internal page 6. It says:

"If Ping Europe were to allow its golf clubs to be sold online, neither Ping Europe nor the online retailer would have a way of ensuring whether the consumer ordering Ping clubs online has in fact been previously custom fitted. Because the online ordering system would

have no way of effectively distinguishing between those online consumers who have been fitted and those who have not, purchases by both would therefore be allowed. This will inevitably lead to incorrect Ping clubs being sold to golfers who have either not been fitted or whose fitting specifications have changed, thereby negatively affecting [...] the Ping brand."

Now, one of the suggestions made in the CMA's skeleton and in some of its evidence is that, "Well, one knows by looking at an order whether there has been a custom fit or not or whether there is something out of kilter within the order and therefore it could be corrected". Now, we would have to explore this with the one witness who says this, but in our submission that is obviously absurd.

The idea that the process of dynamic face-to-face custom fitting, which everyone accepts cannot be replicated online, but that one could then, merely by looking at an order, observe within a set of clubs something which did not look like it was part of a custom fit specification, it's entirely unrealistic. The idea that by simply looking at an order one can understand immediately that there is something funny about the order and that it doesn't correspond to the custom fitting, that is completely and utterly

unrealistic. In a sense, it makes a mockery of the entire process of dynamic face-to-face custom fitting if one can divine by looking at an order whether something looks a bit funny. It is hard to understand why everyone accepts the benefits of custom fitting which they do.

Finally, of course, there is the issue of returns. Ping currently has a 100 per cent returns policy. There would be a serious question mark over the continuation of that policy for standard clubs or for misfit online fitted clubs and equally a number of the CMA's own retailers do not allow custom fit returns either, so that is a further issue in the context of proportionality that would need to be grappled with.

Now, the final point I want to touch on before I sit down is the free rider problem. In our submission the evidence on the free rider problem is overwhelming. The starting point is the CMA's defence at A3, paragraph 197, so it's internal page 67. They say

> only account-holders with an appropriate website would have to meet the alternative measure conditions.

So, in other words, the CMA is saying that within Ping's 1,200 account-holders, only a certain subset of them would have to comply with the alternative measures or would in fact do so.

That immediately runs into the problem, as we have seen before the lunch break, that within Ping's account-holder retail base a de minimis percentage today sell online and the overwhelming majority of them do not have online sales facilities for golf clubs. So if they were to transition from a physical environment to a virtual environment, it would require them to make new investments.

Then one says, "Well, what would those investments entail?" The evidence from the CMA's own retailer witnesses is that the costs of setting up and running their current e-commerce websites are extremely high, in some cases hundreds of thousands of pounds. One of the CMA's witnesses says that on a stand-alone basis his bricks and mortar shop is loss-making, so, in other words, that business as a viable concern in its own right would not survive.

If we can go back to Clark 1, paragraph 40F. This is the point we saw this morning, but it's relevant too in this context. So at the bottom of the page we see the figures on the turnovers of Ping's account-holders. As we noted this morning, the overwhelming majority of them are absolutely tiny, so the idea -- clearly retailers with that level of turnover would not be in a position to invest large sums of money in setting up

and developing websites.

The consequence of that would be the decimation of Ping's deep and wide current retailer network on a nationwide basis and the consequence of that, in turn, will be the dynamic custom fitting rates for Ping will fall through the floor. So the free rider problem is a very real problem because the ability of Ping's retailers to transition to the CMA's brave new world based on the evidence of their turnovers looks very, very thin indeed and therefore what will happen is you will have a small number of online only or mainly retailers who will probably have market power and they have no interest in having a physical retail distribution network because all that will do is add to costs for their business and is the very antithesis of the model they wish to pursue. The net effect of all of that for Ping is that its current distribution network will not be sustainable and therefore custom fitting will fall very dramatically.

In effect, what the CMA proposes to do is to transform these retailers into fitting services and we will explore this next week. They have uniformly given evidence that they are not in the business of fitting. They wish to sell clubs.

There is the fundamental point, which is that the

majority of them today effectively cross-subsidise the fitting service through the sale of clubs, and if that model is to be disaggregated and they are to become stand-alone fitting providers, the cost of custom fitting will increase and that will be a further disincentive for consumers to engage in custom fitting because there will be an upfront increased cost that is separate from the purchase and that too will be detrimental to Ping and those retailers who invest in and believe in face-to-face custom fitting.

So that's all I wish to say and I have finished bang on time.

So there was one reference I struggled to find, which is to high-volume sales. It's on page 38 of the decision and it's a quotation from the complainant. It's at the top of page 38.

THE CHAIRMAN: 38 of what?

MR O'DONOGHUE: Of the CMA's decision.

Sir, unless I can assist you further, those are Ping's opening submissions.

THE CHAIRMAN: Thank you very much.

MS DEMETRIOU: May it please the Tribunal, I am conscious that the stenographers will probably need a break even now or soon. I am in the Tribunal's hands as to whether we take that before I start --

THE CHAIRMAN: I suggest we have a break now for five minutes.

(3.01 pm)

(A short break)

(3.12 pm)

Opening submissions by MS DEMETRIOU

MS DEMETRIOU: May it please the Tribunal, I am going to structure my opening submissions for the CMA in the following way: I want first of all to give an overview of the CMA's case. Secondly, I will make submissions about the legal context in which the appeal falls to be determined and in particular I will explain why we say that the critical question in this case is the proportionality of Ping's online sales ban and I will make submissions as to how the Tribunal should approach the question of proportionality. I will also deal very briefly with the law on the points on the Charter of fundamental right raised by Ping in its first ground of appeal.

Thirdly I will explain in a nutshell the basis on which the CMA found that the online sales ban is disproportionate and I will set out the key differences between the parties on the facts which will have to be resolved by the Tribunal once it's heard the evidence next week.

Like Mr O'Donoghue, I'm not going to address penalty in opening. The Tribunal has seen the nature of the debate between the parties on penalty and this is an issue which is best left until closing, when the Tribunal has heard the evidence.

So I will begin with the overview. The CMA's case in the decision is straightforward. It is that where a manufacturer chooses to sell its product through a network of retailers, it is antithetical to competition between those retailers if the manufacturer bans them from selling the product online.

An internet ban restricts intra-brand competition and, indeed, the CMA's case is that an internet ban which is not objectively justified restricts intra-brand competition by its very nature. This is because it cuts customers off from an important sales channel, a channel which enables customers who have decided that they wish to buy a product to shop around between retailers.

The process of shopping around and comparing prices and comparing the sale service offered by different retailers is what stimulates competition. If retailers are segregated off from one another, then they're not subject to that competitive pressure and the internet is very important to this process. First of all, it readily allows customers to compare the offerings of a

large number of retailers and to buy from the most competitive of them. Secondly, the internet expands the geographical scope of competition.

Now, you heard Mr O'Donoghue in opening refer to Mr Holt's report and, in particular, to his finding that most customers in the UK have a choice of four or five Ping stores within a 15-mile radius. Now, in a world pre-internet, a customer who wished to buy golf clubs and who had four or five stores within a 15-mile radius would be limited to comparing those four or five retailers and, indeed, if it were practically feasible, that would mean driving round to each of them, visiting each of them and discussing what was on offer at each store. But the internet, of course, allows consumers to cast the net much more widely.

There is, for example, evidence in this case from retailers that we will see, which I will come to, who do sell online, who say that there is substantial demand from other EU member states. That's the kind of competitive pressure that the internet permits. Thirdly, of course, the internet is also highly convenient to consumers because it stimulates competition by retailers by enabling customers to make purchases at times when stores would not be open and without having to travel.

The Tribunal can see how the role of the internet in promoting intra-brand competition between retailers was addressed by the CMA in its decision. I would ask you to pick up the decision in bundle A and turn to page 86. At paragraph 4.69 of the decision, the CMA found that there is significant consumer demand to buy custom fit clubs online and they refer to an extract from the SMS survey, indicating that on average over 10 per cent of the surveyed golfers reported purchasing golf clubs online, with the proportion of golfers who have had a custom fitting purchasing online being even bigger, at around 15 per cent on average.

At paragraph 4.70, you see the CMA has found there that the internet online sales are an established channel for the sale of golf equipment and you see evidence from some of the account-holders referred to.

At paragraph 4.71, Ping's submission in the investigation was to accept that there is demand for buying clubs online and they also accept that this is something that can be done.

Then at paragraphs 4.72 to 4.74 you see first of all that for a number of retailers online sales of golf clubs make up a significant proportion of their total sales and represent an important retail channel.

Then at 4.73, the evidence I was referring to is

mentioned there.

"A number of UK account-holders operating online sell Ping golf clubs to consumers in other EU member states, demonstrating that there is a demand to purchase Ping golf clubs cross-border by such consumers."

Then we see at 4.74 that other manufacturers promote the existence of their authorised online retailers; for example Callaway does that on its website.

At 4.75, you see -- and this is an important point in the case -- that some retailers who sell clubs online do so in a way which offers the full range of customisable options in drop-down boxes.

Then over the page at 4.76, you see the CMA's conclusion that:

"The online sales ban contained within the agreements restricts competition for passive sales for Ping golf clubs ..."

And that's notwithstanding that advertising of Ping golf clubs and their prices are not prohibited. That's for a reason that is very intuitive and easy to understand, which is that customers can't click to basket and go ahead with the purchase. So the fact that the prices themselves can be advertised online is only part of the picture.

If, in fact, the retail store is 100 miles away,

then in reality the consumer is not going to complete the purchase by travelling to the store. It's the convenience of completing the purchase online that exerts the competitive pressure. You see that process explained in the next two bullet points.

Going back in the decision to paragraph 3.51, in the factual section you see a heading, "Importance of the internet as a retail channel for the sale of golf clubs", and you see a factual section there which gives further flesh to the points that the CMA is picking up on in part 4 of its decision. You see some figures at 3.51, explaining that for the particular retailers mentioned in that paragraph, a significant proportion of their golf club sales were made online.

Then at 3.52 down to 3.55 you see more of this evidence. So, for example, at 3.53, evidence of some UK account-holders -- Ping gave this evidence -- are targeting consumers in other member states, ie demonstrating that the demand is there from other member states. At 3.54, Ping's internal documents describe consumers as being "very internet savvy". Then at 3.55 there were internal Ping documents demonstrating that Ping was aware of the effect of the internet on pricing and in some cases concerned by the possibility of UK account-holders operating online, selling golf

clubs at lower prices than account-holders established in other EU member states.

So Ping is there aware in its own internal documents of the competitive pressure that the internet and the possibility of online sales allow retailers to exert as against other retailers of the Ping brand.

Now, in opening, Mr O'Donoghue sought to suggest that only a very small proposition -- he sought to suggest that there is very limited demand for online sales and he made the point that only a very small proportion of Ping's account-holders sell online.

Now, I think it's instructive to turn to the annex to the CMA's defence, which is at D11, just to put that point in perspective. You have a table, the second table down, which includes American Golf, which is by a long way Ping's top retailer.

You have the percentage in the confidential figures in the left-hand side of the number of account-holders who do sell online, and so Mr O'Donoghue is right that it is a small proportion, but when you look at what percentage of sales, of revenues, that that represents, it's actually a high percentage of revenue.

We also make this point: that it doesn't avail Mr O'Donoghue or Ping to say that there is very little demand for the online sale of golf clubs because in

a sense that destroys their whole case, their case being that if online sales were permitted, the world would come to an end and Ping's brand would be destroyed. So if there is, as they say, very little demand for online sales, then in fact removing the ban wouldn't make very much of a difference.

So we see from the CMA's decision how the ban restricts competition. I will show you how EU competition law and in particular the Court of Justice and the Commission address bans on internet sales and that's the Pierre Fabre case. I will take you to that because Mr O'Donoghue made a series of submissions in relation to that case which we say are fundamentally wrong and it's obviously the key authority in this appeal.

Now, Ping has devoted a lot of time and effort to explain the importance to it of custom fitting its clubs, but the difficulty for Ping is that this is not enough to justify its internet sales ban. The CMA has accepted in its decision that the promotion of custom fitting is a legitimate aim for Ping to pursue.

Now, I know that Ping describes it as the "maximisation of custom fitting". I am going to come to that point. We say it makes no difference whether you describe the aim as "promoting" or "maximising" custom

fitting, but I will come to deal with that point.

It's not the end of the analysis -- so the fact that they are pursuing an aim which is a legitimate aim is by no means the end of the analysis because Ping also must prove to the Tribunal that the ban is necessary in order to achieve that objective. That's a critical limb of the proportionality test.

The CMA has found in its decision that it is not necessary, it is disproportionate, in particular the ban goes further than is necessary to achieve its aim of promoting or maximising custom fitting and the ban therefore restricts competition between retailers unnecessarily, to put the point a different way.

What I would like to do now is to make a number of points in relation to the facts found by the CMA, additional to those I have already made, about the factual context in which the question of proportionality, which is the key question, falls to be determined. I am going to do that largely by reference to the decision itself.

So first a few points about the market context and, in particular, Ping's competitors. We see in the decision at paragraph 3.11, which is on page 17 of the decision, a description of Ping's key competitors, Callaway, Cobra, Mizuno, TaylorMade and Titleist. You

see there a table at 3.12 showing market shares as at 2015. Now, Mr Holt has some updated, I think, market shares in his report, but these were the shares, I think Mr Holt accepts, as at 2015.

Now, the leading manufacturers -- and we see this from paragraph 3.16, over the page -- all supply custom fit clubs which allow a golfer to specify variables, including shaft type, shaft length, club face lie angle, grip type and grip thickness, based on the golfer's personal measurements and specifications. These manufacturers, including Ping, supply their respective retailers with custom fit clubs, so clubs which are capable of customisation, but with pre-determined variables to be sold off the shelf without further customisation, as well as offering clubs which are custom built following an order. So all of Ping and its key competitors do both things.

Then we see at paragraph 3.28 that custom fitting is increasingly popular across golf club brands, so it's something which across brands is increasing and expanding. Then, in the context of Ping compared to its competitors, you see at 4.64 of the decision -- so flicking forward to page 84 -- the submission made by Ping:

"Ping submitted that consumers value both the

process of custom fitting and the number of customisable options offered for each Ping club and that Ping offers the largest number of variables of any manufacturer. However, the CMA finds that the custom fitting of Ping's clubs does not provide greater benefits to consumers than custom fitting provided for clubs of other manufacturers for the following reasons."

They then set out various reasons. So the CMA's case, then, one can see from this part of the decision is that -- and you see this from 4.65 as well:

"... across all brands manufacturing custom fit clubs, manufacturers, retailers and golfers believe that consumers benefit from a custom fitting before buying a golf club."

So you see that the CMA's case is that Ping's key competitors also promote custom fitting, but an essential part of the CMA's case or an important part of its case is that they are able to do this without imposing a ban on internet sales. Ping is the only manufacturer which imposes a ban on online sales, and this is, in our submission, a factor which very significantly undermines Ping's case.

It does so for these reasons: it undermines Ping's case on the necessity of the ban, so is the ban necessary, because Ping's rivals have not found it to be

necessary even though they are also pursuing an aim of promoting custom fitting and trying to maximise their custom fitting rates. It also undermines Ping's case on free riding because, again, Ping's rivals have invested in custom fitting and Ping's rivals' retailers carry out custom fitting, so Ping's rivals require their retailers to invest in custom fitting despite those rivals' clubs being available online.

So the free riding problem has not materialised in fact and that, we say, is a very good guide to whether or not Ping is correct to say that free riding creates a large problem such that these investments would necessarily have to be reduced if there were online sales. We say in a sense the proof is in the pudding because its competitors invest, its competitors' retailers invest and yet they still sell online and there is no evidence at all to show that their investments have been damaged or negated. In fact, the evidence goes in the opposite direction because, as you have seen, the CMA has found that custom fitting is increasing across all brands and that is, again, a very important point in the case.

I now want to make some short points about Ping's distribution of golf clubs. Mr O'Donoghue took you at length to Ping's custom fitting process and sought to

emphasise the importance of custom fitting and much of that is not in dispute, but the CMA does dispute that it's equally important for every customer to have a custom fitting before each purchase. So what we say, what the CMA says, is that the evidence is fairly consistent that customers believe custom fitting is important -- you have just seen that in the decision -- but we don't accept that the importance is uniform regardless of the circumstances.

So, for example, if a customer has just had a full custom fitting and purchased a set of golf clubs and then a week later is playing on the golf course and breaks one of their golf clubs, then we don't accept that that customer would need a fresh custom fitting before buying a replacement club for the broken club.

Equally, if somebody has had a custom fitting in a store and buys a set of golf clubs and then a month later says, "Well, I am going to my holiday home in Spain, I would like the same set there", equally the CMA does not accept that it would be important for that customer to have a fresh custom fitting. Of course, some customers will be unpersuadable about the merits of custom fitting and Ping also seems to accept this.

So just going briefly to the documents that Mr O'Donoghue took you to in B1, tab F, which is Ping's

custom fitting manual and to explain -- just to take you to two passages. So page 4 -- he started at page 5 but page 4 explains the level 1 and level 2 process. You will recall from his submissions that level 1 is essentially the static fitting and level 2 is the dynamic face-to-face fitting. You see in the second of the smaller paragraphs:

"Level 1 is designed as an entry-level fit where time may be limited or it can serve as the building block of a more detailed fit."

And so --

MR O'DONOGHUE: Sorry, I hesitate to rise, but a dynamic fitting is included in level 1, which I made clear this morning.

MS DEMETRIOU: It may be that Mr O'Donoghue is right and I overstated that, but certainly he took you through level 1 and level 2 and there is a second level -- level 2 allows for a much more elaborate and further process. So the point I make at this stage is that Ping itself is acknowledging in this document that it may be appropriate to have a more limited custom fitting for entry-level purposes.

We see also at page 14 an acknowledgment -- and this is under C at page 14:

"In the cases where the fitter defaults to the

static measurements, they do provide good statistical probability that the suggestions will fit most players."

Now, the Tribunal knows that Ping imposes contractual requirements on its account-holders and Mr O'Donoghue took you to those requirements which require a commitment to custom fitting. They are conveniently exhibited -- Mr O'Donoghue took you to these, but I just want to show you one more section of the terms and conditions. They're at B1/1H.

Mr O'Donoghue took you to clause 12, I think, which is the internet policy relating to hard goods, but I will just ask the Tribunal also to note clause 13, which is the internet policy relating to soft goods. The reason why I ask you to note it is because, in relation to soft goods, it's not the case that Ping allows anyone to be an online retailer. So that sets out conditions that have to be met and one has to apply and Ping then determines whether that online retailer is an appropriate online retailer to sell Ping's goods.

So this ties in to an important feature of this case, which is that the effect of the CMA's decision -- the CMA's decision has attacked the ban on online sales, so it has attacked -- the decision finds that it's Ping's prohibition on any retailer to offer online sales that constitutes the infringement of Article 101. What

the decision doesn't find and what the consequence isn't of the decision is that Ping has to allow anybody that applies to it or any of its account-holders to be an online retailer.

No, the CMA accepts -- and that should be clear from the section of the decision dealing with less restrictive alternatives -- the CMA accepts that it would be open to Ping, just as it does in relation to soft goods, to select criteria that have to be met by anyone seeking to sell Ping's clubs online.

I would just ask you at this stage to note two points about the terms and conditions. These are first of all that the terms and conditions don't prohibit account-holders from selling Ping clubs if the customer hasn't had a custom fitting, so there is no prohibition on selling without a custom fitting. It's all about encouraging, having a face-to-face meeting and seeking to persuade the customer.

This is important because Ping talks about its goal being "the maximisation of custom fittings", but that goal has to be seen in this light; this light being that it hasn't sought to require its retailers to mandate custom fittings in every case, which is something it could have done contractually. We see, moreover -- and this is the second point -- that the terms and

conditions do not prohibit telephone sales and we know from the evidence that some telephone sales do take place. The reference for your note is decision, paragraph 3.118.

So on Ping's own case there is a proportion of golfers to whom Ping's retailers sell Ping clubs who are not custom fit before they purchase those Ping clubs. In terms of the proportion, again on Ping's case, we have seen the figures. If you turn in this same bundle to Mr Clark's first witness statement, paragraph 72 -- this is a confidential figure, but you see there at paragraph 72 the final figure which was confidential.

This is from Ping's retailer survey that Mr O'Donoghue took you to at the end of his opening submissions. You see there the confidential percentage, the very final figure in paragraph 72, which represents the proportion of sales which are sales of Ping clubs preceded by custom fitting. So if one deducts that number from 100, one has on Ping's case the proportion of Ping clubs that are sold without a custom fitting.

Now, turning back to the decision, we see from paragraph 3.79, which is at page 46, that the online sales ban was communicated to customers back in 2000 and at that stage it was a ban on the online sale of all Ping products, not just golf clubs.

Now, that plainly went beyond the scope of the aim that's now being invoked by Ping and we see, at paragraph 3.94, a reference to a communication in August 2012 whereby Ping wrote to account-holders telling them that it had made the decision to allow soft goods to be sold directly on the internet.

So prior to that point it hadn't allowed soft goods to be sold on the internet and, of course, that's not the subject of this decision because the decision only looks at the position post-2012, but plainly the scope of the internet ban at that stage could not be justified on the basis of the legitimate aim being advanced.

Now, it's also common ground -- and we see this from 3.1 to 3.3 of the decision -- that Ping sells its clubs online in the United States. Again, we say that this is an important point in this case because Ping also has a commitment to custom fitting in the United States, it sells the same clubs in the United States and yet it has not imposed a ban on internet sales in the United States. So this in itself tends to demonstrate that the ban is not necessary to achieve the purpose invoked by Ping.

Thirdly, I want to address the Tribunal briefly on the question of alternatives to the ban because, of course, the ban cannot be proportionate if the aim of

promoting or maximising custom fittings can be met through less restrictive means. The CMA, of course, contends that it can. The decision sets out examples of measures that are less restrictive than the ban that Ping could take, the CMA says, in order to achieve its objective. I want to just remind the Tribunal briefly what these are and also to underline an essential point.

These measures are already being used successfully in respect of the custom fit golf clubs produced by Ping's competitors and some of them are used in respect of Ping's own golf clubs in the United States and some of them are measures that have been specifically endorsed by the Court of Justice as less restrictive alternatives that render a ban on internet sales disproportionate.

In relation to that point, can I just refer the Tribunal back to paragraph 60 of our skeleton argument, where we have summarised some of the cases. We have set out there at paragraph 60 some of the CJEU cases where the court has identified online features. We see this from 60.3. In that case:

"the CJEU identified online interactive features as a suitable means of protecting against the risk that medicines would be incorrectly used ..."

Interestingly, if one reads the citation from the

judgment, so the last words that are underlined:

"As regards incorrect use of the medicine, the risk thereof can be reduced through an increase in the number of online interactive features, which the customer must use before being able to proceed to a purchase."

So that's in the context of medicines, where there is an obvious safety concern about customers not receiving advice. So we say if, in the context of medicines, the same objective can be achieved through less restrictive means which involve these kind of online features, then the present case is a fortiori.

It's interesting -- I just ask you to note at this stage, but I will come back to make my submission on this -- that the court talks in terms of " ... as regards incorrect use of medicine, the risk thereof can be reduced through an increase". So the argument that was being put was that a ban was necessary to remove the risk and the CJEU is here saying, "Well, there is a less restrictive alternative that enables you to reduce the risk".

This is an important point when it comes to the question of whether or not a less restrictive alternative is to be deemed ineffective simply because it doesn't achieve the aim to quite the same extent. This is the "unacceptably compromise" point and I will

come back to make my submissions on the law, but we say that this is a good example of the approach that the court takes.

So when the court is looking at less restrictive alternatives, it's not asking, "Can precisely the same aim be achieved?"; it's asking something different, which is, "Can the aim be achieved in a way which doesn't unacceptably compromise it?" Here it puts it in terms of, "can the risk be reduced" not "can it be eliminated?"

Now going back to the decision at page 106 and paragraph 4.115, the CMA found there that "the evidential burden of demonstrating that the online sales ban is justified rests on Ping". Again, we have explained in our skeleton argument why we say that's the case.

Just to remind the Tribunal of the context of this point or a context of this point, as the Tribunal found in its judgment following the CMA's application to exclude certain of Ping's evidence -- so the Tribunal obviously rejected the CMA's application -- but the Tribunal found that Ping had refused, unjustifiably, to engage with the CMA on the subject of alternative measures during the investigation.

The points made by Mr O'Donoghue about, "Well, it was incumbent on the CMA to carry out this research" and

"It wasn't for Ping to adduce evidence of this, that and the other" -- the problem with those submissions are two-fold: one is that they're not consistent with the case law on burden of proof, the evidential burden in the area of proportionality, and, secondly, practically speaking, we're in a position where Ping itself refused, with no good reason, to engage with the CMA during this investigation and that obviously limited the extent to which the CMA was able, during the investigation, to explore some of the factual points that Ping now raises.

Now at 4.117 we see the main alternative that the CMA considers, and that's to permit account-holders to sell online if an account-holder can demonstrate his ability to promote custom fitting in the online sales channel. So what the CMA is saying is, "You already have a selective distribution network that requires your account-holders to promote custom fitting and requires them to demonstrate that they can and so you could do that in the online sphere too". We see at paragraph 4.118 an example of how that can be done or a feature that could be required.

So what could be required is that Ping account-holders have a website which enables consumers to see the full range of customisable options and select from those. That's one of the things that Ping does

already in relation to the sale of soft goods in the United Kingdom. It's also precisely the approach that seems to be taken in the United States and we say that it could be done in the UK too.

Now, the importance of that is that if you have a website that offers all the customisable options, if a customer has gone and had a custom fitting, knows their specifications and wants to shop around online for a cheaper price or wants to buy a replacement club because they have broken it -- so going back to the examples I gave the Tribunal previously -- then they would be able to input their specifications to the website, which will offer the full range. That can't be said, in our submission, to disadvantage Ping's aim of promoting custom fitting at all because, by definition, that consumer will have had a custom fitting.

This is a point that Ping doesn't really grapple with because throughout its evidence and its submissions it talks about the inability of having a custom fitting online. Now, in a sense there is no dispute about that because the CMA isn't suggesting that it's possible to have a face-to-face dynamic custom fitting online. Of course it's not. At present it's not possible to do that. But what the CMA does suggest is that this ban goes further than is necessary because there are

a cohort of customers who have been custom fit, so they're Ping converts or they're converts to custom fitting, they know their specifications and they want to order a replacement club or a new set of clubs and there is no objective need for them to be custom fit again.

Now, why can't those customers go online and shop around to find the best deal? That's what this ban is preventing. But if those customers were allowed to do that, that wouldn't be at all be negative in terms of the aim of maximising custom fitting because they have already had their custom fitting.

THE CHAIRMAN: What about free riding?

MS DEMETRIOU: I am going to come to free riding, but essentially we say, in relation to free riding, that the evidence -- the CMA recognised in its decision that theoretically, in circumstances such as these where you have a selective distribution network, free riding can theoretically be an issue. But one has to look at the facts and ask, "Is it an issue? Is it a danger in this case?". The overriding points that the CMA has are that on the facts it's demonstrably not an issue because it's common ground that all of these retailers -- they're not exclusive Ping retailers. They retail for all of the main golf club manufacturers -- they're all carrying out custom fitting. Many of them don't have a specific Ping

custom fit process. American Golf, which is the top retailer, doesn't carry out the Ping version of custom fitting, it has its own version which it applies to all brands.

So they are all already investing in custom fitting and yet they haven't been dissuaded from doing that by the fact that the other manufacturers can all sell online. So it's simply not borne out by the facts. I will come back to deal with that in more detail but that's the essential point that the CMA advances.

So the CMA then went on to describe some other possible conditions that Ping could impose on its retailers. We see these in the next section of the decision. So at paragraph 4.120, the promotion of custom fitting online. So it could require its retailers actively to promote custom fitting online. Again, we see that some retailers in the UK do that already. We see over the page some examples.

Then at 4.125, this is the additional condition that retailers' websites provide customers with all available custom fit options. I have just discussed that.

At 4.129, there is the additional condition that websites have online interactive features which provide an opportunity for personal advice. Again, there is evidence over the page that some online retailers at

least do that already.

Then, at 4.132, a mandatory tick-box where consumers have to confirm that they understand the importance of custom fitting.

Now, Ping says that none of these alternatives is as effective as the ban, but the CMA contends that Ping has simply not established that on the evidence. This is not a case, of course, where Ping has previously permitted account-holders to sell online and those account-holders have used measures such as these and then Ping has concluded on the facts that the measures are ineffective and then, as a result, imposed a ban on online sales. The fact is that Ping has never trialled any of these less restrictive alternatives. But the best evidence we have is the evidence in relation to Ping's competitors, who have trialled many of them, and they work, they seem to work.

So that's what I wanted to say by way of introductory overview to the CMA's case.

I am going to come back at the end to deal with the question of proportionality, but before I do that, I want to put it in context by addressing you on the law.

I want to address the Tribunal on three matters: first, the proper approach to online sales bans in

a selective distribution context; secondly, the proper approach to proportionality; and, thirdly, very briefly, the Charter of Fundamental Rights. This requires me to take the Tribunal back to the Pierre Fabre judgment, which is obviously the critical authority in this case.

We say it imposes a formidable obstacle to Ping's ground 2, Ping's ground 2 being that the CMA was obliged to carry out an effects analysis and was not permitted to conclude that this was an object infringement.

Of course, I don't need to remind the Tribunal that under section 60 of the Competition Act the Tribunal is under a duty to ensure that there is no inconsistency between its judgment and the principles laid down by the CJEU in the relevant case law.

So turning to Pierre Fabre, which is in the third authorities bundle, tab 67 and 68 -- so we have the Advocate General's opinion at 67 and the court's judgment at tab 68 -- before taking the Tribunal to the judgment itself, we say that the meaning of the judgment is clear. So despite the fact that Mr O'Donoghue sought to make some very elaborate submissions about it, we say, actually, when you look at what the judgment actually says, it's very clear and it establishes a very important proposition.

The important proposition for the purposes of this

case is that in the context of a selective distribution system, an absolute ban on internet sales is a restriction of competition by object unless it is objectively justified and so the question of objective justification is key. What "objective justification" means is that it is proportionate to a legitimate objective. That's what "objective justification" means. So the idea that objective justification doesn't involve proportionality is utterly heretical and this proposition completely undermines, in my submission, Ping's case that the CMA should have carried out an effects analysis.

Secondly, what the case establishes is that this principle, so the proposition I have just sought to encapsulate, is not undermined by a finding that there is effective inter-brand competition in the market, so, in other words, even if inter-brand competition is strong, an online sales ban is a restriction by object unless it is proportionate to a legitimate aim.

To make those submissions good, can I start by taking the Tribunal to the Advocate General's opinion, which is at tab 67, and ask you to look first of all at paragraph 35, which is on page 9435 in the bottom right-hand corner. What the Advocate General is dealing with here is the argument that a private voluntary

measure can be capable of being a legitimate aim which can justify a restriction on competition. So the Advocate General is saying:

"I would not exclude the possibility that, in certain exceptional circumstances, private voluntary measures limiting the sale of goods or services via the internet could be objectively justified, by reason of the nature of those goods or services or the customers to whom they're sold. I agree therefore with the Polish Government's statement in its pleadings that there may exist other situations where the ban on internet sales is objectively justified, even in the absence of national or community regulation. Private voluntary measures, if included in the agreement, may fall outside the scope of Article 81(1) EC provided the limitations imposed are appropriate in the light of the legitimate objective sought and do not go beyond what is necessary in accordance with the principle of proportionality."

So you can see there in the same breath that what the Advocate General is doing is talking about objective justification and appropriate to a legitimate objective and proportionate to that objective because they are one and the same thing.

Now, moving forward to paragraph 54, the Advocate General is here making a similar point, so he

says here, midway through the paragraph:

"It is conceivable that there may be circumstances where the sale of certain goods via the internet may undermine inter alia the image and thus the quality of those goods,thereby justifying a general and absolute ban on internet sales. However, given that a manufacturer can, in my view, impose appropriate, reasonable and non-discriminatory conditions concerning sales via the internet and thereby protect the image of its product, a general and absolute ban on internet sales imposed by a manufacturer on a distributor is, in my view, proportionate only in very exceptional circumstances."

Then at 56, the Advocate General there is noting that inter-brand competition is very strong.

Then we have at 57 the conclusion, which really restates the point that I made, that I took you to in 54. So what you see here is the Advocate General saying -- and another point that I ought to just show you while I am on the Advocate General's opinion -- actually, going back to -- sorry. I should have picked this up at 35. So going back to paragraph 35, the -- I'm sorry, I have missed the reference. There is a reference here to -- I will come back to it. There is a reference here to the Advocate General -- I'm sorry. I will come back to that. I have lost my place. I have

lost the point.

So the conclusion is at paragraph 57. You can see that what the Advocate General is saying -- and this is all consistent with where the court goes -- is that in principle on the facts an absolute ban on internet sales might be justifiable, but in order for it to be lawful, in order not to constitute a restriction of competition by object, then it has to be objectively justified and what that means is it has to be proportionate to a legitimate aim.

Now, we see the court saying the same thing, so starting with --

PROFESSOR BEATH: Sorry, he says at the bottom of paragraph 35 that -- he seems to imply that legitimate aim has to lie -- what I think he calls "in the public law nature" --

MS DEMETRIOU: Yes.

PROFESSOR BEATH: -- so it has to be in some sense a social good that's being protected.

MS DEMETRIOU: Yes, but then what he does is he says -- yes, that's true. So he takes --

PROFESSOR BEATH: Yes.

MS DEMETRIOU: You're quite right.

PROFESSOR BEATH: It's almost unethical.

MS DEMETRIOU: You're quite right. So he's there taking

a very restrictive view of what the nature of the legitimate aim can be.

Now, the CMA has not taken such a restrictive view, so the CMA, in its decision you have seen, has said that in principle Ping's aim of promoting or maximising custom fittings is a legitimate aim capable, in principle, of justifying the ban, but then they go on to find that the ban is disproportionate to that aim.

In answer to your question, Professor Beath, there is a significance to the fact that the Advocate General has said this and the significance is that in most cases, proportionality -- there are now many authorities on how proportionality should be applied in an EU law context and I will come to the Lumsdon authority in the Supreme Court -- but these authorities are almost wholly in the context of public law, and in the public law context the typical situation is where a public authority is taking a measure in the public interest -- so it's to further the sort of aim you see the Advocate General referring to there -- but the measure has a restrictive effect on private rights. So one can see that in those circumstances it might be legitimate to place quite a lot of weight on the public interest aim that's being furthered and it also might be legitimate to give the public authority a certain margin

of discretion.

Now, what we do say -- and we have made this submission in our skeleton. I will come back to it -- is that in this very different context we have the reverse situation. So the aim being pursued by Ping is essentially a private -- what the Advocate General calls a "private voluntary measure" -- it's a private aim and, when it comes down to it, it's a commercial aim. So Ping's policy, commercial policy, is to pursue custom fitting and promote it and maximise it. That's a private commercial policy and we say that in the proportionality analysis it's not to be given the same weight as a measure of a government protecting national security or public health.

The other respect in which it's the reverse of the typical public law situation is that the competing interests -- so in a public law case you have a measure which furthers an important aim in the public good which may encroach on private rights. In this case what you have is a private law aim that's being furthered at the expense of public law interests, namely the public law interest in protecting intra-brand competition.

We say that that context does colour the way that the proportionality test should be applied and I will come back to that.

THE CHAIRMAN: My understanding is that Ping's case is that the aim is in a sense a public good aim. It's aimed at --

PROFESSOR BEATH: Happiness.

THE CHAIRMAN: Yes, happiness of golf players and satisfaction with their purchases.

MS DEMETRIOU: That is what Ping says, but we say ultimately, properly analysed, it's a commercial aim and, even if there were some public good elements in the sense that they confer some benefits on consumers, those are obviously not of the same import as the type of aim that the Advocate General here is looking at and the type of aim that you generally have in a public law case.

THE CHAIRMAN: Yes, well I think -- I have only read that paragraph now, but it looks as if he's talking about a public law good in the context of a private policy --

MS DEMETRIOU: He is in this -- it is a competition case so he is here. I am in a sense taking the point a little further, as we have done in our skeleton. I will come back to it. But essentially we say that most of the authorities that you see are public law cases, that the Supreme Court in Lumsdon has stressed how important it is to adopt a context-sensitive analysis when it comes to proportionality and we say it is important that in

the competition context, in this kind of context, you have essentially commercial aims that are being invoked in order to, in a sense, outweigh the competing public interest competition considerations and that --

THE CHAIRMAN: But Ping's case is, as I understand it, that it's not a commercial aim. That's why they're willing to forego sales, as I understand it, in pursuance of this greater good.

MS DEMETRIOU: Well, the Tribunal will obviously have to take a view on that --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- on the facts.

PROFESSOR BEATH: Yes.

MS DEMETRIOU: So they have referred to one paragraph, one example, in a witness statement, but my submission will be that the Tribunal should be sceptical about accepting that Ping is acting in the public good and doesn't have an eye on the bottom line.

Turning to the judgment and this is -- I think we can take it from paragraph 34. So you see the heading, "The classification of the restriction in the contested contractual clause". It's common ground that the restriction is a complete ban on internet sales so it's on point as far as the restrictions are concerned as a restriction of competition by object.

You see there a reference to what it means, at 34, to be a restriction of competition by object and, at 35, the analysis that has to be undergone. So regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms part.

We say essentially that's on all fours with what the court then said in Cartes Bancaires, so that's the context-specific analysis that's required. We're not trying to shirk or get away from that in any sense.

Then at paragraph 38:

"As the Commission points out, by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It's therefore liable to restrict competition in that sector."

That very much reflects the type of findings that I have been taken you to in the CMA's decision already about the restrictive nature of an internet ban.

Then you see the court go on to look at selective distribution systems because, of course, this ban, both in that case and in the present case, operates in the

context of a selective distribution system. So the court there says:

"As regards agreements constituting a selective distribution system, the court has already stated that such agreements necessarily affect competition in the common market. Such agreements are to be considered in the absence of objective justification as restrictions by object."

Then they go on to explain that selective distribution systems can be objectively justified and therefore can be compatible with the treaty if certain conditions are met. So there are factors that can justify a selective distribution system.

Then paragraph 41 is important because the court sets out that analysis operates. So the court says that:

"In that regard, the court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential resellers and not applied in a discriminatory fashion ..."

So there is no dispute about that in this case.

Then:

" ... that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use ..."

Again, there is no dispute about that in principle in this case. Then this is the critical bit:

" ... and finally that the criteria laid down do not go beyond what is necessary."

That is the critical thing in this case. So the criteria or rather one of the criteria, the online sales ban, does, in the CMA's view and according to the decision, go further than is necessary.

So then at 42, because this is a preliminary reference, the court is recognising that ultimately it's for the referring court to decide this point. But it goes on to provide it with the points of interpretation of EU law to enable it to carry out that essentially fact-sensitive exercise.

The court says in 43, as the chairman indicated during Mr O'Donoghue's submissions or put to him -- this is an important paragraph because the court says here that:

"It is undisputed ..."

So as in Ping's case.

"It is undisputed that [in the Pierre Fabre case the] selective distribution, resellers are chosen on the

basis of objective criteria... which are laid down uniformly..."

The critical factor in that case, as in the present case, is the last bit of 41, which is: "Are the criteria proportionate?"

That's why the court goes on to say:

"However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment."

So what the court is doing there is saying, "You need to look at the criteria, the things that are demanded of the retailers and ask whether they are each proportionate".

Then you have, at 47, the conclusion. The conclusion is -- so looking at the ban -- so where there is a contractual clause that result in a ban on the use of internet for those sales, that amounts to a restriction by object, where " ... following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified".

Now, Mr O'Donoghue says that that doesn't use the word "proportionality", but we say that the concept of objective justification -- it's very well established that the concept of objective justification requires the court to ask: is this proportionate to a legitimate aim? Does it meet the aim? Is it suitable to meet the aim and is it proportionate to that aim?

That's why you have the words "objectively justified" there. It's a shorthand for what's said at the end of paragraph 43, which is:

"Do they pursue legitimate aims in a proportionate manner?"

It's the same thing. "Objective justification" is that.

Now, contrary to what Ping has said, the CMA has at no point said, "We have a slam-dunk case here. It's unnecessary to look at the context of the clause or look at the legal and economic context", because the court has said here that plainly it is necessary to carry out that analysis and the CMA did indeed carry out that analysis.

I will, either now or tomorrow, just canter through the structure of the decision to show you how the CMA approached it, which we say is precisely on all fours with what the court said in this case.

I don't know if you're planning on sitting to 4.30 or whether you rise at 4.15. I am totally in your hands. I don't mind doing it now or tomorrow.

PROFESSOR BEATH: If you need 15 minutes, could we start at 10.15?

MS DEMETRIOU: I think I have a bit more time anyway and I am comfortably on time to finish all of my submissions within -- it's really just whether --

THE CHAIRMAN: We started early. Let's finish now.

Sorry, there is one other housekeeping matter. I believe you have been asked to provide a list of witnesses.

MS DEMETRIOU: Yes.

PROFESSOR BEATH: Yes, a timetable of witnesses. We would like to know who we're going to see when.

MS DEMETRIOU: Yes. Do we have that? That has been agreed and we will hand that up.

Can I just confirm that -- because the parties have agreed, because it's a very compressed timetable, that where witnesses cover the same ground that formally, as a matter of formality, I can put the point to the main witness rather than repeating it several times.

(Handed)

THE CHAIRMAN: Yes, I need to discuss that with the other Tribunal members.

MS DEMETRIOU: That may affect the timetable. We have worked on the basis, because it's compressed, that that's the basis on which we will do it. It may affect the timetable if I formally have to put the points to multiple witnesses.

MR O'DONOGHUE: Sir, we have agreed to that, but we do make the point that where, for example, someone like Dr Wood is giving engineering evidence, that can't be put to a non-engineering --

MS DEMETRIOU: I entirely accept that.

(4.20 pm)

(The hearing adjourned until 10.30 am on Friday, 11 May 2018)

I N D E X