

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

1 Friday, 11 May 2018

2 (10.30 am)

3 Opening submissions by MS DEMETRIOU (continued)

4 MS DEMETRIOU: May it please the Tribunal. I had finished
5 off yesterday by going through the Pierre Fabre judgment
6 and what I would like to do now is show the Tribunal
7 very briefly the structure of the relevant part of the
8 CMA's decision in order to make good the point I made at
9 the end of yesterday, which is that the CMA, in
10 approaching the question, applied the reasoning or
11 applied the approach laid down in Pierre Fabre. After
12 that I am going to deal briefly with the Coty judgment
13 that Mr O'Donoghue referred to and then I can move on to
14 some subsidiary points on the law.

15 So going back to the decision, which is in bundle A
16 at tab 1, you see the relevant section is section 4 and
17 I think we can pick it up at 4.38, which is on page 76
18 of the decision. In paragraph 4.38 the CMA accurately
19 states the test laid down by Pierre Fabre. So the CMA
20 there essentially states, as the court in Pierre Fabre
21 did at paragraph 41 -- we saw that yesterday -- that
22 there are certain requirements a selective distribution
23 system has to meet in order to be compatible with
24 Article 101(1), but the last of those is that:

25 "It must be determined whether an individual

1 contractual restraint pursues legitimate aims in
2 a proportionate manner."

3 You will recall that that's exactly what
4 paragraph 41 of Pierre Fabre says, which indeed is cited
5 there.

6 Then you have a heading, which we can come back to,
7 of "Proportionality". So essentially the CMA there
8 explained what is required by the proportionality test
9 and they refer to the very well known Fedesa authority,
10 which is the locus classicus of the proportionality test
11 in EU law.

12 Then moving forward over the page, we see a bold
13 heading above paragraph 4.44, and that's the legal
14 assessment of the online sales ban as an object
15 infringement. You see below that heading the
16 conclusion, which is set out first before the reasoning
17 which follows. You see that because it says:

18 "For the reasons set out below, following
19 an individual and specific examination of the content
20 and objectives of the online sales ban and the legal and
21 economic context of which it forms part, the CMA finds
22 that the online sales ban reveals by its nature
23 a sufficient degree of harm to competition, and that
24 accordingly it had [...] the object [...] of restricting
25 competition within the UK and between EU member states."

1 So that's the conclusion. You see in the way that
2 the conclusion is expressed that, far from departing
3 from the structure of Cartes Bancaires, what the CMA is
4 doing here is expressly directing itself to carry out
5 an assessment of the objectives and the legal and
6 economic context of the clause in question.

7 You then have a series of headings which relate back
8 to that analysis, which is the analysis laid down in
9 Cartes Bancaires and also laid down in Pierre Fabre,
10 because in, our submission, there is no inconsistency
11 between those judgments and you see the headings. So
12 "Content of the online sales ban", that's then
13 addressed; at B you have "Objectives of the online sales
14 ban", and the CMA here explains what it finds the
15 objective is.

16 Now, just pausing here, one point made by
17 Mr O'Donoghue yesterday is he seemed to be saying, if
18 I understood him correctly, that once the CMA has found
19 that the objective of the online sales ban is
20 an objective which is legitimate, which is what the CMA
21 found, it therefore follows that it can't find that
22 there is an object infringement. If that was his
23 submission, we say that's fundamentally wrong and what
24 it does is it confuses the question of what's
25 a restriction by object, which requires all of these

1 things to be gone through, and the question of the
2 objective of the clause and those are two different
3 things. That's why that submission doesn't work.

4 Then going on a couple of pages, you see above, on
5 page 82, above paragraph 4.57, the heading "Legal and
6 economic context of the infringements" and then you see
7 a series of subheadings in which the legal and economic
8 context of the infringements of the clause are
9 considered. So you see those subheadings and we can
10 just scan through them: "Nature of the distribution
11 arrangements"; "Context of the infringements";
12 "Structure of the market"; "Nature of the product", and
13 so on and so forth. So you see a number of subheadings
14 going forward through several pages.

15 Then you see a consideration of Ping's -- sorry, so
16 then that takes us through, I think, to page 94 and you
17 then have the heading "Objective justification". So by
18 this stage the CMA has looked at the various facets that
19 need to be looked at according to Cartes Bancaires and
20 Pierre Fabre and at this stage, at paragraph 4.83,
21 underneath the heading "Objective justification", it
22 looks at objective justification and you see again the
23 conclusion expressed at 4.83 and the analysis that
24 follows. So the conclusion is:

25 "Following its specific examination of the context

1 of the online sales ban and having regard to the properties of
2 the products at issue, the CMA finds that the online sales
3 ban contained within the agreements is not objectively
4 justified."

5 You then have the reasoning which underpins that in
6 the context of the analysis that's gone on previously.
7 So, again, flicking forward, we see a consideration of
8 Ping's submissions. So we see that on page 98, above
9 paragraph 4.93. Then moving forward, you have a heading
10 on page 100, above paragraph 4.98, the "CMA's assessment
11 of whether promoting custom fitting objectively
12 justifies an online sales ban". That's then the
13 analysis that is carried out. So the CMA considers
14 whether or not the ban has a legitimate aim. We see
15 that under the first subheading and then we see above
16 4.102 whether it's suitable or appropriate to pursue any
17 such aim. In relation to both, there are ticks as far
18 as Ping is concerned, so those aren't concessions, as
19 Mr O'Donoghue likes to characterise them. That
20 represents the CMA's fair and objective assessment of
21 what's going on.

22 Then you see the critical aspect of the reasoning,
23 which is at page 105, which is under the heading "Is the
24 online sales ban necessary to pursue the aim of
25 promoting custom fitting?" This is the section in

1 which the CMA finds that that aspect of the
2 proportionality test is not met.

3 Then finally, moving forward, you have an assessment
4 at page 123, so you have a heading above paragraph 4.156
5 which states the conclusion, where the CMA concludes
6 that the online sales ban is not objectively justified,
7 and then it goes on to consider the ancillary
8 constraints doctrine, which we will come back to, which
9 is a different way in which Ping put its case.

10 So you can see, in our submission, from that
11 structure -- and, of course, it will be essential for
12 the Tribunal to read -- I'm sure it's already done
13 that -- but to read the substance of what the CMA
14 says -- but what I want to show you for these purposes
15 is that, in terms of its approach and the way in which
16 the CMA directed itself, it impeccably applied the
17 Pierre Fabre approach principles which are consistent
18 with the Cartes Bancaires approach to establishing
19 an infringement by object, and there is no basis, we
20 say, at all for Ping's submission that the CMA has
21 adopted the wrong approach or misapplied the case law.

22 Now, turning to the Coty judgment -- and this is in
23 the fourth bundle of authorities at tab 89 and you have
24 here the Advocate General and the court in the same tab.
25 I will come back to one aspect of the Advocate General

1 but if we can start with the judgment, which is about
2 two-thirds of the way through the tab. If you're
3 looking at the page numbers on the top right-hand
4 corner, it's page 24. So it's volume 4, tab 89,
5 page 24.

6 The relevant section -- that's where the judgment
7 starts, and you see at paragraph 20 on page 27 the
8 questions that were referred by the Frankfurt Higher
9 Regional Court to the CJEU. The second question is the
10 key question for these purposes, so:

11 "Does it constitute an aspect of competition that is
12 compatible with Article 101(1) if the members of
13 a selective distribution system operating at the retail
14 level [...] are prohibited generally from engaging third-party
15 undertakings discernible to the public to handle
16 internet sales [...]?"

17 So that's the question. So you can see immediately
18 from the question that the nature of the restriction in
19 that case was less severe than the restriction in the
20 present case and than the restriction in *Pierre Fabre*
21 because, in this case, Coty permitted its retailers to
22 sell online on their own platforms, but what they
23 prevented them from doing was then selling online on
24 third-party platforms, so it's a less restrictive
25 measure.

1 Then you see at 23 to 24 a specific endorsement of
2 the critical paragraph 41 of Pierre Fabre. So the court
3 there specifically cites paragraph 41 of Pierre Fabre.
4 You see at 24 that they are saying again -- and this is
5 exactly what the court said in Pierre Fabre -- that
6 selective distribution systems are not prohibited
7 to the extent that they meet these criteria.

8 Now, lots of them, lots of those criteria -- so
9 whether the criteria are objective, whether they are
10 qualitative, whether they're non-discriminatory -- those
11 are not in play in the current case, just as they
12 weren't in play in Pierre Fabre, so there is no dispute
13 about Ping's selective distribution system generally.
14 So the CMA is not saying, "You can't have a selective
15 distribution system". The critical factor is the final
16 one and you see there, " ... and finally that the
17 criteria laid down do not go beyond what is necessary".

18 So that's the critical feature in the present case
19 and that was the critical feature in Pierre Fabre and it
20 was the critical feature in this case for the purposes
21 of analysing the restriction on third-party internet
22 sales.

23 There is then a passage of the judgment -- and this
24 is 25 and the next few paragraphs -- that deals with the
25 question of whether maintaining a prestigious image for

1 luxury goods can justify a selective distribution system
2 generally. One of the arguments that was put in Coty,
3 because there was case law -- there's substantial case
4 law that says that it can, that preserving a luxury
5 image can in general justify having a selective
6 distribution system, but then the argument was advanced,
7 "Well, you, the court, said that wasn't possible in
8 Pierre Fabre".

9 What the court is doing here -- and this is not
10 directly relevant for this case but I'll just explain it --
11 what the court is doing here is saying, "Well, no, no.
12 In Pierre Fabre the question was a different one. The
13 question was not whether the selective distribution
14 system of Pierre Fabre could generally be justified by
15 maintaining a prestigious image; it was whether
16 specifically its internet ban could be justified
17 according to that aim and it couldn't be". So that's
18 how the court then explains why that passage in
19 Pierre Fabre doesn't defeat all selective distribution
20 systems justified on the basis of luxurious or
21 prestigious image.

22 You can see specifically from paragraph 32, it's
23 exactly what the court says, and paragraph 33 and
24 paragraph 34 and then 35 -- that's all of the reasoning
25 explaining why what's being put here -- why that

1 argument in Coty doesn't work. But notably what the
2 court is not saying there is, "Well, Pierre Fabre was
3 wrong". It's saying, "Well, it was right in the context
4 of the question it was looking at there".

5 Then moving on to the second question, which you see
6 the heading just above paragraph 37 -- the second
7 question, as I have said, is the one that is analogous
8 to the question that arises in the present proceedings.
9 You see at paragraph 38 this question concerns the
10 lawfulness under Article 101(1) of a specific clause in
11 a selective distribution system for luxury and
12 prestigious goods. Now pausing there, that's also the
13 question in these proceedings so, so far, so good.

14 Then at paragraph 39 the court says that as
15 a preliminary point it is apparent from the assessment
16 that the courts carried out that Coty can have
17 a selective distribution system in principle. So,
18 again, the same applies in the present proceedings.

19 Then at 40 -- this is important:

20 "In the context of such a system, a specific
21 contractual clause designed to preserve the luxury image
22 of the goods at issue is lawful [...] provided that the
23 criteria mentioned in paragraph 36 of the present
24 judgment are met."

25 So going back to paragraph 36, one has, again,

1 a re-statement of what the court was saying in
2 Pierre Fabre, and you see, again, that critical last
3 phrase, that "the criteria laid down do not go beyond
4 what is necessary".

5 So that's what the court is saying at 40. They're
6 saying that provided the specific contractual clause
7 doesn't go beyond what is necessary, it is lawful under
8 Article 101(1), and that's the approach that the CMA has
9 applied in the present case.

10 Then you have, at paragraph 43, the court saying:

11 "It is therefore necessary to ascertain whether, in
12 circumstances such as those at issue in the main
13 proceedings, the prohibition imposed by a supplier on
14 [internet sales on third-party platforms] [...] is proportionate
15 in the light of the objective pursued, that is to say,
16 whether such a prohibition is appropriate for preserving
17 the luxury image of those goods and whether or not it
18 goes beyond what is necessary to achieve that object."

19 Now, this really is a critical passage in the case
20 because this sets out in a recent judgment concerned
21 with an analogous clause what the proper approach of the
22 court is in EU law, what the proper approach is to be
23 adopted under Article 101. This is the proper approach:
24 the court has to assess whether there is a legitimate
25 aim, whether the measure is appropriate or suitable to

1 meet that aim -- so far two ticks in Ping's favour --
2 but then, critically, whether or not it goes beyond what
3 is necessary to achieve that aim, so is it
4 proportionate. That, in our submission, renders
5 unarguable the submissions made on the other side that
6 the CMA has adopted the wrong approach.

7 Then the court helpfully broke down the
8 proportionality test. So you see, then, that the court
9 first of all considers -- they accept that there is
10 a legitimate aim and then you see, at 51, an acceptance
11 that in that case, as in this case, there was a rational
12 connection as it's sometimes put, so the aim is
13 appropriate -- sorry, the measure, the restriction, is
14 appropriate to meet the aim.

15 Then it went on at 53 to 55 to consider the
16 question, which is the question in the present case, of
17 whether it nonetheless went beyond what was necessary.
18 You see at 53 to 55 -- at 53, the observation that,
19 "[...] authorised distributors are permitted to sell the
20 contract goods online both via their own websites, [...] and
21 via unauthorised third party platforms when the use of
22 such platforms is not discernible to the consumer".

23 So, in fact, there was a reasonably flexible
24 arrangement that Coty had in place, so it certainly was
25 very far from an absolute prohibition on internet sales.

1 Then you have, at 54, a reference to the
2 Commission's e-commerce sector inquiry. You see there
3 that the court notes that:

4 "as is apparent from the provisional results of the
5 Preliminary Report on the E-commerce Sector Inquiry [...] despite the increasing importance of third-party platforms
6 in the marketing of distributors' goods, the main distribution
7 channel, in the context of online distribution, is
8 nevertheless constituted by distributors' own online shops."

9 So they're saying that in terms of internet sales,
10 the most important factor is whether the retailers' own
11 shops can sell the goods.
12

13 They then go on to say at 55:

14 "Those factors support the view that it may be
15 inferred that a prohibition, such as the prohibition [in
16 question] [...] does not go beyond what is necessary in order
17 to preserve the luxury image of those goods."

18 So that's the answer that the court is giving in the
19 circumstances of that case.

20 Now, we say that there are three points to
21 emphasise. The first point I have already made, that
22 the analysis is not only the same as the analysis in
23 Pierre Fabre, but the court cites Pierre Fabre and
24 specifically endorses the Pierre Fabre test, and that's
25 the same approach that the CMA applied in its decision.

1 Secondly, that of course proportionality is
2 a fact-sensitive question for the court, so it's been no
3 part of the CMA's case that, because this is
4 an online -- a complete prohibition, it's bound on the
5 facts by Pierre Fabre. That's not the CMA's case.
6 Nonetheless, there is a strong steer here that
7 an absolute prohibition on internet sales is likely to
8 be disproportionate and that's something we saw from the
9 Advocate General's opinion as well in Pierre Fabre. And
10 there is absolutely no suggestion here that an effects
11 analysis is required. So those are the three points we
12 take from Coty.

13 So in relation to Coty and Pierre Fabre,
14 Mr O'Donoghue sought to say that they somehow diverged
15 from Cartes Bancaires and he made the point that
16 Cartes Bancaires post-dates Pierre Fabre, so he says.
17 Well, if there is a clash between them -- of course we
18 say no clash -- but he says that if there is a clash,
19 then you have to prefer Cartes Bancaires.

20 It's very interesting in this context just to go
21 back to what the Advocate General in this case says.
22 The relevant paragraphs of the Advocate General's
23 opinion are to be found on page 20 and it's
24 paragraphs 116 to 118. An important thing to note is
25 that the Advocate General, Advocate General Wahl, is the

1 same Advocate General as the Advocate General in
2 Pierre Fabre. So he says that:

3 "Even on the assumption that it might be concluded
4 in the present case that the clause at issue could be
5 caught by Article 101(1), [...] it will still be necessary to
6 examine whether the clause has an effect restrictive of
7 competition, and in particular to determine whether it
8 amounts to a restriction 'by object' within the meaning of
9 that provision. On the latter point, and unlike the
10 contractual clause at issue in the case that gave rise
11 to the judgment in Pierre Fabre, the prohibition at
12 issue in the present case is in my view wholly incapable
13 of being classified as a 'restriction by object' ..."

14 He's there contrasting it. He says:

15 " ... unlike the clause that gave rise to the
16 judgment in Pierre Fabre."

17 So he's saying there, "Obviously the clause in
18 Pierre Fabre was an object restriction. This is
19 different". Then you see, at 118, the reasoning:

20 "In fact, unlike the absolute ban imposed on
21 authorised distributors making use of the internet in
22 order to distribute the contract products, a prohibition
23 on the use of third-party platforms does not, at least
24 at this stage of the development of e-commerce, which
25 may undergo changes in the shorter or longer term, have

1 such a degree of harm to competition."

2 So that's the point I wanted to make on the AG's
3 opinion.

4 Can I just finally take you to the Advocate General
5 in Cartes Bancaires, which is in the third bundle of
6 authorities at tab 82. This is Advocate General Wahl.
7 At paragraph 39 on page 12 he talks about the
8 distinction between infringements by object and
9 infringements by effect and then he says -- so he
10 explains what an "infringement by object" is in the
11 first sentence and then he says:

12 "Various forms of cooperation between undertakings
13 have thus been considered to entail, by their very object,
14 a restriction of competition by object. Not only have
15 types of horizontal cooperation other than those
16 referred to Article 81(1) (a) to (e) EC been considered to have
17 as their object the restriction of competition, but also
18 a number of vertical agreements."

19 Then do you see footnote 19? If you turn to the end
20 of the tab, you will see the footnotes and footnote 19
21 expressly footnotes the Pierre Fabre judgment.

22 So this is the Advocate General in Cartes Bancaires,
23 on which my learned friend extensively relied, expressly
24 saying, expressly acknowledging, that the restriction in
25 Pierre Fabre was a restriction by object. You see that

1 from page 41 and you have the relevant footnote. It's
2 footnote 19.

3 So that's what I wanted to say about the proper
4 approach to these types of clauses in a selective
5 distribution system.

6 THE CHAIRMAN: Can I just clarify my understanding of Coty?
7 Is the court saying there that it's a -- I mean, you
8 have infringement by object, which it wasn't.

9 MS DEMETRIOU: Yes.

10 THE CHAIRMAN: Was it an infringement by effect, then, or
11 was it a sort of hybrid or something in between?

12 MS DEMETRIOU: The court doesn't go on to -- let me just
13 take up Coty again. So the question referred by the
14 court, which is at paragraph 20 of the judgment, the
15 question referred ... I think the answer -- can I come
16 back to that, sir, because I think the answer is that
17 the only question was whether it was a restriction by
18 object because of the way that the national proceedings
19 had evolved. So I don't think that there had been any
20 finding -- I think they had proceeded on the basis that
21 there was a --

22 MR O'DONOGHUE: Sir, I hesitate to rise but it is manifest
23 from the first two questions that it was nothing to do
24 with object. It was simply selective distribution.

25 MS DEMETRIOU: Can Mr O'Donoghue make his submissions later?

1 He has had a chance. I said I would come back to the
2 question and it's not really an opportunity to make
3 submissions on his case.

4 THE CHAIRMAN: Thank you.

5 MS DEMETRIOU: So turning to the proportionality test,
6 I took you briefly to the CMA's decision and I took you
7 to paragraph 4.42, which is the Fedesa test, and
8 I think, if it's convenient, if the Tribunal could turn
9 that up. That's page 77.

10 MR DORAN: Where are we now?

11 MS DEMETRIOU: We are back in the CMA's decision -- I'm so
12 sorry. So it's bundle A, tab 1, page 77. At paragraph 4.42, we
13 have seen already the structure of this and I just want
14 to now look in a little bit more detail at what the
15 substance of this was. So the CMA there sets out the
16 proportionality test in the Fedesa judgment and you see
17 what that test is, are the measures:

18 "appropriate and necessary in order to
19 achieve the objectives legitimately pursued" -- there by the
20 legislation in question, here by Ping -- "...when there is
21 a choice between several appropriate measures recourse
22 must be had to the least onerous, and the disadvantages
23 caused must not be disproportionate to the aims."

24 So that's the test that the CMA goes on to apply.
25 Then you see at 4.95 to 4.96 the CMA is saying -- this

1 is page 98 -- that it has applied the principle of
2 proportionality using the framework of the court in
3 Fedesa.

4 The CMA then break that down at 4.96 into the
5 various steps. So the critical steps in this case
6 are 3 -- because we know that 1 and 2 are satisfied by
7 Ping -- so the critical steps are 3:

8 "Is the online sales ban necessary to pursue that
9 aim? In particular, are there realistic alternatives
10 and, if so, are they suitable or appropriate to meet the
11 aim in question?; [and] are those alternatives less restrictive?

12 Also 4:

13 "Is the online sales ban proportionate *stricto sensu*,
14 by which is meant whether the burden imposed [...] is
15 disproportionate to the benefits secured."

16 So both of those are in play in this case.

17 You see that the CMA has, on the previous page at
18 4.95, referred to the Supreme Court's judgment in
19 Lumsdon. I am going to ask you to turn that up briefly.
20 So that's in the second authorities bundle at tab 24.

21 The context of this, the question that arose was
22 whether the quality assurance scheme for criminal
23 advocacy that had been laid down by the Legal Services
24 Board was a disproportionate restriction on the EU
25 freedom to provide services. So it was in an EU law

1 context, although it was also in a public law context.
2 So it was whether an action of a public body designed to
3 serve the public good unnecessarily restricted the
4 freedom of services.

5 You see at paragraph 23 -- this is just to make good
6 a point I made in my submissions yesterday -- so that's
7 at page 717, under the heading "Proportionality in EU
8 law":

9 "It appears from the present case, and some other
10 cases, that it might be helpful to lower courts if this
11 court were to attempt to clarify the principle of
12 proportionality as it applies in EU law."

13 So the court is here using the opportunity of this
14 case to expand generally on how proportionality applies
15 in EU law. That's the aim of the following summary:

16 "It should however be said [...] that the only
17 authoritative interpreter of that principle is the
18 Court of Justice."

19 Then:

20 "It has also to be said that any attempt to identify
21 general principles risks conveying the impression that
22 the court's approach is less nuanced and fact-sensitive
23 than is actually the case. As in the case of other
24 principles of public law, the way in which the principle
25 of proportionality is applied in EU law depends to

1 a significant extent on the context."

2 Now, that's in a public law context. Even in
3 a public law context the Supreme Court is saying that
4 the manner in which this test is applied varies, is
5 highly context-specific. So we say, well, that's
6 a fortiori where you're not in a public law context but
7 you're looking at somebody's commercial, private aim.

8 Then you have at paragraph 33 a reference to the
9 locus classicus in Fedesa. Then 36 to 37 -- they're not
10 directly relevant in this case. I'm not going to read
11 them out now -- but the court there is explaining two
12 different contexts in which proportionality can arise in
13 an EU law framework. So neither of them -- they're both
14 public law contexts -- neither of them is directly
15 relevant here. But what the court is saying is that the
16 application of the principle varies as between those two
17 different contexts; so namely whether or not one
18 is derogating from EU law or whether or not one is
19 reviewing national measures in accordance with EU law --
20 and there are two different contexts and the application
21 of the principle varies as between those two.

22 Then importantly, on a separate point, moving on to
23 paragraph 105, which is at page 737, we have the court
24 explaining how one approaches the question of less
25 restrictive alternatives in the context of EU law. You

1 see halfway through that paragraph:

2 "Rather, the question was whether a less intrusive
3 measure could have been used without unacceptably
4 compromising the objective of improving the standards of
5 advocacy in criminal courts."

6 We say that if that's the test in a public law
7 context, then the test certainly can't be any more
8 generous to Ping in this context.

9 Now, we say -- and I think I made my submissions
10 really on this yesterday -- that there are at least two
11 respects in which the context of this case makes
12 a difference to the application of the proportionality
13 principle. One is in the weight to be attached to the
14 aim, to Ping's aim, which we say is essentially
15 a commercial aim and is not to be equated -- not to be
16 given the weight accorded to an aim such as protecting
17 national security or public health.

18 The second is that we say that Ping is wrong to
19 suggest that the proportionality test required the CMA
20 to grant it a margin of discretion because a margin of
21 discretion is only appropriate in circumstances where
22 a public authority has been invested with public powers,
23 with statutory powers, to carry out a particular
24 assessment, because in those circumstances there is
25 a constitutional justification for the courts deferring

1 to the judgment of the decision-maker and namely that
2 justification is that the decision-maker is
3 democratically accountable.

4 We see this, for example -- it's referred to in lots
5 of cases. We have given a couple of examples in our
6 skeleton -- but we see it, for example, in the
7 Brown v Stott case, which is at authorities 1, tab 16,
8 at 703 by letter C, so it's authorities 1, tab 16.

9 The only reason I am going to this is to give you
10 an example of a case in which the court has explained
11 what the justification is to deferring to a
12 decision-maker.

13 So you see at C, halfway through that paragraph:

14 "While a national court does not accord the margin
15 of appreciation recognised by the European court as
16 a supra-national court, it will give weight to the
17 decisions of the representative legislature and
18 a democratic government within the discretionary area of
19 judgment accorded to those bodies."

20 So that's the constitutional justification for
21 recording a margin of discretion to the decision-maker
22 and we say it's simply not appropriate in a case like
23 this, it's not appropriate to give Ping, a private
24 company, any margin of discretion and the
25 proportionality question must be determined objectively.

1 The application of the competition rules cannot, in our
2 submission, depend on what an individual undertaking
3 deems to be acceptable or unacceptable.

4 Now, going back to the notion that the idea set out
5 in paragraph 105 of the Lumsdon judgment and this idea
6 that one approaches less restrictive alternatives by
7 asking the question, "Would the less restrictive
8 alternative unacceptably compromise the aim?", Ping
9 seeks to argue that any less restrictive measure would
10 not, in this case, be an effective measure and so has to
11 be discounted. They say that because they say -- they
12 characterise their aim as maximising custom fitting. So
13 they seem to be suggesting that if they can demonstrate
14 that less restrictive alternatives would lead to even
15 one fewer custom fitting, that is not consistent with
16 the aim of maximising custom fittings and so those less
17 restrictive alternatives fall to be discounted.

18 Now, we say that's manifestly not the right
19 approach. It's inconsistent with Lumsdon, which does
20 not take that very granular approach, but asks instead
21 the broader question, "Is the aim unacceptably
22 compromised?" So to apply that here, the Tribunal would
23 have to ask, "Would Ping, if it employed less
24 restrictive alternative measures -- would those measures
25 have a significant or material impact on its aim of

1 maximising custom fittings?"

2 Now, there are many other public law cases which
3 frame the question in the same way and we have referred
4 to them in our skeleton argument. I'm not going to pick
5 them up here. One of them in a human rights context is
6 the Bank Mellat case, which is also in the authorities
7 bundle. We see also how the matter is approached in the
8 context of ancillary restraints which, of course,
9 the Tribunal will recall is the alternative way in which
10 Ping seeks to make its argument.

11 If I can ask you, again, to turn up the decision in
12 bundle A, tab 1, we can take this from page 123. You
13 see the heading above paragraph 4.157, "Ancillary
14 restraints doctrine". Ping's primary submission is that
15 its online sales ban is objectively justified within the
16 framework for assessing restrictions adopted in the
17 context of selective distribution. However, Ping also
18 submits that the online sales ban is an ancillary
19 restraint for its custom fitting policy.

20 Then at 4.159, the framework for considering
21 ancillary restraint claims has recently been restated by
22 the Court of Justice in MasterCard. So the CMA sets out
23 here the framework and you can see from the citation
24 from paragraph 89 of MasterCard that: "if a given activity
25 is not covered by the prohibition laid down in

1 Article 101(1), owing to its neutrality or positive
2 effect in terms of competition, a restriction of the
3 commercial autonomy of one or more of the participants
4 in that operation or activity is not covered by that
5 prohibition rule either if that restriction is
6 objectively necessary to the implementation of that
7 operation or that activity and proportionate to the
8 objectives of one or the other."

9 So that's the framework for considering ancillary
10 restraints. One immediately sees that it's very similar
11 to the Pierre Fabre test because it's asking the
12 decision-maker or the court to apply a proportionality
13 test. So what Ping says in a nutshell is "Our aim of
14 maximising custom fitting is either neutral or positive
15 in terms of competition" and they say that the ban is
16 an ancillary restraint -- is a restraint ancillary to
17 that.

18 Now, whether or not that clears the restraint has to
19 be determined by applying these principles, so: is the
20 restraint objectively necessary to the activity or
21 proportionate to the objectives of one or the other? So
22 one sees it comes down to precisely the same test as the
23 test we have been looking at in Pierre Fabre and you see
24 at 91 that it's necessary to inquire whether that
25 operation would be impossible to carry out in the

1 absence of the restriction in question.

2 "Contrary to what the appellants claim, the fact
3 that that operation is simply more difficult to
4 implement or even less profitable without the
5 restriction concerned cannot be deemed to give that
6 restriction the objective necessity required in order
7 for it to be classified as ancillary. Such an
8 interpretation would effectively extend the concept to
9 restrictions which are not strictly indispensable to the
10 implementation of the main operation. Such an outcome
11 would undermine the effectiveness of the prohibition
12 laid down in Article 81(1)."

13 So one can see there a very high threshold being
14 applied by the court when looking at the effectiveness
15 of alternatives. So the court there is saying, "If
16 there is a less restrictive alternative, would use of
17 that alternative make it impossible to carry out this
18 objective?" Not "more difficult" or even "less
19 profitable" but "impossible", which is a high threshold.

20 We say that that chimes -- is potentially even
21 stricter and less favourable to Ping than the
22 unacceptably compromised threshold. But what you do get
23 from these authorities is a clear steer that what you're
24 not doing -- you're not in the game of precisely
25 identifying the numbers. So it just doesn't avail Ping

1 to say, "Well, our objective is maximising and so, if we
2 can show that there is a tiny numerical difference, that
3 gets us home". That's not the right approach.

4 MR DORAN: Clearly if you take maximisation at its face
5 value, you're just discounting. You might not be able
6 to achieve maximisation --

7 MS DEMETRIOU: You might not --

8 MR DORAN: -- on the wording here because it will be
9 impossible to carry out.

10 MS DEMETRIOU: Well, if one takes it at -- if one says
11 "maximisation" means numerically an absolute number,
12 then taken at face value that's true. It may not be
13 possible to reach precisely the same number. But we say
14 that that's not the proper approach because that doesn't
15 chime with the approach taken by the Supreme Court in
16 Lumsdon, where it's talking about unacceptably
17 compromising the objective and also it's far too
18 generous an approach to Ping. It would essentially mean
19 that the company could frame its objective in terms of
20 maximisation and essentially always escape the
21 proportionality test.

22 The second point I would make in relation to that,
23 which is a point which we will have to explore in the
24 evidence, is that the Tribunal needs to be very careful
25 to understand what's meant by Ping by "maximisation"

1 because we are in a context where Ping is not
2 prohibiting sales without a custom fitting, so Ping
3 itself is not currently maximising custom fitting
4 because it could take steps to prohibit sales without
5 custom fitting and it hasn't done that.

6 It permits telephone sales and it permits its
7 retailers to sell golf clubs to consumers who come in
8 and don't want a custom fitting. So it's in that
9 context that the Tribunal has to judge what's meant here
10 really by "maximisation". We say in that context it
11 cannot have the result that, if Ping can show that
12 numerically there may be one or two fewer custom
13 fittings under the less restrictive alternative, that
14 discounts those alternatives as proper alternatives.

15 MR DORAN: Just to take the first point as a follow-up --

16 MS DEMETRIOU: Yes.

17 MR DORAN: -- you told us that Lumsdon referred us to the
18 European Court of Justice as being the way in which one
19 should approach proportionality --

20 MS DEMETRIOU: Yes.

21 MR DORAN: -- and of course this is a Court of Justice case
22 that is being cited.

23 MS DEMETRIOU: Yes, that's correct.

24 MR DORAN: So Lumsdon in itself is the Supreme Court which
25 is directing us to the Court of Justice.

1 MS DEMETRIOU: That's correct. What the Supreme Court has
2 done in Lumsdon is to distil all the relevant
3 Court of Justice authorities --

4 MR DORAN: We shouldn't take the words as read here; they're
5 to be read in not the granular approach that you're
6 suggesting?

7 MS DEMETRIOU: That's correct because what the Supreme Court
8 does in Lumsdon is analyse all the relevant EU
9 authorities. Now it says ultimately, of course, that
10 this is a matter for EU law, but it's correct to say
11 that as a general matter the EU authorities haven't
12 approached the less restrictive alternatives in that
13 kind of granular way. So the Supreme Court hasn't taken
14 a wrong direction in distilling the ECJ authorities. It
15 very carefully distilled those authorities and indeed
16 the purpose of the judgment was to lay down a guide as
17 to what those authorities require.

18 MR DORAN: That's very helpful. Thank you.

19 MS DEMETRIOU: So then, of course, in any event -- so in
20 a sense this is a third answer to your question, sir --
21 in any event the Tribunal must determine whether the ban
22 is proportionate strictu sensu; so, in other words,
23 whether any benefits secured by the ban exceed those,
24 exceed the disadvantages.

25 So in looking at that balance, which is the final

1 step of the proportionality exercise laid down in the
2 Fedesa judgments, then the Tribunal, at that stage,
3 needs to weigh up what are the benefits that result from
4 the ban. That will involve necessarily, in our
5 submission, looking at the extent to which the ban
6 facilitates the aim of maximisation or promotion and
7 weighing that against the disadvantages.

8 So in a sense the interesting question of law, which
9 we say, for the reasons I have given, is as expressed in
10 Lumsdon -- in a sense that may become a rather arid
11 debate because, once you get to the final limb of the
12 proportionality test, then certainly small numerical
13 differences at that stage can be outweighed by the
14 disadvantages.

15 PROFESSOR BEATH: Sorry, aren't we therefore being put in
16 a very difficult position because in a sense to answer
17 the question -- you said we must answer the question,
18 "Is this an unacceptable compromise?" Now, it would
19 seem to me, at least, that the way to answer that would
20 be that we have to conduct a thought experiment, namely,
21 if the ban had not been in place, what would the numbers
22 have been.

23 MS DEMETRIOU: Yes.

24 PROFESSOR BEATH: Now, that's not a thought experiment we're
25 really capable of carrying out, nor is it an accurate

1 experiment that Ping have -- so it seems to me we're in
2 a very difficult position here.

3 MS DEMETRIOU: Sir, I understand that concern and in fact
4 it's a concern -- this may reassure you in a sense --
5 it's a concern which lots of courts, faced with
6 assessing proportionality in a variety of contexts, have
7 expressed.

8 Going back in a way to the early days of EU law, you
9 will recall the Sunday trading cases which required
10 magistrates' courts up and down the country to decide
11 whether the ban on Sunday trading was proportionate and
12 that, in the end, necessitated several references to the
13 Court of Justice because courts were saying, "Well, how
14 do we, as courts, go about assessing this? There are
15 a whole number of different imponderables that we have
16 to consider", including, analogous to this case, "Well,
17 what would be the position if shops were open on
18 Sunday?" The courts provided guidance of sorts, so it
19 said, "Well, this is the proportionality test and now
20 over to you to apply", but it's a difficult question
21 that courts have grappled with for a long time.

22 What we say specifically, sir, in relation to your
23 question is that you're quite right, you have identified
24 the precise question that this Tribunal will need to
25 address in considering proportionality. You will need

1 to consider the extent to which the ban assists or
2 facilitates Ping's aim and that will require, as you
3 say, a thought experiment, which is: what would the
4 position be without the ban? Now, that thought
5 experiment has to be conducted on the basis of the
6 evidence before the Tribunal.

7 Now, what Mr O'Donoghue said to you yesterday was --
8 well, he placed a lot of emphasis on the retailer
9 surveys. The reason that those are important -- so, of
10 course, that's not directly looking at what would happen
11 if Ping didn't have the ban because Ping has always
12 materially had the ban, so we don't actually know -- but
13 the reason that they say that the surveys are important
14 is because we know that Ping's competitors don't operate
15 a ban.

16 PROFESSOR BEATH: Yes.

17 MS DEMETRIOU: So what Mr O'Donoghue is saying is that if he
18 can show that those surveys indicate that there is
19 a differential between Ping and its competitors, then
20 that involves the thought experiment that the Tribunal
21 is faced with. So that's the type of evidence that
22 the Tribunal will have to consider in this case.

23 PROFESSOR BEATH: Okay. I think we have had that
24 discussion. I still have a problem that in a sense
25 a thought experiment requires us to change only one

1 variable, whereas, when looking at these two sets of
2 surveys, we're actually looking at -- we can't be sure,
3 essentially we're comparing like with like. That's the
4 real problem.

5 MS DEMETRIOU: Sir, I agree with that and that's one of the
6 points we make. So we say our submission -- essentially
7 at its core, our submission is that the evidence adduced
8 by Ping does not establish that the ban has been
9 effective in enhancing its aim. So it may be
10 appropriate in the sense that there is a rational
11 connection but the evidence certainly doesn't establish
12 that it has been effective. That's a matter on which
13 I will make detailed submissions after the evidence, but
14 that's the CMA position in this case.

15 PROFESSOR BEATH: Thank you.

16 MS DEMETRIOU: Now, burden of proof. You will have seen
17 that there is a dispute between the parties on burden of
18 proof. We say that that is a dispute which manifestly
19 has to be resolved in the CMA's favour.

20 Can I just take you to one authority, which is the
21 Racecourse Association case. That is in the first
22 bundle of authorities at tab 7, where this Tribunal was
23 faced with the same question in a very similar context.
24 I think we don't need to get bogged down in the facts,
25 but the relevant section is a short section beginning on

1 page 58. You see at paragraph 131:

2 "Subject to one qualification, there was no issue
3 that the legal burden of proof of the alleged
4 infringement [...] lay with the OFT."

5 Then you see at 132:

6 "The OFT submitted, however, that this position is
7 qualified in cases in which the decision-maker has to
8 decide whether what appears to be a restriction of
9 competition is justified by the particular circumstances
10 of the case."

11 That's the territory we're in in this case too.

12 "It submitted that, in such cases, whilst the
13 legal burden of proving the infringement [...] remains with
14 the decision-maker (here the OFT), the evidential burden
15 of demonstrating that the apparent restriction on
16 competition is justified falls upon the undertaking
17 advancing such assertion: he who asserts must
18 prove. The OFT submitted that, to the extent that the
19 appellants defended the prima facie anti-competitive
20 effect of the MRA as being 'necessary' to achieve
21 a pro-competitive outcome, the evidential burden of
22 showing it lay on them. We accept this. It cannot be
23 for the OFT to set up and disprove a case founded on the
24 'necessity' argument. If, as the appellants claimed, any
25 apparently anti-competitive effect [...] was justified by the

1 necessity of such dealing, it was for them to demonstrate
2 it by evidence. Once that evidence was before the OFT, the
3 overall legal burden still remained on the OFT to prove
4 the infringement [...]But unless the appellants first made
5 out a necessity case on the facts, no such case would
6 arise for consideration."

7 We say that's the same approach. That's the
8 approach that should apply in this case.

9 Charter of Fundamental Rights, I can be extremely
10 brief on this. Perhaps I can just deal with this point
11 before the short break for the stenographers and then,
12 when we come back, I have a small section to do and then
13 I am finished. It won't take very much longer, but
14 I think it might be convenient for me to finish this
15 short section first on fundamental rights.

16 We say that Ping doesn't come anywhere close to
17 proving its case that the CMA's decision breaches its
18 rights under Article 16 and 17 of the Charter.

19 There are numerous difficulties with its argument
20 which we have set out in our skeleton. I'm not going to
21 repeat them all now, but I will at this stage emphasise
22 two key difficulties for Ping. The first is that
23 Articles 16 and 17 of the Charter are qualified rights
24 and they can be the subject, therefore, of derogation by
25 public authorities in the public interest, and if the

1 CMA is right that Ping's ban infringes Article 101, then
2 it obviously follows that the decision is a justified
3 interference with any right that might be engaged by
4 Articles 16 and 17.

5 So we say that in that sense these arguments add
6 nothing to the main competition argument. If the CMA is
7 right on the main competition argument, then any
8 restriction would be justified.

9 We say that, second, Ping doesn't even get off first
10 base because it hasn't substantiated its claim that the
11 rights under Articles 16 and 17 are engaged. We say
12 that they're not because, contrary to what Ping
13 contends, the decision doesn't force Ping to sell
14 a product it doesn't wish to sell. Ping sells golf
15 clubs and the decision does not prevent it from selling
16 golf clubs and we say that Ping hasn't begun to
17 establish any interference with its property for the
18 purposes of Article 17.

19 So that, in a nutshell, is what we say. We have
20 said it much more fully in our skeleton argument, but
21 I think I'm not going to take up any more time at this
22 stage going through the detail of those submissions but
23 I just wanted to give you the headline points.

24 Might it be convenient to take a short break now and
25 then, when we come back, I will complete my opening

1 submissions?

2 THE CHAIRMAN: Yes, are you on track to finish before
3 1 o'clock?

4 MS DEMETRIOU: Well on track.

5 THE CHAIRMAN: Are we going to start the Ping witnesses this
6 morning?

7 MS DEMETRIOU: We are.

8 THE CHAIRMAN: Very good.

9 (11.27 am)

10 (A short break)

11 (11.37 am)

12 MS DEMETRIOU: Can I at the outset come back to the question
13 you put to me on Coty?

14 So I think the question was -- and please correct me
15 if I am wrong -- "Did the court go on to look at
16 effects?" so "Were effects relevant in the judgment?"

17 THE CHAIRMAN: Effectively, yes.

18 MS DEMETRIOU: The answer is no, they didn't analyse it in
19 terms of effects and in terms of why that is the case,
20 I think the reason for that, although it's not expressly
21 said, is that -- of course, this was a reference for
22 a preliminary ruling and so the court was tasked with
23 answering the question posed by the national court,
24 which was the question that arose in the national
25 proceedings.

1 If you just take up Coty, which is at volume 4,
2 tab 89, you see on page 27 in the top right-hand
3 corner -- so this is in the judgment, a succinct summary
4 of the judgment of the court --

5 THE CHAIRMAN: Sorry, which page is it?

6 MS DEMETRIOU: I'm so sorry, page 27 in the top right-hand
7 corner. So you see a succinct summary at paragraph 17
8 of what was going on before the national court. So this
9 was the lower court which has given the judgment,
10 against which there was an appeal, and it was the higher
11 court, the appeal court, that made the reference. We
12 see that from 19.

13 But at 17 you see that by its judgment the court
14 dismissed that action on the ground that the contractual
15 clause at issue was contrary to -- I won't attempt to
16 pronounce the German legislation -- or Article 101. "It
17 found that the objective of maintaining
18 a prestigious image of the mark could not, in accordance
19 with [... Pierre Fabre], justify the introduction of
20 a selective distribution system which, by definition,
21 restricted competition".

22 So I think we can take it from that that the
23 national court had reached the view that there was
24 an object restriction because that -- it cited
25 Pierre Fabre, it's talking about by definition

1 constituting a restriction on competition and you have
2 seen from the Pierre Fabre judgment -- which I'm not
3 going to ask you to take up, but I just remind you of
4 paragraph 39 in particular and paragraph 47 -- the very
5 thing that the court was concerned with in Pierre Fabre
6 was what's needed to show an object restriction.

7 So I think that that's the context in which the
8 court was answering the question. So you see, just
9 going to the end of the judgment -- again at 52, this --
10 so the entirety of the judgment -- of the second
11 question, 37 through to 58, as I explained -- and
12 I'm not going to repeat my submissions -- what the court
13 there is doing was applying the Pierre Fabre approach,
14 which was the approach of showing a restriction by
15 object. At the end they end up, as I have shown you,
16 saying, that the restriction there was more absolute and
17 so this is different and they end up saying that it's
18 compatible with Article 101(1).

19 Sir, you're quite right to point out that they're
20 not then undertaking an effects analysis, which
21 obviously would be a much more convoluted and nuanced
22 and fact-sensitive analysis. They're not doing that.
23 I think that the reason they're not doing that is to be
24 understood by reference to the scope of the national
25 proceedings. I hope that answers --

1 THE CHAIRMAN: Yes, thank you very much.

2 MS DEMETRIOU: Mr Lask reminds me that we have dealt with
3 that point in our skeleton argument at paragraph 29.

4 So I want to, finally in opening, explain in
5 a nutshell what the CMA's case is on proportionality,
6 which is the key issue in these proceedings.

7 This is largely an evidential question and I will
8 make detailed submissions, of course, on the evidence
9 once we have heard it and once the Tribunal has heard it
10 tested, but I do, at this stage, want to summarise what
11 the CMA's case is and I think I can best explain it in
12 four steps.

13 So the first step is that we say that Ping needs to
14 show, first of all, that the ban is effective to achieve
15 its aim; in other words, it needs to show that the ban
16 materially advances its aim of promoting or maximising
17 custom fittings.

18 So, as Professor Beath put it to me, it needs to
19 show, in effect, that if there was no ban, it would
20 achieve materially fewer custom fittings. We say that
21 if Ping cannot show this, then its appeal does not get
22 off the ground.

23 So how does Ping seek to prove that the ban is
24 effective? The evidence on which Mr O'Donoghue placed
25 a lot of weight in his submissions yesterday is

1 evidence of a comparison between its own custom fitting
2 rates and those of its competitors which do not have
3 an internet ban. The Tribunal will obviously hear
4 evidence on those comparative rates and will have to
5 reach a view.

6 The CMA's case is that the evidence does not
7 establish that Ping's custom fitting rates are
8 materially higher than those of its competitors and we
9 say that Ping's competitors are successfully selling
10 custom fit clubs and promoting custom fitting without
11 the need for a ban on online sales. I just pause there
12 to say that of course Ping will have to show that, of
13 course, none of Ping's competitors operate an online
14 sales ban. So, at this stage, at this step 1, we say
15 that it's incumbent on Ping to show that its rates
16 exceed all of its competitors because, if there is one
17 of them that has rates that are materially similar to
18 Ping's rates and doesn't operate a ban, then we say its
19 appeal doesn't get off the ground. So that's step 1.

20 Step 2 is that, even if Ping has established that
21 there is a difference between its rates and those of its
22 competitors, it also needs to show that this is caused
23 by the ban and, again, the CMA's case is that Ping has
24 failed to do that. Certainly we say it's not something
25 which can just be assumed. It's something that needs to

1 be proved on the evidence.

2 Thirdly -- and this is step 3 -- if, contrary to the
3 CMA's case so far, Ping shows that its rates are higher
4 than those of its competitors and that this difference
5 is caused by the ban, it must show next that the ban
6 does not go further than is necessary, and the CMA, of
7 course, contends -- and you have seen in the decision --
8 that the ban does go further than is necessary and one
9 respect in which the ban goes further than is necessary
10 is very easy to see.

11 Take a consumer who has had a custom fitting and
12 knows their specifications. Such a consumer may well
13 wish to buy a golf club online and there are websites
14 which enable this to be done. So, for example,
15 a consumer may have gone into a Ping retailer and had
16 a complete custom fitting and bought a set of clubs and
17 then the following week they may have broken one of
18 their clubs on the golf course and want a replacement.

19 Now, Ping's ban prevents that consumer from buying
20 the replacement online, but the CMA says that it's
21 self-evident that preventing that consumer from buying
22 a replacement club online does nothing to further Ping's
23 aim of maximising custom fitting as the player has
24 already been custom fit.

25 Now, that's just one example, but you can see that

1 there are a host of other factual possibilities. So
2 take a consumer who has gone into a Ping retailer and
3 had a custom fitting and is given their specifications
4 and then wants to shop around online for the best deal.
5 Again, we have seen that there are websites that enable
6 all the various options to be put in and that consumer
7 is prevented by the online sales ban from shopping
8 around and finding the best price, but the ban in
9 respect of that category of consumers doesn't achieve
10 any purpose. It goes beyond what's necessary because
11 that category of consumers has, by definition, on the
12 example I have given, had a custom fitting.

13 Ping's ban also goes further than is necessary
14 because, as the CMA found in its decision, Ping's aim
15 can be achieved through less restrictive alternatives.
16 We say, again in a nutshell, that Ping's arguments that
17 these alternatives are either not viable or not
18 effective ring hollow and the reason they ring hollow is
19 because Ping's retailers in the United States have
20 adopted some of these measures and Ping in the
21 United States successfully continues to pursue its
22 policy of promoting or maximising custom fittings and,
23 moreover, some of these measures are used in the
24 United Kingdom, in this country, in respect of the sale
25 of custom fit clubs produced by Ping's main competitors,

1 who also pursue successfully a policy of promoting
2 custom fitting. So that's step 3.

3 Step 4, if we get to this stage, is that, taking all
4 of the relevant circumstances into account, any benefits
5 associated with Ping's ban -- so that's assuming that
6 Ping has demonstrated everything so far -- are
7 outweighed by the disadvantages in terms of restricting
8 competition between Ping's retailers and by the
9 disadvantages to consumers. That's proportionality
10 strictu sensu as the case law refers to it.

11 So that, in a nutshell, is the CMA's case. I'm not
12 intending to make detailed submissions on the facts at
13 this stage because the Tribunal hasn't heard the
14 evidence, but obviously I will make those submissions in
15 due course once we have heard the evidence.

16 Unless I can assist any further, those are my
17 submissions in opening and I think we can proceed to the
18 evidence.

19 THE CHAIRMAN: Thank you very much.

20 MR O'DONOGHUE: With the Tribunal's permission, we would
21 like to call Derek Holt.

22 MR DEREK HOLT (affirmed)

23 Examination-in-chief by MR O'DONOGHUE

24 MR O'DONOGHUE: Mr Holt, you should have in front of you or
25 can it be presented to you bundle C of the trial bundle.

1 A. Okay. Yes.

2 Q. If you turn to tab 1 of that bundle, please --

3 A. Okay.

4 Q. -- you will see a document and various exhibits. Can
5 you confirm from the cover page that this is your report
6 in these proceedings?

7 A. Yes, it is.

8 Q. Can we turn to page 61 of that document, please --

9 A. Yes.

10 Q. -- the signature page. Is that your signature at the
11 bottom?

12 A. It is indeed, yes.

13 Q. Can you confirm that the contents of the report and its
14 exhibits are true to the best of your knowledge and
15 belief?

16 A. Yes, that's correct.

17 MR O'DONOGHUE: If you wait there, the CMA may have some
18 questions for you.

19 Cross-examination by MS DEMETRIOU

20 MS DEMETRIOU: Good morning, Mr Holt.

21 A. Good morning.

22 MS DEMETRIOU: Before I ask you questions, there is
23 a preliminary matter I just wish to raise with
24 the Tribunal, which is that Mr Holt's evidence contains
25 a lot of confidential material, so, for example, he

1 refers extensively to the SMS survey which is, in its
2 entirety, confidential. I think I am going to find it
3 quite difficult to cross-examine him unless we go into
4 closed session because it's quite difficult to
5 cross-examine him on the figures without referring to
6 the figures. So I am in Tribunal's hands in relation to
7 that.

8 That part of my cross-examination is at the
9 beginning and so it may be that we go into closed
10 session and then we can come into open session again
11 a little bit later, where I'm not referring to sensitive
12 documents, although to some extent it goes all the way
13 through.

14 THE CHAIRMAN: Have you discussed this?

15 MS DEMETRIOU: I haven't. It just occurred to me this
16 morning, as I was coming into court, that a lot of the
17 cross-examination is going to be very difficult to do
18 unless we go into closed session.

19 MR O'DONOGHUE: If it assists, there is a slightly unusual
20 feature of the SMS study in that it's a commercial
21 industry report. Now, it's a report that Ping had
22 acquired and paid for, but it has usage restrictions and
23 it was for that reason that the report is considered
24 confidential.

25 Now, the Tribunal may well take the view that Ping,

1 having acquired the report and the obvious interest in
2 the public administration of justice -- that weighing
3 these things up, in fact, at least the SMS figures could
4 to some extent be put in open court. So there is
5 a slightly unusual genesis of the confidentiality
6 redactions in the case of SMS because it's not Ping's
7 study, it's a commercial study which must be bought at
8 considerable expense. Ping doesn't have the copyright
9 and for that reason we didn't want to sort of throw it
10 around willy nilly, so there is a context there that
11 the Tribunal may wish to reflect on.

12 For our part, we're reluctant to go into closed
13 session for obvious reasons and if it's simply the
14 study, it seems to us that may be disproportionate.

15 THE CHAIRMAN: Can you explain? Did you say that the SMS
16 material is confidential and Ping has agreed to keep it
17 confidential?

18 MR O'DONOGHUE: The only reason we put forward
19 confidentiality is that it was acquired by Ping as
20 a commercial report which is subject to usage
21 restrictions.

22 THE CHAIRMAN: What are those restrictions?

23 MR O'DONOGHUE: It's essentially for the company's own
24 consumption. I don't think, at least on the face of the
25 terms, it expressly permits use in litigation

1 proceedings, but that, in my submission, isn't
2 necessarily the end of the matter. We adopted
3 a cautious approach because it's not our report and not
4 our copyright.

5 MS DEMETRIOU: Sir, if it helps, it's not just the SMS
6 study. There is also data that's confidential in the
7 decision itself and there are data which are
8 confidential to Ping, for example in the retailer
9 surveys, which it has said are commercially confidential
10 and doesn't want referred to in open court, but there is
11 also material which is confidential from the CMA's
12 perspective. So I understand the reluctance not to go
13 into closed session, but I will find it very difficult
14 to cross-examine Mr Holt effectively whilst not
15 referring to the figures given that his report is about
16 the figures. (Pause)

17 MR O'DONOGHUE: Sir, one final point, if I may. I'm sorry.
18 If it's not just SMS, if it's also Ping confidential
19 material, there is a difficulty because most of my
20 client's attendees are not in the confidentiality ring
21 and therefore they will have to be absent for the
22 entirety of this mini-session which does concern us.

23 THE CHAIRMAN: The difficulty is that the Tribunal is being
24 asked to rule on a question of confidentiality relating
25 to material that we haven't looked at in any detail.

1 From what Ms Demetriou says, this encompasses
2 confidentiality of SMS, Ping and CMA. In those
3 circumstances, it seems to us that the pragmatic
4 solution would be to go into closed session, but to make
5 that closed session as short as is compatible with your
6 being able to cross-examine in a proper way.

7 MS DEMETRIOU: I am very grateful. Then may I suggest we go
8 into closed session at the outset? I think there is
9 then a -- I think for most of the -- there is some
10 confidential material at the end, but I can probably
11 deal with that -- I may be able to deal with that
12 without going into closed session again. So if we can
13 go into closed session for the outset, I think I can
14 cover in quite short order the first points which relate
15 to the confidential material.

16 THE CHAIRMAN: Very well.

17 PROFESSOR BEATH: Okay.

18 MR O'DONOGHUE: Sir, just to be clear, there are obviously
19 non-Ping people in the room, but given that Ping
20 acquired the report and has the report, I assume that
21 the Ping personnel can stay on that basis?

22 MS DEMETRIOU: No. We have worked on the basis that we have
23 a confidentiality ring and there is material here which
24 is confidential and material which is just in the ring,
25 so I'm not --

1 MR O'DONOGHUE: It's Ping material.

2 MS DEMETRIOU: It's not only Ping material. There's --

3 MR O'DONOGHUE: It's SMS and --

4 MS DEMETRIOU: There is also CMA confidential material
5 relating to other retailers.

6 THE CHAIRMAN: I think my direction is clear. We are now going
7 to go into closed session.

8 (Proceedings in private - please see separate transcript)

9 In open session

10 MS DEMETRIOU: If you don't mind, I will wait until whoever
11 wants to come in comes in or would the Tribunal like me
12 just to plough on?

13 THE CHAIRMAN: No, let's wait. (Pause)

14 MS DEMETRIOU: So, Mr Holt, the final source to which you
15 refer is a Deutsche Bank report on Acushnet, which is
16 the parent company of the Titleist brand. You refer to
17 this at 5.3.18 of your report. That report says, as
18 you've summarised in that paragraph, that over
19 50 per cent of the company's global irons and over
20 35 per cent of total volume is customised. But I think
21 you have said -- yes, you do say that you don't know how
22 precisely this figure has been estimated or defined.
23 But, again, this is a global figure, isn't it, so there
24 is no indication of Titleist UK rate?

25 A. That's right.

1 Q. So, again, we're not comparing like with like. It
2 doesn't enable a proper comparison with Ping's UK rates.

3 A. And I think I've recognised that in reaching my overall
4 perspective on the evidence.

5 Q. You have.

6 A. I have put more weight on the ones that were the most
7 comparable bits of evidence. I've then tried to find
8 any other third-party evidence I was able to identify.
9 I have quoted that and I've acknowledged that there are
10 some limitations in terms of whether that's UK evidence
11 and so forth.

12 Q. Mr Holt, yes, you have. So we see you have very fairly
13 acknowledged that there are limitations. Another
14 limitation, of course, is that Titleist is only one
15 brand and so what this doesn't indicate is that Ping's
16 rates, even if it were otherwise a reliable source -- it
17 doesn't indicate that Ping's rates are higher than all
18 of its other competitors.

19 A. No, obviously it couldn't ever do that, even if you --
20 yes, that's right.

21 Q. Now, moving away from this section of your report to
22 section 6, which is concerned with intra-brand
23 competition, you analyse the number and geographic
24 distribution of Ping's account-holders. We see the
25 results of that at 6.3.5 and 6.3.6 and the results were

1 also set out in tabular form in table 6.1.

2 A. Yes.

3 Q. The headline conclusion from 6.3.5 is that nearly all
4 consumers have a choice of at least three Ping retailers
5 in addition to the option to purchase golf clubs from
6 retailers who are not Ping account-holders.

7 Then you have a more granular explanation of the
8 figures in the following paragraph and in the table.

9 Now, you say at 6.3.1 -- and this is the reason for
10 undertaking this analysis -- is that it is relevant to
11 the question of intra-brand competition to consider the
12 coverage and choice available to consumers from the
13 bricks and mortar sales channel.

14 A. Yes.

15 Q. You say that -- essentially your conclusion is that,
16 because most of the population have a choice of at least
17 three Ping retailers, then the CMA need not be concerned
18 about intra-brand competition.

19 A. Well, I think I haven't quite put it like that. I think
20 what I've identified is that there are a number of
21 contextual and factual points that need to be taken into
22 account when looking at the impact on intra-brand
23 competition. This is one amongst several of those.

24 Q. I see.

25 A. There are several other points as well.

1 Q. I see. That's important to understand. So you accept
2 that it doesn't follow from this analysis that
3 intra-brand competition could not be enhanced or would
4 not necessarily be enhanced if online sales were
5 allowed?

6 A. Yes, clearly it does not imply that. What it does imply
7 is that the level of intra-brand competition is already
8 high when looking at the amount of choice that the vast
9 majority of the population already has from the Ping
10 distribution network.

11 Q. So you accept, then, that if online sales were allowed,
12 then consumers within any one of these areas would in
13 principle have access to a wider range of Ping
14 retailers; that must be the case, mustn't it?

15 A. So they would potentially have access to online offers
16 in the absence of the online sales ban.

17 Q. Yes.

18 A. Obviously there is another potential impact, which is
19 that they may have less access to local custom fitting
20 options and retailers selling and carrying out custom
21 fitting if the diversion to online sales had an impact
22 on the physical distribution --

23 Q. And that's because of your free riding argument, is it?

24 A. That's due to a number of factors, not merely free
25 riding, but that will be one aspect of it.

- 1 Q. We will come on to free riding, but assuming for the
2 time being that Ping -- if the ban were relaxed or if
3 the ban were not permitted, that Ping would continue to
4 deal only with retailers that demonstrated a commitment
5 to custom fitting, so assuming that, then in principle,
6 of course, allowing online sales would permit consumers
7 to have access to a wider range of Ping retailers,
8 including retailers in much further geographic
9 locations?
- 10 A. Well, I think -- I accepted that was the case
11 previously, but also noted that they might have less
12 access to local fitting options and I think that also is
13 the case; so, in other words, the incentives for the
14 network to continue to (a) retail and (b) carry out
15 custom fitting to the same extent may be affected and
16 therefore that could have effects on intra-brand
17 competition within some of these regions.
- 18 Q. Leaving aside that point for the moment, but looking at
19 potential benefits for consumers, they would be able to
20 shop for Ping clubs outside of business hours and at
21 a wider range of retailers?
- 22 A. Yes, if that --
- 23 Q. Subject to your point, I understand.
- 24 A. Yes, that's right, yes.
- 25 Q. It's possible, isn't it -- so it's possible that the

1 presence in the market of online retailers would
2 exercise a greater competitive constraint on the
3 physical outlets in any given area than this is at
4 present?

5 A. Well, that's possible. I haven't analysed that --

6 Q. You haven't analysed it?

7 A. -- and I haven't seen any evidence either way on that.

8 Q. No.

9 A. I think, again, the contextual point here that's
10 relevant is there is very significant inter-brand
11 competition and, furthermore, we don't have single
12 branding, so there is already a high degree of
13 competitive pressure within those retailers to offer
14 good prices for Ping because when the customer comes
15 into the store, they obviously visualise and see all of
16 the options there at the same time. So I think my
17 points in relation to intra-brand competition have to
18 capture the broader context in terms of, one, the
19 strength of inter-brand competition is important and
20 that tends to lessen the relevance of intra-brand
21 competition firstly; secondly, that while there are
22 different elements of competition, obviously price being
23 one aspect, there are other dimensions that are also
24 important; and while it may be that removal of the
25 online sales ban would allow people to purchase online

1 from a further distance, that would also have potential
2 impacts on other dimensions of quality which would go
3 the other direction. So the statement that there is
4 a severe restriction on intra-brand competition I don't
5 think holds because actually there is a negative impact
6 on the quality dimension of competition.

7 Q. But you accept that one of the potential restrictions on
8 intra-brand competition, one of the potential
9 restrictions that follows from the ban, is reduced price
10 competition?

11 A. Well, that could well be the case. That could be the
12 case.

13 Q. The fact is, I think, as you have said, you haven't
14 analysed this in any detail in your report because that
15 falls outside the scope of your report.

16 A. Yes, but what I have done, though, is identify the
17 relevance of certain factors which would have an impact
18 on the extent to which any price competition would be
19 greater and I think there are some limiting factors to
20 that: one being the fact that you do not have single
21 branding so you already have strong price competition as
22 a result of the inter-brand competition and then,
23 secondly, the fact that any customer -- virtually any
24 customer, 95 per cent -- at least in the UK has access
25 to multiple of options within a very close proximity.

1 Q. Yes. Mr Holt, yes, we understand these points. Those
2 are the points that you deal with in the section on
3 intra-brand competition, yes.

4 A. Yes.

5 Q. Now, turning to section 6.4 of your report, you talk
6 about the importance of the online channel to custom
7 fitted golf clubs. You say at 6.4.1 that
8 whilst the CMA found that the internet was the
9 important channel for the sale of golf clubs, it did not
10 find that it was an important channel for the sale of
11 clubs following a dynamic custom fitting.

12 You then say at 6.4.2 that
13 a dynamic custom fitting must take place in store
14 and so: "supplying a consumer with a correctly-fitted club
15 is not something that can adequately be done via the
16 internet."

17 So I would like to take the second of those
18 propositions first. I think we can agree in principle,
19 can't we, that it would be open to a consumer to have
20 a custom fitting and then use their specifications to
21 buy online?

22 A. I think that is possible but the -- a number of factors
23 would then depend on whether that would be likely or
24 not, including the incentives for the party to carry out
25 the custom fitting in the first place, but also the

1 likelihood that the customer would use that route rather
2 than buy directly online and not actually undertake a
3 custom fitting.

4 Q. So I agree that these are all facts that would have to
5 be investigated, but I'm just asking you at the moment
6 at the level of principle. So in principle that's
7 possible and in that scenario it's true to say, isn't
8 it, that supplying that consumer with a correctly fitted
9 club is something that in principle can be done over the
10 internet?

11 A. Well, I think it is possible.

12 Q. Yes, that's all I am asking.

13 A. There would obviously be an issue about the likelihood
14 of that --

15 Q. Yes, but --

16 A. -- which in my view would be low and, furthermore, would
17 also risk errors; in other words, one would, I think, be
18 very concerned that, even if someone did have a custom
19 fitting and then got all the full range of parameters,
20 how would they actually accurately put that into the
21 system. It's not clear.

22 Q. Is that something you have investigated yourself?

23 A. No, but I have identified that there are, I think, a low
24 likelihood that online sales would follow a true dynamic
25 face-to-face fitting and that's one of the sort of

1 factual points that I understand has been raised in the
2 context of the matter.

3 Q. But that's a factual point. Your report doesn't examine
4 what that demand is, does it, so you haven't ascertained
5 yourself factually how likely it is that someone would
6 do that or whether or not -- you've just raised
7 a potential difficulty about accurately doing it.

8 That's not something that you yourself have explored.

9 A. That's true. I think what I'm doing is examining the
10 evidence in the round from the factual witnesses.

11 Q. The evidence that you have read, so Mr Clark's witness
12 statement, or the evidence in the case?

13 A. They are various, including the CMA witnesses, who
14 identify that in general, even if they make an online
15 offering available and even if they allow for
16 tick-boxes, they actually don't know that those people
17 have actually carried out a custom fitting and they
18 can't know.

19 Q. No but if you have a -- well it may be that this is
20 factual evidence and that it doesn't really help to take
21 it any further with you, but I think that what you have
22 said is that you haven't -- your report -- it's outside
23 the scope of your report to examine what that demand is.
24 That's not something that you have analysed here?

25 A. No, but I think it stands to reason that either the

1 person is going to do a dynamic fitting and then, if
2 they were to carry forward the parameters outside, then
3 that would lead to a free riding concern --

4 Q. I will come to free riding.

5 A. -- if they were to buy online without the dynamic
6 fitting, then that would lead to a reduction in the
7 custom fitting rate. So, in a sense, either you have
8 the free riding concern or the alternative economic
9 explanation of that, which is the incentives
10 misalignment between Ping and its retailers, both of
11 which would lead to a reduction in incentives to carry
12 out the investment in time for fitting, or you have the
13 individual going online, where the probability of them
14 having had the custom fitting would be lower, which
15 I think actually is a common-sense point really.

16 Q. Let's come to free riding -- I am going to come to that
17 separately --

18 A. Okay.

19 Q. -- because at the moment I was just putting to you
20 a more limited point, which is that in principle it's
21 open to -- I think we have explored it as far as
22 possible -- but the limited point was that in principle
23 it's possible for a customer to have a custom fitting
24 and use those specifications to buy online, so it's not
25 correct to say -- it's not correct, is it, to say that

1 by definition supplying a consumer with a correctly
2 fitted club is not something that can be done online?

3 A. I think, again, if you were to have that as a prevalent
4 model, it would have all sorts of repercussions in terms
5 of the incentives to do a custom fitting in the first
6 place.

7 Q. But that's a separate point, Mr Holt. I am asking you
8 whether it's correct to say that by definition this is
9 something that can't be done?

10 A. Okay, so --

11 THE CHAIRMAN: In fairness, I think the report says that it
12 can't adequately be done.

13 MS DEMETRIOU: It can't adequately be done. Okay. Well
14 I think I have taken that as far as I can.

15 Turning next to your first proposition concerning
16 the importance of the internet for the sale of clubs
17 following a dynamic custom fitting, at footnote 90 you
18 have referred to the CMA decision at paragraph 4.69,
19 citing SMS research. So if we just take up that.
20 That's in bundle 1.

21 Mr Lask just reminds me that we're coming up to
22 1 o'clock and this is not necessarily a short point, so
23 shall we pause there?

24 THE CHAIRMAN: Yes.

25 Mr Holt, you shouldn't discuss your evidence in the

1 lunch-hour.

2 A. I understand.

3 (1.02 pm)

4 (The luncheon adjournment)

5 (2.00 pm)

6 MS DEMETRIOU: Mr Holt, I think we were on 6.4.1 of your
7 report and I was dealing with the first of the
8 propositions in that paragraph, where you referred to
9 the CMA's decision. You say that
10 the CMA does not, however, go on to find that the
11 internet is an "important channel for the sale of golf clubs
12 following a dynamic custom fitting."

13 Now, if you take up the CMA decision, please, which is
14 in bundle A at tab 1, which I think will be handed to
15 you now, and turn to paragraph 4.69, which is at the
16 bottom of page 86, you see there that:

17 "The CMA finds that there is significant consumer
18 demand to buy custom fit clubs online. The SMS Survey
19 Results Extract indicates that on average over
20 10 per cent of the surveyed golfers reported purchasing
21 golf clubs online ..."

22 Then it goes on to say:

23 "... with the proportion of golfers who have had
24 a custom fitting purchasing online being even bigger at
25 around 15 per cent on average."

1 So that reference to 6.4.1 has to be read in light
2 of the full excerpt from the CMA decision, doesn't it,
3 which does go on to make a finding about the proportion
4 of golfers who have had a custom fitting purchasing
5 online?

6 A. But I think there is a definitional issue that needs to
7 be addressed here as well. Obviously you can go online
8 and sort of select different variants of golf clubs and
9 I think that may be what many people sort of assume is
10 happening when they say that golf clubs have been
11 purchased in a custom fit manner online, but obviously
12 that's not the same thing as having a dynamic fitting
13 session which identifies which particular variant is the
14 outcome of the full fitting process.

15 Q. No, but what the CMA is saying -- they're talking about
16 the proportion of golfers who have had a custom fitting
17 purchasing online, so they're not purporting there to
18 say that the purchaser has its fitting online, that the
19 fitting is carried out online, which I think we're all
20 agreed is -- it's impossible to have a dynamic fitting
21 online -- but they're looking at something different,
22 which is the proportion of golfers who have had a custom
23 fitting --

24 A. Sure.

25 Q. -- purchasing online.

1 A. But, again, I think the point remains, the fact that
2 somebody has had a custom fitting at some point in time
3 does not necessarily mean that when they're buying
4 online, they're buying the appropriate, ie dynamically
5 custom fit golf club at that time. If there is any
6 period of time which elapses between that situation --
7 again this is because the SMS survey is at this point
8 asking about, "Have you ever had a custom fitting?"
9 It's not asking about the proportion of occasions when
10 you're buying golf clubs, when you're -- when you're
11 actually doing so having had a direct custom fitting for
12 that particular purchasing decision. Those are quite
13 different points and quite a fundamental distinction,
14 really.

15 Q. That may be, but as phrased in the decision we simply
16 don't know, do we, so it could well be that of that
17 15 per cent, a significant number have had a custom
18 fitting which they then use to purchase clubs online?

19 A. Well, it's possible that some proportion of that
20 15 per cent may have had dynamic custom fitting. The
21 reasons for which I think that that is unlikely to be
22 a material percentage is that, certainly in the UK,
23 relatively few, in terms of percentage of certainly Ping
24 retailers, offer online fitting; in other words, in
25 a sense that they carry out sales online which are

1 actually directed at people who have carried out
2 a dynamic fitting. So I understand that American Golf,
3 which does obviously have online sales, does not do so
4 in the context of people who wish to select custom
5 fitting, so that's obviously the majority, at least
6 within the Ping retail network, of the online sales
7 within its network.

8 Then I think the second point, which I just alluded
9 to earlier, is that there is an important distinction
10 between, one, having ever had a custom fitting and
11 having had one for that particular purchase, which, as
12 I appreciate, we don't know what the answer to that is,
13 but all we know from this is that some of those people
14 have had a custom fitting at some point in the past.

15 Then, finally, the third and important definitional
16 issue is: what do these customers say actually is
17 a "custom fitting"? Is it the mere selection of
18 a variant, which -- some people might say that's
19 a custom purchase. Is it a static fitting, which some
20 again might characterise as that, as having gone through
21 a custom fit but isn't actually the full dynamic custom
22 fitting process which leads to the optimal results.

23 Q. No, but you yourself haven't analysed how that
24 15 per cent might be broken down as between those three
25 categories?

1 A. No, I have not.

2 Q. No. So turning to the basis for the CMA's finding, as
3 you say, that's in the SMS survey, which is at tab S of
4 the bundle containing your report. If we can pick that
5 up at page 23 of the internal page numbering. Rather,
6 23 just has a pretty picture -- so 23 is the section
7 which is point of purchase. Then over the next seven
8 pages what you see for each different golf club type is
9 the percentage of respondents who purchased a club from
10 various different points of purchase. The results are
11 split between all respondents -- that's the yellow
12 bar -- and those who have been custom fit -- those who
13 have been custom fit for the club in question, so for
14 a driver. So I appreciate that they -- I take on board
15 your point which we have explored previously that these
16 are people that have ever been custom fit --

17 A. Yes.

18 Q. -- so I appreciate that. I am making a narrower point,
19 which is purely to read the guide just to make sure we
20 are clear where we are -- so the yellow bar is overall,
21 overall people surveyed --

22 A. Yes.

23 Q. -- and the blue is those who have been custom fitted at
24 least at some point in the past for that particular type
25 of golf club.

1 A. Agreed.

2 Q. If we take the results, for example, for drivers, then
3 you can see there that [redacted] per cent of all
4 respondents had bought a driver from an internet golf
5 retailer and [redacted] per cent of those who had been
6 custom fitted for a driver had bought a driver from
7 an internet golf retailer. And when one adds that to
8 the figure for non-specialist golf retailers, then one
9 arrives at a figure of [redacted] per cent -- sorry,
10 those are confidential figures. I will need to do it
11 from now on without reference to the figures themselves.
12 I'm sorry.

13 Then we see the corresponding percentage for other
14 types of clubs. So just going through this, on page 25,
15 do you see the two internet non-golf specialist and
16 internet golf retailer, the two sections there? You can
17 see the figures in blue, which, if you add together,
18 give you the total of people that have been custom fit
19 in the past for a fairway wood, but then have bought
20 online.

21 A. Yes.

22 Q. We see that going forward for all of the different types
23 of golf clubs. So one sees that there is a percentage
24 of consumers who both want to be custom fit and want to
25 buy their golf clubs online.

1 A. Well, I think that's not quite the same thing as what
2 these figures are saying. I think that what this is
3 saying is that people who have ever had a custom fit do
4 show tendencies to also have bought online. I think
5 that's what this is saying.

6 I think the conclusion that I would draw from that
7 is actually it's even more important to ensure that
8 those customers are having the full information
9 available to them to understand the benefits of custom
10 fitting on each occasion because what seems to be
11 happening here is that people are in some cases buying
12 online and they may not have been custom fit for those
13 purchases. I think that is potentially of concern in
14 terms of consumer welfare.

15 Q. Well, I understand that that's Ping's case --

16 A. Yes.

17 Q. -- but we don't know which proportion -- so included in
18 those proportions -- I think we can agree this at least,
19 can't we, that included in those proportions will be
20 a number of people who have been custom fit and are
21 using those specifications to buy the club online?

22 A. It's possible. We don't know that. That's true.

23 Q. Okay. The percentages -- so looking at the figures and
24 subject to the caveats that you have just taken as to
25 how those groups are made up, the percentages are not

1 insignificant?

2 A. I agree that the percentages of people who say they have
3 bought online, you know, typically seem to be in the
4 [redacted] per cent range or, if you add the two
5 together, a bit above that, yes.

6 Q. Then there is also a percentage, of course, of consumers
7 who don't want to be custom fit and you consider this
8 group. So going back to your report at paragraph 7.5 --
9 so that's one of the groups that you consider at
10 section 7.5 of your report.

11 A. Yes.

12 Q. You say that there is a percentage of consumers who
13 don't want to be custom fit and you acknowledge here
14 that they may benefit from being able to purchase Ping
15 clubs online because the thinking is, come what may,
16 they won't be custom fit.

17 A. Yes, I think what I'm trying to do here is identify what
18 different types of customer groups might exist and what
19 the potential effects are. Now, obviously it's hard to
20 know whether it's that they had no desire at all to be
21 custom fit or is it the case that they just weren't
22 sufficiently aware of it and ended up buying a club
23 without having gone through the custom fitting
24 process --

25 Q. Yes.

- 1 A. -- so it's not -- you know, it's I think perhaps
2 an overstatement to say that they absolutely wouldn't
3 have been open to persuasion had the full information
4 been available to them.
- 5 Q. That's a fair point, Mr Holt, and I will come back to
6 this part of the report but at the moment I think based
7 on the results of Ping's retailer survey, we know that
8 this group represents -- we know that the percentage
9 that that group represents, don't we, based on the
10 retailer survey?
- 11 A. Yes.
- 12 Q. You say that -- I think you've mentioned the figure at
13 various points. I think we all know what the figure is.
- 14 A. [redacted] or [redacted] per cent, I think, on the basis
15 of this --
- 16 Q. The reason I am not saying that is because that is meant
17 to be a confidential figure.
- 18 A. Oh.
- 19 Q. So the fact that there is a demand for purchasing clubs
20 online is a relevant factor for the Tribunal to
21 consider, even if that demand doesn't extend to
22 consumers who want to be custom fit?
- 23 A. Sorry, I just want to ensure I answer having fully
24 understood the question.
- 25 Q. Shall I ask it a different way --

1 A. So there is demand for -- the proposition, I believe, is
2 that it is relevant that there is some demand for
3 purchasing online, which I think there's some evidence
4 of that -- I don't disagree -- some purchases happen
5 online and then your next proposition was that that is
6 relevant even in the context of people who have not
7 custom fit?

8 Q. Yes. So the proposition is that the proportion
9 identified by Ping in its retailer survey that you just
10 mentioned of people that it doesn't currently custom
11 fit -- so those are necessarily because it doesn't sell
12 online or its retailers don't sell online -- those are
13 necessarily people that have come into the store or have
14 bought by telephone.

15 A. Yes.

16 Q. So there is currently a demand for purchasing Ping clubs
17 without a custom fitting. We see that on the results of
18 the retailer survey.

19 A. Yes, there seem to be some people who are doing that and
20 obviously --

21 Q. So you accept in relation to those people, I think -- so
22 you accept in relation to those people that they may
23 gain some benefits by being able to buy online?

24 A. Yes, so that's exactly what this examination at 7.5.2(b)
25 is looking at. I should highlight that I did note in

1 the report that merely because there is a proportion of
2 people who ended up buying without a custom fitting
3 doesn't necessarily mean that they would actually gain
4 from the opportunity to buy online because, of course,
5 a proportion of those may have enjoyed the opportunity
6 to browse in-store, but merely bought without having
7 gone through a custom fitting, and, you know, that to
8 some extent would suggest that this would -- overstate
9 the benefit of online sales.

10 Q. Okay. We can come back to that, but at this stage what
11 I think we can agree is that, in terms of what's
12 relevant for the Tribunal to look at, it's relevant for
13 the Tribunal to look at demand for purchasing clubs even
14 where demand doesn't extend to people that have had
15 a custom fitting because we know that there are a group
16 of people that currently don't have custom fitting for
17 Ping clubs and, subject to the caveats that you make,
18 those people may potentially benefit from the ban being
19 lifted?

20 A. Yes, I think it's also important to note that that group
21 would be less likely to gain the material benefits of
22 having a custom fitting if you were to remove the online
23 sales ban because it may be that they have been in once
24 and made a purchase, but they're -- on their next
25 occasion going in, they might go for a custom fitting,

1 but on the other hand, if you remove the online sales
2 ban, that group who have previously not been custom
3 fitted would then perhaps go online and lose that
4 opportunity. So I think when -- I think you're correct
5 in saying that there is a group that might get some
6 convenience benefit from purchasing online.

7 Q. Or price benefit?

8 A. Or potentially a price benefit, but that they would also
9 potentially lose out on the benefits of custom fitting.

10 Q. Okay. Now, moving -- I am going to come back to this in
11 a moment, but I just want to deal in the interim with
12 price comparison websites because one of the issues that
13 you deal with in your report -- or, rather, one of the
14 issues dealt with in the decision was the ability of
15 consumers to use online price comparison tools to
16 compare prices for Ping clubs. The CMA made a finding
17 in relation to that in its decision, which you then
18 tested for the purposes of this report using three
19 websites. We see this from 6.5.5 of your report.

20 So you use three websites, Google Shopping,
21 pricerunner.co.uk and shopzilla.co.uk, and you
22 concluded -- and we see this from 6.5.12, so I am just
23 at the moment framing the area of debate -- you
24 concluded that, since consumers can use price comparison
25 sites to compare Ping prices online, the CMA has made

1 an error in its decision. I hope that's a fair summary
2 of your report.

3 A. Yes, yes.

4 Q. So let's take Shopzilla first. You deal with that at
5 6.5.5. You explain that you weren't able to compare
6 Ping prices on Shopzilla and so what you then did was
7 you then tried comparing prices for two other brands on
8 the same site, Callaway and Titleist, and you found it
9 hard to compare prices for those brands too, so
10 essentially your conclusion was that it was probably
11 a difficulty with the site itself.

12 A. Yes.

13 Q. Then the position in relation to Google was
14 a bit different, wasn't it? So it's step 1 -- and this
15 is at 6.5.6 -- you search for "Ping G400 driver", which
16 produced a number of results and we see that in the
17 figure at 6.1. These results listed the available
18 offers for various different specifications for
19 Ping G400 drivers, but they don't all refer to exactly
20 the same club. You can see that -- the print is
21 a little small, but you can see it in the description of
22 each club, so it's --

23 A. Right. I'm happy to take that as the case. I haven't
24 re-examined that particular point.

25 Q. Okay. So at figure 6.2 you clicked on the top result,

1 which is "G4 driver right regular alta" and then there
2 is a CB 55 10.5" reference. You say that this brought
3 up a box with prices for that club from three different
4 retailers -- and we see this in figure 6.2 -- and this
5 box also provided the option to compare prices from
6 three stores.

7 Then, at step 3, you clicked on -- we see this from
8 6.5.8 -- the blue "Shop" button and this took you, you
9 say, to JamGolf's website, where you were invited to
10 call a telephone number to order the product.

11 A. Yes.

12 Q. Then we see the screenshot in 6.3. Now, you didn't here
13 carry out a comparative search for Callaway or Titleist
14 clubs on Google Shopping; you confined your search in
15 the report to Ping drivers.

16 A. Yes, I was merely testing the proposition made in the
17 decision that it was not possible to compare online.

18 Q. No. So you weren't carrying out a comparative exercise.
19 I think that's fair.

20 A. No.

21 Q. The same applies to Pricerunner?

22 A. Yes.

23 Q. So again you were testing the proposition?

24 A. Yes.

25 Q. Have you read Ms Aspinall's third statement where she

1 does carry out a comparison?

2 A. Yes, I have seen that.

3 Q. I just want to establish that there is nothing in your
4 report that essentially deals with that question of
5 comparison that she carries out.

6 A. That's true, yes.

7 Q. Now at 7.3 of your report you address the question of
8 why consumers need to be encouraged to be custom fit.

9 A. Sorry, are we sort of leaving the question of comparing?

10 Q. I am leaving that and I am going on to page --

11 A. I'm happy to make a brief comment on what my perspective
12 is on that issue.

13 Q. On what issue?

14 A. On this issue of price comparison because I think what
15 this comes down to is to what extent is there
16 a reduction in intra-brand competition. I think that's
17 where this came out in the decision. And I think all
18 I was saying is that having a starting point of high
19 inter-brand competition and a high degree of intra-brand
20 competition based on the retail network, was it possible
21 to also have comparisons -- if you go into a store and
22 you get fitted up, you then want to buy a Ping model,
23 the important question for me was, "Can you then compare
24 that?", and the answer to that is "Yes".

25 But I don't see this as the most critical of all of

1 these issues because this goes back to the question of,
2 well, you know: what are the consumer harm issues
3 associated with buying online in the first place? If
4 someone were to have that comparison option and were to
5 click on it and were to buy, then it's much more
6 probable that they would not have gone through a custom
7 fitting.

8 So, in my view, even if there was some increase in
9 relative degrees of comparability between the brands --
10 for other brands relative to Ping, I should say --
11 I think that's sort of part and parcel of the converse,
12 which is that there would be less quality-based
13 intra-brand competition in terms of focusing on the
14 benefits associated with custom fitting.

15 Q. Okay. Now, moving on, please, to 7.3, where you have
16 dealt with the question of why consumers need to be
17 encouraged to be custom fit. You cite a number of
18 studies here in support of that proposition --

19 A. Yes.

20 Q. -- and you argue -- or you say that Ping has said --
21 this is at 7.3.4 -- so to be more accurate you say:

22 "Ping has said that its internet policy sends the
23 'strongest possible message' to consumers that they should
24 be custom fit."

25 The studies cited in this part of your report are

1 general economic studies, aren't they, so they don't --
2 they're not concerned specifically with the behaviour of
3 golfers?

4 A. Yes, that is right. I am trying to identify what is the
5 most relevant economic analysis and theory that applies
6 to this particular set of circumstances.

7 Q. You do, however, cite paragraphs 3.31 to 3.36 of the
8 decision. Can we just turn that up? So, again, we're
9 back to bundle A, tab 1. Do you have the decision
10 there?

11 A. I do. Can you repeat the reference, please?

12 Q. 3.31. The decision starts at page 26 through to 3.36.
13 We don't need to go through all of it, but what we see
14 here is evidence considered by the CMA that golfers
15 believe custom fitting to be beneficial across all
16 brands. That's consistent with the SMS survey that we
17 discussed earlier and the figures for "important" and
18 "Very important". If one --

19 A. Sorry, just can I comment on that because I think, while
20 that does focus on people who responded, whether they
21 thought it was important, again that doesn't necessarily
22 indicate that they feel that they would do the process
23 on each and every occasion and, furthermore, obviously
24 there's a fairly substantial proportion of the
25 population that does not identify and understand the

1 importance associated with custom fitting. Therefore
2 I think both of those factors suggest that it is
3 important to try and help them understand the benefits
4 to the extent that that's possible.

5 Q. Mr Holt you have made that point before, but at the
6 moment I am really just trying to establish what the
7 CMA's decision says before I ask the question.

8 A. Right. Okay.

9 Q. So if you turn back a page at 3.30, you see there that
10 the number of golfers who have had a custom fitting for
11 custom fit clubs has been increasing over recent years
12 and there is reference to the Golf Datatech study, for
13 example.

14 A. Yes.

15 Q. We already looked at that. The evidence in this case as
16 well, which you have read, establishes also that custom
17 fitting rates have increased generally over the last few
18 years.

19 Now, it's possible, isn't it, that factors such as
20 that may affect the way in which the economic theories
21 you cite apply in the present context, so if there is
22 evidence to show that there is an increased awareness
23 amongst golfers that custom fitting is beneficial and
24 that it's happening more often, then this may affect the
25 way in which these economic studies apply? So there are

1 contextual factors, I am putting to you, that may affect
2 the conclusions you draw about the extent to which
3 consumers need to be encouraged to be custom fit.

4 A. Well, I think that goes back to the consumer welfare
5 groups analysis that I identified before. I agree with
6 you, there is likely to be a category of customer who
7 place sufficient weight on custom fitting, in other
8 words, they identify it as being very important and are
9 furthermore aware of the benefits of doing so on each
10 and every occasion, but I don't think that's a -- the
11 whole set of consumers. We obviously have other groups
12 of consumers who might give it some importance, but not
13 necessarily understand the benefit on each and every
14 occasion, and there's obviously a substantial group who
15 don't understand the importance and say that it's not
16 important.

17 Q. I understand.

18 A. So -- yes, I just think that whilst the CMA has
19 identified some evidence that consumers as a group, at
20 least in terms of some proportion, understand the
21 benefits of custom fitting -- and I certainly agree with
22 that -- it's far from perfect.

23 Q. No, but it's been increasing and that's something that
24 we need to take into account --

25 A. Agreed.

1 Q. -- to determine the extent to which persuasion is
2 necessary because, if one starts from a point where
3 there is no awareness about the benefits of custom
4 fitting, then logic dictates that persuasion will be
5 more important at that stage, but if things develop to
6 a point in time where there's much more awareness about
7 the importance, then commensurately persuasion will be
8 less important.

9 A. Well, again, I think I would agree that the more people
10 fully understand the benefits and do so on every
11 occasion, then the need for this would arise to a lesser
12 extent.

13 Q. That's all I'm putting to you.

14 A. But I think that, you know, if you look at the factual
15 evidence, that does not appear to be the current
16 structure of the consumer set in the UK market.

17 Q. Well, you say that, Mr Holt, but the factual evidence is
18 that awareness is increasing.

19 A. It's increasing, but it's still, you know, modest by
20 reference to, you know, the full set of understanding;
21 in other words, it's, I think, around 60 per cent or so.

22 Q. But I am putting to you a much more limited question --

23 A. Right.

24 Q. -- which is really a question which I hoped we would be
25 able to agree on, which is that where you have a market

1 which is characterised by lack of awareness about
2 benefits compared to a market where awareness has
3 increased -- albeit, I take your point that it may not
4 be all-pervasive -- then the need for persuasion in the
5 second group is less. It follows as a matter of logic.

6 A. Yes, I mean, obviously the greater the extent to which
7 you identify that people are fully aware of the
8 benefits, the less the need to persuade them. I think
9 that's true. I think there are some longer-term effects
10 here that are important, ie new people coming into the
11 market, you know, need to be persuaded and also people
12 who have already had a custom fitting also need to
13 understand the importance of that on a regular basis.
14 So I think both of those features from my view of the
15 facts seem to still be relevant.

16 Q. Okay. So assuming that there is a cohort of customers
17 that need to be persuaded, then you say that measures
18 such as a mandatory tick-box -- I am looking at 7.3.4 --
19 by which a customer confirms that he or she understands
20 the risks of making a purchase without custom fitting
21 must certainly be less effective than Ping's ban. Now
22 of course a mandatory tick-box was one of the
23 alternative measures proposed in the CMA's decision, but
24 I just wanted to understand the basis for your view.

25 So the basis for your view is not, as I understand

1 it, any analysis that's been carried out by Ping prior
2 to the investigation. You refer to three sources in
3 7.3.4 and we see that from the footnote, footnote 110.
4 The first is a Ping presentation to the CMA on
5 17 December 2015. Are you aware of what the context of
6 that presentation was?

7 A. I'd have to be reminded of that.

8 Q. So it was a state of play meeting between Ping and the
9 CMA --

10 A. Right.

11 Q. -- which took place once the investigation had been
12 opened. This presentation, of course, sought to
13 persuade the CMA that Ping's ban was a good thing.

14 So you accept, presumably, that the assertion that
15 Ping makes, which you quote in the first line, that its
16 internet policy sends the strongest possible message is
17 not an impartial statement?

18 A. I accept that it's a statement that Ping says. I have
19 no further comment on it than that.

20 Q. The second source is a speech by the CMA's chairman
21 given on 20 April 2015. We see that --

22 A. Yes.

23 Q. -- in the remainder -- yes, exactly, over the page.
24 That's extracted or the full speech I think is exhibited
25 to your report at W. If you turn to tab W, it's page 4

1 that you have referred to. You will see the extract
2 from Mr Currie's speech. It's the second paragraph up
3 from the bottom, the paragraph that begins:

4 "This is not a flippant debating point."

5 We see there, three sentences into that paragraph --
6 sorry, I will start earlier:

7 "The UK University of East Anglia's Centre for
8 Competition Policy undertook fascinating research on how
9 many of us actually read the terms and conditions
10 online - the advantage of online purchases, unlike
11 offline, is that it is possible to analyse this with
12 great precision. They found that only one or possibly
13 two of us in a thousand actually call up the terms and
14 conditions before ticking the accept box. And of that
15 tiny minority, the vast majority spent so little time
16 looking at them that they cannot have read the whole text
17 let alone understand it. Is that surprising, when the
18 terms and conditions for signing up to an HSBC account
19 run to a little more than 29,000 words and Ryanair [...] more
20 than 18,000?"

21 He goes on to explain why reading a full set of
22 terms and conditions, he puts it, requires more than the
23 average PhD thesis -- he puts it rather colourfully
24 there.

25 The suggestion is then in his speech that, because

1 terms and conditions tend to be very lengthy and
2 detailed, consumers tend not to click through to the
3 terms and conditions themselves before ticking the
4 confirmation box -- and I'm sure we have all in this
5 room had experience of that --

6 A. Well, I mean, obviously if you haven't called up the
7 terms and conditions, then you wouldn't know that it's
8 long. So it might well be that, even if you called it
9 up, you wouldn't read it. But this is saying that they
10 don't even call it up.

11 Q. No, that is right, because most consumers know that
12 these terms and conditions tend to be very long and
13 they --

14 A. Well -- maybe.

15 Q. If we look at the context that the CMA is considering --
16 so, again, turn back, please, to the CMA's decision.
17 This is at 4.132 on page 115 -- this is not about
18 lengthy terms and conditions at all. This is simply
19 a tick-box to confirm that the consumer understands the
20 benefits of custom fitting and the risks of purchasing
21 without having custom fitting and, of course, it doesn't
22 take many thousands of words to explain that. So do you
23 accept, then, that the context of Mr Currie's speech is
24 a little different to what the CMA is suggesting here?

25 A. Well, it might be that the precise sector being

1 discussed obviously is different. It might even be that
2 the length of the terms and conditions is longer in the
3 banking context. But obviously that, I don't think, has
4 a big impact on whether you call it up or not. I think
5 what this is suggesting and I think what the chairman of
6 the CMA was indicating is in issue more generally is the
7 degree of engagement of the typical consumer when
8 looking at things like terms and conditions online.
9 I don't think it's a unique proposition to the banking
10 sector.

11 I think it's a more general concern that consumer
12 engagement is very limited unless you have very engaging
13 sort of conversations or reasons to be proactive in
14 thinking about these sorts of issues. So I think it's
15 certainly a broader concern than merely an HSBC and
16 banking consideration.

17 Q. But you would accept, wouldn't you, that there is
18 a difference between having to call up lengthy terms and
19 conditions and having to tick a box on a screen that
20 says "I confirm that I understand the risks of
21 purchasing without a custom fitting"? There is
22 a difference in kind that may affect the propensity of
23 a consumer to read the particular warning?

24 A. There may be. I can't really comment on that.

25 Q. Okay.

1 A. Yes.

2 Q. We will leave that there. Now, I want to go back to
3 section 7.5 of your report which we touched on already.

4 A. Sorry, which section, please?

5 Q. Section 7.5.

6 A. Right.

7 Q. We have touched on this already.

8 A. Yes.

9 Q. So at page 45 -- and I just want to first of all
10 establish, which I think should be uncontroversial, what
11 you have done before asking you questions on it.

12 So what you do at section 7.5, as I understand it,
13 is that you consider the effects of removing the ban on
14 three groups of Ping customers.

15 A. Yes.

16 Q. So first of all -- and we see this at 7.5.2 -- you say
17 that:

18 "it seems plausible that three groups of Ping golf
19 club buying consumers exist."

20 You have in group 1 those who are committed to being
21 custom fitted prior to making a purchase and then you
22 have in group 2 those who do not wish to be custom
23 fitted and then group 3 are consumers that lie somewhere
24 between those extremes.

25 At 7.5.3 you express the view that, whilst allowing

1 online sales could potentially provide convenience
2 benefits to group 2 -- group 2 consumers, that is -- it
3 would potentially harm group 3 consumers. So that's the
4 conclusion that you reach.

5 A. Yes.

6 Q. Then you go on -- I am still establishing what you have
7 done -- to estimate the size of those two groups. This
8 is over the page.

9 A. Yes.

10 Q. You conclude that group 2 contains a small proportion of
11 the UK golf market, and again these are confidential
12 figures but you see the figure at 7.5.5(c). It's the
13 figure in the second of the yellow boxes.

14 A. Yes.

15 MR O'DONOGHUE: Sir, if it helps, there are ranges on the
16 left which are not confidential, if they want to be read
17 out.

18 MS DEMETRIOU: It's probably just me, but I find that even
19 more complicated dealing with it in ranges, but thank
20 you. I am going to just refer to the box in the report.
21 We all have it in front of us.

22 Then you say that group 3 contains -- the figure for
23 group 3 is in 7.5.6 and we see it halfway down that
24 paragraph, flush against the left-hand margin.

25 A. Yes, that's right.

1 Q. So that's what you have done. I now just want to ask
2 some questions about that. So according to your report,
3 the only benefits that might flow from the removal of the
4 ban are the convenience benefits of being able to order
5 online, for example when a retailer is closed. We see
6 that from 7.5.2(b).

7 A. I say they may gain convenience benefits, so I don't --

8 Q. There may be, yes. So we're talking about potential
9 benefits.

10 A. That's right.

11 Q. But a little earlier we explored the possibility that
12 allowing online sales might lead to other benefits like
13 price benefits. I think you accepted potentially that
14 might be the case, subject to various caveats that you
15 had, but potentially in principle they may do?

16 A. Yes, I think that then would relate to some further
17 discussion around what would be the implications of that
18 for issues around incentives to carry out custom
19 fitting. So I think one of the concerns is that -- is
20 when you're constructing a counterfactual, you need to
21 make sure you're taking into account all of the
22 potential consequences of that. In the short term, if
23 there were price benefits, then obviously those
24 customers would derive some benefit from that.

25 Q. Yes.

1 A. The problem, of course, is that would have some knock-on
2 consequences and that is not taken into account in this
3 exercise.

4 Q. No, and I am going to come back to free riding.

5 A. Okay.

6 Q. Essentially at the moment I am just looking at potential
7 benefits.

8 A. Sure.

9 Q. I think we can agree that the potential benefits are not
10 just convenience benefits, but maybe other benefits that
11 flow from greater intra-brand competition, such as price
12 benefits, and subject to the caveats and the incentives
13 point and the free riding points, I think you agree that
14 potentially that could be the case?

15 A. Again with the caveat that an increase in intra-brand
16 competition in one dimension, ie price, could also lead
17 to a reduction in intra-brand competition in another
18 dimension. So, again, it would be of concern to me if
19 we're identifying these potential benefits, but only
20 doing an analysis halfway and not taking into account
21 the knock-on effects.

22 Q. So leaving aside the question of whether -- the point
23 you have just made about whether they would be offset by
24 disadvantages -- leaving that aside for the moment --
25 the potential benefits would in principle -- so in

1 principle -- extend to consumers in all three of your
2 groups?

3 A. Well, I think that's unlikely because, firstly, even the
4 second group wouldn't necessarily gain these benefits;
5 in other words, the fact that there might be some online
6 access would not necessarily mean that, even if you
7 haven't been custom fitted, you would derive benefits
8 from that for the reason I mentioned before. So I think
9 that's the first point, that even for the group for
10 which it's most obvious that there might be some
11 convenience benefits, that would not necessarily be the
12 case.

13 I think the second point is that, even if there were
14 some convenience benefits were one of the members of the
15 other groups to purchase online, then they would, you
16 know -- those would be, in my view, outweighed by the
17 reduction in the custom fitting aspect --

18 Q. Mr Holt, can I just interrupt just briefly?

19 A. Yes.

20 Q. When I asked the question, I am asking you just for
21 these purposes to leave aside the question -- because
22 you have made your point about the disadvantages that
23 might outweigh and the Tribunal has that point.

24 A. Sure.

25 Q. I am just asking you at the moment to leave that

1 aside --

2 A. Okay.

3 Q. -- and focus on potential benefits. So you say -- so
4 looking at group 1 -- so group 1 consists of those who
5 are committed to custom fitting, and your view is that
6 such customers are likely to continue to be custom
7 fitted even if the opportunity exists to buy Ping clubs
8 online. So that's group 1.

9 A. Yes.

10 Q. Now consider the scenario that I gave you earlier and,
11 please, at the moment, ignore the factual likelihood of
12 this happening or not, but consider the scenario in
13 which a consumer has had a dynamic custom fitting and at
14 the end of it has his specifications and is able
15 precisely to input those specifications onto an online
16 website. Now, of course, at the moment they can only
17 use the specifications to buy Ping clubs in-store or by
18 telephone, but it's true, isn't it, that if the ban were
19 removed, it follows as a matter of logic that that
20 consumer would have the additional option of being able
21 to purchase online?

22 A. Yes.

23 Q. So potentially -- and, again, we're at the level of
24 potentially -- he receives or she receives the same
25 benefits, the same convenience benefits, as those that

1 you acknowledge in respect of group 2?

2 A. Yes, again, subject to the caveats on a knock-on effect.

3 Q. Subject to the caveats.

4 A. Sure.

5 Q. Now, you estimate the size of group 1 -- we have seen
6 the estimate for the size of group 1. That's over the
7 page at 7.5.6. That's the figure halfway down flush to
8 the margin; is that right? The size of group 2 -- no,
9 perhaps let me come back to that point. Sorry, that's
10 a slightly more detailed point. Let me come back to
11 that.

12 Now, group 3 comprises consumers who lie somewhere
13 between the two extremes and so they may choose to
14 purchase online if given the opportunity to do so, but
15 they're also -- some of them -- so they're somewhere
16 along the spectrum. So some of them may choose to buy
17 online if they have the opportunity, but others may be
18 persuaded to be custom fit --

19 A. Yes.

20 Q. -- and would decline the opportunity to buy online.

21 Consumers within group 3 who do choose to be custom
22 fit are currently limited to purchasing Ping clubs
23 in-store or by telephone so, by parity of reasoning,
24 removing the ban would give them the additional option
25 of purchasing online so they fall into the group 1

1 category at that stage?

2 A. Yes.

3 Q. Now, I want to look a little bit more closely at your
4 estimate of the sizes of the three groups, which is the
5 point I was just about to come to. So you estimate the
6 size of group 2, so that's those who in your view would
7 benefit from online sales, as being small. That's the
8 figure that we see at 7.5.5(c) in the second box.

9 A. Yes and, again, that's --

10 Q. Potentially.

11 A. -- the ones who would potentially get and not all of
12 them would.

13 Q. This is all on that basis, so we can take that as read.

14 A. Sorry, it's a different issue than the knock-on effects
15 point. This is a separate point that --

16 Q. That they may not --

17 A. They may have a preference to go in-store in any event.

18 Q. I understand. Thank you.

19 Then the basis for this estimate is drawn -- that's
20 drawn from the retailer survey. We see there at (b) -- so
21 at 7.5.5(b) we see a number there in the first box, and
22 that's the percentage in the retailer survey of Ping
23 customers who buy clubs without that purchase being
24 preceded by a custom fitting.

25 A. Yes.

1 Q. So you would accept, presumably, that if the percentage
2 of Ping customers who currently buy without a custom
3 fitting is in fact larger than that number, then
4 logically so too group 2 must be larger?

5 A. Yes.

6 Q. So it depends on the accuracy of that figure?

7 A. Yes.

8 Q. You then estimate the size of group 3, so those who in
9 your view are at risk of harm if the ban is removed. So
10 we see at 7.5.6:

11 "By contrast, the group of consumers who would be
12 harmed by the removal of the internet policy is large."

13 Then you estimate what the size of that group is.
14 You see at the end of that paragraph it's almost ...
15 times the size of --

16 A. I see that, yes.

17 Q. Now, group 3 -- just so I make sure I understand how you
18 got to this -- is a subsection of all Ping consumers who
19 are all custom fitted.

20 A. Yes, that is right.

21 Q. So the starting point is the estimate from the retailer
22 survey of the proportion of Ping customers that are
23 custom fitted?

24 A. That's right.

25 Q. Let's assume for the purposes of this discussion that

1 that starting point is accurate.

2 A. Sure.

3 Q. Your next step is to calculate the share of the UK
4 market represented by that percentage of Ping customers
5 who are custom fitted.

6 A. Yes.

7 Q. We see that share at 7.5.6 in the second line.

8 A. Yes, that's -- the reason for that is, of course, we're
9 looking at the impact of removal of the online sales ban
10 for Ping.

11 Q. Of course.

12 A. So what this is not taking into account is the point
13 I made earlier about any market-wide effects; in other
14 words, to the extent that inter-brand competition on
15 quality would degrade in time, that obviously could lead
16 to lower fitting rates not only for Ping but also other
17 parts of the market. Obviously I haven't taken that
18 into account in this calculation.

19 Q. No. Let's just stick with this calculation. We see
20 there the share of the market which you have set out
21 there in the second line of 7.5.6. What you then
22 attempt to do, as I understand it, is to extract from
23 that group the category that is currently custom fitted
24 but who would no longer be custom fitted if online sales
25 were allowed, in other words, the group that would

1 suffer harm, because what you're trying to ascertain
2 here is the group that would suffer harm if the ban were
3 lifted.

4 A. Potentially.

5 Q. Potentially.

6 A. Again this is on the same basis as I identified for the
7 first group.

8 Q. Potentially, yes.

9 A. They're not sort of, you know, die-hard absolute
10 aficionados who would do it every time irrespective.

11 Q. Yes. Okay, so what you're trying to do is extract from
12 that group, from that number in the second line, the
13 proportion that are likely or may be harmed by lifting
14 the ban.

15 A. Yes.

16 Q. What you do is you assume that 50 per cent of Ping
17 customers who are currently custom fit would no longer
18 be custom fit?

19 A. No, that's not quite right. Obviously, we have
20 an estimate of the share of club sales that are custom
21 fit. That's the value that you have seen here. What,
22 of course, I don't know is how many people are in these
23 different categories.

24 Q. No.

25 A. I don't know how many are absolutely committed versus

1 less absolutely committed, so some assumption has to be
2 made.

3 Q. Yes. And your assumption is 50 per cent?

4 A. My assumption is 50 per cent.

5 Q. Now, earlier in your report you refer to the results of
6 Ping's second retailer survey and those results
7 indicated a differential between Ping's custom fitting
8 rates and those of its competitors. Do you remember
9 that?

10 A. Yes.

11 Q. Just so that we can -- because it's, again,
12 a confidential figure -- let me just see where it is.
13 The differential is -- I think you can most easily see
14 it at 5.3.16. So you see there are a number -- you have
15 two numbers and the differential is the difference
16 between those two.

17 A. Yes.

18 Q. So, on that basis, wouldn't a more reasonable approach
19 be to assume that that differential reflects the size of
20 the group that would no longer be custom fit if the ban
21 were removed?

22 A. Well, again, this is the outcome of the potential group
23 that would not be -- which would potentially suffer
24 harm, so it might be that -- you know, that could be
25 an alternative assumption. I think really what I am

1 trying to do is just understand what is the set of
2 people who are absolutely committed because over the
3 longer term it's only -- anyone else would be subject to
4 influence from the various sort of economic conditions
5 I described earlier in terms of biases, present bias and
6 so on, and in my view that would increase if Ping also
7 became an online supplier.

8 So I don't think that the level for the other
9 parties is necessarily the appropriate limit here
10 because, once you have this additional impact from the
11 Ping side, you would have these market-wide effects that
12 would lead to a degradation.

13 Q. But we don't know what those market-wide effects are and
14 at the moment the most accurate figure that we have in
15 the evidence for the effect of the ban is that
16 percentage differential.

17 A. Well, again, that's not necessarily the case because of
18 the limiting factor associated with that retailer survey
19 which we described earlier; in other words, that that is
20 not necessarily the most accurate level of custom
21 fitting rates for the non-Ping brand. It's only if
22 there would be no changes in the distribution network
23 for Ping and no changes in the incentives for those
24 existing distributors that you would put any weight on
25 that particular value, I think.

- 1 Q. No, but we established earlier that if there were --
2 subject to your incentives point, if there were no
3 changes to the distribution network of Ping, then it is
4 reasonable to place weight on that evidence subject to
5 your incentive points, and it represents, doesn't it,
6 a firmer starting point than 50 per cent, which seems to
7 be an arbitrary figure?
- 8 A. Yes, I mean, I agree that the 50 per cent is arbitrary
9 in the sense that nobody knows, you know, enough about
10 the characteristics of these people to place a precise
11 value, but, again, there are concerns also with the
12 [redacted] per cent value which we described earlier.
- 13 Q. Now, if one were to take the differential from the
14 retailer survey which we have just seen, the number of
15 percentage points, then expressed as a percentage of the
16 overall golf market -- we can do that following your
17 methodology there -- essentially that would be -- well,
18 it's now difficult -- I think I will just have to say
19 the figure, [redacted] per cent.
- 20 A. Well, I would have to probably work through what the
21 values are because -- so when you're saying it's about
22 less than a quarter --
- 23 Q. Well, taking the differential, which we have seen in
24 5.3.16, which is the number of percentage points between
25 those two rates, so you have a figure, and then applying

- 1 the same method that you have in 7.5.6?
- 2 A. I don't think that's quite right. I think what you're
3 saying is the [redacted] would apply to the [redacted] per cent.
- 4 Q. No, I'm saying the differential between those -- so
5 going back --
- 6 A. I don't quite understand that. I think what we're
7 saying is what would be the rate of likely committed
8 custom fit consumers. Obviously I've used one example
9 here --
- 10 Q. Yes.
- 11 A. -- on the alternative of using a [redacted] per cent rather than
12 a 50 per cent, then [redacted] times the number in yellow
13 halfway along is something like 15/16 and the gap is
14 therefore 6 or 7 --
- 15 Q. Well, in any event, it's --
- 16 A. So it would be -- clearly you're right, if the --
- 17 Q. It would be smaller.
- 18 A. It would be smaller, but I disagree that it would be
19 anywhere near as small as you've suggested.
- 20 Q. Okay. Well, let's leave that there.
- 21 A. Okay.
- 22 Q. I just want to deal now briefly --
- 23 A. Can I just make one other very quick point?
- 24 Q. Of course you can.
- 25 A. So this set of calculations was about the distribution

1 of consumers that would potentially gain some benefit
2 but also potentially suffer. The other relevant issue,
3 of course, is the magnitude of any gain or loss and in
4 my view that's -- you know, we don't have precise
5 evidence on the size of either the gain or the loss --

6 Q. No.

7 A. -- but in my view it seems much more likely that the
8 harm done would exceed the gain in convenience. It's
9 actually quite a common sense point. The gain in
10 convenience is a more or less a one-off gain in time,
11 whereas the harm in performance would be systemic
12 throughout the three, five, seven -- however long you
13 keep the golf clubs -- years that you would continue to
14 play and achieve performance benefits. So although it's
15 difficult to sort of quantify that in any monetary
16 sense, it does seem from a magnitude sense that that
17 would be another factor to take into account.

18 Q. And another factor to take into account would be
19 potential benefits other than convenience, including
20 potential benefits relating to price?

21 A. Yes, with the same caveat associated with the knock-on
22 effects of that and the likely limitation of that given
23 the existence of high inter-brand competition already.

24 Q. But, in any event, that complex analysis is not
25 something that you have undertaken --

1 A. No.

2 Q. -- in this report?

3 A. No, I have not.

4 Q. Now, moving on to free riding -- so you deal with this
5 quite shortly at section 8.3 of your report. I think
6 it's fair to say that what you address here is one point
7 made by the CMA in its analysis of free riding in the
8 decision, namely the question of charging.

9 A. Yes.

10 Q. We see that from 8.3.1. Now, could you take up the
11 decision -- I think this is probably the final time I am
12 going to ask you to look at it -- and just turn, please,
13 to page 122.

14 A. Yes.

15 Q. We see there at 4.152 a summary of the CMA's reasoning
16 and, of course, as the CMA say there, that reasoning is
17 expanded later on in the decision.

18 A. Right.

19 Q. You will have seen that.

20 A. Yes.

21 Q. We established -- so just keeping that open at the
22 moment -- you see that the final point in the bullets,
23 rather after the bullet points at 4.153 -- sorry, it's
24 4.154, that's where charging is addressed. So various
25 other factors are addressed before that point.

1 A. Yes.

2 Q. Then charging is addressed at 4.154. Now, we
3 established and I think you have said in your report
4 that individual golf retailers tend to stock multiple
5 brands.

6 A. Yes.

7 Q. That's also a factor identified by the CMA as relevant
8 to free riding because the CMA points out that all the
9 retailers' stock, carry, the main brands and so the
10 investments that they make in relation to custom fitting
11 are not driven by Ping alone, so they are investments
12 that can be used for all brands. You accept,
13 presumably, although you haven't dealt with it in your
14 report, that that's a relevant factor to take into
15 account?

16 A. Yes, so I agree that that is relevant to some extent; in
17 other words that to the extent that investments made by
18 the retailers are multi-brand rather than a single
19 brand, that would have some bearing on the free riding
20 point. It wouldn't mean that there is no prospect of
21 free riding because, of course, even if -- even in the
22 context of multi-brand investments, the incremental
23 effect of the Ping brand being sold online would change
24 the incentives for the retailer across the board.

25 So there would be incremental effects in that sense

1 and then, secondly, my understanding of the facts is
2 that there are some aspects of the investments made by
3 retailers that are associated with multi-brand
4 aspects -- fitting bays and so on -- but there is also
5 some element of their investment that is brand-specific,
6 so sending staff away for training days at a particular
7 supplier and, of course, the particular time spent
8 carrying out fitting in relation to a particular brand.
9 So those would be examples of more specific brand
10 investments that the retailer would make.

11 Q. You just mentioned -- I think your first point -- that
12 it's necessary to consider the incremental effect.

13 A. Yes.

14 Q. In relation to the incremental effect, that might vary,
15 might it not, from retailer to retailer because
16 incentives may well differ?

17 A. I think that is fair, yes.

18 Q. One reason why that might vary is the importance to the
19 particular retailer of the Ping brand?

20 A. That is possible. I think the general proposition here
21 is that to the extent that investments made would not
22 return an investment, ie you wouldn't achieve as high
23 a proportion of sales following the investments, then
24 the marginal incentive to carry out those investments
25 would fall.

1 Obviously the significance of that might vary from
2 retailer to retailer. It would depend on -- some
3 retailers would see much bigger effects than others --
4 I think that is fair -- depending on how much Ping
5 equipment they sell. It also might depend on their
6 fixed cost base relative to their sales; so, in other
7 words, if some retailers suffered a relatively modest
8 fall in direct sales following investments in fitting
9 and so on, then that might be enough to actually make it
10 untenable to continue with those fixed investments going
11 forward.

12 Q. But those are factors that may well vary -- I think you
13 have said it yourself -- from retailer to retailer.

14 A. Yes.

15 Q. They're all factors which you say are potentially
16 relevant to the question of whether free riding would be
17 problematic --

18 A. Yes, I think so. That's right.

19 Q. -- in the event that the ban is lifted. The analysis,
20 I think it's fair to say, of all of those factors is not
21 necessarily a straightforward thing and certainly it's
22 not something which you have attempted to tackle in your
23 report.

24 A. No. I've actually highlighted a separate issue, which
25 in my view is equally if not more important, which is

1 the importance of the alignment of incentives between
2 Ping and its retailers. So this is not a free riding
3 concern; it's a concern around the incentives that the
4 retailer would continue to have, if you remove the
5 online sales ban, to spend as much effort as before in
6 trying to encourage -- and carrying out the investments
7 to fit its staff -- sorry, to train the staff -- but
8 also to carry out the fitting process.

9 The reason I say that's not necessarily a free
10 riding problem, but is nevertheless a problem in terms
11 of achieving high custom fitting rates, is that it may
12 be that that retailer would still retain a sale, it
13 might do so online, so it's not technically
14 characterised as a free riding problem, but it is
15 an incentive alignment issue which has a direct
16 consequence for custom fitting rates.

17 Q. The assessment of those incentives or incentive
18 alignments, that's a fact-sensitive matter, I think
19 you've just accepted, and one of the factors that may be
20 relevant to that are the obligations that the
21 account-holders, in the event that the ban were lifted,
22 would continue to be subject to under the selective
23 distribution regime. That's also fair, isn't it?

24 A. Yes, I think what that indicates, though, is that there
25 are important factors that determine the relationship

1 between the supplier and the retailer. Obviously the
2 selective distribution network can set out and outline
3 a number of desirable behaviours, including focus on
4 custom fitting, doing certain things to try and
5 encourage it and so on.

6 Obviously, the key problem with all of that is that
7 it's actually very hard to implement that in any
8 rigorous way in practice without some contractual
9 mechanism to apply. It's obviously not possible to
10 physically be there to monitor the performance of the
11 retailer all the year long for the entire network, so
12 what you do have to do to recognise this -- and this is
13 a pretty standard problem in economics called "principal
14 agent issues" -- is to have some deliverable contractual
15 mechanism in order to encourage the right sorts of
16 behaviour.

17 I think one of the concerns is that if you remove
18 the online sales ban, which is a mechanism designed to
19 encourage the retailers to -- well, both the customers
20 to come into the store, but also the retailers to spend
21 the investment in carrying out the fitting process -- is
22 that the alternative aspects of the selective
23 distribution network wouldn't be as effective.

24 Q. Well, that depends on the incentives, which is
25 a fact-sensitive question, so it depends on whether the

1 incentives would change -- the incremental change which
2 is represented by the lifting of the ban, it depends on the
3 extent to which that would affect retailers' incentives,
4 which again is fact-sensitive, and there may well be
5 contractual mechanisms that Ping could put in place.
6 That's not an issue that you're an expert on, is it?
7 You're not a retail expert?

8 A. No, I'm not a retail expert.

9 Q. Given that this is a highly fact-sensitive matter,
10 that's presumably why you very fairly say at 8.3.3 of
11 your report -- you express your conclusion,
12 appropriately, if I may say so, in caveated terms. You
13 say:

14 "If online sales were to increase [...] and if retailers
15 responded by increasing custom fitting charges ..."

16 So you're not there reaching a conclusion that they
17 actually would do that.

18 A. No, I think -- well, in that regard I'm not. I am just
19 trying to understand or explain what the likely
20 consequences of that would be.

21 Q. Yes.

22 A. I think a separate assessment of what would be the
23 incentives for the retailers to actually do that,
24 ie impose charges -- we know that there are some good
25 reasons why you wouldn't do so because having the

1 charges would put people off, you know, coming in to do
2 the fitting in the first place. On the other hand, it
3 would be untenable if the share of people who
4 essentially come in, do the fitting and then purchase
5 online were to increase to -- the retailer would become
6 sort of stuck. They either, you know, try and increase
7 the charge to make it cost-reflective, but then that
8 would reduce the incentive for the customer to do it in
9 the first place, or they don't do that, but then their
10 incentive to carry out the activity falls in that event
11 as well because of the risk of free riding going on.

12 Q. But one thing they might do, which is what some of them
13 already do, is structure their charge so that they offer
14 a rebate, for example a full rebate, if the consumer
15 makes a purchase. Then that would, on the one hand,
16 incentivise the consumer to make the purchase and, on
17 the other hand, would allow the cost of custom fitting
18 to be recouped through the purchase or potentially
19 through the sale of other products as well as the golf
20 products.

21 A. Well I think in that case what's being indicated there
22 is that the cost of the fitting would be recouped
23 upfront; in other words, it would be a higher upfront
24 charge with the prospect of having that rebated if the
25 purchase would go ahead. I think -- again, I sort of

1 explained this in my description of essentially
2 behavioural economics, how do consumers respond to that
3 type of thing, and it's also consistent actually with
4 the facts from the factual witnesses -- that would not
5 be likely to lead to a similar outcome in terms of
6 people coming in to get custom fitted; in other words,
7 it's not the same thing if you're a customer paying £100
8 and then with the possible prospect of having a rebate
9 as having the custom fitting carried out for free and
10 then you having a choice as to whether you carry out the
11 purchase or not.

12 It's an obvious distinction between a no risk
13 proposition on the one hand and a significant upfront
14 outlay on the other, and I think what we know from
15 behavioural economics is that people put a lot of weight
16 on those upfront costs. They put somewhat less weight,
17 particularly in the event that you might not actually
18 get the rebate because you might have some reason why
19 you don't not want to go ahead with that sale -- so you
20 would discount as a consumer, at least to some extent,
21 the value associated with that rebate.

22 Q. Well I think "to some extent" is key, isn't it, because
23 I think that there is a difference in kind between
24 a charge in which there is no offer of a rebate and
25 a charge which is subject to an offer of a rebate and

1 that's a matter of degree.

2 A. So I agree that a rebate would be better than no rebate
3 from the customer perspective of carrying out purchases.
4 On the other hand, I disagree that that is in any sense
5 equivalent or would be as likely to generate a demand
6 for coming in to be custom fit as the existing model.

7 Q. But, in any event, the effect that that would have on
8 a consumer's incentives is not something that you have
9 specifically looked at for the purposes of this report
10 because, as we have seen, you have confined your
11 analysis of free riding to the specific point relating
12 to charging.

13 A. No, I think it's the retailer factual witness evidence
14 who have explained what the reasons are for the limited
15 amount of fees that they set -- even though they do
16 offer rebates in the manner I think that most of them
17 tend to do that, most of them say that they're more or
18 less at the limit or wouldn't be keen to raise the fees
19 beyond a notional charge of £25/£35 and that that's
20 actually quite a long way off being cost-reflective.

21 Q. Okay. Thank you. Can you just bear with me for
22 a moment?

23 A. Sure.

24 MS DEMETRIOU: Those are all the questions that I had for
25 you, Mr Holt. Mr O'Donoghue may have some

1 re-examination.

2 A. Okay, thank you.

3 MR O'DONOGHUE: I am in your hands. I have seven or
4 eight minutes, not more. I don't know if it's
5 convenient to break now or whether you wish me to crack
6 on and complete that.

7 THE CHAIRMAN: We will crack on.

8 Re-examination by MR O'DONOGHUE

9 MR O'DONOGHUE: Mr Holt, a handful of things. You mention
10 on a number of occasions the issue of inter-brand or
11 market-wide effects which you suggested were adverse.
12 Are you able to assist the Tribunal in understanding the
13 importance of that factor in the present case?

14 A. Yes. So I think the first proposition is that, as
15 a general feature when thinking about vertical
16 restraints, which obviously this case is about, the
17 likely effects on competition associated with that --
18 the likely negative effects on competition associated
19 with that vertical restraint depend on the nature of
20 inter-brand competition; so, in other words, it's
21 recognised by economists that as a general proposition,
22 if inter-brand competition is strong, the likely
23 negative consequences of a vertical restraint leading to
24 some reduction in intra-brand competition are less
25 material. There are very good reasons for that.

1 I can expand, but essentially it's fairly obvious.
2 The main value derived, for example in this case, from
3 the purchase of golf clubs is the design, the use over
4 multiple years, you know, playing however many rounds of
5 golf you get out of the set of golf clubs. It's a
6 persistent long-term advantage associated with an
7 improvement in design, quality, innovation and so on,
8 and that's all driven by inter-brand competition.

9 I think the second relevant point in the context of
10 this case is that -- well, firstly, inter-brand
11 competition I think is broadly recognised to be strong
12 in the golf sector. There's lots of players, no one has
13 dominance and so on. But also I think it's important to
14 note that the inter-brand competition is live right at
15 the point of sale; in other words, because you don't
16 have single branding -- you don't go into a store and
17 only see Ping clubs, you see all of them. So what that
18 means is the extent to which competitive pressures, both
19 for quality but also for price, come to bear in the
20 inter-brand market, those are actually, in effect, right
21 at the point of sale. So that again mitigates, in my
22 point, the extent of potential harm from any vertical
23 restraint.

24 Q. To follow up, suppose Ping's custom fit rates were to
25 drop as a result of the decision, would that have any

1 impact on inter-brand competition?

2 A. Well, yes, I think in my report I recognise that there
3 are two possible factors in relation to the change in
4 the online sales ban for Ping on inter-brand
5 competition. One which would be negative I found to be
6 not very significant; in other words, in the online part
7 of the market you would have one less brand amongst many
8 to compare prices against.

9 On the other hand, there's what in my view is
10 a stronger effect, which is a positive effect,
11 associated with the differentiation and the focus that
12 Ping is able to bring for custom fitting, which clearly
13 has strong consumer value effects which I don't think
14 are necessarily in -- you know, it's particularly
15 controversial. I think the factual evidence shows that.

16 Now, what that means is that, if you remove the
17 online sales ban, you remove that point of
18 differentiation, then inter-brand competition on quality
19 would be expected to fall. That was the point I was
20 alluding to earlier, in that in my view the market level
21 of dynamic custom fitting is likely to be influenced by
22 the focus that Ping puts on that through the process of
23 inter-brand competition and the others, in a sense,
24 following behind to try and catch up in that regard.

25 Now, it's clear that they don't put as much focus on

1 it because they're willing to have online sales, which
2 it seems common sense to suggest would have a lower rate
3 of custom fitting, but nevertheless they are in that
4 part of the market as well and so there is strong
5 inter-brand competition on quality. You take away one
6 aspect of that and in my view the degree of inter-brand
7 competition in that regard would fall.

8 Q. Now, you mentioned on a number of occasions that in
9 relation to selective distribution there are parameters
10 of competition involving price and non-price, such as
11 quality. As a matter of economics in the context of
12 selective distribution, can you assist the Tribunal on
13 the relative importance of those for selective
14 distribution specifically?

15 A. Okay. So I think this is sort of broadly based on my
16 comment earlier about vertical restraints. So selective
17 distribution is one form of vertical restraint.
18 Obviously what it means is that the manufacturer
19 identifies a set of objective criteria which the
20 retailers have to meet in order to be part of the
21 network.

22 Now, it's broadly recognised by economists that by
23 virtue of having a selective distribution network, you
24 are imposing some cost on yourself as a supplier. You
25 are limiting potentially some retailers who would like

1 to sell your product, which obviously, in general, would
2 be a good thing if -- you know, you would rather sell
3 more golf clubs than less clearly.

4 So the question is, by applying a selective
5 distribution network which does have some negative
6 effect on the degree of potentially price competition
7 and which means therefore you would sacrifice some
8 sales, you have to think about: well, why are they doing
9 it? The reason they're doing it is because there are
10 other important dimensions to competition as well. That
11 might be quality in the context here. It's the
12 long-term benefits associated with custom fitting, which
13 means obviously playing better, having a better
14 perception of the golf equipment and then making future
15 sales down the road.

16 So obviously the objective of the selective
17 distribution mechanism in this case is to generate
18 those -- enhanced value on the non-price dimension and
19 it's generally recognised by economists that that is
20 a particularly important criterion.

21 Q. My penultimate question: you were questioned about price
22 comparison services. As a matter of economics, are
23 there any competition concerns about the use of price
24 comparison services?

25 A. Well, I'm aware, although I'm not acting on any of

1 these, that there have been a number of competition
2 enquires in relation to price comparison services in
3 the sense that in theory -- and I'm not making any
4 specific allegations about any particular price
5 comparison services, of course -- that could lead to
6 increased risks of collusion because more price
7 transparency might become available for retailers to set
8 their prices at, but, on the other hand -- so that's
9 a possible negative consequence.

10 You know, obviously, on the other hand, being able
11 to compare prices can be positive, but, again, it
12 depends on the balance between the quality and the price
13 dimension. In some parts of the market, you know, there
14 isn't really an important quality dimension to try and
15 promote or enhance and, in that case, you know, price
16 competition might be particularly effective in terms of
17 customer value. It's where you undermine some of the
18 other features of competition that it becomes more -- of
19 greater concern.

20 Q. Thank you. Now, finally, you were questioned in some
21 detail on the evidence you relied on in respect of the
22 delta between Ping and rivals' custom fitting rates.
23 Were you in a position to consider evidence in the other
24 direction from the CMA?

25 A. I'm just trying to think back to the decision as to what

1 evidence was put. I mean, obviously there was a brief
2 comment in my report about the CMA's evidence in
3 relation to the two suppliers, which I understand was
4 then taken up by the factual witnesses as to the
5 potential relevance or otherwise of those two pieces of
6 information. I'm not aware offhand of other evidence
7 other than commentary on the evidence that I produced.

8 MR O'DONOGHUE: Thank you.

9 Questions from THE TRIBUNAL

10 THE CHAIRMAN: Mr Holt, I have a couple of questions.

11 A. Yes.

12 THE CHAIRMAN: If we go back to paragraph 7.5.5 of your
13 report --

14 A. Yes.

15 THE CHAIRMAN: -- you're dealing here with the size of the
16 second group of consumers, those who don't wish to be
17 custom fitted, those consumers who are in a rush, they
18 just want to get a golf club and don't want to go
19 through the hassle of custom fitting.

20 A. Yes.

21 THE CHAIRMAN: Then you take as the evidence of the size of
22 that group as the [redacted] per cent of Ping customers
23 who don't go through custom fitting, who buy through
24 telephone sale or whatever.

25 A. Yes.

1 THE CHAIRMAN: What about consumers who go on to the
2 internet, would like to buy a Ping club, but then get
3 put off because of the need to go through custom fitting
4 and buy another brand? Have you taken those into
5 account as well? Surely they should be part of that
6 group.

7 A. So, no -- so I think you're right, I have not -- I have
8 not considered that group. I think obviously if there
9 were such people who had a strong preference but ended
10 up not buying the Ping, then that could be a -- some
11 additional customers who might have gained from having
12 the access to a Ping online customer.

13 Having said that, I think if they were -- two
14 points. First, in that case it's very clear that they
15 were not carrying out a custom fitting purchase because,
16 even if they knew their characteristics for a custom
17 fitting, they would not be applicable from one brand to
18 another for the many reasons explained by the factual
19 witnesses. So while that group might include some
20 additional customers, it would clearly not be designed
21 to focus on custom fitting.

22 I think, again, one would have to consider, well how
23 much actual benefit would accrue in that case. You do
24 have a lot of inter-brand competition and options to buy
25 online already, so how much worse would the customer be

1 buying any of those, you know, dozens of different
2 alternative options relative to buying a Ping one?
3 I think that would not be necessarily a very great loss,
4 particularly when the real advantage of having a Ping
5 golf club is not necessarily how great Ping is
6 inherently -- although I'm sure it is -- but it's
7 actually that you're buying one that actually is
8 specifically designed, in terms of the dynamic fitting,
9 to achieve optimal performance. So the actual advantage
10 of having Ping is not just the technical characteristic,
11 it's part and parcel of the fitting.

12 THE CHAIRMAN: I understand. My other question was a more
13 general one. If, as you suggest, the absence of
14 an online ban would cause material harm to consumers, do
15 you find it in any way surprising that all other
16 manufacturers do not operate an internet ban?

17 A. Well, that's a good question. Why do they not operate
18 an internet ban? I think it's because there are
19 different potential values associated with the different
20 philosophies adopted by the different suppliers.

21 The advantage associated with custom fitting I think
22 is very clear from the factual evidence. The size of
23 the advantage which, if I recall correctly, is something
24 like 11 yards gained, you know, which obviously on
25 a base of 200 or so is quite significant, and

1 a 25 per cent reduction in dispersion. That's very
2 clear. For that reason obviously the other
3 manufacturers have entered the custom fitting game.
4 They have designed their own software, got customisable
5 clubs and so on. So it's not that they don't want to be
6 part of that. It's that they also see advantage in
7 achieving non-customised sales. Those are still sales,
8 they make a margin on it, so there's nothing necessarily
9 wrong with that. It's not that -- I'm certainly not
10 critiquing those business models as being problematic or
11 irrational.

12 What they are doing is putting more weight on the
13 immediate margins they get with those standard fit
14 sales, whereas Ping obviously puts less weight on that
15 type of margin that they could also gain but put more
16 weight on the longer-term benefits associated with the
17 perceived advantage that the customer has on having
18 a well-fit club. So I think they're both valid business
19 models; they're just different philosophies.

20 THE CHAIRMAN: Thank you.

21 MR DORAN: Could I just ask one question, Mr Holt? Just
22 going back to your table 5.2 --

23 A. Yes.

24 MR DORAN: -- the information you have derived from the
25 retailer survey about those who bought Ping clubs who

1 regard custom fitting as important or very important or
2 who have ever received custom fitting --

3 A. Yes.

4 MR DORAN: -- are we talking about the very specific custom
5 fitting that is described in Mr Clark's evidence and
6 that Mr O'Donoghue described to us yesterday or are we
7 talking about the rather more generalised custom
8 fitting, some static, some derived, as I understand it
9 from some of the evidence, the other evidence, that
10 other retailers may do in order to be multi-branded so
11 that they don't go through serial sorts of different
12 manufacturers custom fitting for each customer?

13 A. Yes, that's an excellent question in terms of
14 understanding precisely what does the phrase "custom
15 fitting" mean in this context. I think in this case,
16 because this is derived from a customer survey rather
17 than a retailers' survey, it's less likely to be
18 influenced by the perspective that the retailer has on
19 whether something has been custom fit or not, but it is
20 more likely to be influenced by how the consumer
21 considers custom fitting.

22 So I think the concern you have identified is
23 a valid one, but it stems from the perspective of
24 a consumer as to whether they have bought something that
25 was custom fit or not and, in my view, that does lead to

1 a risk in relation to these numbers. Some of these
2 consumers saying they have been custom fit may have had
3 a static fit or may have purchased something where they
4 have chosen a very precise variant of a golf club but
5 may not have had a full dynamic fitting session.

6 Now, the consequence of that is that these
7 market-wide values may be overstated. I wouldn't want
8 to comment on how great that effect might be. But it
9 would generally be only a downward direction because you
10 can't really -- in terms of what the level of custom
11 fitting that we're talking about for Ping, that is the
12 full dynamic custom fit approach, so anything else
13 obviously is either not custom fitting or a lesser
14 degree.

15 MR DORAN: This is sort of a definitional question across
16 a spectrum, as I understand it, because one is talking
17 about static -- let me just try and use some of the
18 language that was used yesterday.

19 A. Right.

20 MR DORAN: One is talking about static custom fitting which
21 is at the lower end of the degree of customisation that
22 is available right up to the full monty, so to speak --

23 A. Yes, the dynamic.

24 MR DORAN: -- which is full dynamic custom fitting. What
25 I think you're saying to me -- but please correct me.

1 I'm just trying to understand the figures -- what
2 I think you're saying to me is that not all of these
3 people will have had Ping custom fitting; they may have
4 had either Ping custom fitting or, in their journey to
5 choose the right club, a different manufacturer's custom
6 fitting, but they ended up in a process where the
7 retailer suggested a different club or where some
8 retailers have what one might describe as a "hybrid
9 custom fitting", which is that they have something which
10 they say suits all clubs and all potential purchases.
11 They may have gone through that process.

12 A. Yes. So I think I put less distinction on whether they
13 have had a Ping custom fitting or an alternative,
14 because the market-wide evidence is intended to be that,
15 so it would include --

16 MR DORAN: Okay. Sorry. Then, I misunderstood that.

17 A. Nevertheless I think your identified issue is a valid
18 one. Whether it's Ping or a different brand, the
19 market-wide evidence definition of "custom fitting" may
20 not conform to the Ping view of what really
21 constitutes --

22 MR DORAN: Or some other manufacturers.

23 A. Or even another manufacturer who might also recognise
24 that there is some distinction between a dynamic fitting
25 and a static one. The potential issue here is that

1 these consumers may or may not appreciate that
2 distinction and therefore may, in saying they have had
3 a custom fit or put some weight on it, be perceiving
4 even the static or less extensive version of custom
5 fitting when responding.

6 What that would mean is that when you're comparing
7 what we're trying to do here, which is the Ping dynamic
8 face-to-face fitting versus the market-wide evidence,
9 that might understate the gap. The market-wide one
10 might be lower for this reason, in which case the gap
11 between the Ping achieved dynamic custom fitting rate
12 and the market level one would be bigger than what is
13 shown here.

14 MR DORAN: Sorry, just talk me through that again because
15 I was going to edge towards the other conclusion.

16 A. Well, the reason I say that is because, if people are
17 saying, "I've ever been fitted", 62 per cent -- well at
18 least some proportion of that 62 per cent might be
19 saying, "Yes, I remember having a static fitting in
20 1982", so that really shouldn't count.

21 MR DORAN: Sorry, I am with you. Good. Thank you very much
22 indeed.

23 A. Thank you.

24 MR O'DONOGHUE: Would that be a convenient moment to break
25 before we call Professor Brady?

1 THE CHAIRMAN: Yes.

2 (3.30 pm)

3 (A short break)

4 (3.41 pm)

5 MR O'DONOGHUE: Sir, Ping calls Professor Chris Brady.

6 THE CHAIRMAN: Yes, can I just make it clear that
7 the Tribunal cannot sit beyond 4.30 this afternoon?

8 PROFESSOR CHRIS BRADY (sworn)

9 Examination-in-chief by MR O'DONOGHUE

10 MR O'DONOGHUE: Mr Brady, you should have in your vicinity
11 bundle C. If you could turn to tab 2 of that bundle,
12 please.

13 On page 1 you see an expert witness report. If
14 I can ask you first to turn to page 24 of that report
15 under section 7. Do you see the statement of truth?

16 A. Got it.

17 Q. Then if you go to the last page, 28, you will see
18 a signature and date. Is that your signature on
19 page 28?

20 A. It is.

21 Q. And is this your report in these proceedings?

22 A. It is.

23 Q. And are the contents of the report true to the best of
24 your knowledge and belief?

25 A. They are.

1 MR O'DONOGHUE: Thank you. If you wait there, Ms Demetriou
2 will have some questions.

3 Cross-examination by MS DEMETRIOU

4 MS DEMETRIOU: Good afternoon, Professor Brady.

5 A. Good afternoon.

6 Q. I want you to please take up your report. So, for
7 the Tribunal's benefit, the CMA have provided Mr Brady
8 with a short bundle of materials that I might possibly
9 take him to and note you should have an index to that
10 bundle. I think the witness is the only person in the
11 room that has the bundle, but it replicates - it's just
12 that it makes it easier, but we all have the documents
13 in the original bundle. I may not go to all of them.

14 Could I ask you, Professor Brady, just to turn to
15 your report and pick it up at paragraph 3.19? Now, what
16 you say there is that it's too simplistic to view
17 a product as being merely a physical item and you say at
18 3.19 and at 3.20 that Ping's custom fit product consist
19 of a good, a service and an experience. You say at
20 paragraph 3.26 that the custom fitting process is
21 an integral part of the experience element of the
22 product. Then, at 3.20, just piecing these paragraphs
23 together, you say that these three elements are
24 inseparable from one another.

25 Now, when you wrote your report, had you read

1 a draft of Mr Clark's witness statement?

2 A. No.

3 Q. Now, are you aware then -- you may not be aware -- that
4 Ping allows its clubs to be sold without a dynamic
5 custom fitting?

6 A. No.

7 Q. So I am going to ask you to go to the decision at
8 paragraph 4.66. Do you have that? Sorry, that's
9 a separate part of the decision. Sorry our foolproof
10 plan didn't work. So paragraph 4.66 of the decision.

11 A. Got it.

12 Q. If you look at 4.66, do you see there it says:

13 "In particular Ping custom fit clubs are sold:
14 without a custom fitting in a bricks and mortar store -
15 there is no contractual requirement for account-holders
16 to sell only after a custom fitting."

17 Then, over the page at (b), they're sold by telephone
18 and, at (c), they're sold by USA online retailers. So
19 consequently a customer can walk into a bricks and
20 mortar and purchase a Ping club without a custom fitting
21 and Ping also allows its retailers to sell Ping clubs
22 over the telephone.

23 Now, are you aware that Mr Clark's evidence --
24 I don't think you are because you have said already that
25 you haven't read his statement -- but I think we can --

1 I can tell you that what he says -- this is at tab 12 of
2 your mini bundle, so I am going to the second statement
3 of Mr Clark, which for the rest of the room is at
4 volume 1 of B at tab 2. Do you have that?

5 A. I've got the -- I've got the tab, yes.

6 Q. Yes. So if you go to paragraph 6 --

7 A. Got it. It starts "In the real commercial world ..."?

8 Q. Yes. Exactly. He says:

9 "it is... not practically possible for Ping to prevent"
10 its customers from buying without a custom fitting.

11 The proportion of people that buy -- sorry, at
12 paragraph 4, you see the proportion at 4(a), the
13 proportion of people that buy with a custom fitting. Do
14 you see the percentage in the box?

15 A. The percentage, yes.

16 Q. So that's the percentage of people --

17 A. Footnote 3?

18 Q. Yes, the one that has "Footnote 3" on it.

19 A. Yes.

20 Q. So that's the percentage of people -- this is Ping's
21 evidence -- that buy Ping clubs with a custom fitting.
22 So if you deduct that number from 100, you have the
23 percentage of people that buy Ping clubs without
24 a custom fitting.

25 Now, those customers, Professor Brady, they still

1 take home a set of golf clubs, don't they?

2 A. Presumably.

3 Q. So those customers that have bought the clubs, the Ping
4 clubs, without a custom fitting, they haven't paid for
5 a product that has ceased to exist which is what you say
6 at paragraph 3.20 of your report.

7 A. What I actually said was that a brand or a product could
8 cease to exist --

9 Q. Yes.

10 A. -- if it compromised any of the brand proposition that
11 lived within that. What I was asked to do by the
12 lawyers was look at -- was define and differentiate the
13 brand, it was to say whether or not the brand would be
14 damaged by online sales and whether the CMA's
15 alternatives were reasonable.

16 In the second of those, "Would the brand be damaged
17 by those?", the answer is "Yes". Irrespective of
18 whether it was 13.6 per cent or whatever it is who took
19 away another club, the brand would still be damaged and
20 the brand eventually would cease to exist if you took
21 away an integral element of that brand and that product.

22 Q. Well, you say that it will cease to exist. I will come
23 back to that. But dealing with the percentage that we
24 have just seen of customers that buy a Ping club -- that
25 Ping permits to buy a Ping club without a custom

1 fitting, it's right to say, isn't it, that what they're
2 buying is not the experience but the physical product;
3 they're buying the clubs?

4 A. Does that refer to the customers who bought them in this
5 country because also I notice it references USA and
6 telephone --

7 Q. That's this country.

8 A. So 13-point whatever it is per cent took away a club --

9 Q. Without a custom fitting.

10 MR O'DONOGHUE: I hesitate to rise, but there is a risk of
11 the witness being misled here. Can he be shown 4(d) in
12 paragraph 5, please?

13 MS DEMETRIOU: Right, so 4(d) ...

14 MR O'DONOGHUE: ... paragraph 5 of Clark 2.

15 MS DEMETRIOU: I'm sorry. It's not appropriate. I have put
16 a figure to the witness and if Mr O'Donoghue has
17 a point -- I haven't misled the witness with the figure.
18 If Mr O'Donoghue has nuanced points he wants to put, he
19 can put them in re-examination. But I have put a figure
20 which is the figure that everyone accepts is the figure
21 that Mr Clark has put in paragraph 4(a), so I'm not
22 proposing to nuance my question. I certainly don't
23 agree that I have misled the witness.

24 THE CHAIRMAN: I have to say, I am not at the moment
25 persuaded that Ms Demetriou has misled the witness.

1 MR O'DONOGHUE: It's the use of the word "allow". If you
2 read paragraph 6, that is completely inappropriate.

3 MS DEMETRIOU: Well, this is not a point put to this
4 witness. I have made my points about -- I have made my
5 points in opening about Ping not prohibiting, that's the
6 basis on which I say "allow". But the question is not
7 dependent on the word "allow". I am certainly not
8 intending to mislead and I would ask Mr O'Donoghue not
9 to jump up. If he has any points, he can put them in
10 re-examination, otherwise he's really stopping my
11 progress here.

12 THE CHAIRMAN: Perhaps on this occasion if you rephrase the
13 question, but I take your point.

14 MS DEMETRIOU: I will rephrase your question. So going
15 back, we see the figure at paragraph 4(a). So that is the
16 proportion of customers that buy a Ping club without
17 having a custom fitting. The question that I am putting
18 to you --

19 A. No, no, sorry. The figure there is the proportion of
20 people who do buy.

21 Q. I'm so sorry. You're quite right. I was knocked out my
22 stride. So if you deduct that figure from 100, then you
23 have the figure that buy without a custom fitting.

24 You're quite right, Professor Brady. So sticking with
25 that figure, do you agree that -- so you didn't know

1 about that because you haven't read Mr Clark's statement
2 before you drafted your report -- but going back to look
3 at paragraph 3.20 of your report, do you agree that for
4 those customers at least, the three elements of the
5 products are separable from each other?

6 A. I would agree that, but I would also go back to my point
7 that I was asked to comment on whether or not it
8 affected the brand, and it clearly affects the brand and
9 the fact that you have said such a small percentage do
10 that in effect makes my point.

11 Q. Can you just answer the question I am putting to you.
12 So you can come on to deal with where you go with all of
13 this, but I am just asking you a very narrow question
14 which is: for that proportion of customers, they're not
15 buying a product which has ceased to exist. They have
16 a product, they take home a product.

17 A. They have a product that is different to the product
18 that Ping wishes to sell.

19 Q. Well, that's a factual question which I think --

20 A. Is it?

21 Q. The question of what Ping wishes to sell is a factual
22 question, but --

23 A. Well, we know that's what they want to sell because they
24 keep telling us.

25 Q. Quite. Okay. Now, moving to section 4 of your report,

1 you comment on the consequences of allowing Ping's clubs
2 to be sold online.

3 A. Sorry, which pages?

4 Q. Sorry, section 4 of your report.

5 A. Section 4. Yes, got it. (Pause)

6 Q. So this is where you start your paragraph numbers,
7 beginning with 4. So you have a section saying "Comment
8 on online sales of Ping clubs".

9 A. Got it.

10 Q. What this section is all about is commenting on the
11 consequences of allowing Ping's clubs to be sold online,
12 in other words of lifting the ban. At paragraph 4.5 you
13 say that:

14 "If the experience element of custom fit products
15 were to be forcibly removed from the overall composition
16 of the product by the CMA's decision, it would be
17 catastrophic for the fundamental existence of that
18 product."

19 Now, I think we can agree that this wouldn't be true
20 in the case of those consumers who already buy Ping
21 clubs without a custom fitting.

22 A. True but, again, it goes back to the next sentence that
23 you haven't read, which says:

24 "Ping's brand proposition would be irreparably
25 damaged."

- 1 Q. Okay, but sticking with those customers, lifting the ban
2 on internet sales wouldn't affect them at all, would it,
3 because they would buy Ping clubs without a custom
4 fitting anyway?
- 5 A. Well, we don't know that, do we?
- 6 Q. Well, they currently buy Ping clubs without a custom
7 fitting, so as a matter of logic, one can see that if
8 the ban were lifted, that would make no difference.
- 9 A. But they might think, "Ah, I'm getting this thing
10 without the custom fitting, I'm getting a good deal
11 here", and then they go on and do something else later
12 on and buy a Titleist or something else later on. So
13 I take your point that it's hypothetically true, but it
14 could be equally they go on to something else.
- 15 Q. I'm not sure I understand that, but let's move on.
- 16 A. Do you want me to explain it?
- 17 Q. Please do, yes.
- 18 A. Right. So you go into a shop and you see that this
19 product is supposed to have custom fitting and it says
20 that this is a really good thing, and so this product
21 that comes out at the end is a fantastic product as
22 a consequence of that. And you say, "Actually I have
23 found a way of not doing this and having this product
24 anyway". When you find out later on that everybody's
25 doing that, you then go, "Well, actually, I might buy

1 something else". That's --

2 Q. But the ban is irrelevant to that, Professor Brady. So

3 you have a customer -- just stick with my example.

4 A. Go on.

5 Q. So there is a customer at the moment -- we have seen

6 a proportion of customers who do not value custom

7 fitting. They are customers that despite --

8 A. No, no, no, they didn't say they didn't value it. They

9 didn't pay for it, they tried to get round it.

10 Q. Lots of the times it's free so --

11 A. So when they --

12 Q. So there are customers -- and Mr Holt accepted this --

13 there is a category of customers who are unconvinced

14 about custom fitting -- you accept as a matter of logic

15 that there may be customers that are unconvinced,

16 despite everyone's best efforts to persuade, that custom

17 fitting is important. They just want to go in and

18 buy --

19 A. No, I don't accept that.

20 Q. You don't accept that?

21 A. I don't accept that they're unconvinced. I accept that

22 they choose not to do it. It may be on price, it may be

23 on a whole load of things it may be the fact that they

24 didn't want to bother with the time it takes because

25 these things take -- so they're not necessarily

1 unconvinced, but I agree with you that they do not
2 choose to buy it.

3 Q. Okay. So we can agree that. So there are a proportion
4 of customers that do not choose to have custom fittings.
5 Now, in relation to those customers, lifting the ban
6 should have no impact because the ban is there, Ping
7 says, to persuade more customers to have custom fitting.
8 Now, if in the factual, if in the real world, that
9 proportion don't have custom fitting, the ban ought not
10 change that. Can we agree that?

11 A. We can agree that.

12 Q. Thank you. Now, let's also consider this scenario. So
13 a customer has a custom fitting -- let's take a customer
14 who has a custom fitting and is given his or her
15 specifications; okay? So assume that that takes place.
16 They then use those specifications to buy the club that
17 they have been recommended online. So let's assume the
18 ban is lifted. Now, can we also agree that this
19 customer hasn't been deprived of any aspect of Ping's
20 product because they have had the custom fitting and
21 they have the clubs?

22 A. So they're going to buy online from somebody other than
23 Ping?

24 Q. No, so Ping distributes through its retailers -- as you
25 know, they don't sell directly. So let's assume that

1 a customer goes into a Ping retailer and has a full
2 custom fitting, as Ping wants them to do, and they're
3 then given their specifications at the end of the custom
4 fitting, but what they want to do is go away, not buy
5 the clubs immediately and shop around online and use
6 those precise specifications to get the club that fits
7 them online. Now --

8 A. With Ping or just generally?

9 Q. From a Ping retailer.

10 A. No, but generally, when you talked about shop around
11 online --

12 Q. Yes, I am now imagining that the ban doesn't exist. So
13 let's say that Ping retailers are able -- the ban has
14 been lifted, they're able to sell online. So the
15 consumer goes to retailer A to their bricks and mortar
16 store, they have a full custom fitting, they're given
17 their full specifications, they go away and then later
18 that evening they shop around to find a better price and
19 buy those clubs online from retailer B, those Ping
20 clubs, would you agree that that consumer has not been
21 deprived of any aspect of Ping's product?

22 A. Well they will be in due course because there is
23 constant fitting, as far as I understand it, after the
24 event.

25 Q. Professor Brady, I'm not asking you about a subsequent

1 purchase.

2 A. You asked me if they were disadvantageded and I said --

3 Q. No, I'm not.

4 A. You're not?

5 Q. I am asking you, in relation to that purchase --

6 A. Yes.

7 Q. -- have they been deprived of any aspect of Ping's
8 product?

9 A. Of Ping's product I would say they have still been
10 deprived because when they were doing the fitting, it
11 was assumed they were going to be carrying on that
12 relationship in subsequent fittings. It's like if you
13 go for a bespoke suit. If I go in for a bespoke suit
14 and they measure me up, they measure everything up and
15 they say "Lovely" and I go to another tailor and go
16 "There you go", I'm depriving myself of the relationship
17 with that tailor over a period of time who will bring me
18 back over and over again until I've got it just right.
19 And when I go out, by the way, and I go walking round
20 the street and I come back and say, "Actually it doesn't
21 fit that much", two weeks, three weeks, four months,
22 after the fitting, he still going to be my guy.

23 Q. But, Professor Brady, let's assume that the customer
24 just wants to buy one set of clubs so they don't want to
25 go back --

1 A. No.

2 Q. -- over and over again --

3 A. That's where I think -- sorry --

4 Q. Can I finish my question?

5 A. Good.

6 Q. So let's assume that the customer doesn't want to --

7 they're not interested in an ongoing relationship with

8 the local Ping retail store. They just want to go and

9 buy a set of Ping clubs. They go into shop A, they have

10 a full custom fitting, they have their specifications

11 and they go away and they buy online from shop B. Now,

12 going back to your components of the product, they have

13 the physical golf clubs, so tick, they have had the

14 service, that is the face-to-face interaction, tick, and

15 they have had the experience, the custom fitting --

16 I think you say that's the experience -- tick. So can

17 we agree that in respect of that purchase of golf clubs,

18 they haven't been deprived of any aspect of Ping's

19 product?

20 A. When you're looking at the product -- and I think this

21 is where we either agree to differ or we go down

22 a slightly different line -- when you look at the

23 product -- when I was looking at the brand implications and

24 when you look at the product as a component part of the

25 brand, what Ping wants to do is establish that

1 relationship, is work through that relationship and keep
2 that relationship. They don't want -- as far as
3 I understand, they would -- I mean, if you look at --
4 I think it's exhibit 4, they -- there's a statement in
5 exhibit 4 that they make in "Why do business with
6 Ping" which says, "While we are keen to grow the brand,
7 we are more keen to protect the brand", and so this
8 is -- "so if we allow the customer ..." -- and so
9 you're looking at this very much from the customer's
10 point of view. I am looking at it from the damage to
11 the brand point of view, which is what I was asked to
12 do.

13 Q. Why is it damage to the brand if a consumer doesn't have
14 an ongoing relationship with --

15 A. Because he goes away and tells his mates that he did so
16 and that damages the idea of the
17 whole relationship that Ping wish to build up.

18 Q. Can I just finish the question so that you understand my
19 question? So why does it damage the brand if a customer
20 chooses to buy Ping clubs from a different Ping
21 retailer? Now let's be careful clear about what I am
22 saying. Of course Ping want an ongoing relationship
23 between the Ping brand and a customer. I accept that.
24 Of course any brand would want a customer to remain
25 loyal to the brand. But I don't understand it to be

1 part of Ping's case that they wish customers to
2 necessarily have an ongoing relationship with any one of
3 their particular distributors.

4 A. I'm not arguing Ping's case. I am arguing -- I'm
5 defending what I have written down. That's what
6 I believe the relationship is between a brand and its
7 customers, and the brand is trying to say to the
8 customer -- it's when we look at a lot of the CMA's
9 points about promoting online sales and they talk about
10 promoting online sales. Ping, in my view -- I don't
11 know, but reading from what Ping -- all the documents
12 that Ping sent, what Ping want to do is they don't want
13 to promote custom fitting. They want to have a sort of
14 voluntary contract that -- it's absolute that it has to
15 be delivered as part of the overall brand proposition,
16 so --

17 Q. Can I just stop you there because I think what you're
18 talking about is loyalty to the brand.

19 A. Yes.

20 Q. But I am talking about something different. So let's
21 assume a customer who is loyal to the Ping brand --
22 okay? -- and let's assume that that customer goes in to
23 a shop, retailer A, has a custom fitting, takes away
24 their specifications and later that night shops online,
25 because we're assuming the ban has been lifted, and buys

1 from another Ping retailer, retailer B, the precise set
2 of clubs, now that doesn't imply any disloyalty to the
3 Ping brand. On the contrary, they're loyal to the Ping
4 brand, aren't they?

5 A. Yes, but you -- sorry, can we agree that but with
6 a slight caveat that when you said earlier on -- you
7 said they go shopping around. In that shopping-around
8 process they could actually pick up a Titleist or
9 a Callaway and they go, "Ah, actually I can use ...",
10 you know, which goes back to the free riding thing that
11 you mentioned earlier on, " ... I can use that to go to
12 Callaway or to somebody else and use that information".
13 So I was responding to your point about shopping around.
14 It seemed that what you were saying was they shop around
15 and they end up on the Ping.

16 Q. No, no, to be clear, I wasn't canvassing that at all.
17 So I'm sorry if I wasn't clear --

18 A. So "shop around" was ...?

19 Q. "Shop around" means shop around for Ping clubs at the
20 best price.

21 A. Okay.

22 Q. So can we agree that if a customer is in that position,
23 so they have gone into shop A, they have had all their
24 custom fit specifications, they take those
25 specifications away, they're convinced they want to buy

1 a Ping club, they're not looking at Titleist or anyone
2 else, they go back home, there is no ban, they shop
3 around online between Ping retailers and they buy a set
4 of Ping clubs, the set for which they have been custom
5 fit -- can we agree that that customer has not been
6 deprived of any of the three aspects of the Ping brand?

7 A. In that hypothetical case that the ban has been lifted,
8 I would tend to agree.

9 Q. Okay. So what you don't know, because you haven't been
10 asked to look at it, is whether lifting the ban would
11 lead to a significant increase in the proportion of Ping
12 customers who buy Ping clubs without a custom fitting.
13 That's correct, isn't it?

14 A. That's correct.

15 Q. Now, when you prepared this report you were provided
16 with the materials, I think, which you have listed at
17 section 8, so that's page 24. We see those materials
18 listed there. Do you have that?

19 A. Yes.

20 Q. That's largely -- so you see the decision -- you have
21 the CMA decision, the CMA alternatives paper and then
22 there is a variety of Ping documents, presentations,
23 strategy document and I think two articles, press
24 articles. Now, presumably if you had been provided with
25 any further documents, you would have listed them

1 alongside these in section 8?

2 A. Yes, I think it's slightly misleading when it says
3 "provided with". I mean, I asked for a variety of
4 things which said, you know, "This is what it seems to
5 me would help me in answering the question", so if they
6 weren't provided to me, I said, "I need to see this,
7 I need to see that", and they provided it.

8 Q. I understand.

9 A. Clearly I also looked at -- as you can see from the
10 references, I also looked at a huge amount of other
11 research, but they were the actual documents that
12 I asked for specifically.

13 Q. Okay. That's helpful. Thank you. So we can take it
14 from this that you didn't read or you didn't ask for or
15 you weren't provided with material relating to Ping's
16 competitors?

17 A. I looked -- I did interrogate Ping's competitor
18 websites, you know, as part of my research. I also
19 looked at Datatech -- MyGolfSpy, a whole load
20 of sites, but very much -- I mean, to be honest, it was
21 a time constraint. So my research tended to be very
22 much meta research, using other people's research and
23 the data that -- but, you know, they were peer-reviewed.
24 But in terms of personal -- gathering personal evidence,
25 I also talked to -- and notwithstanding it's anecdotal,

1 but I also talked to -- I used to be a professional
2 footballer and I'm the only one who never played golf.

3 Q. Apart from me.

4 A. Did you used to be a professional footballer?

5 Q. Certainly not, but I have never played golf.

6 A. I read your sports law chapter, very good by the way.
7 But the point is most professional footballers play
8 golf. So a lot of my friends are low-handicap golf
9 players, which is the market, so I used that evidence as
10 well to draw my conclusions, you know, from a brand
11 perspective.

12 Q. Okay. Thank you. That's also very helpful,
13 Professor Brady.

14 I want you to turn now to section 4.3 of your
15 report, so paragraph 4.3. What you say here -- and I am
16 looking at -- do you have that paragraph?

17 A. I do, yes.

18 Q. Looking at the final sentence, you say:

19 "As such, and crucially, custom fitting is
20 an integral and inseparable part of Ping's custom fit
21 products, which is fundamentally different from Ping's
22 competitors in their sale of mere 'hardware'."

23 You make a similar point at paragraph 3.33, where
24 you say:

25 "In this case, Ping has differentiated its products

1 from those of other producers by offering a unique
2 experience, in the form of custom fitting, which provides
3 the consumer with enhanced performance on the golf
4 course."

5 Now --

6 A. Sorry, do you mind if I clarify that on 3.33?

7 Q. Yes.

8 A. Where I say "in the form of custom fitting", it was
9 a bit loose wording on my part. It's more "of which
10 custom fitting is an integral component", which
11 I actually carry through throughout the report into --
12 by use of the term "holistic" in terms of the
13 experience. That's actually -- I know that was picked
14 up by the CMA and quite rightly so.

15 Q. Thank you for that clarification. Now, in reaching this
16 conclusion, you had regard to the materials in part 8
17 that we have just looked at and also the independent
18 research --

19 A. Yes.

20 Q. -- and you looked at some competitors' websites, but you
21 weren't given -- I think we have established this
22 already that you weren't given strategy documents of
23 those competitors --

24 A. No.

25 Q. -- in the same way that you had no access to figures?

1 A. I did manage to access Titleist's brand proposition --

2 Q. Right.

3 A. -- and also some Callaway stuff that I could refer to if
4 you want me to, but I didn't have the documents to which
5 you refer.

6 Q. Okay. You didn't have evidence from retailers about
7 their perception of the Ping brand compared to the
8 competitors?

9 A. Not -- only from Datatech and the other open source --

10 Q. Right. Okay.

11 A. -- but I would assume that they're reasonably accurate.

12 Q. So the CMA, of course -- so if we can turn back to the
13 decision -- and this is paragraph 3.16, which I think is
14 in -- maybe not.

15 So 3.23 I think is the relevant part of the
16 decision. So it's 3.16 and 3.23. So 3.16 is on
17 page 19. The CMA's finding, having looked, for example,
18 at Golf Datatech, but also, of course, at all the
19 sources that the CMA had available, is that the leading
20 manufacturers across all main categories of clubs also
21 supply custom fit clubs which allow a golfer to specify
22 variables. Then we see at 3.23, which is a few pages on
23 at 22, that:

24 "Although the main manufacturers may recommend
25 a particular brand-specific custom fitting process, in

1 practice the same fitting process and equipment ... is used
2 regardless of the brand being fitted and a consumer may
3 try several brands of golf club simultaneously to
4 ascertain which suits them best."

5 Now, you haven't any real basis, have you, for
6 reaching a different conclusion about that specific
7 point?

8 A. About -- not that specific one, but about the tangential
9 point which refers to the brand. When you look at
10 Ping's brand proposition, customisation is at the actual
11 centre of that brand proposition. If you look at
12 Titleist's brand proposition, for example, it doesn't
13 mention custom fitting at all. If you look at Callaway,
14 it doesn't mention custom fitting at all. In fact
15 Callaway had a whole marketing campaign that says that
16 they were going for the fashion market with them. So in
17 terms of the brand, in terms of compromising the brand,
18 taking away the notion of custom fitting is difficult.
19 But I accept your point about these figures because
20 obviously I can't deny them, but I don't think it
21 compromises in any way the conclusions I have come to
22 about brand, about brand damage.

23 Q. But in reaching your conclusion about Ping's competitor
24 brands, you haven't had access to all the full
25 information you would need to look at, so you haven't

1 seen their internal strategy documents, for example?

2 A. I have seen -- I have seen Titleist's internal brand
3 proposition and it doesn't mention customisation at all.

4 Q. Right, but you haven't methodically done that for each
5 of Ping's main competitors?

6 A. No.

7 Q. You haven't Mizuno's, for example?

8 A. I haven't, no. Just for the record, Callaway and
9 Titleist were the only ones I really interrogated
10 closely.

11 Q. Okay. Thank you. So where you say, just going back to
12 your report -- where you describe Ping's competitors in
13 their sale of mere hardware -- so that's 4.3 -- so you
14 say what they're selling is mere hardware --

15 A. Yes.

16 Q. -- would you now like to qualify that in light of the
17 fact that you haven't, for example, looked at Mizuno's
18 documents?

19 A. In relation to the ones I haven't looked at, I'm quite
20 happy to concede that they may well do something else.

21 Q. Thank you. Now, at paragraph 5.5 you talk about the
22 CMA's suggestion that Ping could require online
23 retailers to make all of its custom fitting options
24 available online via drop-down boxes.

25 A. From the decision --

1 Q. From the decision. So you will recall that one of the
2 things the CMA said is that one thing that Ping could do
3 that's less restrictive than a ban is to offer all of
4 its custom options online and have them in a series of
5 drop-down boxes. So you have said here that you would
6 point out that there is a body of evidence that
7 indicates the use of drop-down boxes is problematic and
8 should therefore only be used sparingly. When we looked
9 at the articles that you footnote -- so you give
10 examples of this evidence, and when we looked at those
11 examples, both of these, it's right to say, isn't it,
12 concern the methodological problems that arise with
13 online surveys; that's what both concern?

14 A. Correct.

15 Q. One of the problems that is identified by the authors of
16 those papers is that sometimes respondents to surveys
17 don't know what to do with drop-down boxes --

18 A. Correct.

19 Q. -- so it's suggested that they are used sparingly with
20 appropriate instructions.

21 A. Correct.

22 Q. That's the gist of those articles.

23 A. Correct.

24 Q. So you would accept, wouldn't you, that the context is
25 different in this way: that survey-producers have to

1 overcome consumer reluctance to complete surveys and so
2 that's the context of those articles, whereas a consumer
3 who is motivated to buy might be less put off by
4 drop-down boxes?

5 A. I would -- yes, I think that's reasonable to concede,
6 but what I also said here was that this was part of
7 a series of research --

8 Q. Yes.

9 A. -- and -- you know, for example, I mean, I heard quoted
10 by Mr Holt the Lord Currie speech and I think that's the
11 key. I would agree with you that there's something in
12 kind there, something -- in a sense of where you've
13 identified the questionnaire, I get your point there.
14 But in terms of the drop-down boxes, we also know that
15 looking at -- for example terms and conditions -- since the
16 report there has been a very short piece of research in
17 which they actually bought in, I think it was, somewhere
18 between one and 200 consumers into a shopping mall asked
19 them if they wanted to use free Wi-Fi. The shoppers
20 said "Yes". They said, "By the way, you need to sign
21 the terms", and in the terms and conditions were things
22 like you had to give up your first born for sacrifice
23 and a whole load of other stuff and 100 per cent of them
24 signed it. So the point about drop-down boxes is, if
25 you're targeted on what you want to do, you're going to

1 ignore drop-down boxes and, again, it goes back to the
2 brand. If you look on the Titleist site, the Callaway
3 site, notwithstanding Mizuno and all the others -- if
4 you look on those two particular sites, there is
5 a drop-down box that just says at the top of it
6 "Fitting", and actually here is an organisation, Ping,
7 that says "You must custom build, you must custom
8 engineer, you must custom fit". There is a difference.
9 There is a difference in brand proposition there
10 clearly. Would you accept that?

11 Q. Well, I'm not here to answer the questions.

12 A. No, but you keep asking me whether I would accept this
13 and that.

14 Q. That's the traditional role of the barrister asking the
15 questions.

16 A. Would you accept that?

17 Q. So, Professor Brady, you talk about terms and conditions
18 and Mr Currie's speech, but what the CMA is looking at,
19 I think we can agree, is something a bit different at
20 least, isn't it, because we're not talking about
21 clicking through to terms and conditions --

22 A. I have agreed that, but, I mean, incidentally -- I mean
23 Lord Currie is head of Ofcom and chairman of the CMA.
24 I worked for Lord Currie for four or five years. If he's
25 gone into that sort of detail -- he doesn't open his

1 mouth without checking out all the data, so you can
2 understand there is a lot of data behind Lord Currie's
3 conversation there.

4 Q. Now, the other point about those articles, of course, is
5 that they're quite old now, so they date from 2001 and
6 2004. So you would accept as a general proposition that
7 people have become a bit more internet-savvy in the
8 interim?

9 A. I would accept that, notwithstanding my wife.

10 Q. Are you aware that there are golf retailers who do sell
11 custom fit clubs using those types of drop-down boxes?

12 A. Yes.

13 Q. So we can infer from that, can't we, that at least they
14 consider that that's an effective way to sell, otherwise
15 they wouldn't make the necessary investment?

16 A. I would -- well, you can imply. I'll infer that what
17 they decided is that their sales are more important than
18 an aspect of a brand. So Ping have made a different
19 decision. So I would accept your implication.

20 Q. Okay.

21 That's all I had to ask you, Professor Brady. Thank
22 you very much.

23 A. No, you're welcome.

24 MS DEMETRIOU: You kept us awake this afternoon.

25 A. Come lecture on the sport law chapter. I will see you.

1 Re-examination by MR O'DONOGHUE

2 MR O'DONOGHUE: Sir, I have only one short question.

3 Mr Brady, if we can go to the exhibit to your
4 report. In my tab it's tab E. You seem to have
5 a magical bundle that's different.

6 A. I've got a magical person here.

7 The one that's got a welcome mat? No?

8 Q. Yes.

9 A. Yes.

10 Q. It's tab E, which is an internal Ping presentation. If
11 I can ask you to turn to pages 12 and 13, please.

12 A. Yes.

13 Q. You will see on slide 13 you have the philosophies and
14 you have the internet policy and dynamic face-to-face
15 fitting.

16 A. Yes.

17 Q. What do you understand from those bullets in terms of
18 Ping's branding?

19 A. I think they -- I think they're right at the heart of
20 the Ping brand. I have to say that another part of the
21 evidence was talking to the Ping sort of senior
22 management team and the owners and getting
23 a confirmation, if you like, of what they were saying
24 was actually what they were doing and one of the -- the
25 biggest key to the compromise of any brand is for people

1 to see something different to what people are saying.
2 So, I mean, if you look at United Airlines, (inaudible)
3 "The Friendly Skies" and there is some guy being dragged
4 out and punched, you know -- so if people see that
5 you're not doing what you say you're going to do, that
6 definitely compromises the brand. One thing I did find
7 genuinely and obviously -- believe me or not -- but I
8 genuinely found that these people actually really lived
9 this brand. That's why I reference that exhibit 4 with
10 the brand -- protecting the brand in there.

11 There's a really -- can I -- Mr Chairman, can I tell
12 a very quick anecdote or not?

13 THE CHAIRMAN: Provided it's over by 4.30.

14 A. It will be over by 4.25. Some years ago I interviewed
15 Steve Ridgway, who was the CEO of Virgin Atlantic and
16 Brendan O'Neill who was the CEO of ICI at the time. ICI
17 were going through a rocky time. One of the questions I
18 ask people I interview for research is "What's your
19 job?" I say to them, "What's your job?", and people
20 will say, "Well, I'm director of ..."; "No, no, no.
21 What's your job? What do you actually do?", and Brendan
22 O'Neill, the CEO of ICI, said, "I increase shareholder
23 value. That's my job". Steve Ridgway of
24 Virgin Atlantic said "I protect the brand". 12 months
25 later Brendan O'Neill was gone, ICI are in the toilet

1 and Virgin Atlantic are still there with a very strong
2 brand. It doesn't mean they're a great airline, but
3 their brand is very strong. I was brought in as a brand
4 expert, you know. That to me -- the way in which they
5 sell and they talk about protecting the brand -- when
6 somebody talks about protecting the brand, it's a very
7 powerful signal to somebody like myself. It might not
8 be to anyone else, but it is to somebody like myself.

9 MR O'DONOGHUE: Thank you.

10 THE CHAIRMAN: We have no questions. Thank you very much.

11 A. You're welcome.

12 MR O'DONOGHUE: Sir, can Dr Wood be released for Monday
13 morning?

14 THE CHAIRMAN: Yes, of course.

15 Professor Brady, you are released as well.

16 A. Thank you.

17 THE CHAIRMAN: Thank you very much.

18 (4.25 pm)

19 (The hearing adjourned until 10.30 am on Monday,

20 14 May 2018)

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