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

Transcript of Epiq Europe Limited
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400
Email: casemanagers@epiqglobal.com
(Official Shorthand Writers to the Court)

Wednesday, 23 May 2018

(10.30 am)

MR O'DONOGHUE: Mr Chairman, members of the Tribunal, good morning.

THE CHAIRMAN: Good morning.

MR O'DONOGHUE: It is tempting to call this the reprise, but I think we're not even there yet. I hope to be as brisk as I can today. The Tribunal has had the benefit of lengthy skeletons, lengthy closings, and to a good extent what I wish to do today is deal with the CMA's points in closings and obviously assist the Tribunal in questions to the extent that the Tribunal has questions.

So what I am going to do is broadly follow the template of our closings and in that context pick up on the CMA's points and deal with questions as they arise.

THE CHAIRMAN: Thank you and thank you both for the closing submissions. I hope they didn't wreck too many people's weekend.

MR O'DONOGHUE: I'd be lying if I said that wasn't true. We work quick, but not that quick.

THE CHAIRMAN: The Tribunal does have one question. It's actually for both parties and perhaps more particularly for the CMA. It concerns the relationship between Articles 101(1) and 101(3). The judgment in Pierre Fabre held that a ban, an internet ban, could

amount to a restriction by object which is not objectively justified, but yet was capable of satisfying the conditions in Article 101(3). That would appear to suggest that the test for objective justification cannot be the same as the test under the criteria under 101(3). It must be a more stringent or more limited test.

One possibility which neither party has raised but we would like you to consider is that the test of objective justification as referred to in paragraph 47 of Pierre Fabre is equivalent to or akin to the test of objective necessity as is described in paragraphs 107 to 109 of the Metropole case, which I don't believe is in the bundle of authorities, but we will provide for you copies of that case.

I'm not obviously suggesting that you deal with that point now, but it would be helpful if the parties could address us on that issue at some point.

MR O'DONOGHUE: Thank you. We have that well in mind. It may be more convenient for me to set out my position after the CMA has set out its position, but we will give that careful consideration.

Closing submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, before we get into the reeds or trenches, there are a few preliminary points that Ping wishes to raise. We would first invite the Tribunal to

take a step back in this case and think about the wider context.

It is clearly not in question in this case that the love of the game of golf runs deep in Ping's veins. For more than 50 years Ping has competed in a unique way by focusing on getting customers custom fit. It is undisputed that there are significant benefits to being custom fit. It optimises the equipment and gives the consumer the best chance of playing well and therefore the best chance of sticking with the game. This is a good thing for consumers and a good thing for the game of golf.

Now, those of us who have the misfortune to attempt to play golf will know the euphoric feeling of being in a four-ball, playing particularly well, and it giving you a lift for the entire week and a bit of one-upmanship on your mates.

Mr Chairman, you put the point in an interesting way, which is that it makes people happy, and it does. There is great happiness in playing better and great unhappiness in playing badly.

THE CHAIRMAN: Professor Beath knows about that. I have never played golf so I'm not in a position to empathise.

PROFESSOR BEATH: I would confirm your view.

MR O'DONOGHUE: My strong advice --

PROFESSOR BEATH: I have less of a strong view on whether playing badly or well is due to my clubs.

MR O'DONOGHUE: There is an old adage that a bad workman always blames his tools and I think there is some truth in that.

Now, a critical point is that Ping's five-decade-long focus on custom fitting, it's not some gimmick come up with the management consultants in the last couple of years. It goes back to the founding father of the company, Karsten Solheim, who is John Solheim's father. One of the most privileged and humbling experiences for me as an advocate has been listening to John Solheim, discussing with him the company's philosophy and commitment and trying to do the right thing and that he values these things above everything else.

Now, we have a couple of examples of this in the annexes to Professor Brady's report. I would like to show you these briefly because in my submission they are extremely striking. This is in bundle C tab 2, please.

If we can start at tab D, please, there is a decorative slide entitled, "Why do business with Ping?"

If we go a couple of pages in, we see a picture obviously of Karsten Solheim and his son, John Solheim,

and his son.

Then if we go to the fourth slide, you will see a number of references to custom, " ... based on a product-led philosophy and driven by custom fitting".

Then two pages on there is a picture of John Solheim, and the last picture of John Solheim, on the right it says:

"We aim to be the number one brand in the market, but the long-term protection and success of the Ping brand is more important."

Then about three slides on you will see a slide "Custom fitting strategy" and about four slides after that you will see something headed "Business strategy mission statement" and there are four boxes. The third box:

"We want to drive consumers in-store to be custom fitted."

That really is a critical point.

Then if we go to the next tab, E, we have a 2013 September sales meeting. In my submission what is very striking about this document -- so this is a meeting of the sales team. Then on pages 12 and 13 it says:

"We will stay true to the principles we have held for 53 years. This means: holding true to the things

that define the brand [and] changing things so we are current and can compete."

Then the next page, "Sales philosophy", so a sales philosophy. So these are the defining characteristics of the brand and one of them is the internet policy which goes hand in glove with the dynamic face-to-face fitting policy.

So, in my submission, it is quite extraordinary that in a sales meeting the internet policy is one of the five most important things that define the company.

Now, when e-commerce came of age, Ping took a decision that selling online was not compatible with the custom fitting philosophy and hence the internet policy and it has not been suggested that the internet policy has any other purpose, apart from supporting in-store custom fitting.

I do find myself in the unique position, in more than 20 years of competition practice, that there hasn't been a single document in the case that required awkward explanation from me. There isn't a whiff of a suggestion that the intention of Ping in respect of the internet policy is anything other than supporting custom fitting. That is important.

Now, all of this leads, in my submission, to an important point. If Ping's internet policy is based

only on the desire to maximise custom fitting in-store, it is obvious in my submission that if there were other as or more effective ways to achieve this, then Ping would already be employing them. To put this another way, the internet policy represents Ping's clearly good faith and best efforts to maximise custom fitting based on 50 years of experience in this area of being devoted to custom fitting.

Now, with the greatest of respect, the CMA does not know the market, it doesn't know the game of golf and -- I hesitate to say this -- it seems more interested in this case as a test case than as a test bed for improving the game of golf and improving competition.

The CMA is not an expert in golf and custom fitting and we do make the point that, to the extent there is a question of margin of appreciation in this case, it is one that firmly points in favour of Ping and not the CMA. The CMA is an expert in competition law. It is not an expert in golf.

When one draws all this together, the answer to this case, in our submission, is quite an obvious one. Ping for 50 years has had a unique way of competing that has dramatically increased competition in the form of choice and quality. Custom fitting is the ultimate expression of competition based on quality. Ping stands apart from

every other manufacturer in this regard and the decision effectively wishes to remove this unique and important way of competing and effectively wants Ping to be like its rivals, who either do not care about custom fitting or consider it simply an adjunct to a business that is just as much about volume.

Ping's short message to the Tribunal today is that it should be permitted and trusted to compete in the most effective way as it has done for the last 50 years.

The second point I wish to make by way of introduction is that the Tribunal, of course, has had hundreds and hundreds of pages of written submissions in evidence, more than a dozen factual and expert witnesses, but the essence of Ping's case is very, very simple and, in my submission, very intuitive.

What the internet policy achieves at its core is it stops consumers buying online and therefore drives the consumer who has even a remote interest in purchasing a Ping club to the store for a custom fitting.

The internet policy leads to an iterative process of persuasion. In the first instance you cannot buy online and therefore can book a free custom fitting online. There is a second phase whereby you call a telephone number and, again, the policies will be explained to you at that stage and a custom fitting can be arranged and,

at least in the case of American Golf, there is an obstructive manual work-around of a telephone order which Mr Mahon's evidence shows leads to appreciably lower sales than online sales by other manufacturers. So that is a starting point.

Now, if the internet policy is removed and consumers can, for the first time, buy Ping online, in our submission it is obvious and common sense that that will lead to far less consumers going to the stores to be custom fit, it will lead to a substantial number of consumers guessing their specifications, and even in the case where customers have specifications, significant quantities of sales will shift from the physical shops to the online environment.

It is this dynamic aspect of the process that is important. If more and more buy online, there will be less and less incentive for bricks and mortar stores to custom fit, custom fit rates will drop and the current deep and wide retailer network that Ping has built up with considerable care and attention over the last several years will drop.

Now, the CMA's only real answer to that point is to say that online sales would be permitted, but Ping could impose certain measures to require online retailers to promote custom fitting. It is striking, in our

submission, just how vague the CMA has been as to what exactly these retailers will be required to do. As we understand it, they will be required to have a bricks and mortar outlet and will be required to offer a full range of custom fit drop-boxes online, but in our submission it is obvious that if online purchasing is permitted, that a series of warm and cuddly messages about promoting custom fitting will be nothing near as effective as the internet policy.

Now, during the trial Professor Beath raised an entirely fair question, which is: in this thought experiment around a counterfactual world, how is the Tribunal to begin to get a handle on this? In my submission in a sense we already have a natural experiment which makes that point good because it is clear that high-volume retailers like Mr Patani, Mr Lines and the Complainant are interested in high-volume sales and, save for the Complainant, we certainly do not criticise them for that. They're entitled to make a living in the way that they choose fit.

The promotion of custom fitting will manifestly stand in the way of their commitment to high-volume sales and it would obviously be very easy for them to pay lip service to promoting custom fitting and equally

very hard for Ping as a contractual matter to control this.

You have seen the screenshots in our written closings from Mr Patani's website, where you have the red bar for specifications; the green bar for instant gratification of so-called online custom fitting. His consumers are being shunted towards an environment of buying instantly without specifications. You have seen the evidence from Mr Lines that custom fitting is not his responsibility [redacted]

We put the point in very simple terms: if your objective is as Ping's is to maximise quality, a retailer whose objective is, to maximise quantity is not going to be a good solution for you. It does bear emphasis that the only reason these retailers have come forward to give evidence in this case is they are committed to high-volume sales. We say that that is the long and short of this case and that is the end of the CMA's alternative measures. It is manifest, in our submission, that steps towards promotion will be nothing near as effective as the internet policy.

The third point we wish to raise, which I will have to come back to, is in the CMA's written closings there has been a significant change in their case. Just to give you a few examples: the case as originally run and set out in the decision was that Ping is no different to the other manufacturers in promoting custom fitting. The case as now set out in closings is that Ping is so different to the other manufacturers that it is these differences that explain the difference in custom fit rates and not the internet policy.

Now, we will come back to this, but this is not something trailed in the Decision, it is not something which has been evidenced, it is not something which really has been put to the witnesses and in particular we emphasise that it is fundamentally unfair to advance a case that Ping is no different and for Ping to put in evidence on the basis of that Decision and that finding and then to close the case on the basis that Ping is so different that that is the explanation for the difference in custom fitting.

That is one significant change. The second significant change is that there has been a clear concession on suitability of the internet policy in the decision and that concession is not even mentioned in the CMA's closings.

Now, I will come back to this, but just to give you the quotations from the Decision. The Decision says that the internet policy:

"provides account-holders with an opportunity to promote custom fitting in line with their contractual obligation to do so."

It also says that the Internet Policy is a suitable means to promote custom fitting and it is now suggested the internet policy is not a cause at all and that it is overwhelmingly likely that other causes explain the differences. That is another important change.

The third change is there has been a volte-face on the importance of the internet. The CMA closings at paragraph 214 say that:

"Although the CMA found that there was demand for online purchase of golf clubs, that demand is reasonably limited."

The Decision by contrast at paragraph 4.69 says the opposite, that the CMA finds that there is significant consumer demand to buy custom fit golf clubs online.

It is difficult to avoid the impression that the CMA's counsel has come to this case and realised, either shortly before or during trial, that the CMA has run the wrong case and is now effectively trying to rewrite the Decision. We say they're not entitled to do that. They

must defend the Decision as rendered and they are not entitled to embroider it or rewrite it before the Tribunal.

Two final points on the Tribunal's role: first of all an obvious point, but Ping is accused of a quasi-criminal offence and that has a number of consequences for these proceedings. Ping is stigmatised by the imposition of such a sanction in the form of fines.

I have addressed you in detail on the importance of integrity and ethos to Ping. There is a cottage industry, as the Tribunal will be well aware, of follow-on damages actions and we say in those circumstances the Tribunal must be convinced and must be sure that the infringement is made out.

The second point -- again an obvious one but it bears repetition -- this is an appeal on the merits. It is not a judicial review of the reasonableness of a public authority's decision. In contrast to, say, a merger appeal, which is a judicial review, there are a series of options open to Tribunal in the merits appeal which would not be open to the Tribunal in a judicial review.

Now, the starting point is the Tribunal should not ask itself whether the CMA has acted irrationally or

failed to take into account a relevant consideration or otherwise acted reasonably. Instead, the Tribunal is entitled to make and should make its own findings of primary fact and in particular, where there is live evidence before the Tribunal, it must decide whether the CMA has made a factual error of assessment. We emphasise the obvious point that a fact is a fact and not a matter of appreciation or discretion.

The second feature of an appeal on the merits is the Tribunal is entitled to substitute its view of the evaluation of the facts for those of the decision-maker, the CMA.

The third point, which is a truism of all litigation, the Tribunal must decide the case on the basis of the evidence as presented and not on any other basis.

Finally, the CMA's reasoning and approach should be subject to the familiar test of profound and rigorous scrutiny.

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

On the law, we have two points to make. I was accused in openings by Ms Demetriou of having an elaborate legal argument and I think it wasn't exactly a compliment.

Now, what we have done in our closings is we have

a flow chart in Annex 2 where we have tried to simplify things.

Now, we may need to come back to this in the context of the Metropole decision following the Tribunal's question, but just to make it clear in simple terms where Ping are coming from. So we say there are a series of discrete questions and, in the context of selective distribution, question 1 is: does the agreement or clause fall entirely outside 101(1), and that is the Metro test.

Now, we do accept that if a company is arguing that its system should fall outside the scope of 101(1) entirely, then it is incumbent on the firm to show that and in that context a version of proportionality is one of the Metro criteria, so there is some role for a type of proportionality analysis there.

Now if, by contrast, that question isn't in issue and the only question is object, then that is question 2, that is the Cartes Bancaires test and at that stage proportionality is completely and utterly irrelevant.

MR DORAN: Could I just ask you a question, Mr O'Donoghue? The way you have characterised this here, does that mean that there is no specific competition test in A, B, C, D that you list here, so you're judging if it falls in or

out of Article 101(1) without applying -- and I assume when you say "SDS" you mean the entire system, the constitution of the system and the sales of product through the system?

MR O'DONOGHUE: Sir, yes.

MR DORAN: But there is no specific competition test in this characterisation.

MR O'DONOGHUE: Well, sir, I think it's probably a bit more nuanced than that because, of course, the Metro criteria in a nutshell are that if you impose qualitative criteria in a non-discriminatory manner, that is deemed to be essentially a compliant selective distribution system. The logic of that, I think, is a type of competition assessment, that selective distribution with those features applied in a non-discriminatory manner is more likely to generate quality benefits than one, say, based on quantitative criteria.

So I think it is implicit in the objective criteria A, B, qualitative criteria and non-discrimination. That is a type of competition assessment. But it is done at more of a global level I think is the point; whereas, when one gets to question to an object, that is clearly a pure competition assessment and requires a proper consideration of the factual context, the economic context, the legal context

and so on and so forth.

So I think, sir, in answer to your question, there is certainly a difference between the two questions, but I think there is a degree of competition assessment built into question 1, but it is probably fair to say it is more of a light touch at that stage.

MR DORAN: I'd always read Metro and L'Oreal as dealing with the constitution of the system and not so much the Ts and Cs, for want of a better word, of the products which flow through them. Clearly push comes to shove in Pierre Fabre or could be seen as coming to shove in Pierre Fabre, which appears to combine the two, but it just strikes me that on this analysis one doesn't actually have an explicit competition test applying to either of those two things, the constitution, which I can understand, of the selective distribution system but nor, if SDS includes the whole package, so to speak -- neither the goods or services that flow through it.

MR O'DONOGHUE: Sir, I think it is a bit of both because the selective distribution system will be a collection of Ts and Cs and other features and the way the Metro criteria operate is that, if the system is structured in a certain way and the criteria are limited in a certain way, it is presumed that that system is so competitively

benign or perhaps even positive that it falls outside 101(1) completely. So to that extent we say that where these features are present, there is a competition assessment in the sense that it is considered on a global basis that the features of the system compliant with Metro do result in a system that is positive for competition; in other words, it introduces a form of quality-based competition that is justified in terms of the features of that system.

So we do say that it is a type of competition assessment.

MR DORAN: So a pricing issue or tacit agreement that is -- would be somehow swept up in these four, you think?

MR O'DONOGHUE: Well, sir, no. I think it has always --

MR DORAN: So it's price maintenance or something like that?

MR O'DONOGHUE: Sir, no. I think that would be something which would be carved out. It is clear from Metro itself that if the application of the system leads to other features such as retail price maintenance, they are not swept up in Metro. Metro in a sense is a sort of structural test that if you have a certain structure, certain types of product and you have qualitative criteria in place, that is deemed to be competitively benign or even positive, but it certainly doesn't carve out each and every other feature or subsequent conduct

by the parties to the selective distribution system.

MR DORAN: So you could fall outside 101(1) on structure but fall in again on terms and conditions?

MR O'DONOGHUE: Or other conduct, yes.

MR DORAN: I see, because here you're falling in, if I have it right. The analysis here is that Ping may not satisfy those, but falls into Cartes Bancaires. So the answer is: no, it doesn't satisfy, so falls into Cartes Bancaires.

MR O'DONOGHUE: Well, the question we say in these proceedings is simply question 2.

MR DORAN: Yes, because you don't satisfy, you don't fall out.

MR O'DONOGHUE: Sir, I think we set this out -- it's footnote 168 of the decision which we set out in our closing. So there is a finding that the Ping system is not an issue and that the only thing which is in issue is --

MR DORAN: No, I fully take that point and I realise this. I was just trying to -- perhaps too vigorously -- test the edges of this -- because you fall inside. You fail the test that you set up here and therefore fall into 101(1). If you succeed on the test, it would mean that the competition analysis that you say could apply to the terms and conditions in any event, retail price

maintenance or whatever, would somehow be dealt with in A to D or could drop into Cartes Bancaires even if you have satisfied the test.

MR O'DONOGHUE: Sir, I think we're putting it slightly differently. What we're saying is that question 1 is not an issue in these proceedings and that the only question is question 2.

MR DORAN: That's fine.

MR O'DONOGHUE: Just to complete the analysis, so we do say in question 1 that there is a version of proportionality which is part of the analysis. We say very clearly in question 2 that proportionality has nothing to do with the analysis. We accept that if there is a question of exemption, at that stage proportionality is one of the four conditions. Essentially it's the third condition. So there are essentially two roles for proportionality. Our essential point is that, when one is dealing with question 2, that is not a proportionality assessment at all.

I think perhaps the most convenient way is to deal with the cases very quickly, just to make good this point.

THE CHAIRMAN: Can I just make a fairly obvious observation about the flow diagram? It's the conspicuous absence of any reference to Pierre Fabre and, as I understand it,

your position on Pierre Fabre is that that case has no application to this case because it was premised on an infringement in support of a sham basically, as opposed to an infringement which had -- a restriction which had a legitimate objective, which is what you say this case is. Is that a -- I mean, it is a fairly broad summary.

MR O'DONOGHUE: That's certainly one of the points we make, but it's not the only point. Let me run through the cases. We say that, properly understood, Pierre Fabre is not inconsistent with any of this in any way. I will take the Tribunal to the analysis. So there is no Pierre Fabre qualification to this flow chart. We say that properly understood it is entirely consistent with what we set out in the flow chart. But we do make the factual point that the premise of Pierre Fabre, the ban and being a sham, is a very, very important factual component of that case and is a distinguishing feature in any event, but we do have other points. We take the analysis in Pierre Fabre on its own terms.

Sir, I will quickly go through the case. If we can start with paragraph 52 of our closings.

So we have set out there a number of formulations from Cartes Bancaires as to what is the inherent nature of object. The Tribunal will be familiar with these,

so it should be "plain that the object is to restrict competion ...", the effect should be "sufficiently deleterious" and only conduct "whose harmful nature is ... easily identifiable" can be object and if it has ambivalent effects it cannot be object.

So, again, object in a sense, it's a bit like an elephant. We know it when we see it and it's something that is clear and obvious.

Now, if we then go to Cartes Bancaires, which is in Authorities 3 and it's tab 82. If we go to the court's judgment, starting at paragraph 49. We saw this in opening so I can take it very quickly. So at 49 you see the point about " ... reveal a sufficient degree of harm to competition"; then at 50, " ... conduct that by its very nature ...."; 51, " ... so likely to have negative effects ..." and so on.

Then at 53, the critical test, content, objectives, economic and legal context, nature of the goods and services affected, and the rear conditions of the functioning and structure of the market and markets in question.

Then at 57, the essential finding of the Court of Justice was that the General Court had erred in relation to object because it did not refer to the conditions set out at paragraph 53 above.

So pausing there, on traditional object principles there isn't a hint of a suggestion that proportionality or objective justification plays any part in the analysis. That is the starting point.

If we now go to Coty which I think deals in part with Mr Doran's question. That's in tab 89 of Authorities 4. If we start with the court's judgment at paragraph 25. So it's really the first two questions referred to the Court of Justice that interest us. The first question was a very simple question, essentially whether luxury goods could in principle justify a selective distribution system.

You then see over the page at paragraph 30 -- so essentially the first question arose out of a confusion created by paragraph 46 of Pierre Fabre as to whether luxury goods could justify selective distribution. The Court of Justice said in clear terms in Coty, at paragraph 35, that Pierre Fabre did not establish a statement of principle in relation to luxury goods and selective distribution, so, in other words, paragraph 46 of Pierre Fabre was essentially a finding on its own facts and was not setting out a point of principle. So that's the first question.

Now, the second question essentially was all about the Metro criteria. We can pick this up first of all in

the opinion of Advocate General Wahl at paragraph 96. You will see over 94 -- so he's considering the second question and then at 95 he says:

"The question, which is closely linked to the first question, concerns the compatibility with Article 101(1)TFEU of the particular clause in the selective distribution system that is specifically called in question in the main proceedings."

Then at 96 he makes clear -- well, it's really 96 to 100 he makes clear that that is all about Metro.

If we then go back to the court judgment at paragraph 40 -- so they make the same point. They talk about the criteria mentioned in paragraph 36. If one then looks at paragraph 36, that is the Metro criteria. Again, it is manifest from this judgment that all they're dealing with in the second question is the Metro question and, were that in any doubt, the Advocate General at 115 and 116 makes this crystal clear.

So if we go to 115 of his opinion. At 115 he makes the point about compatiblility with Article 101(1), which is the Metro point. Then at paragraph 116, which is an important paragraph, he says:

""Even on the assumption that it might be concluded in the present case that the clause at issue could be

caught by Art.101(1) TFEU, owing in particular to failure to comply with the Metro criteria, it will still be necessary to examine whether the clause has an effect restrictive of competition, and in particular to determine whether it amounts to a restriction 'by object' within the meaning of that provision."

So this is entirely consistent with our flow chart that there are sequential questions. Question 1: do you fall outside 101(1) completely because of Metro? If the answer is "No", question 2 is: is there a restriction of competition in this case by object? These are sequential and different questions.

Again, on the first question, a version of proportionality is relevant. On the second question, proportionality doesn't enter into the equation at all.

This isn't some happenstance of Coty. The L'Oreal case, which we refer to in our closings, which is in Authorities 2, tab 37 -- so we can pick this up at paragraph 15. So I think, Mr Doran, this partly answers your question. So they say:

" ...selective distribution constitutes an aspect of competition which accords with [Article 101(1)]."

Then it sets out the Metro criteria. So I think it is clear that the Metro criteria involve a type of competition-based assessment, albeit it is a different

kind of assessment to, say, an object or effects case.

Essentially, it is the point I made, that an agreement which has qualitative conditions and has products of a kind that can justify selective distribution is presumed to be pro-competitive and therefore outside 101(1) completely. So there is certainly a degree of in-built competition assessment in that. Then at paragraph 16 they set out the Metro criteria, including that "the criteria do not go beyond what is necessary".

So that's stage 1. Then paragraph 17 shows stage 2. So it's the third line:

"the distribution system falls in principle within the prohibition in [Article 101(1)]."

So in other words Metro is not satisfied and they say:

"...the agreement fulfils certain conditions depending less on its legal nature than on its effects first on 'trade between Member-States' and secondly on 'competition'."

So the first stage: do I comply with Metro? The answer is "No". There is then a further stage: is there restriction on competition and of course an effect on trade?

Then at 19 an important point:

"...in order to decide whether an agreement is to be considered prohibitive by reason of the distortion of competition ..."

Which is the second question.

" ... which is its object or its effect, it is necessary to consider the competition within the actual context in which it would occur in the absence of the agreement in dispute."

So the court is making a completely orthodox point which is that, even if one does not comply with the Metro criteria and then in principle 101(1) is in play, for the second question of restriction of competition it can be by object or it can be by effect. It is perfectly possible at that second stage that there is not a restriction of competition at all. So, for example, if this were an effects case, there would have to be a factual analysis of -- based on a counterfactual analysis, "Was there an effect on competition?" It may be that the facts of the case do not justify a finding of effect.

There are also questions of appreciability. It may be that on the analysis of the facts there is no appreciable restriction of competition.

So, in other words, the fact that one does not comply with the Metro criteria, in other words

question 1 is assumed against me, has no necessary implications for whether at stage 2 there is a restriction of competition; never mind the restriction of competition by object.

These are sequential and analytically distinct questions, and the mere fact that I don't comply with Metro has no necessary implications for whether there is a restriction of competition. That, in my submission, shows very clearly the separateness of the two stages.

Again, what one does not see in the second stage is any hint of a suggestion that proportionality has anything to do with the analysis and that is entirely orthodox. The question of proportionality does not -- we have seen, appear in Cartes Bancaires. It does not feature in object and the question under effects is a counterfactual analysis which, again, has nothing to do with proportionality.

So that is the state of the case law before one gets to Pierre Fabre.

Now, pausing there, we say that if the CMA is to make good its case on Pierre Fabre, that would involve implicitly but clearly saying that Cartes Bancaires, L'Oreal and Coty were wrongly decided. The CMA makes a point of a binding effect in section 60, but we say it cuts the other way because the court has the three cases

I have shown you which suggest that the CMA's analysis of Pierre Fabre is completely misguided and those precedents need to be brought to bear.

Now, if we pause there for a second, what's interesting is, if one looks at the statement of objections in Bundle E -- it's tab 6 -- paragraph 4.69, page 71, at that stage the CMA was saying:

"In Pierre Fabre the Court of Justice concluded that, in the context of a selective distribution system, a contractual clause resulting in a ban on the use of the internet for sales amounted to an object restriction"

So at that stage the CMA was certainly not saying that proportionality was part of Pierre Fabre. The first mention of proportionality came in the alternative measures paper and as now reflected in the decision, and it was only at that stage that the CMA said for the first time that proportionality was part of Pierre Fabre, whereas their original instinct in the statement of objections was to agree with us that proportionality had nothing to do with the object assessment. So that does lead to a situation where the only case which is remotely capable of supporting what the CMA is arguing for is Pierre Fabre itself.

Now, just to take the case on its own terms -- so we

can pick this up in our closings at paragraph 62. So it's 62(a). We start by making the point, which is not a trivial point, that the question sent by the French court to the Court of Justice was what we call an omnibus question because what it condensed into one question were potentially up to six different questions. So you see the question:

"Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of selective distribution network, in fact constitute a 'hardcore' restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]"

We then set out the six questions that were condensed into that single question. Faced with this omnibus and to some extent unhelpful question, we say that the critical thing to understand about Pierre Fabre is the court was required to unpack the question and it divided its judgment into two clear parts. So the first part, we say, is paragraphs 39 to 43 of the judgment and 44 to 46, and that is concerned with the application of

the Metro criteria. Because the aim in that case was a sham, it didn't even get off the ground in terms of Metro because it failed the first Metro criteria of legitimate aim. So, in fact, proportionality in that case, under Metro, didn't arise at all because they had failed the first of the three cumulative criteria. Because Pierre Fabre was therefore outside of Metro and 101(1) was capable of applying in full, the second part of the judgment, which is at paragraphs 34 to 38, concerns the question of object. We make the point that the lack of legitimate aim was a common denominator in Pierre Fabre in respect of the Metro criteria and in respect of the question of object and the lack of legitimate aim was essentially fatal both to Metro and to object.

THE CHAIRMAN: What do you say about paragraph 39? Earlier on I think you said that objective justification plays no part in the analysis of object.

MR O'DONOGHUE: Sir, let's turn it up, please. It's in Authorities 3, tab 68. Sir, it's paragraph 30?

THE CHAIRMAN: 39.

MR O'DONOGHUE: 39. So we would make four points. First of all, of course, it's the point, Mr Chairman, you made, which is that this has to be seen in the context of the facts of Pierre Fabre itself.

The second point is that it has to be seen in the light of the other parts of the judgment and in particular paragraph 47, which I will come to.

Insofar as it is suggested that failing Metro necessarily leads to object, that is flatly contradicted by L'Oreal, which I have just shown you, Coty and by Cartes Bancaires itself.

The final point is an interesting one. So the only reference the court gives there to any previous case law is the Telefunken judgment. We can pick this up at Authorities Bundle 2, tab 41.

So, sir, you will have seen that paragraph 39 has a cross-reference to paragraph 33 of Telefunken. If one looks at paragraph 33 of Telefunken, which is Authorities Bundle 2 tab 41, that's actually making a very different point. It's the last section:

"Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition"

Which again, Mr Doran I think is your point:

" ... in relation to factors other than price, therefore constitute an element of competition which is in conformity with [Article 101(1)]."

This is a clear reference to the Metro criteria. So insofar as paragraph 39 is relying on this paragraph in

relation to object, it's a rather curious reference but, sir, I think the critical point is paragraph 47 of Pierre Fabre.

THE CHAIRMAN: Yes, I think I agree, but I think that paragraph may link back to paragraph 39 and again it raises the question of what exactly is meant by "objective justification", what is meant by "objectively justified". Does it entail a full proportionality analysis or is it something different? Is it something narrower, as I suggested in my opening question.

MR O'DONOGHUE: Sir, yes, we certainly say it suggests something narrower. We do say that one cannot disentangle 39 from 47 and it is the point that the court is answering two separate questions, one to do with Metro and one to do with object. In my submission what one gets from 47 is that the reference to your objective justification -- so we have put forward two alternative interpretations for 47.

The first one, which is our primary position, is that all 47 is saying is that, having regard to the properties of the products at issue in Pierre Fabre, the clause was not justified, and we see that as essentially a fact-specific finding that, because of the illegitimate aim of Pierre Fabre, the sham point, that the nature of the goods and their properties in that

case were not capable of justifying a legitimate aim both under Metro and in respect of object.

We say it goes no further, so it's essentially the omnibus answer to the omnibus question. Because of a lack of legitimate aim, that defeated the first Metro criterion and it equally defeated the object. We say that that is all it means.

So we do say that 38 needs to be read in the light of 47 and that there is a perfectly sensible interpretation of 47 that is consistent with the sequential questions that we have outlined.

Sir, I did mention in openings the question of intellectual honesty and I think it is fair to say that if one goes through L'Oreal, Coty and Cartes Bancaires, it is difficult to read certain parts of Pierre Fabre and it has been suggested by the CMA on a number of occasions that Pierre Fabre is dead clear and it's dead against Ping and so on and so forth. With respect, I don't think that's a fair reading of the judgment at all.

One cannot simply decontextualise Pierre Fabre from all of the other case law and in my submission there is a very clear line running through all of the cases that the first question is Metro. That does concern a species of proportionality. If you fall outside

Metro, then and only then does the question of restriction of competition arise. That is a different question which has nothing to do with proportionality.

Based on the cases I have shown you, that is a very clear fault-line running through the case law and I do emphasise the point that the Tribunal would effectively have to say that L'Oreal, Coty and Cartes Bancaires were wrongly decided to apply the CMA's interpretation of Pierre Fabre.

If that is the existing position, one then has to try and rationalise Pierre Fabre in a way that makes sense with the other case law, whereas the CMA's approach is essentially to look at the other end of the telescope and say "Look at Pierre Fabre" and to essentially disregard all of the other case law. We say that is an incorrect approach.

There is an interpretative way forward with Pierre Fabre that is entirely consistent with the two-stage sequential analysis we have outlined in our closings and in the flow chart. We say there is no inconsistency once it is properly understood.

That is the first legal submission we wished to make and, just to recap, there is a first question to do with Metro which does involve some consideration of proportionality. That is not the issue in this case.

The only issue in this case is object and there is nothing in the case law which suggests that proportionality is a part of object at all.

The second point is a slightly different point. We say that the accumulation of the concessions made by the CMA in its Decision also preclude an object finding. Just to list the concessions, I will quickly give you the references. So the first concession is that custom fitting benefits consumers. That is 4.216 of the Decision. The second concession is that dynamic face-to-face custom fitting cannot be carried out online; the third concession is that the internet policy is --

THE CHAIRMAN: Do you have a reference for that one?

MR O'DONOGHUE: Forgive me. It's 4.226.

The third concession is the rationale and aim of the internet policy is to further Ping's custom fitting policy. That is 4.99. The fourth concession is that custom fitting is a genuinely held commercial concern reflected in Ping's contemporaneous documents. That is also 4.99. The fifth concession is that it is in principle a positive and neutral activity, improving quality and distribution. That is 4.164. The sixth concession is that the online sales ban is a suitable means to promote custom fitting. That is 4.113. The

seventh concession is that the internet policy ensures that customers can only buy in-store or over the phone. This provides account-holders with an opportunity to promote custom fitting in line with their contractual obligation to do so. That is 4.102. And the eighth concession is that, at least in principle, the prevention of free riding is a legitimate objective, albeit there is a dispute on the facts.

Now, our second legal submission is that the cumulative effects of these concessions ipso facto preclude an object characterisation. We make the point in our written closings that we're in a very curious position that an internet policy that is supportive of a legitimate aim is an object and we say that is essentially an oxymoron.

Now, just to tease this out from the case law, one of the cases referred to in our Notice of Appeal, but which I haven't taken to you, is the BAGS case. That is in Authorities Bundle 1 in tab 19. We can start at 415.

So this was an allegation that collective agreements between the race courses to negotiate collectively with AmRac had the object of fixing prices. We see that at 415.

Then if we go on to 424, the last sentence, Mr Justice Morgan says:

"...the critical question is: was it the object of the concerted practice to fix prices?"

And 429:

"how does one go about assessing the object of an agreement?"

Then he picks this up at 431, the last two sentences:

"The Defendants submit that A and B have not made an agreement with the object of price fixing. Their object was to increase competition for the purchase of their raw materials and they have done so."

Then at 434, last sentence:

"one had to look at the economic context in which the agreement operated."

Then 439 is the critical paragraph. He says:

"I must have regard to the content of the relevant agreement. The agreement or, more accurately, the concerted practice in this case arises from the cooperation between racecourses to negotiate collectively with AMRAC. The object of the arrangements was not the crude and simplistic object of fixing prices, as the Claimants allege. They had a more complex function. The objective aim of the cooperation was to sponsor the entry of AmRac into the market."

And at 440, the conclusion:

"[it] did not have the object of fixing prices."

So we say the present case, if anything, is a fortiori because the CMA has conceded that the purpose of the internet policy is to support dynamic face-to-face custom fitting, and that is inherently a benefit to competition and described as a "positive or neutral activity", and we say that that runs into a brick wall when one is considering object. In many ways it is the antithesis of object.

Sir, I am about to move on to something else. Is that a convenient moment?

THE CHAIRMAN: Yes.

(11.40 am)

(A short break)

(11.50 am)

MR O'DONOGHUE: Sir, just to complete the final legal submission, if we can go to our written closings, please, footnote 73. Sir, I think this partially picks up on the Metropole point. We make the point in footnote 73 that:

"The case law of EU courts is clear that 'objective justification' means just that: an objective justification. It has not been conflated with the principle of proportionality."

We give a number of references there which are

contained in the supplemental authorities bundle.

We will see what the CMA says about Metropole, but one of the points made in Metropole is that objective necessity cannot simply be the same as 101(3) because, if that were the case, 101(3) would be redundant. So these are separate stages. They cannot be fungible because then there is no 101(3).

THE CHAIRMAN: Precisely.

MR O'DONOGHUE: The CMA cites cases such as Streetmap to show, well, "Look, how objective justification has functioned", but, with respect, those are cases which are completely against the CMA because that is a case in which the restriction of competition is clearly established and then the objective justification functions effectively as 101(3) and that is the traditional analysis. So insofar as they are put forward as examples of objective justification in the sense of Pierre Fabre, it is a point against the CMA because that is classical 101(3). We accept under 101(3) there is a proportionality component under the third of the four conditions and we accept that, if a restriction by object is shown, it would then be up to Ping to bring forward the exemption in defence, but what we don't accept is, at the stage of object, that it is incumbent on Ping to show proportionality.

I will come back to that once we have heard from the CMA on Metropole, but I think, sir, you have my point well in mind.

MS DEMETRIOU: Sir, if there is something to be said by the other side on Metropole, I would quite like to know what it is, given that we only have one shot at this and Mr O'Donoghue gets a right of reply.

THE CHAIRMAN: I'm not going to shut off any case. If there are further submissions that need to be made on this point, then I will allow them to be made.

MS DEMETRIOU: In that case, would the Tribunal also allow me to reply to that point?

THE CHAIRMAN: Yes.

MR O'DONOGHUE: Sir, I want to move now to a number of points on proportionality. The first question, of course, is: what is Ping's aim?

THE CHAIRMAN: Where does proportionality fit into your analysis?

MR O'DONOGHUE: Well, sir, you have my submissions from before the short break, which is that if one is considering object, proportionality is simply not part of that assessment. By contrast, if the question in this appeal were Metro, which is not, there would be some element of proportionality there and I accept that in relation to our 101(3) ground there would be

a question of proportionality under the third condition and Ping would have to show a justification to that extent. But what I do not accept is that at the stage of object, proportionality is something which is relevant and, in any event, even if I am wrong on that, because the CMA has the burden in proving the infringement, it also has the burden in relation to proportionality.

THE CHAIRMAN: So on your primary case it simply comes in under 101(3)?

MR O'DONOGHUE: It simply doesn't arise. It's the point we have made consistently, that you cannot have an object that is about not acting proportionately. That is fundamentally the antithesis of object. Object should leap out of the page, it should be plain, it should be obvious, it should not be ambivalent. The test for object cannot be some sliding scale of necessity because that is something which, at best, is in the effects territory and is inherently incapable of being an object. So my submissions on proportionality need to follow that rubric.

Now, starting with the aim, Ping's position is very clear and simple. Ping's aim is to maximise custom fitting and Ping is surprised that in the CMA's closings at paragraph 57 there is a suggestion that Ping has

opportunistically framed its objective as maximisation. They use the phrase, "plumped for maximisation" in the skeleton argument.

Now, we say that is a fundamentally unfair and incorrect characterisation. The starting point, of course, is clause 14 of the terms and conditions imposed by Ping. That says that Ping wants each consumer to have the right product and to be custom fitted, so it was there from the very beginning.

Then if one turns to the Decision, there are a number of references to Ping setting out its objective of maximisation. I will quickly give you the references. It's 4.84 where Ping said -- I am quoting:

"Ping stated that the aim of the online sales ban is the 'legitimate aim of maximising custom fitting of its clubs'."

There is a further reference at 4.136, again to maximisation, and critically the Notice of Appeal in Bundle A has more than 30 separate references to maximisation. I will quickly list those. It's paragraphs 4, 10, 11, 16(a), 78, 83, 93, 95, 99(a), 101, 102, 108, 119, 121, 127, 129, 141, 145, 146, 148, 150, 153, 155, 156, 157, 163, 166, 174, 175, 184, 187 and 194.

So we simply don't understand on what basis it is

suggested that the issue of maximisation was not raised by Ping until the skeleton. The supporting evidence with the Notice of Appeal had multiple references again to maximisation: Clark 1, paragraph 40(f), Clark 1 paragraph 50 and Clark 2, paragraph 15.

That is why Ping's skeleton for trial explicitly drew the distinction between maximisation by Ping and mere promotion by the rivals. Again, there are multiple references: paragraph 8, paragraph 14 and paragraph 20.

Now, one of the reasons we're particularly surprised at the point made in closings about maximisation is that there were multiple references in the CMA's trial skeleton to Ping's objective of maximisation. Just to give you a flavour of these, at 4.2:

"the ban goes further than is necessary to achieve its aim of promoting or maximising custom fitting."

Paragraph 26:

"Ultimately the aim relied on upon by Ping the promotion or maximisation of its custom fitting rates ... "

Paragraph 80:

"As such, it is bound up with Ping's earlier case on the promotion and maximisation of custom fitting."

During the trial the Tribunal heard from multiple Ping witnesses who made very, very clear that

maximisation was the goal.

Mr Clark at T3, page 26, line 18 refers to maximisation.

At T3/72, "100 per cent of consumers".

References by Mr Dave Clarke to maximisation and also Mr Mahon.

So there is no question but that maximisation has been at the forefront of Ping's case from the very, very outset.

Now, in a sense the proof of this pudding is in the eating and we make three points: first of all Ping, unlike all other manufacturers, does not permit online sales; second, Ping, unlike the other manufacturers, does not impose volume commitments in respect of stocking. There is a point about the initial season orders, which I will come back to, but the point there is that these volumes are tiny and in any event should be custom fit.

So when one compares and contrasts Ping with its rivals, it is clear that Ping's objective is maximisation and that Ping's rivals at best have some interest in promotion, but are not committed to maximisation.

Now, in its closings the CMA makes essentially two points said to undermine the objective of maximisation.

First of all, it criticises Ping for not requiring custom fitting for every sale. We say, with respect, that is a bad point. There is a contractual obligation to do everything reasonable and that must include custom fitting everyone who reasonably can be custom fit or, to put it another way, Ping would expect a particularly compelling justification for why a customer was not custom fit.

The fact that the contract doesn't require each and every sale to be absolutely subject to custom fitting simply recognises the proportionate and commercial reality that sometimes -- take the example of the clumsy golfer, there doesn't need to be a custom fitting. Sometimes you can lead a horse to water, but can't make him drink. There are people who are unpersuadable. So the contractual position is a reflection of this reality.

Now, the examples the CMA gives of the clumsy golfer or the Spanish millionaire who wants a second set of clubs for his holiday home, they are pretty theoretical in any event. If a consumer should have the misfortune to break a club, that club will have a unique code and can be replaced by Ping within 48 hours. Even if the consumer has the unique Ping code, that will not allow the consumer to buy that club online. It is a unique

code to Ping in Gainsborough.

In any event, if the customer has made a purchase of the clubs, it is unlikely they will have a copy of the specifications. Specifications typically are provided in the event of a non-sale. We know that many retailers do not give out specifications and it seems to us obvious that it is much more likely that the consumer will go back to the retailer where he or she purchased the club, get a free custom fitting to the extent he or she needs one and the club will simply be replaced. It may be as simple as the club being under warranty and therefore being replaced without question.

So the first point on Ping not requiring each and every sale to be custom fit we say doesn't go anywhere.

The second point made by the CMA in closings is that Ping allows telephone sales. Now, we say first of all that that is a distortion of the true position. From Ping's perspective a telephone sale is appropriate where it is clear from the telephone conversation that the customer has been custom fit recently or is opposed to being custom fit at all. We can pick this up in the Decision at paragraph 3.119 on page 60. So this is a reference to Mr Clark. The CMA says:

"When asked about this process at the Oral Hearing, Ping's Managing Director stated that during a telephone

call Account-Holders are expected to' 'persuade the customer to come into the shop to be custom fitted face-to-face and dynamically put through the fitting process and express to them that, that it is the best thing for them to do if they are intending to purchase a club'. Furthermore, 'telephone orders are - probably - an extremely minuscule amount of business'."

So Ping's clear expectation is that the telephone process is a process of persuading, as far as possible, the consumer to come in and be custom fit.

The further point made by the CMA in respect of telephone sales -- this is at paragraph 3 of their closings -- is that a considerable quantity of sales are made by telephone. We say that is simply incorrect. The figure before the Tribunal is that it is no more than [redacted] per cent --

MS DEMETRIOU: We don't say that.

MR O'DONOGHUE: -- [redacted]

So in our submission the American Golf data, which

work out at about [redacted] per cent of telephone sales, is representative of the true position.

So that is a question of aim and Ping's aim is maximisation and is not undermined by the points made by the CMA.

So the second question is legitimacy. We can pick this up in the Decision at 4.99. Essentially the point of legitimacy is conceded.

Now, in our submission, the consequences of that concession, they are significant, because the point we make in our closings is that the legitimacy and all that it entails of Ping's aim of maximisation is a very substantial and weighty aim. It reflects Ping's pioneering work in the area of custom fitting. It reflects enormous investments by Ping in custom fitting. Ping has stimulated inter-brand by forcing its competitors to up their game to some extent in relation to custom fitting and it has improved the position of consumers in terms of quality and choice in a dramatic fashion.

The unchallenged evidence from Dr Wood is that custom fitting generates significant improvements for each player. For certain categories of consumer, perhaps those with disabilities, the improvements may be very significant indeed. It may, for some people,

involve the difference between playing golf at all and we make the point that it actually saves consumers money by ensuring they play with the right clubs and are not saddled with having to replace a set of clubs that are unsuitable with a second set of clubs at a later stage.

So Ping's legitimate aim is good for the game and is good for consumers and, by contrast, it is again uncontested that static fitting comes nowhere close to dynamic fitting. It is common ground that online fitting tools are nowhere near as effective as a dynamic face-to-face custom fitting and it is common ground that you cannot be dynamically custom fit online and that simply using drop-down menus is not the same thing as being custom fit. So that is the question of legitimacy.

The third question is the question of suitability. If we can go to the Decision on this point because that has been conceded in principle at 4.113. So the CMA says:

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

And they make the point about limited effect which I will come back to:

" ... in increasing the rate of custom fitting by Ping Account Holders."

Then at 4.102:

"The online sales ban ensures that consumers can only buy in-store or over the phone. This provides Account Holders with an opportunity to promote custom fitting in line with their contractual obligation to do so."

In our submission, it is quite extraordinary that in its written closings the CMA doesn't refer to suitability at all and it's as if the concessions I have taken you to were never made. During trial the evidence on suitability was, in our submission, overwhelming. The CMA's own witness, Mr Mahon of American Golf, he fully accepted the point of causation and suitability and that the internet policy drives consumers to the retail stores where they can be custom fit. He also gave relevant evidence on the use of telephone sales which are [redacted] per cent, and he also gave evidence that rivals' online sales relative to these telephone sales are much, much larger.

Now, there is a further point in the evidence that is important. Four of Ping's retailer witnesses gave direct evidence on the causation of the internet policy and I want to show the Tribunal what they said. We can pick this up in Bundle B2, please. We can start with Hedges 1 at B2, tab 4, please. It's paragraph 21. So

he says:

"Ping's internet policy is definitely an important contributor to Ping's success in custom fitting."

Then Sims in tab 6, paragraph 15, says that the:

"The biggest distinction in how it promotes custom fitting as compared with the other brands is through its insistence that before Ping golf clubs are bought by a customer, the customer should obtain advice on that purchase and be informed of the benefits of custom fitting. This acts as a warning"

And further down:

"...the internet policy is the most effective measure that a manufacturer can use in an online world to ensure that the custom fitting of its clubs via a face-to-face interaction takes place..."

Then Dave Clarke at tab 7, paragraph 8, second line, it says:

"[The internet policy] is doubtless a key factor in increasing Ping's custom fitting rates across the market and is the strongest possible message..."

Then finally Challis 1 at tab 8, paragraph 9, he says:

"...a key element is the internet policy, which is the most effective way to ensure that retailers have the opportunity to promote custom fitting..."

Now, none of this evidence was specifically challenged and the CMA has not advanced a case, at least based on evidence, that the internet policy does not affect retailers' behaviour and incentives. We say that this is an important point.

Now, just to spell out the implications of the concession: if the point of principle on causation is conceded, then the only question for the Tribunal is therefore how much the internet policy increases custom fitting. We say the evidence as it has emerged at trial is clear and unambiguous on this point. The internet policy makes a substantial contribution to custom fitting by stopping online purchases and requiring those who may be interested in purchasing Ping clubs to be custom fit in-store.

THE CHAIRMAN: Causation hasn't been conceded, has it? It's strongly disputed.

MR O'DONOGHUE: Suitability for the reasons I have shown you in 4.102 and 4.113 of the Decision has been conceded. The dispute is about the allegation of a limited effect. We do say that is a concession and we do say it is quite wrong for the CMA, having made that concession, not to recognise its implications. I am perfectly content to tackle the causation points that are made in closings head on, but the concession should not be forgotten. It

is a concession on suitability. When one reads 4.102 and 4.113, it is also a concession on some degree of causation. The challenge is to the question of extent or effect. The point in principle, I think, is conceded.

Now, moving directly to what the CMA now says -- we can pick this up in their closings at paragraph 5. So at the bottom of the page they say:

"...the differential is overwhelmingly likely to be caused by a range of factors other than the [internet policy]."

Then they list -- it's actually seven, although they number it six different factors. So the first one is Ping's heritage; the second is customer loyalty; the third is advantages in terms of custom fit product offering; the fourth is the contractual term in clause 14; the fifth is the retail chain penetration; the sixth is the delivery time; and the seventh is the minimum quantity point.

Now, in response Ping has five points to make. You have my first point, which is that there has been a concession in the decision at 4.102 and 4.113 and that must not be forgotten.

The second point is that we say it is quite wrong for the CMA to conduct its case to date on the basis

that Ping was no different to its rivals when it comes to custom fitting or promoting custom fitting and therefore the internet policy they say was not necessary, but to now turn around and say that Ping is so different to its competitors that the difference in custom fit rates is caused by these differences and not by the internet policy. We say it's actually unfair because Ping has approached its evidence on the basis of the Decision and on the basis that it was said at that stage that Ping was no different to its rivals and it should not be open to the CMA, at this late stage, to say that Ping is so different that those differences are, in fact, the causes.

The third point is that the CMA's case that Ping is either the same or different is hopeless anyway because for that case to be made good there would need to be a comprehensive comparison between Ping and its rivals who are interested in custom fitting. The Tribunal is in a very unsatisfactory position that the CMA has gathered no information on who exactly are these rivals, what policies, if any, do they have on custom fitting, what contractual requirements, if any, do they impose on retailers regarding custom fitting. The CMA didn't even survey the other manufacturers during the entirety of its administrative phase.

Now, we say that that is truly an extraordinary omission, and if the Tribunal is being asked to compare and contrast the heritage of Ping and these companies, the degrees of customer loyalty, the extent of their custom fitting offerings, contractual differences, the extent and depth of their retail chains, their delivery terms, things like minimum quantities, it has no information before it on what the position of the other manufacturers is in that regard. There is simply a vacuum in terms of the evidence.

So there is a fundamental problem as to how the Tribunal is expected to grapple with these seven new causative features and it gives rise to a further difficulty, which is, if there are now seven separate causes, each and every one of those would need to be effectively regressed out to identify the effective cause and there is simply no material before the Tribunal on which any such regression or assessment could be made.

Back to Professor Beath's point, there is a thought experiment, but it is a thought experiment that, because of the CMA's evidential failings, falls to be conducted in a vacuum. It is truly astonishing that, even on the simple matter of what are the contractual requirements imposed in respect of custom fitting, if any,

the Tribunal has no information. The only terms and conditions before the Tribunal are Ping's.

The fourth point is that, in any event, the CMA's argument has a spurious precision because it wrongly assumes that one could remove the internet policy and that all of the other things Ping does, which are said to make it different, would remain unchanged and we say that is highly unlikely.

Take, for example, Ping's retailer network, currently more than 1,200 Account-Holders. Ping has carefully grown this network from 100 fitting accounts to 1,200 accounts over a period of many years as a way of spreading the scope and scale of its custom fitting efforts. But if the removal of the internet policy leads to reduced custom fitting incentives, then the network will shrink. The point is that all of these alleged differences are interrelated, but the internet policy remains at the fulcrum of what Ping does in respect of custom fitting. That is the critical thing.

The final point is that there is a curiosity in the way this argument is being advanced now because it was put to Mr Clark that he could not disentangle the internet policy from these other causes or differences, whereas the CMA now says in closings that one can do this and that it is clear that the causes are not the

internet policy. We say, with respect, that is a case based on supposition and assertion and not evidence.

So we do make the point that this is effectively a new case which they should not be entitled to run, but it is a bad case in any event for reasons of principle and for reasons of evidence.

There is a fundamental point of fairness. Defendants before the CMA are entitled to know the target they have to hit in their appeal and it shouldn't be open to the CMA, in closings, for the first time, to put forward seven new causes for what are said to be differences in custom fit rates. That would have had a profound bearing on the evidence that we presented at trial and it is unfair to Ping that a volte-face of this kind is conducted at this stage.

THE CHAIRMAN: Is it open to the CMA to invite the Tribunal to make findings of fact which are different from the findings in the decision?

MR O'DONOGHUE: Well, sir, it would require an application on specific legal grounds. The default position is the CMA is defending its Decision as rendered and there is a series of case law that it is not open to the CMA to embroider that Decision during the trial. If the CMA wishes to invite the Tribunal to decide the case on a somewhat different basis as set out in the Decision,

that would require an application and we would have quite a lot to say about any such application.

The starting point is that we are attacking the Decision, they are defending the Decision and it shouldn't be open to the CMA at the 11th hour to put forward seven new causes.

I now wish to turn to the survey evidence, which obviously touches on the question of difference. There are six points Ping wishes to make in relation to the surveys. First, we do say that this is the best available estimate of the relative shares of fitting for Ping since it is common ground that retailers do not keep records for these purposes.

We make a more general point, which is that the CMA itself frequently uses survey evidence and it is difficult to see what is wrong in principle with such survey evidence and in particular if the underlying raw data is not something which is available.

Second, the critical figure in our submission for the Tribunal's purposes is the negative delta between Ping and its rivals. Ping has half as many non-custom fit consumers as its rivals. That is a significant difference and is a more relevant delta than the delta between who is fit.

The third point we make is that the differences as

set out in the two retailer surveys, they must be a significant underestimate of the Ping rate because first of all it only surveys the Ping account-holders who are the most committed to custom fitting in the entire country, and, second, it does not include custom fitting rates of non-Ping retailers such as Mr Patani, Mr Lines and retailers such as Sports Direct.

The fourth reason is there is no reason to suppose that any noise in the data has an asymmetric effect one way or the other and there is no reason to think that Ping's number was uniquely increased or that rivals' numbers were uniquely decreased because of so-called noise in the data. That should be a neutral factor in the context of the overall survey.

The fifth point we make is that the third-party evidence in the Golf Datatech and SMS surveys does assist at least directionally, even if independently that would not be in itself sufficient evidence. So it is corroborative of the general position as set out in the two Ping surveys.

The final point is that the criticisms made of the Ping evidence have to be put side by side by what is the nature of the CMA's evidence, and the evidence in the other direction, with respect, is hopeless. We have two retailers, data from four years ago or three years ago,

data in one case covering a period of eight months which is incomplete and we have [redacted]

So when one conducts a comparative exercise of the CMA's evidence and Ping's evidence on this point, it really bears no serious comparison. The evidence goes all one way.

A new point made by the CMA is that, because non-Ping manufacturers require certain retailers to hold standard clubs in stock, more than Ping does, this explains why rivals' custom fit rates are lower. Now, as a starting point, this obviously has no bearing on Ping's custom fit rate. That is not affected by how much non-Ping stock the retailers hold. Ping's rate is high because of Ping's commitment to custom fitting, as reflected most clearly in the internet policy.

The second point is that this confirms that Ping's rivals are less committed to custom fitting, which, again, shows that Ping has a different objective of maximisation, whereas Ping's rivals are more interested in volume and are less concerned with their custom fit rates.

The third point is that the internet policy, for the

reasons I have set out, remains the most convincing and logical explanation for the difference between Ping and its rivals. Again, you cannot buy Ping clubs online. You can buy as many of itsrivals' clubs online as you wish, whether in standard fit or in drop-down so-called custom fit options.

We do say that these differences are borne out in the retailer figures themselves. If, for example, one takes Mr Clarke, from whom this evidence comes, his custom fit rate for non-Ping clubs is quite low, it is around 65 per cent, and that does clearly suggest that there is something else driving the substantial difference between Ping's custom fit rate and his custom fit rate for non-Ping clubs. I have shown his evidence where he says that doubtless the key difference is the internet policy. That's Dave Clarke, just to make that clear.

I now want to turn to two final points: the harm to Ping and the harm to consumers. This has two components that the Tribunal will be familiar with. The first is the question of guessing of specifications and the second is the free rider issue which we have covered in our closings.

So starting with the question of guessing. It must be the case that if consumers are purchasing Ping clubs

without a custom fitting and guessing their specifications, there is unambiguous harm to Ping and the consumer, in that case since a sub-optimised Ping product will have been sold to the consumer, and we think or we hope that that is common ground. Based on the record, there is strong evidence that this is a substantial concern.

Now, to be clear -- and we have made this clear in our closings -- we are not saying for a second that everyone is guessing or anything like that. Mr Clark has made a certain concession on that point. But we do say that the most likely scenario in relation to guessing is not one where it is a pure guess but is a situation where a consumer has some incomplete or out-of-date information and is relying on that information to populate drop-down boxes or buy standard-fit clubs online.

We have, for example, evidence from Mr Patani [redacted]

Now, if by contrast the consumers are engaged in static fitting, self-measurement, we also know from Dr Wood's evidence that that is highly likely to be off-beam as well.

The third possibility is in some ways the worst, which is they are not using online fitting tools, they're not even static fitting, they are using a collection of other forms of online information to arrive at what they think are their specifications. In our submission, that is barely even informed guesswork.

So you have the evidence from Mr Patani [redacted] that this type of online research in different shapes and forms is a feature of this market. And, again, the proof of that pudding is in the eating. You have evidence from virtually all of Ping's retailers that essentially every week consumers come into their retail shops because they cannot return the clubs to the online retailers, complaining about ill-fitting clubs purchased online. So there is clear evidence that that is taking place and that something adverse is occurring.

Mr Lines, in a very candid manner -- he fairly

accepted that it was not his responsibility to ensure that consumers had been custom fit and it is fair to say that he sees his responsibility to conduct the sale and whether or not the consumer has been custom fit is essentially not his problem.

So we do say that guessing is a feature of this market. I don't wish to overstate the point, but I want to make very, very clear that we do say this is not a trivial feature of the market. It's something which is real and meaningful and it is something which unambiguously harms Ping and unambiguously harms the consumer by putting a sub-optimal set of products in his or her hands.

THE CHAIRMAN: But it's not sufficiently important to lead to other manufacturers having a similar internet policy.

MR O'DONOGHUE: Sir, that's true to an extent, but they have a different philosophy and they're essentially riding two horses. They are happy with the volume. They will promote custom fitting to a certain extent. That is what consumers would want. So there is a difference in their case, which is that essentially they don't mind, whereas Ping, by contrast -- where the objective is the maximisation essentially to get 100 per cent of people custom fit, there is harm in the case of Ping that the other manufacturers are at best agnostic about and in my

submission probably don't care very much as long as a sale is made.

MR DORAN: They did suggest low rates of returns in terms of measuring harm.

MR O'DONOGHUE: Well, the truth is we don't have empirical data on this point. Essentially the only information that I am aware of is the four Ping retailers who have given evidence, who all say that returns of ill-fitting online is a feature and an increasing feature of what they see in their shops. That is certainly true. We also know that Mr Lines and Mr Patani -- there is no contractual right to make a return in any event. It may be for some consumers that they have to suck it and see. They think, "Well, I've made a mistake, this hasn't worked out well, but I have no recourse".

MR DORAN: That could play both ways, of course, because if you're not allowed to return your club, you may be very careful about how you choose it.

MR O'DONOGHUE: Well, I have been keen to make clear that we're not saying that guessing is endemic. All we're saying is that it is a meaningful feature of the market.

MR DORAN: Because I thought we had heard from Mr Patani and others that levels of returns were quite low, which I agree contrasts with the evidence that the Ping retailers gave, who said that people are coming in --

I think one of them said one or two times a week -- I remember one saying.

MR O'DONOGHUE: I do emphasise the point that if you have no right to make a return, it's not surprising that Mr Patani and Mr Lines apparently don't have any returns.

MR DORAN: But they did, I think, if I am right, say they would, in the interests of good customer relations, since they're about return repeat visits and repeat sales -- that they would deal with these cases.

MR O'DONOGHUE: Sir, yes, there were some noises to that effect, but it's clear it would be purely discretionary and would be case to case.

So we do say that there is some guessing and it is not to a trivial extent and we say that that is uniquely harmful to Ping and we say harmful to the consumers as well.

PROFESSOR BEATH: Sorry, I wonder if I could just raise a point about harmful to consumer. That is you -- in a sense, the evidence you have for harm to consumers comes from the data we got from Dr Wood about how you could start with a wide range of things and suddenly you converge to your optimum fit and I follow that logic okay.

What essentially Dr Wood was saying is that there

you -- if you have a particular fit ascribed to you, there is an optimal performance you get. That's measured in many dimensions, but there is an optimal performance.

What Dr Wood was not able -- or at least his report did not say anything about -- was, as you move away from that optimal fit, how rapidly does your performance drop away, because if it didn't drop away very much, then in a sense there is a lot of tolerance in the question of -- you could buy what you might call "ill-fitting clubs" but your golf will still be okay. So we have to be rather careful to the extent to which we rely on this result from Dr Wood. I think it's important we recognise that, so -- you know, guessing may not do you so much harm if it's true that there is a very flat performance surface, but, of course, it would do you a great deal of harm if it's very steep.

MR O'DONOGHUE: Sir, a couple of points. First of all, one of the difficulties is that Dr Wood was not cross-examined.

PROFESSOR BEATH: I was hoping that he would have been cross-examined.

MR O'DONOGHUE: So were we, so those kinds of questions could have been asked.

Sir, I think the second point is that it may depend

to some extent on who the consumer is and how interested they are in improving their golf game because, if you take the point that at the highest level of optimisation you will get the greatest benefits, then for someone who is playing off a five or ten handicap, that incremental benefit may be incredibly important. But if, like me, you're hacking around in the long grass, it may be that the extra precision is of less incremental value to me.

But, I mean, it must be a truism that we would all wish to play golf as well as we possibly can and that if the equipment is optimised to the maximum, that is much more beneficial than it being sub-optimised. But I take the point that it may be a question of degree. I think it would have been a question for Dr Wood --

PROFESSOR BEATH: Yes.

MR O'DONOGHUE: -- and we're in a difficult position where he was not cross-examined.

PROFESSOR BEATH: Thank you.

MR O'DONOGHUE: Professor Beath, one final point. It also comes back, in my submission, to what is it that Ping is trying to do, and Ping is not in the business of, "Well, it will do". Ping is trying to maximise custom fitting because that is the maximal optimisation of the club for that individual. So that is certainly Ping's objective and something which is sub-optimal, albeit we don't know

to what degree, that is not what Ping is trying to achieve.

PROFESSOR BEATH: I take that point. Yes.

MR O'DONOGHUE: Now, turning to the question of free riding, Professor Beath may well have an example but I cannot think of a market that is more susceptible to free riding than custom fit golf clubs because you have a substantial investment of money in facilities, in specialised fitting staff and you have a significant time commitment in the form of a 60-minute or 90-minute specialised custom fitting.

We have set out in our closings a quote from the Department of Justice to the OECD on the free rider and the only example they give of the free rider is custom fit golf clubs. As the Tribunal will know, the DoJ is not exactly a pushover when it comes to permitting restraints of this kind and we say that that is a significant factor in the context of a starting point for free riding.

Now, the Tribunal will have this well in mind, but just to be clear as to what is the concern: so the free riding problem is simple. The customer goes to a bricks and mortar store for a custom fitting. The customer then leaves the store with a prescription of specifications, having spent 60 or 90 minutes with

a trained fitting professional and making use of expensive equipment. The customer then takes his or her prescription online and purchases a set of clubs and the cost of rendering the service is borne by the bricks and mortar store and not by the company making the sale of the clubs to the consumers.

Now, there are two general points in relation to free riding. The first is that the prospect of free riding will greatly reduce the incentives for Ping's retailers to custom fit and the obvious question is, "Why bother to custom fit if the customer is going to free ride in any event?" The service of custom fitting at full cost is expensive, probably something of the order of £100 per custom fitting session, and Mr Holt in his evidence used the term "incentive misalignment" and we say that is a good depiction of the problem.

The consequences of free riding will be that retailers stop investing in custom fitting to the same degree or at all; in other words, they will stop buying the expensive equipment, they will stop training their staff in fitting and, in basic terms, there is then an economic choice for the retailer. If the golf shop has to decide whether to allocate space, investments and personnel to a custom fitting room or a cafe, then that depends on the extent to which it can maximise its sales

through closing bill sales.

MR DORAN: Could I just ask a question about that, which is that we heard from a number that there is a sort of hybrid sort of custom fitting that goes on. I think American Golf was one of those who gave that example. That can be used for a number of different manufacturers, many of whom sell online, unlike Ping.

American Golf deals with the free riding problem by not handing over the prescription, as you term it, unless a club is bought that day. Is that not the answer to the free riding problem?

MR O'DONOGHUE: Well, sir, there are a number of answers. One, in a sense, the mere fact that American Golf has to take that step shows the threat of the free rider problem. So this is the largest retailer in the country, 130 stores, a very significant online presence as well, and so even the biggest retailer in the country understands now, even before any possibility of selling Ping online, that it needs to protect itself from free riding.

MR DORAN: But it's applying it to manufacturers who sell online already.

MR O'DONOGHUE: It's currently applying it to everyone, yes.

MR DORAN: Yes.

MR O'DONOGHUE: The second point, sir, is that there is

evidence that a number of retailers do hand out specifications and in particular from Mr Lines, that if the consumer asks for specifications, he says he is hard-pushed to refuse them. So the American Golf position is not a typical one within the market. That is a second important one.

MR DORAN: Do you think Ping is particularly susceptible in a way that other manufacturers are not?

MR O'DONOGHUE: Sir, I am coming --

MR DORAN: I don't want to ask scurry you along in your case.

MR O'DONOGHUE: My answer is "Yes", for the reasons I will develop.

Sir, one final point to your question: obviously the premise of the Decision is that there is and should be online purchasing and if no one gave out any specifications, it is very difficult to see what this Decision would achieve at all.

Now, turning to what the CMA says about free riding, they make six points. The first point is that retailers could charge the full effective cost for custom fitting. We say that is a bad point because it ignores the fact that a full, upfront charge for a custom fitting will itself deter custom fitting, so that will be a disincentive and will have the opposite effect. There

was considerable evidence from Mr Holt on this point and on the impact on incentives and how that is likely to be adverse.

The second point that the CMA makes is that free riding is not really very likely and we would make a number of points in relation to that. First of all, the Tribunal has heard very clear testimony from retailers in the market as to how real this concern is, including, of course, from CMA witnesses. In fact, we say the evidence goes the other way, which is that the CMA has not managed to find a single retailer with a focus on bricks and mortar store to come along and tell you that free riding is not a concern. The obviously explanation we say is that there is no such retailer out there.

Now, looking at the evidence the Tribunal has heard, we say it essentially all goes one way. A very, very important piece of evidence is Clark 1, paragraph 40(f), where he gives evidence on the unique depth and width of the Ping retailer network and he also gives evidence on the unique vulnerabilities of a large cohort of Ping's retailers, half of whom have Ping turnover of less than £10,000 per annum.

In answer, Mr Doran, to your question, Ping has a unique network. It is deeper and wider and is largely

populated by small retailers who are dependent on Ping. So there is a fundamental difference between the Ping retailer network across the United Kingdom in terms of its depth and scope and in terms of the characteristics of the retailers who populate that network.

Now, I will come back to some of the implications on that, but we do make the point that Ping is in a different position because of its particular and, we say, unique retailer network.

You have the evidence from Mr Hedges, who represents up to 1,000 individual members, and we set this out in paragraph 185 of our closings. If we can turn to that. So he says:

"In custom fitting, what we have been driving - and you mentioned the complete equipment solution in the phraseology there - that complete equipment solution is actually a pre-sale custom fit that we offer free of charge, then the sale and then the after-sales, to touch on the comment we made earlier,that there is a requirement to make sure that, having been fitted, those clubs still work for the customer. Now, those things have a cost to them. We have to provide the fitting equipment, the technology and all those things..."

Then he goes on:

"The relevance of it is, of course that small individual retailers, they've had to invest a huge amount of energy, money and finance and facilities into providing this service and that is at threat if those sales are then taken away from them online."

Again, you have compelling evidence before you that free riding is taking place. Mr Challis gave evidence that based on free riding there has been a 30 per cent reduction in their sales and he gave evidence that the only basis on which they're able to invest in custom fitting is that the company owner has come into a windfall through a land deal.

You then see the ratios of in-store sales to online sales from Mr Patani, Mr Lines and the Complainant. The ratios are about 10 per cent in-store relative to 90 per cent online. What one will see is a number of online mainly retailers with a bricks and mortar shop and a strong online presence and they will hoover up the vast majority of sales.

The third point made by the CMA is that online sales by other retailers have not led to free riding or reduced investments in custom fitting and we say that is, with respect, a rather glib point. There is clearly a free rider problem. That is why the likes of American Golf refuse to hand out specifications.

There is clearly significant evidence of a free rider concern already. I have taken you to the Hedges evidence and the Challis evidence. We have compelling testimony from Mr Patani, Mr Lines and the Complainant, who say that their objective is to make high-volume sales and they are making high-volume sales.

The critical point, in our submission, is that the CMA's point ignores the dynamic aspect of the market. The situation today is that Ping is not selling online. Ping is an important market player, with market share, perhaps, of 20 per cent. It has an unusually deep and wide network. The CMA now says that this is actually a critical difference between Ping and its rivals.

We see from paragraph 40(f) of Clark 1 that in many cases only one or two other brands are present at Ping retail accounts, and this is a very, very important point because, for those accounts where Ping is the mainstay of their support for custom fitting and only one or two other brands are present, they are uniquely exposed to free riding and it would take a very marginal shift in their sales of custom fit clubs for those incentives to be misaligned and for the custom fitting either to reduce or not to be offered at all.

We do make the point and we emphasise it that, given the small turnovers typical of the Ping retail network,

one doesn't need a very big shift at all in their custom fit sales or much of an increase in the incidence of free riding for a significant problem to materialise. It isn't simply a case of the retailer going out of business, although we do say that is a distinct possibility; it is rather that their current investments in custom fitting in terms of space and personnel will get diverted to other more profitable uses.

So it is not a requirement of my case that we need to show that a substantial quantity of retailers will go to the wall. It is enough if there is a misalignment of incentives and their incentives to offer custom fitting at all or to the same extent are diminished and it is more profitable for them to invest in a coffee shop or something of that kind.

Sir, I am about to move on to a separate point. Is that a convenient moment?

THE CHAIRMAN: Yes.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

MR O'DONOGHUE: Mr Chairman, I'd like to go back, if I may, to a point raised by Professor Beath just before the lunch break.

Now, this is in relation to the evidence of Dr Wood.

If we go to Bundle E, please, tab 9 -- so this is the transcript of the oral hearing before the CMA which Dr Wood attended. I'd just like to pick up a few points in his evidence that respond to some of the questions raised by Professor Beath. We can start this on page 9, please.

You will see this starts on page 8 with Dr Wood and Mr Clark -- and he actually had a club and a ball during the hearing for the CMA's demonstration. So we can pick this up about a third of the way into page 9. He quotes Churchill:

"Golf is a game whose aim is to hit a very small ball into an even smaller hole with weapons singularly ill-designed for the purpose."

And at the end of that page where it starts "Hopefully ...", he says:

" ... but if Winston Churchill would be able to come in and get a good custom fitting, I think we would confidently say we could take five shots off his game and maybe he would not have had such a negative view of it."

Now, the point that Professor Beath put to me -- it is a relative one, but on any view, if I can shave five shots off my game, that's obviously a good thing.

He then goes on, page 13, so starting at line 15 --

he makes the point in the second sentence:

"We get very excited if we can gain, in this case, about 3 to 4 yards of distance from one model to the next."

So an important point. So the technological games in terms of new clubs, new model of clubs, would -- a good result would be a 3- to 4-yard game in distance and a 5 to 10 per cent better dispersion.

PROFESSOR BEATH: Yes.

MR O'DONOGHUE: So that's the progress you would get from a new set of clubs.

Then if we go back to his evidence in bundle B2, please, tab 3. It's paragraph 34. He says that:

"The MyGolfSspy articles explain the basic elements of custom fitting and what the consumer should look for in a good fitting, as well as documenting some of the measured performance improvements using Ping custom fitting software. The average performance gains in a good custom fitting are striking. For example, the Driver Fitting article shows that players gain an average of 11 yards increased distance and have 25 per cent better dispersion with their fitted club when compared to their current club."

So comparing that figure with on a custom fitting, if we go back to page 13 of the transcript of the oral

hearing, that compares to 3 or 4 yards for a new club and 5 to 10 per cent better dispersion also for a new club. So there is a dramatic difference between a good custom fitting and upgrading your clubs to a new set of clubs.

Then if we can go to page 16, so, again, a relative point -- so starting at line 5:

"So one shot makes a big difference in golf. I mean, it kind of goes without saying that golf is a game where the aim is to hit a lower score, so every shot does count, but one shot per round is the difference between being the number 1 guy on the PGA tour which is the top professional tournament and the 21st. Just one shot per round is the difference between 1st and 21st. Two shots per round is the difference between being 1st and 121st out of 185, so being the best guy in the world and not being as good as the average tour player. So every shot really makes a huge difference. Then probably more important to the 99.9 per cent of golfers in the world, one shot is the difference between my dad winning his local Monday seniors' competition at the club in Worcestershire he plays at and coming second, and that is bragging rights for the week and, you know, most people do not earn their living out of golf, but for those golfers every

shot still counts. It might not be £1 million."

So that is the point I touched on before lunch, which is -- it's Mr Chairman's point -- that it can make you extremely happy and you may be extremely unhappy if you don't have the bragging rights.

Then over the page at 17, line 5:

"So, custom fitting, for us, this is a huge way to get big gains for golfers. What is custom fitting? Well, traditionally and for most of our last 50 years custom fitting has been around going to visit a PGA professional, someone who has trained as a golf club retailer, usually hitting balls out on the driving range like this and the professional watches the ball flight, makes recommendations and they are the experts in the art of fitting. More recently that has started to change as technology has come in to play and through a different variety. That still happens but there is a variety of different ways you can get fit. This is a Ping demo van that travels around the country and takes a wider range of fitting equipment to golfers."

Then on page 21, starting at line 3:

"So, iron lie angle, was one of the key pieces of the fitting and has now been for a long time. Karsten [Solheim] was one of the first to really recognise how important this is. So, this is my Show 'n

Tell. So lie angle is this angle here. Lie angle is the angle between the shaft and bottom of the club, and with an iron club the ball is sat on the turf - it is not sat up on a tee - and so the club interacts with the ground when you hit it. There is no way round that. Even the best golfers in the world - in fact, especially the best golfers in the world use the ground quite a bit. So, when you come in and hit the ground, if the toe or the heel of the club misses the toe side here - this the heel side - if either of those dig into the ground first then, as they hit the ground the club will twist and cause a change in the angle. Even more fundamental than that this club is designed to come through with a certain angle and so if this is my target here - so this would be a club that is square to you, sir, and then as now I have changed the lie well just the physics of the fact that this is an inclined plain means I do this and now it starts to point over this way, I'm exaggerating a little but remember, 3 degrees is a long way in golf."

Professor Beath that in a sense responds to one of your questions, which is, well, it rather depends what you're getting wrong. So if it's simply that your grip is too thick or too thin, that may have lesser effect, but if your lie angle is completely wrong, that can have a profound effect.

PROFESSOR BEATH: Yes. I think he's making the point in all of these various places that the performance curve falls away quite rapidly, which I think was -- my question was: is it flat or does it fall away rapidly? He's implying from this that it falls away fairly rapidly. So I think that's the point answered. Thank you.

MR O'DONOGHUE: A couple of final references, if I may. An interesting example on page 23 of the swimmer, Michael Phelps. So he says:

"Michael Phelps. I would assume most people know who Michael Phelps is 25 gold medals in the pool. I had the joy of doing a club fitting for him a couple of years ago and he is a very big dude and so he is six foot five and my assumption was: 'Well he is going to need really upright clubs,' and when we look ahead on the chart, this is just a good example, so typically if what we might stock in a store is something like blue or yellow, which is near the middle of the curve, and my immediate assumption was there is no way that is going to work for Michael Phelps, and I was correct in that. However, if we look on the chart by his height he is up in there. Now, what I was not sure about was his wrist to floor measurement and it is something that people do not know off the top of their head. He actually has extremely long arms, which makes him such a good swimmer, so his

wrist to floor is not as high as you would think it would be and it brought him down into the silver range and then actually through the dynamic fitting itself he went down again to the white range."

So again, even if one is making informed guessing, even a static fitting, there is a substantial chance that that is quite radically wrong.

A final point on page 28, starting at line 8:

"So what does it all add up to? Well, actually, a couple of years ago, maybe it was last year, we did quite a big study on what are the average benefits of custom fitting and this was from the article we published on myGolfSpy as part of my statement so this is taken exactly from that. The average iron fitting gains the customer 10 - 12.5 yards' distance. This said, contrast that with two, three, four yards would be a good improvement for us with one club generation to the next. For irons it is even more important. It does not show up super well but you can see here is the red. A gamer is the phrase we use in the gold industry for the golfer's current club and then the fitted would be the part that they would fit it to and that has a 30 per cent better dispersion area on average. So, some golfers have maybe got a club that is working reasonably well for them to start with, and some golfers maybe never

been to a fitting at all, but on average they gain 30 per cent better dispersion."

The dispersion point is obviously important because distance is one thing, accuracy is another, and particularly if one is playing on links course, then dispersion may be very, very important indeed.

Now, it is a pity that Dr Wood was not cross-examined. He would have been able, no doubt, to elaborate on these points and responded to Professor Beath's further questions, but there is some information on the record which I think allows one to --

PROFESSOR BEATH: Thank you. That has been very helpful. Thank you very much.

MR O'DONOGHUE: Now, going back to the free riding point, I should make clear that the critical thing from Ping's perspective is that it has available to it as deep and wide as possible a retailer network.

Now, as I said in opening, that is not because of some fetish on Ping's part for bricks and mortar retail. It is because, in the current state of the art or the science, custom fitting can only be conducted effectively on a face-to-face or physical basis. So the reason Ping has this extensive network is that that is the optimal way to ensure that custom fitting is maximised on a geographic and personal basis.

From Ping's perspective, the free rider issue is not really a lament about the decline of the high street. It is a different point. Ping cares about retail because that is the vehicle through which it can deliver effective and proximate custom fitting for its consumers and the geographic scale and scope of that network on a nationwide basis is a critical vehicle or funnel by which Ping delivers its custom fitting maximisation objectives.

If that network is marginalised or decimated or even narrowed in any non-trivial sense, that has an immediate and dramatic impact on Ping's ability to deliver custom fitting in terms of its maximisation objectives.

So the critical thing is that the current 1,200 retailers from the network is an optimal and in fact growing network for Ping and Ping needs each and every one of these retailers -- and in fact more and more -- for it to disseminate its objective of maximisation of custom fitting.

Now, I made the point before lunch that half of these retailers are, on any view, pretty small and even a marginal shift in their incentives to offer custom fitting could have a significant medium- and long-term impact on Ping's ability to maximise custom fitting. They are the critical vehicle by which Ping can spread

its message and can affect custom fitting on a micro-level. So the maintenance of that network is absolutely critical.

Now, we make a point in our written closings and it's quite striking. If we go back to paragraph 6 of our written closings, we say:

"Because of Ping's commitment to custom fitting and the need for that to be done in person it has painstakingly built out a very large and deep retailer base in the United Kingdom, comprising over 1,200 Account Holders."

Now, pausing there, you will have seen in Mr Clark's first witness statement that over the course of about two decades the fitting network has grown from about 100 members to 1,200 members. There has been a dramatic increase in the scale and scope of the network and on a geographic basis that gives Ping the optimal level of coverage. Again, that is the most effective way by which custom fitting for Ping can be maximised.

We go on to say:

"No other manufacturer comes close to this."

I think that is common ground, as I indicated. We are now in the curious position where the CMA is actually relying on the fact that Ping has a deeper and wider retail network as being a difference between Ping

and its rivals:

"This network coverage maximises the possibilities for consumers to be custom fit somewhere convenient for them and thereby maximises the custom fitting of Ping's clubs."

The Tribunal will recall the evidence in Mr Holt's report, that if one looks at this in terms of isochrones or catchment areas, something like 99 per cent of consumers have three or more retail options available to them for Ping within a 15-minute or ten-minute drive of their location. So the proximity point is very, very important and in particular if one -- it's all very well in Central London, but if one lives in a remote part of this country, that catchment area and coverage and proximity is critically important. If that network is diminished really in any way, the direct consequence will be that custom fitting through a physical interaction will become difficult, if not impossible, for many, many people.

The last sentence, an interesting point:

"For perspective, Ping's network of retailers is four times that of Waitrose, 25 per cent more than Starbucks, the same as McDonald's and similar to Sainsbury's."

So on a comparative basis, this is one of the most

impressive, in terms of depth and scale and scope, retailer network of any comparable network in the country.

THE CHAIRMAN: It's very hard for the Tribunal to assess what the effect on the retail network would be, though, isn't it, if the internet policy was removed?

MR O'DONOGHUE: Well, sir, it certainly isn't straightforward. I see that. But you have had direct testimony from quite a large cross-section of retailers. Effectively, every one of them has made the same point. You have important evidence from Mr Hedges, who is a surrogate for up to 1,000 PGA professionals' accounts. That evidence is particularly important; you have the evidence of Mr Holt in terms of the undisputed geographic scale and scope and catchment area coverage of this network, which is impressive on any view; you have the evidence at paragraph 40(f) of Mr Clark, which goes to a number of points.

So the first point, which is uncontested -- he wasn't cross-examined on this -- is that there are a large number of Ping account-holders where there are only one or two other brands present. The figure is between 40 and 60 per cent. Now, in my submission, those accounts are obviously the most vulnerable to this free rider problem because even a small change in their

relative incentives could easily affect their ability to offer custom fitting at all.

Now, there is an important point which we have touched on in this context, which is in custom fitting terms one can see Ping as a sort of tide that raises all boats, because take the small retailer who has Ping and maybe one or two other brands -- you have evidence before you from Clark 1 that Ping goes deeper and further down the retail chain than its competitors. So you will have retail accounts that are particularly reliant on Ping in the sense that Ping is the only one or the main person funding the equipment, the fitting heads and so on, and that can be used for the custom fitting of other brands. In a sense the other brands have been a free rider on Ping's custom fitting investments and Ping's deep and wide retailer base. So there is a sort of double effect. It is not simply intra-brand competition that has been stimulated; there is an inter-brand component that is very, very important.

So that is the first point in paragraph 40(f) of Clark, which is that there is a large cohort of retailers for whom Ping is their main or one of the two or three main brands that they carry.

He then makes the point about the relative turnovers

for Ping products and it's a figure of £10,000, which on any view is small.

Now, I take the point that that is turnover of Ping products and we would need to understand what else the retailers are doing, but in our submission that doesn't really matter. The critical point is that if your turnover of Ping is, say, £10,000, it doesn't take very much free riding at all for your incentives to offer custom fitting to diminish or evaporate because, with that level of sales, which could be as little as five sets of golf clubs, even a small amount of free riding could fundamentally change your incentives to offer custom fitting.

It's back to the point I made before lunch, which is, well, if I have allocated 400 square feet to an expensive fitting studio and I look at my P&L, I may very quickly out figure out that selling cafe lattes is a better use of my time and money. So the point is not about them going to the wall. The point is about a small shift in their incentives and then switching to a different line of business because that is a more profit-maximising way of using the space.

So we do say that there is a lot of cumulative evidence before the Tribunal that allows the Tribunal to make intelligent and informed conclusions based on the

evidence as to the free rider problem and we do make the point that the evidence in the other direction -- I mean, it's really no more than inference.

There is very, very little evidence from the CMA's side on this issue, and the irony is that the witnesses who came along from the CMA, they fall into two camps. We have the American Golf witnesses and, as the largest retailer in the country, they are extremely concerned about free riding. So that is evidence against the CMA.

We then had Mr Patani and Mr Lines. They are the free riders, with respect and they are highly motivated, highly able. They are extremely successful and competent business people and they are interested and only interested in high-volume sales. One looks at their ratios of in-store to online sales, about 90 per cent to 10 per cent, and it is clear that they are in pole position to become and to expand as the free riders.

We do make the point that the only economic evidence in this entire case has come from Mr Holt. The Tribunal would certainly have been assisted by economic evidence from the CMA and there is nothing. So I said when I started my closings that the Tribunal should decide the case on the basis of the evidence before it and we say there is a compelling body of evidence on this issue

and really no evidence to talk about going in the other direction.

We do emphasise the point that on object, if indeed proportionality is part of object, which we disagree with, the CMA clearly bears the burden of proving object. It is their burden, their evidence and there is no evidence.

Now, just to go back and complete the response to the reasons advanced by the CMA on free riding: the fourth suggestion by the CMA is that Ping could somehow limit the number of retailers who are selling primarily online and, with respect, we say that is economically illiterate because the free riders' only weapon is price and it therefore follows that it is only those online retailers who have the highest volumes who will survive because they will have the economies of scale and scope through volume to undercut the other free riders.

What therefore will occur is that there will be a handful of very large, mainly online players, perhaps the likes of Mr Patani, Mr Lines and the Complainant -- these are very substantial businesses amounting to many, many millions of pounds -- and they will be a small number of free riders with a very high volume of sales.

So it isn't a numbers' game. It isn't simply a question of limiting it, even if you could, to half

a dozen people. The point is that the top six online retailers will be very substantial high-volume retailers. So the idea of a quantitative limitation, even if that were legal, that simply doesn't work.

The fifth point made by the CMA is that free riding is not a major concern because the conversion rates in-store of custom fit to sales are high.

Now, we do make the point that, if that is true, then the entire rationale for the Decision falls away because the one and only premise of the CMA's case is that each and every customer who buys online will be a free rider. We also say, secondly, that this is obviously untrue. You have my point on the guessing which I have addressed you on before lunch, but the CMA's case is that the only customers who will benefit will be the free riders. So we do find it more than a little odd to hear them extol the virtues of a measure that they say would not actually lead to free riding in any event.

The final point on free riding is the question of portability, which Mr Doran's question touched on. So the CMA advances a further version of the argument I have just dealt with, that the specifications are not very portable and some retailers do not provide prescriptions following a custom fitting.

Now, I touched on this before lunch, but just to recapitulate on the points. The first point is, again, if free riding truly is a phantom concern, then the benefits of the Decision for competition are equally phantom.

The CMA's case only works if there are high volumes of free riding in order to sustain its argument that every online purchaser will have had a custom fitting and that there is a real and substantial benefit from this measure.

The second point is that the evidence on the whole points in the other direction. Companies are already taking measures to prevent free riding, but nonetheless many thousands of golf clubs are being sold online each year. You have heard the evidence of Mr Lines and Mr Patani, who have built up very substantial businesses based on this feature of the market alone.

The third point is essentially a consumer rights point, that if I have been to a retail store, paid £25, £50, £100, for a custom fitting, and if, at the end of that exercise, having paid for that service, I am refused my specifications, that, in practical and even in legal terms, is not an obviously tenable position for the retailer.

Those are Ping's closing submissions.

THE CHAIRMAN: Thank you very much. There is one other point that perhaps you could help us on and that's the Racecourse Association case. It's to do with burden of proof. Do you have anything to say about that case? You don't need to come back to me now on that.

MR O'DONOGHUE: Sir, I can deal with it now. It ties in with Metropole. So to be clear, in terms of burden our position is very straightforward. We would accept that if we were applying for a conclusion that under the Metro criteria everything falls outside 101(1), we would have to show that. That's the first point.

If the question put before the Tribunal -- and we say this is the question -- is whether Ping has committed an object infringement, you have my submissions that, one, that doesn't include proportionality at all. That is a legal error. But if it does include proportionality, because the CMA bears the burden of proving the object infringement, it also bears the burden on that front. So that's the second point.

Now, the third point, sir, which I think is your point, is essentially the ancillary restraint point. If we were advancing a case of objective necessity, then we accept that on that front we would bear a burden and the Racecourse case makes that point. But the primary

argument we're attacking is the object argument and we do not bear the burden on that.

Finally, we accept, as I have said before lunch, that insofar as we are seeking an exemption on a 101(3), we would bear the burden on that. So I hope that makes our position on burden crystal clear.

THE CHAIRMAN: What if, as per -- well, at least on one reading, paragraph 47 of Pierre Fabre, restriction by object happens where the clauses are not objectively justified. Who bears the burden on objective justification?

MR O'DONOGHUE: Well, sir, it's the same answer. If a necessary ingredient of object is proportionality, then it is up to the CMA to show that the Ping measures are disproportionate.

THE CHAIRMAN: Thank you.

MR O'DONOGHUE: In a sense, I mean, the CMA took it on itself to issue the alternative measures paper. That sets out their views on proportionality and we say that is entirely consistent with the fact that they bear the burden.

MS DEMETRIOU: That's a highly misleading submission, which I will come back to at the end, but that was canvassed in the application. The chairman will be aware of that.

THE CHAIRMAN: I remember, yes.

MS DEMETRIOU: That's a highly misleading submission and I will have to return to it. I am very surprised that Mr O'Donoghue makes that submission, having been here in court responding to the application to exclude evidence.

Anyway, I will come back to that at the end.

Closing submissions by MS DEMETRIOU

MS DEMETRIOU: Mr Chairman, sirs, I am going to address my closing submissions in the following order: I am going to first of all make some opening remarks which we say colour the assessment of the issues in this case.

Secondly, I am going to deal with the law. We say that Ping is very plainly wrong on the law and that Mr O'Donoghue has tied himself up in knots, we say, trying to escape the consequences of Pierre Fabre, and I will come back to that.

Thirdly, we're going to deal with proportionality and I wish to deal with four main points on proportionality. Some of them are short points. Let me tell you what they are. So the first is the question of aim, whether its promotion or maximisation, which is the same point on analysis as the unacceptably compromised point.

Secondly, I want to address the Tribunal on the effectiveness of the ban. In a nutshell the CMA's case is that the online sales ban has very little -- no

material, we say, effect on Ping's custom fitting aim and the gaping hole in Ping's case is causation, and it's proceeded on the basis that it's enough to show that its rates are higher than its competitors, but we say that's only the starting point of the analysis because the critical issue, then, is whether this difference, if there is a difference, is due to the online sales ban or due to some or all of the other factors that Ping says distinguish Ping from its competitors, and those factors are common ground on the evidence and that's important.

Thirdly, I want to make a short point about counterfactual. Essentially what I am going to be submitting to the Tribunal is that Ping's entire argument is premised on a counterfactual whereby, absent the online sales ban, it would permit any retailer to sell online. You heard how Mr O'Donoghue put it towards the end of his submissions. He said it would lead to a situation where you have very high-volume online retailers selling Ping clubs who have no commitment to custom fitting and we say that is not the correct counterfactual.

Fourthly, I want to deal with free riding. On that we say that the evidence as it's come out before the Tribunal in this case goes only in one direction.

It supports entirely the CMA's finding in the Decision that although free riding is a theoretical possibility, in this particular market and on the facts it is not a problem in practice.

Now, that's the order of my submissions. So I want to commence with some opening remarks. We say that it's striking that quite a lot of the evidence in this case is common ground and that there are a lot of undisputed facts. That, in a sense, makes the Tribunal's task a little easier. But where it gets more complicated is, of course, how you characterise those facts and where they lead. But the undisputed facts are significant.

Now, the main question, of course, for the Tribunal to determine is whether it's necessary for Ping to prohibit its retailers from selling Ping golf clubs online and, in particular, we say whether it's necessary to prohibit them from doing so in order for Ping's aim of promoting custom fitting not to be unacceptably compromised.

I am going to come back to that question of the aim, whether it's promotion or maximisation, but the point that I wish to make at this preliminary stage is that, in light of the uncontested evidence in this case, Ping starts from a very unpromising position because it's common ground that custom fitting rates across all the

major brands are high and it is common ground that those rates are increasing and it is common ground that they are increasing because consumers want to be custom fit. So, in other words, a high proportion of consumers have already been persuaded that custom fitting is important.

The Tribunal has heard evidence showing that the price of a set of golf clubs is high and that consumers in general think very hard before they buy them. You may recall the evidence given by Mr Hedges in that respect, and I think he said -- so what he did say was that buying golf clubs, he said, is not an impulse buy. There will be a six-week buying cycle for the customer before they make that purchase. So, in other words, what he was trying to get across, which he did very well, is that this is not a Decision that consumers take lightly. It's one that they think about.

It's common ground in this case that retailers are increasing their investments into custom fitting, so investments are increasing, and, of course, they're increasing because it's demand led. This is what consumers want, so it's logical that retailers want to respond to consumer demand and are increasing their investments in custom fitting. The Tribunal heard evidence from Mr Sims of Silvermere, called by Ping, and that evidence showed very clearly that Silvermere is

very committed to custom fitting. Indeed it has increased its custom fitting rates year on year since 2015 as a result precisely of considerable and increased investment.

Now, this increasing demand and this increasing investment is taking place in a world in which Ping is the only manufacturer to have a ban on internet sales. We know -- again, this is common ground and it's a very important fact in this case -- we know that the vast majority of investments made by retailers into custom fitting are cross-brand investments; in other words, these investments that are being increasingly made into custom fitting by retailers are investments that they recoup by selling all the major brands, not just Ping, and yet, despite the fact that all the other brands are allowing their retailers to sell online, these investments have not been deterred. On the contrary, the evidence shows that they are increasing.

So at the outset it's very difficult to see why it's necessary for Ping, just one manufacturer, to have an online sales ban when things are going very nicely indeed in terms of increasing custom fitting, even though most golf clubs are available online.

Consistently with this picture, we see that the demand for online sales of golf clubs is relatively

limited. Now, this is not a volte-face on the CMA's part because the CMA considered this question very carefully in the Decision and it found that the demand for online sales of golf clubs is around 10 per cent, so there is a demand, which is why it's important not to shut off this channel. But it's a limited demand and that's precisely because most consumers want to be custom fit and because these are not, by their nature, impulse purchases. That all fits together.

Now, Ping says, "Well, we value custom fitting more than our competitors do", and the concrete example it gives of this in its closing submissions, the concrete example it gives, is very illuminating because the example it alights on is the example that other manufacturers force their retailers to buy onerous stocks of inventory which can only be sold without a custom fitting. The Tribunal will have seen in both sets of closing submissions reliance on this key fact, the fact that Mr Dave Clarke referred to as "very expensive wallpaper".

But this is a point which undermines Ping's case. It undermines Ping's case because it shows that Ping accepts -- and so it's also common ground -- that there are a number of important ways, aside from the online sales ban, that Ping utilises to try to persuade

consumers to be custom fit before buying its clubs. One of the things it does, in contrast to other manufacturers, is that it does not, as Mr John Clark has said, impose a minimum inventory requirement on its retailers.

But Ping also takes other steps which we have elaborated on in our closing submissions and these include, of course, imposing a contractual requirement on its retailers to persuade customers about custom fitting. So this type of undisputed evidence we say makes it very difficult for Ping to argue that it also needs the online sales ban in order to achieve its aim.

It's important not to lose sight of the other side of the balance, the other side of the equation, because the other side of the equation is that Ping's online sales ban undoubtedly restricts intra-brand competition, and that's precisely why the European Court of Justice has said that this type of restriction is a restriction of competition by object unless objectively justified. I am going to come back to what that means. But it's obvious that shutting off this important sales channel does restrict intra-brand competition, and the evidence the Tribunal heard demonstrated in a very practical sense how that happens.

So take a consumer that has been custom fitted and

buys a set of golf clubs and then wants to add to the set. Ping agrees that they don't need another custom fitting. Now, why should that consumer have to traipse off to their local bricks and mortar store to buy the club? Why shouldn't they be able to shop online? They know what their custom fit requirement is. Why shouldn't they be able to shop around online and buy it from the retailer that sells it the most cheaply or that gives the quickest delivery time? They should be able to do so.

Now take also the percentage -- the Tribunal will know the confidential figure, but it lies between 10 and 20 per cent -- of Ping customers who currently, even with the ban, buy without a custom fitting. Now, we have to assume that a proportion of those customers who currently buy without a custom fitting are unpersuadable about the benefits of custom fitting. They simply don't want to be custom fit because they're going to stores, they're no doubt being given the message and they still decide they don't want a custom fitting.

So the online sales ban hasn't worked in their case, so why should they be limited again to heading off to their local or maybe not so local on-course retailer? Why shouldn't they be able to shop around online when they know that they want a set of Ping golf clubs

without being custom fit?

So the result of these restrictions --

THE CHAIRMAN: Well, they can shop around online to the extent that Ping is advertised online.

MS DEMETRIOU: That's very different. No, what you can't do is shop around online and have the convenience of then clicking to basket and buying it online. So one has to either -- there are two points, sir, to make about that and they're both covered in the decision. The first point is one of convenience and the decision establishes that customers are deterred from that process. Indeed that's a point that Ping positively asks the Tribunal to find. So Ping says, "Well, telephone sales are very, very restricted in number". Well, the reason they're restricted or one of the reasons they're restricted is because it's not very convenient to shop around online and then pick up the phone and hope to speak to someone and make the order. It's much more convenient just to be able to make the purchase there and then by clicking to basket.

The other point is that there is a difference -- and this is a difference which has never really been satisfactorily dealt with by Ping -- so Mr O'Donoghue put to Ms Aspinall that even though she found on her researches or the CMA found on its researches that price

comparison is much more limited on price comparison websites for Ping clubs, on the one hand, as compared on other manufacturers on the other, the points put to Ms Aspinall by Mr O'Donoghue all related to advertising. Well, that's a different thing because you may have several retailers advertising, but what a price comparison website gives you is reference to a whole bunch of retailers, which is different.

So in relation to -- aside from the point about telephone sales being less convenient, what if you're shopping around online and you find that the cheapest price is a retailer that's 100 miles away? Well, it's not an easy thing. What the ban prevents you doing is easily buying, purchasing, from that retailer.

So the result of these restrictions is that Ping's retailers are not subject to the competitive constraint that internet sales permit. Online sales are obviously important in competition terms precisely because they allow customers to access retailers who are geographically distant and in that way they result in more competitive pressure being brought to bear. This is reflected in the approach that the CJEU has taken in its judgments.

I'd like, now, to turn to the law, which is really ground 2 of Ping's appeal, where it says that the CMA

erred in approaching this as an object restriction. Obviously the most important authority in relation to this is the Pierre Fabre case. The court in that case very clearly laid down the approach that must be taken in relation to an online sales ban in the contribution of a selective distribution system.

Now, I know that the court has now seen this judgment several times, but I would ask the court to go back to it so I can make our submissions clear.

It's at bundle of authorities 3, tab 68 and, sirs, as the chairman pointed out, the critical paragraph in this judgment is paragraph 39 and it's at paragraph 39 that I want to start. Ping simply does not address paragraph 39 properly in its submissions, if at all.

What this establishes is that selective distribution agreements are restrictions of competition by object unless objectively justified. We see that stated in express terms. So: "As regards agreements constituting a selective distribution system, the court has already stated that such agreements necessarily affect competition in the common market. [...]
Such agreements are to be considered in the absence of objective justification, as 'restrictions by object'."

Now, that's then explained further in paragraphs 40 and 41. So what the court is now doing in

paragraphs 40 and 41 is explaining what kind of objective justification is needed in order for a selective distribution agreement not to be a restriction by object.

So we see at 40 a recognition that systems of selective distribution can be legitimate. Then at 41 -- and a reference again to the AEG Telefunken case, which I will come back to. Then at 41, "In that regard ..." -- so it's 41 that sets out what's required by way of objective justification in order for the selective distribution agreement not to be an object restriction. So we see there that: "the court has already pointed out that the organisation of such a network is not prohibited by Article 101(1), to the extent that ...", and then there is a series of criteria.

Now, the first set of criteria, "...resellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential resellers and not applied in a discriminatory fashion;, and that relating to 2the characteristics of the product in question [...]", they are not in dispute in this case. But what is in dispute is the final requirement:

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

That is the part of the test that is in dispute in this case. Then we have paragraph 43, which refers back to paragraph 41 and in particular refers back to that final requirement. So what the court says is that it is undisputed that Pierre Fabre's selective distribution system satisfies the first set of requirements, but, "However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41". Looking back, that's that the criteria 2do not go beyond what is necessary".

So clearly 43 is referring back to 41. It says so in terms. And clearly what's required, because 43 says so in terms, is a proportionality assessment. It must be established that the criteria don't go beyond what is necessary.

Then what you have is 47, and 47, as with all judgments of the European Court, is the ruling. So it's piecing together the reasoning that's gone on further up and it's encapsulating it in one single paragraph. What that says, very, very clearly is that:

"...in the context of a selective distribution system [an internet sales ban] [...] amounts to a restriction by object[.] where, following

an individual and specific examination of the content and objective [...] and the legal and economic context of which it forms part, it is apparent that[...] [it] is not objectively justified."

Now, what does "objectively justified" mean? Well, it means what's said in 41 and 43. There can be no other meaning ascribed to it. It means: does it comply with the criteria in 41, including the final one particularly here, that it doesn't go beyond what's necessary? That's put beyond doubt by 43.

MR DORAN: Can I just ask you -- sorry, I don't want to stop you --

MS DEMETRIOU: No, no, please do, Mr Doran.

MR DORAN: If you read 41, " ... to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure proper use and finally that the criteria ...", ie those four things.

MS DEMETRIOU: Well, the criteria which the retailers have to comply with in order to be selected for the distribution system.

MR DORAN: So that's those four things?

MS DEMETRIOU: No, those are -- the four things are -- which four things, sir? Sorry.

MR DORAN: " ... to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature laid down uniformly for all potential resellers and not applied in a discriminatory fashion"

MS DEMETRIOU: No, those are not criteria. They are descriptions. They're requirements that the criteria have to fulfil. So do you see the third sentence says "on the basis of objective criteria" and then there is a series of descriptions that they have to fulfil. So they have to be qualitative, they have to be laid down uniformly, they have to be not applied in a discriminatory fashion, they have to be necessitated by the quality of the goods and, finally, they mustn't go beyond what's necessary.

MR DORAN: And you hold to that, despite that it says, "The court has already pointed out that the organisation of such a network is not prohibited to the extent that ...", and then the four points --

MS DEMETRIOU: That is right, so --

MR DORAN: That's the beginning point of 41.

MS DEMETRIOU: Exactly. So reading all this together, 39 says, "Selective distribution agreements are object restrictions unless they comply with these requirements

as set out in 41", and 41 lays down the conditions that criteria, selective distribution criteria, have to comply with. Lots of them are not in dispute, but the final one is that the criteria don't go beyond what's necessary.

So those are all the conditions that the criteria have to comply with for it not to be an object restriction. That's why we see at 43 that the court there is saying, "Well, lots of them have been complied with in this case, but we're really focusing on the final one, which is that the ban doesn't go beyond what's necessary. It's proportionate". So we say that Pierre Fabre is clear. I was going to turn to see what Ping says about it, unless you have a question at this stage.

THE CHAIRMAN: I do have a question because -- I had my question at the outset. How do you ever get on to 101(3)?

MS DEMETRIOU: Yes, can I address that?

THE CHAIRMAN: If you don't satisfy these criteria, how can an agreement possibly satisfy the not dissimilar, if not identical, criteria in 101(3)?

MS DEMETRIOU: Sir, yes. So at the outset you put that point to both of us and you also put the Metropole point. I think you asked, "Well, does proportionality

really require the sort of Metropole type analysis?" So can I deal now with both of those points, if I may.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So in relation to 101(1) and 101(3), it is true to say that the proportionality requirement in 101(1), which we say follows clearly from the way that the judgment is expressed -- that that requirement overlaps with the 101(3) analysis, so we accept that there is an overlap. But we don't accept that that leaves no function for 101(3). It may be that I can best put the point by reference to the Decision itself.

So if you take up the Decision in Bundle A and in particular paragraph 4.82. It's at page 94. So there the CMA is considering an argument made by Ping that the restriction of intra-brand competition for Ping golf clubs resulting from the online sales ban can be justified by virtue of an alleged increase in inter-brand competition. So the CMA says about that:

"it would have to be demonstrated[...] [that it] was objectively necessary [...] if that were not the case, such "trading off" may be assessed under Article 101(3). In any event, as Ping didn't provide evidence to support its submissions, the CMA is unable to give any weight to these claims."

So, sir, in answer to your question, you will have

seen from the CMA's written submissions in opening -- perhaps you could just turn them up -- reference to the Consten and Grundig line of authorities. We deal with this in our closing written submissions at paragraphs 42 onwards. What we say here is that since the early days of Consten and Grundig, it has been clear that once you have established a restriction of competition by object, that you can't say, "Well, it's not a restriction of competition by object -- this is in the context of a restriction of intra-brand competition -- because it benefits inter-brand competition a bit". So that trading off or weighing up is something which is done under 101(3). So do you see the quotation from Consten and Grundig at paragraph 42 that -- the principle of freedom of competition concerns -- because this was a vertical case, the various stages and manifestations of competition:

"Although competition between producers [that's the inter-brand level] is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition [that's intra-brand competition] should escape the prohibition of Article 85(1) merely because it might increase the former. Besides, for the purposes of applying

Article 85(1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."

So, sir, in answer to your question, what we say is that the analysis under Article 101(1) in this context is a relatively short analysis because you carry out the proportionality analysis, but then, once you have established that it's not proportionate, then you have established a restriction by object and everything else -- so if there are other arguments, such as, "well, it doesn't restrict competition very much in terms of its effects" or "actually it increases inter-brand competition and so it should be permitted", those arguments are all dealt with under Article 101(3). So it's not as if Article 101(3) doesn't fulfil any role. It's not a dead letter. So that's what we say about the interrelationship between the two.

MR DORAN: And the cumulative nature of 101(3) isn't compromised?

MS DEMETRIOU: I think you will have to unpack that a little bit because it's not clear to me what --

MR DORAN: For the exemption you have to satisfy the four --

MS DEMETRIOU: Yes.

MR DORAN: So that's not compromised then?

MS DEMETRIOU: No, we don't think -- I'm not sure --

MR DORAN: If you found not objectively justified even in a limited extent in 101(1), can you find differently in 101(3) if you have got to satisfy all those four elements?

MS DEMETRIOU: Well, you may be able to. So, for example, if Ping, at the 101(3) stage, said, "I know you haven't looked at effects because you have run an object case but we want to show you what the actual effects of this are and we are going to adduce evidence", then they may be able to satisfy those hurdles.

THE CHAIRMAN: So effects simply don't come into it in the proportionality test under 101(1), you say?

MS DEMETRIOU: No, other than -- no, they don't, other than, of course, the fact that, as you see from paragraph 47 of Pierre Fabre, you have the Cartes Bancaires requirement, that you look at something in its context. But that isn't the same at all as analysing the effects on competition. We see that again, going back to Consten and Grundig, in the paragraph that deals with the same point, it's paragraph 42 of our written closing submissions.

"for the purpose of applying Article 85(1) there is no need to take account of the concrete effects of an agreement once it appears it has [the object]."

These principles -- this is at 44 -- they have been affirmed by the court many times since that judgment, including in Cartes Bancaires itself. That's paragraph 51.

We have set out the important T-Mobile judgment, which says that once you find that the object of an agreement is to restrict competition, you don't go on to look at the effects.

So that's very well established in the case law and indeed this Tribunal in the recent Paroxetine appeal found exactly the same and we have given you the reference at paragraph 45 of our written closing.

So we say that there is an overlap -- of course there is an overlap -- because you have indispensability in 101(3) and you have proportionality in 101(1). So it's a very good question. We recognise there is an overlap, but we say that there is space in 101(3) to justify a restriction by object if the proper evidence and argument are adduced, including by looking at its effect and also trading off intra-brand and inter-brand competition are examples.

Sir, you mentioned Metropole. Can I just deal with that because I think what was being put was that Metropole requires a somewhat different approach. We don't accept that it does. Can I just take you to

Metropole?

THE CHAIRMAN: Yes.

MS DEMETRIOU: If we go to paragraph 106 -- so this is the concept of ancillary restriction. The Tribunal is quite right to raise this as a point because, in fact, it has been a point, you will see, in these proceedings. So Ping originally and I think up until -- the point hasn't been pressed in closing, but throughout has also put its case in terms of ancillary restraints, that this is a legitimate ancillary restraint. So the CMA dealt with both in its Decision.

You see at 106 that:

"The condition that restriction be necessary implies a two-fold examination. It is necessary to establish first whether [it] is objectively necessary for the implementation of the main operation ..."

So that's a factual point: is it related to the main operation?

" ... and second, whether it is proportionate to it."

So you have proportionality there and you see that over the page. So you see at 107 that there is no need to weigh the pro- and anti-competitive effect of an agreement because that's under 101(3), which is consistent with the answer I have just been giving

the Tribunal.

Then over the page at 113:

"Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under 85(3)."

So this is all getting at a proportionality analysis. If you also just turn up a more recent authority which is in the bundle on ancillary restraints, which is the MasterCard judgment, which you will have in the same volume as Pierre Fabre, towards the back of authorities 3 in tab 83 -- and if you turn to paragraph 91, you see there the point that I am seeking to make, which is that it is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question. So it's actually a very strict test. Is it impossible to carry out the main operation? Is it impossible to promote custom fitting without this ban? So that's the same as necessity or even -- it's even expressed a little bit more strictly.

Then:

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

So, sir, if implicit in your question was that somehow ancillary restraints require a slightly more attenuated form of proportionality, we don't accept that and we say that that's clear on the face of these authorities.

THE CHAIRMAN: Would you accept that necessity under 101(1) is as described here?

MS DEMETRIOU: Yes, we think that it is essentially the same approach, and it would be very odd if it weren't the same approach in this context because one is really tackling the same problem through a slightly different legal lens, but actually you're asking yourself the same question, which is: is this necessary to the aim -- to

the aim, is it necessary? So under ancillary restraints the court says: is it impossible to carry out --

THE CHAIRMAN: Without any detailed balancing exercise.

MS DEMETRIOU: Yes, so -- well --

THE CHAIRMAN: That's at the 101(3) stage.

MS DEMETRIOU: Well, without trading off any pro-competitive benefits because -- or without analysing the actual effects, yes.

THE CHAIRMAN: I think that's what I had in mind, yes.

MS DEMETRIOU: Yes. So, sir, I hope that has answered those questions. So I have made my submissions on Pierre Fabre, but what I now want to do is look at what Ping says about Pierre Fabre and address the submissions made by Mr O'Donoghue.

Is now a convenient time for a short break before I do that? It's going to take me longer than five minutes.

THE CHAIRMAN: Yes.

(3.12 pm)

(A short break)

(3.27 pm)

THE CHAIRMAN: Ms Demetriou, before you carry on, can I just raise another point? I believe that you said before our break that the proportionality analysis under 101(1) is not concerned with effects and is not concerned with

weighing up detriment and benefit, if you like, in a nutshell. If that is the case, what has all the evidence been about?

MS DEMETRIOU: No, so -- thank you for giving me the chance to clarify that -- no, of course we're not saying that the proportionality analysis doesn't require you to examine whether the ban is necessary to achieve the proportionate aim. So we accept that that's why everyone has adduced evidence, to try and ascertain that, whether or not it is effective, whether it's necessary, because you do need evidence to establish whether or not a ban is necessary to achieve its objective.

So the point I was trying to make was a slightly different one, which is that there are -- can I take you back to the MasterCard judgment, because it may be that it's best -- there are two paragraphs that I should have gone to that Mr Lask reminds me that I omitted. It is at the third authorities bundle, tab 83.

So I took you to paragraph 91, but paragraphs 92 and 93 are important for the Tribunal's point because the court is directly there addressing the question put to me about the overlap between 101(1) and 101(3), so it's important to see what's being said because, having said at paragraph 91 that you need to essentially carry out

a proportionality analysis and decide whether it's strictly indispensable, the court then says:

"...that interpretation does not mean that there has been an amalgamation of, on the one hand, the conditions laid down by the case law for the classification - for the purposes of Article 81(1) EC - of a restriction as ancillary and, on the other hand, the criterion of indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted"

Then it goes on to explain why. An important consideration -- and this comes out from 93 -- is that of course what you're looking at for the purposes of establishing a restriction of competition by object under 101(1) is the proportionality of the clause in question to the stated aim of the company. So that's what you're looking at there.

But the proportionality assessment under 101(3) is different because you're looking under 101(3) at whether or not there are countervailing benefits, the named ones in 101(3), and whether the clause is indispensable to those.

Now, it's true that in this case the arguments put forward by Ping were essentially overlapping arguments, so the arguments it put forward under 101(3) in relation to the efficiencies it relied on were the same

efficiencies as it relied on -- or it was the same point as the benefits flowing from its aim of custom fitting. But that won't be the same in other cases.

So that demonstrates why there is not an amalgamation, as the court puts it -- why the proportionality analysis doesn't result in an amalgamation of 101(1) and 101(3). So, sir, in answer to your question we do say that it's incumbent on Ping to demonstrate that its ban is proportionate. So it has to show that it has a legitimate aim -- now, that's common ground -- it has to show that the measure is appropriate in order to achieve that aim. The way that that is put in other cases is, "Is there a rational connection?", so is it rationally connected. Again that's common ground.

What isn't common ground is whether it's necessary, and in determining necessity, plainly a very critical question will be: well, how effective is it? Because if it's not effective, if it only has a marginal, tiny effect, then it's much less likely to be necessary, whereas if it has a very large effect, it's much more likely to be necessary. That's why we say you do get into this evidence about: how effective is it?

So, sir, I was going to next deal with Mr O'Donoghue's arguments on Pierre Fabre. I think

we can take this most conveniently from Ping's written closing submissions because that's how Mr O'Donoghue advanced the point orally. The starting point, really, is paragraph 54. That's a paragraph that Mr O'Donoghue took you to, on page 21 of Ping's written closings.

So you see from paragraph 54 that what Ping is alleging -- the error that Ping is alleging that the CMA has made -- they say that the CMA has conflated two separate issues. The first question is whether Ping's selective distribution agreement falls outside Article 101(1) per the Metro criteria and then they say that that question is not in issue in these proceedings because the CMA has accepted that Ping's products justify a selective distribution system. They say -- and this is a very important final sentence. They say:

"This sub-issue does raise considerations that touch on issues to do with 'proportionality'."

Of course they have to say that because the case law all says that. So Pierre Fabre, paragraph 41, says in terms it has to go no further than is necessary. But they say that that's not -- the way they try to deal with that is they say that that's not the ground of appeal at issue in this case. So they say, "Well that just doesn't arise in this case".

They then say that the CMA has conflated that with

the second question about whether or not, if a clause does fall within Article 101(1) -- whether it's a restriction by object or by effect. They say that the CMA has conflated both of these points, but this is, in our submission, obviously incorrect. Ping is wrong to separate out these two stages and the only reason it does so, it's driven to do so, is because it needs to somehow distance itself from the reference to proportionality in paragraph 41 of Pierre Fabre.

Now, the CMA make two points. The first is that this whole analysis is flatly contradicted by paragraph 39 of Pierre Fabre. I have already made that point to the Tribunal because 39 is clear on its face.

The second point is that Tribunal only has to read paragraphs 54(a) and (b) to see the logical flaw, because -- let's look at what issue 1 is. So Ping says "Issue 1 is not live in this appeal", but let's see what issue 1 is. Ping says that the CMA has accepted that Ping's products justify a selective distribution system, but the difficulty with that submission is that of course the CMA hasn't accepted that. That's why we're all here arguing this lengthy appeal.

What the CMA has accepted is that some of the Metro criteria are met, including the criterion that Ping's products are the type of products that can justify

a selective distribution system. But what the CMA hasn't accepted is the final criterion, the final condition in paragraph 41 of Pierre Fabre, which is that the criteria, here the online sales ban, don't go further than is necessary. So the CMA has not accepted that this selective distribution system falls outside Article 101(1).

Now, if Ping were right about that, let's just stop and think about what the consequence would be. We can take this from Ping's flow chart, which is at the back of its submissions. So if Ping were correct that the CMA had accepted that Ping's selective distribution system falls outside Article 101(1), then we would be on the first arrow pointing right. So Ping says:

"Question 1: does that selective distribution system fall outside Article 101(1)?"

Ping says, well, the CMA has accepted that. Where does that take us? "Yes, accepted it"; "Lawful selective distribution scheme outside scope of Article 101(1)".

Now, if that's correct, you don't get onto the question of object or effect or anything like that. So that just shows how deeply misconceived Ping's argument is, because Pierre Fabre tells us that you do look -- when you have an online sales ban in a selective distribution system, you do have to analyse whether or

not it is objectively justified. So it can't be the case that somehow Ping can escape by this flow chart to a position where the Tribunal never examines any of that at all. It's wholly misconceived.

Now, let's look also at what Ping says about Pierre Fabre. We go back to paragraph 62 of its written submissions. There is first of all a rather convoluted and confusing attempt at 62(b) to impose Ping's two-stage analysis on the court's judgment. We say that that's entirely unconvincing. That's not what the court said for the reasons I have given. But then Ping is faced with a new problem. How does Ping explain paragraph 47 of Pierre Fabre, which says in terms that the online sales ban is a restriction by object unless it is objectively justified? How does it get away from that?

So one of the points that Ping seeks to make is that "objectively justified" doesn't mean the same as "proportionality". Well, we say that that, again, is deeply misconceived because "objective justification" in paragraph 47, as I have shown, obviously refers back to paragraphs 41 and 43. This is a passage -- paragraph 47 is drawing together the analysis further up in the judgment and it obviously refers back -- it can only refer back to proportionality in paragraphs 41 and 43.

Now, in our closing submissions at paragraph 31, if I could just ask the court to turn that up, we make the point that "objectively justified" is a term used throughout the court's case law as a common shorthand for the proportionality test. We have given just one example of many and we have cited the relevant part of a free movement case there, where the court held:

"It therefore constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified. In order to be justified, it must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective."

So the court is saying there in terms, "This is what 'objective justification' means." It means it must have a legitimate aim, it must be appropriate for securing that aim and it must not go beyond what is necessary to attain that aim, ie proportionality as in Fedesa.

Now, Ping tries to say -- and it has this in footnote 73 -- it tries to say that there are some judgments that don't say that, but if we look at just one of those -- so this is in Ping's supplementary authorities bundle, tab 11. This is a case Ping relies on. If we start with paragraph 63 of the judgment, you see the court is saying there:

"Next, with regard to whether a requirement for residence [...] is contrary to the principle of non-discrimination [...] it must be borne in mind that that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified."

So there we have the use of the term "objectively justified".

Then you see at 64, the last sentence:

"It is therefore necessary to examine whether the different treatment[...] is objectively justified."

Then at 69 you have this:

"In order to be justified in the light of Community law, the difference in treatment provided for by the Netherlands legislation must also be proportionate to the legitimate objective pursued", and it must not "go beyond what is necessary" to achieve it.

So again we have further confirmation, if it is needed, that objective justification is proportionality.

Now, Ping says, going back to their written closing at paragraph 62(c) -- this is where they try and grapple with finding some other meaning for "objectively justified". They give two possibilities at (i) and (ii). We say that both, with respect, are unarguable.

They say that the first and most natural meaning of the paragraph is that you just look at the object of the clause and you ask whether the object is legitimate. Well, that's only part of the analysis because we see, going back to 41 and 43, that not only do you have to have a legitimate aim, but it has to be proportionate. The measure has to be proportionate to that aim.

Then you see at (ii) a very convoluted argument, which I won't attempt to do justice to, which harks back to this two-stage process and tries to convince the Tribunal that that's indeed what the court was doing, but it's utterly unconvincing.

So in summary we say that the CMA directed itself properly, correctly, as to Pierre Fabre and so the key question in this appeal is whether Ping's ban is indeed proportionate to its legitimate aim, as Ping contends, or whether it goes further than is necessary, as the CMA contends.

Now, I think Mr O'Donoghue said orally and it may be also in writing -- I don't want to do Ping an injustice -- I think he said orally that Pierre Fabre is the only authority that takes this approach. That's not correct. So can I just show you a couple more? One is Coty, which we say is entirely consistent with the analysis of the court in Pierre Fabre and Ping are wrong

to suggest otherwise.

So if we take Coty up at authorities 4, tab 79. It's the court's judgment I am interested in.

The Tribunal will recall, because we have now looked at this authority several times, that there are two questions that were referred. So it is behind tab 89, towards the back, because I am going to the court judgments. On the top of the page, it says "Page 28" in the right-hand corner.

So you see there on page 28 the first question. The first question is not directly relevant, but over the page, paragraph 36 is because the court refers back to it later in its judgment when looking at the second question. The court says in 36:

"the answer to the first question is that Article 101(1) must be interpreted as meaning that a selective distribution system for luxury goods [...] complies with that provision..."

So falls outside 101(1).

" ... to the extent that resellers are chosen on the basis ..."

And we have exactly the same wording as Pierre Fabre, paragraph 41, which is the point I just ask you to note at this stage.

Then at 40 -- we then have a consideration of the

second question, which is the restriction on internet sales on third-party platform sales in this case. So at 40 you have a reference back to 36. So:

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

So this is entirely so far on all fours with Pierre Fabre, which says that you fall outside Article 101(1) if the criteria are met, including the criterion that the provisions, the restrictions in the selective distribution network, don't go beyond what is necessary. You see that at the end of 36.

Then you have at 43:

"It is therefore necessary to ascertain whether, in circumstances such as those at issue in the main proceedings the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods at issue is proportionate in the light of the objective pursued, that is to say, whether such a prohibition is appropriate for preserving the luxury image of those goods and whether or not it goes beyond what is necessary to achieve that objective."

So, again, the court is saying that in order to establish whether you're within 101(1) or outside it, you have to carry out this proportionality analysis.

You have at 52 a distinction that's drawn, a factual distinction, between the clause at issue in Coty and that in Pierre Fabre because the one in Pierre Fabre was clearly an absolute ban, whereas the one in Coty was not at all an absolute ban on internet sales.

Then you have the conclusion at paragraph 57:

"It follows that, subject to inquiries which it is for the referring court to make, such a prohibition appears to be lawful in relation to Article 101(1)."

So it has applied exactly the same analysis.

Then you have the summary of that analysis in 58, so, again, on condition that the clause -- you fall outside 101(1) on condition that the clause has the objective of preserving the luxury image and that it's proportionate to that objective, these being matters to be determined by the referring court which is seized of the matter.

So that's the same analysis there. So it's not the case at all that Pierre Fabre is some kind of outlier. This is the next most recent authority on precisely this point.

Then, sirs, the other authority I wanted to take you

to is one relied on by Ping, which is the AEG Telefunken case which is at Bundle H2, tab 41.

Mr O'Donoghue took you to paragraph 33, but the next paragraphs are important. You see that paragraph 33, which is the paragraph he took you to, says that selective distribution systems can be in conformity with Article 85(1). Then 34 says that they're acceptable only if their aim is an improvement on competition. Then 35 sets out the Metro criteria.

Now, one point to note is that at that stage the final criterion, which is the one that is important in the present case, hadn't been added. That came later. But these are the Metro criteria. Then it says at 36 -- and this is the important paragraph:

"It follows that the operation of a selective distribution system based on criteria other than those mentioned above constitutes an infringement of Article 85(1)."

So it's an infringement if you don't comply with the Metro criteria, which is exactly what paragraph 39 of Pierre Fabre says.

In a similar vein, just going back to paragraph 33, the opening words of that is that:

"It is common ground that agreements constituting a selective system necessarily affect competition in the

common market."

So that's the starting point. So what's being said, entirely consistently with paragraph 39 of Pierre Fabre, is that you have an infringement of Article 101(1) if the selective distribution system doesn't comply with the Metro criteria. So this is not inconsistent at all. It's a case entirely in the CMA's favour. That's why the court in Pierre Fabre referred to AEG, because it's consistent.

THE CHAIRMAN: Before we leave AEG --

MS DEMETRIOU: Sorry.

THE CHAIRMAN: -- I don't believe it's in the bundle, but paragraph 73 of that judgment may be of some relevance.

MS DEMETRIOU: 73? Is it not in the bundle?

THE CHAIRMAN: You may want to have a look at this. Both parties may want to have a look at that.

MS DEMETRIOU: Yes, we don't have it in the bundle, but I will have a look at it.

THE CHAIRMAN: That may suggest that the test of necessity is a stringent test and it goes to the question of whether the restriction is necessary for the survival of the trade in question.

MS DEMETRIOU: Okay. I'm grateful, sir. We will look at that and come back to you on that, if we may.

Now, of course, just before leaving the legal issue,

we ask the Tribunal not to lose sight of some of the points we made in our skeleton argument in opening, which really frame why the court is so concerned about internet bans. We see this reflected not only in the court's case law -- so this goes to the suggestion that somehow Pierre Fabre is an outlier of a case.

If we can take it from the CMA's skeleton in opening, we made the points, for example, at paragraph 20 of our skeleton in opening -- it's not paragraph 20. I have the wrong ... no, it is.

So I don't know if the Tribunal has that, but these are the Commission's guidelines on vertical restraints. Now, it is true that they're dealing with a slightly different point about whether or not internet bans are hardcore restrictions which prevent the block exemption from applying, but you get a sense there of the importance attached to the possibility to sell goods over the internet via the Commission. So you see -- you know, in principle the Commission says:

"every distributor must be allowed to use the internet to sell products."

So it characterises as hardcore restrictions an agreement that the distributor shall limit its proportion of overall sales made over the internet. We of course have something much more stringent than that.

We have a complete ban. So this gives you a flavour. The following paragraphs as well, which I'm not going to repeat now in closing, but I would ask the Tribunal just to look at those again when considering the point made by my learned friend that Pierre Fabre is an outlier of a case that has no support anywhere else. I'm sure they would like that to be true, but it's not.

So that was what I was going to say -- those were my submissions on the law. Unless I can assist further, I was going to move on to proportionality.

So the first point I want to address on proportionality is the question of legitimate aim, is it promotion or maximisation, and the issue of unacceptably compromised, which are two ways of looking at the same point in our respectful submission.

We say that it's clear on the case law that if a measure can be achieved in a less restrictive way, then it is disproportionate and that it is no answer to that to say that the less restrictive alternative doesn't achieve the aim precisely as well. I took you to, in the context of ancillary restraint, the MasterCard judgment, which makes precisely that point at paragraph 91. So they say, "Well, if an alternative would be somehow less profitable or less efficient, that is not a reason to discount it. The measure does not

meet the test for indispensability".

As the Supreme Court in Lumsdon made clear, the test is indeed whether the less restrictive measure would unacceptably compromise the aim. It follows that some degree of compromise is permitted when comparing less restrictive ways of meeting the aim. That's logical because, when you're looking at or assessing less restrictive alternatives, there are ex hypothesi going to be different measures that are liable to produce slightly different results. So if a less restrictive alternative had to be discounted just because it was marginally more expensive or marginally less effective, then every measure would always be proportionate. You would never have any disproportionality at all.

Ping doesn't appear to dispute now that that is the proper test in law, the unacceptably compromised test, and that, of course, poses a difficulty for Ping because it is clear that all the other manufacturers are achieving high custom fitting rates without the online sales ban. So what Ping would like to be able to argue is that the online sales ban is proportionate so long as Ping can show that it's more effective than any other measure, even to a minuscule degree. So that's what it would like to show.

We see this, in fact, from its closing submissions,

where it talks about the same -- it says -- I will find the reference in a moment -- but it says that the question is whether the result will be the same, so that's what it would like to argue.

It can't get round the test in Lumsdon, so what it's done is it has sought to reframe its aim as being that of maximisation of custom fitting, rather than promotion of custom fitting. It was very clear about that in its opening oral opening arguments.

Now, we have made the point in our written closing that on any view -- and we have provided the Tribunal with authority from the context of public law -- on any view, when you're assessing what the aim is, the Tribunal needs to reach its own conclusion, so that needs to be assessed on the basis of the objective evidence, so it's not for Ping to say what the aim is. That must be right.

We say -- and we have explained why in our written closing -- that on an objective basis Ping doesn't seek to maximise custom fitting in absolute terms. We have made our points on that. So we say that, yes, it encourages, it promotes, but it doesn't seek to maximise in absolute terms. We see that from the terms of the contractual obligation which speak about encouraging and promoting and we see that from what Ping does in

practice.

So Mr Clark says in his witness statement that -- if a retailer sells a high proportion of its clubs without a custom fitting, what does Ping do? Well, Mr Clark says, "Well we don't terminate their contract, their supply agreement. We just withdraw some support". So Ping clearly does tolerate some of its clubs being sold without a custom fitting. We accept that they encourage custom fitting, we accept that's important to Ping and we accept that they promote custom fitting, but we do not accept that they maximise it in absolute terms.

We have made all of our points in writing, but the point I want to make now to the Tribunal orally is that there is also an important point of principle that arises here and that's this: that it's not permissible, we submit, to circumvent the unacceptably compromised standard simply by framing the aim in the most extreme way possible because, if that were permissible, everything would always be justified -- it always would be.

So to take an example, let's say the government decided tomorrow to ban all cars and it said, "Well, our legitimate aim as a government is public safety and we want to reduce car accidents. That's our aim. We want to reduce car accidents. That's a legitimate aim. It's

in the public interest", now, clearly, there would no doubt be a very interesting judicial review alleging that the ban of cars is disproportionate. One of the things that no doubt would be made -- one of the points that would be made -- is that there are a whole host of less restrictive measures that you can take to reduce car accidents. So you can have speeding restrictions, you can have safety requirements on the manufacturers of cars, you can have seat belt rules, you can have public information and dissemination. All of those things achieve your aim, but they do it in a less restrictive manner.

Now, it wouldn't be open, in my submission, for the government to say at that point, "Aha, no, none of those work. They all have to be discounted because our aim is not just reducing car accidents, it's reducing them to the maximum extent possible and so therefore no other less restrictive alternative falls to be taken into consideration in the proportionality analysis and we therefore escape judicial review on grounds of proportionality".

We say that's not an acceptable -- not a permissible approach and that raises an important point of principle. So where one ends up is that, whether one is analysing this in terms of "Well, is the aim promoting

or maximising?" or in terms of whether the less restrictive alternatives unacceptably compromise the aim, the point is the same. The point is that you don't need the less restrictive alternatives to achieve the aim precisely to the same degree.

How does that translate to this case? Well, we say it translates to this case as follows: we say that the ban is disproportionate unless Ping can show that it makes a material or meaningful contribution to Ping's custom fitting rates in the sense that the other options available to Ping would unacceptably compromise its rates. We say that's how that case law translates to this case.

The reference to the different approach taken by Ping -- you don't need to turn it up -- is paragraph 72 of their written closing, where they say the test is: would the less restrictive alternatives achieve the same custom fitting rates? We say that's not the correct test.

Now, linked to all of this is the issue of proportionality strictu sensu because Ping, of course, downplays the importance of that limb of the proportionality test in its submissions, but it's also relevant to this point because Ping can't have it all ways.

Let's say that I am wrong and Ping is correct to say that the aim is absolute maximisation of custom fitting rates and let's say that Ping is right and I am wrong to say that you have to show that the less restrictive alternatives achieve exactly the same custom fitting rates, well, then, in that case proportionality strictu sensu would be an extremely important part of the analysis, because if you have got to the point where Ping has shown a minuscule difference, a non-material difference, but it says, "Aha, we get past necessity because of this point about maximisation", well, that doesn't get it home and dry because the fact that the difference is not material or not meaningful must be taken into account at the proportionality strictu sensu part of the analysis because, if the ban is only effective to a small degree, then we say it's plainly going to be outweighed by the restrictions of intra-brand competition.

Now, Mr O'Donoghue made a forensic point about the CMA's skeleton argument accepting that maximisation was the aim. We at that stage didn't understand this to be the nuanced point that Ping was making and so we were keen not to quibble about wording, but once it became clear that this was the point that Ping was making, that they mean maximisation in absolute terms and that this

is the effect, no, we absolutely don't accept that at all and we have explained why in our written closing submissions.

So that's aim and unacceptably compromised.

The next issue I wanted to look at was the effectiveness of the ban. This encompasses both the issues of the comparative rates and the causation issue, because we say that in order to show that the ban is proportionate, Ping needs to show that it is materially effective; in other words, that there is a material proportion of consumers that are currently custom fit for their Ping golf clubs who would not be custom fit absent the ban. That's what they need to show.

Ping's case is essentially that the ban is effective because its custom fitting rates are -- I think it's a confidential figure, but the Tribunal will recall from the supplementary survey the percentage point differential that Ping relies on. So it relies on that differential and says that, "Our rates are that much higher than those of other brands", and it relies on its survey to show the effectiveness of the ban. In his oral opening, Mr O'Donoghue put the supplementary survey front and centre of his submissions on why the ban is necessary.

But this does not establish the effectiveness of the

ban because, as we have said in our closing submissions, establishing a differential is only the starting point for Ping. Critically it needs to show that this difference is caused by the ban, is due to the ban, rather than to the other factors that are common ground in these proceedings and which have been established by the evidence that the Tribunal has heard.

But this response to the CMA's argument that the ban is not materially effective -- there has been no real response until Mr O'Donoghue made his five points in his oral closing today. So in all of their written submissions there is a gaping hole. They simply haven't grappled with this issue.

MR O'DONOGHUE: Sir, to be fair, the seven reasons did not appear until closing.

MS DEMETRIOU: Mr O'Donoghue has made his points and he has a right of reply, so if he can contain himself, that would be useful, I think.

I am going to deal with that point because we say it's highly misleading to say that the CMA -- this is another misleading submission that the CMA has conducted a volte-face and never put this point in the Decision. I am going to take the Tribunal to the references because that's not a good point and in fact it's surprising that it is a point that Ping raises and it's

probably indicative of the fact that they have no substantive answer, that they have to resort to incorrect points like that.

Now, what I want to do is start -- first of all I am going to deal with my submissions in this order. I want to deal -- first of all I am going to start with the rates and the percentage point differential, then I am going to deal with causation and then I am going to deal with Mr O'Donoghue's five points he made against us orally on causation. So I am going to deal with the issues like that.

Now, the CMA contends that the differential established by the supplementary retailer survey overstates the difference between Ping's custom fitting rates and those of its competitors. We have set out reasons for that in our closing submissions. I want to highlight two of them, but first of all I want to dispose of one point that Ping makes.

So Ping repeatedly says that this differential understates the difference because the supplementary retailer survey only includes Ping retailers who are by definition committed to custom fitting and Ping says it understates the differential because, if you conducted a survey that included all of the high-volume online retailers that are not committed to custom fitting, the

differential would be higher.

Now, that may well be true, but that would not be the correct comparison and that is something Mr Holt accepted very fairly when he was cross-examined. So he accepted that including retailers who are not committed to custom fitting would render the comparison that Ping is seeking to make less accurate and not more accurate and that's because essentially that's the incorrect counterfactual because it is inconceivable -- and Mr Clark confirmed and I will come back to this point -- inconceivable that Ping would, if the ban were removed, permit any online retailer to sell its golf clubs no matter that it had no commitment to custom fitting at all.

It would no doubt -- and Mr Clark confirmed this -- require its online retailers to demonstrate a commitment to custom fitting and so widening the pool in that sense would produce a much less accurate analysis.

So one starts with the differential that was identified in the supplementary retailer survey. I think it would be probably quite helpful to take you to Mr Holt's oral evidence in the transcript, just so you see where he accepts that point. So this is Day 2, page 21. These are the private transcripts, so it's the private transcript, page 21. Does the Tribunal have

that? It's lines 2 to 15.

So the question, which I won't repeat because it's the point I have just been making, was put to Mr Holt -- so the question put was:

"If it continued ...[redacted]... irrelevant this analysis?"

He says:

"I think that's true ...[redacted]... that it currently has."

THE CHAIRMAN: Sorry. We haven't found that yet.

MS DEMETRIOU: I was also very confused by this. There is a private transcript and an open transcript and this is Day 2 in private. I think two separate transcripts were sent through. It may be -- if you're like me, I had only printed off the open transcript. So I can give you for your note a reference to the private transcript if you would like.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So what you see from those pages is that he is accepting the principle that if Ping were able to require its online retailers to show a commitment to custom fitting, then it would not be relevant to include all sort of retailers who were not committed to custom fitting in the analysis.

So we say that's not a good point. It's one that

Ping has repeatedly made, but it's not a good point.

So the pool of retailers in fact that Ping has surveyed, which is its own retailers, is the correct pool for the analysis. That is what gives you the most accurate result.

We say just on that point that of course in the United States Ping doesn't allow any online retailer to sell its products. In fact it said in its closing submissions that it only allows, I think, 16 to sell online in the States.

So that's that point. But we say that the percentage differential yielded by the supplementary retailer survey overstates the actual differential for a number of reasons. I just want to highlight two now, but we make other points in our closing submissions that of course I know the Tribunal has read.

The first is that the rate for other brands yielded by that retailer survey is an aggregate rate which includes all other brands. So there are two issues here. One issue is that it will include brands which aren't custom fit at all because we know that some manufacturers in the market don't focus on custom fit clubs, but provide manufacturers with standard-fit clubs, and the second is that it doesn't distinguish between the major brands which do produce customisable

custom fit clubs.

The Tribunal may recall, for example, Mr Sims' evidence. So when I put to Mr Sims -- I think he said in his witness statement that for irons Ping's rate is higher than two of the other manufacturers. I said, "Well, how about the rest?" and I said, "How about [redacted], for example?", and he said, "Yes, [redacted] is a brand which focuses very heavily on custom fitting". So it's clear that there are distinctions between the other brands and that, of course, the percentage, the aggregate percentage -- that's the average for the other brands -- it's not going to represent all of them. So there will be some within that rate which are higher than that and some which are lower. What Ping needs to show, in my submission, is that its rates are higher than any other brand because, of course, none of the other brands have online sales bans. We know from Mr Mahon's evidence that Ping's' custom fitting rates are not the highest rates for American Golf, for example.

The second issue is that the rates are estimates. We have seen from the evidence of Mr Dave Clarke, for example, that the estimate that was given by his son didn't correspond to what he said in his witness statement. I don't criticise him for that because when

a retailer is phoned up out of the blue and asked for an estimate, it's quite difficult to gauge. We do say, though, that they are estimates, and insofar as actual data are available, not just from the two companies that submitted data to the CMA -- but we do rely on those -- but also American Golf, which has said in Mr Mahon's witness statement that Ping is not its highest custom fitted brand, that those estimates need to be looked at with a certain degree of circumspection.

So those are the key points we make about the rates, but as we said in our written submissions, it's an entirely unpromising starting point for Ping because the differential that it has identified is actually very small and we know that there are an array of other factors which one which would expect to lead Ping to have a higher rate than its competitors. So that's the causation point and it was an important reason -- and this I will come to -- why the decision found the ban to be disproportionate.

So throughout its closing submissions, its written closing submissions -- and, again, Mr O'Donoghue emphasised some of these points orally -- Ping makes great play of the fact that it takes a different approach to custom fitting than its competitors. So when Mr O'Donoghue was saying to the Tribunal, "Well,

our aim is maximisation. They all have a lower aim, a lesser aim than that", he was relying precisely on these differences to try and make good those points. But he can't have it both ways. He can't say, "Well, we're different for the purposes of establishing that our aim is a higher aim, but actually you have to discount all of those differences when you look at causation". That simply does not work and they haven't adequately grappled with that.

Now, we see in Ping's written closing an example of this at paragraph 125, where in answer to a point being made there by the CMA, Ping says:

"it is plainly not the case that the process of persuasion is the same for all clubs."

Then at paragraph 125 they say:

"As Mr Clarke explained, retailers upon whom non-Ping manufacturers foist non-returnable hardware in large volumes, which is very expensive and takes up valuable shelf space, are heavily incentivised to shift that hardware in order to avoid suffering losses the wallpaper must be sold, come what may. These retailers are not contractually obliged to seek to persuade the customer to be custom fitted for these sales and the manufacturers could not care less whether they are not custom fitted, so as long as the hardware is sold.

Self-evidently, there is no incentive for retailers to go through that process with sales of non-Ping clubs since this would merely reduce their profits on sale. Many of these other clubs are standard anyway, so there is no point in a custom fitting."

So there the Tribunal sees in very stark terms that this is not a point on which the parties disagree in terms of what the evidence is. It's an important point on which we agree. But the difficulty for Ping is that, whilst it invokes it in some contexts, it has not grappled with the consequence of that point for causation.

Sir, I don't know if the Tribunal was intending to sit until 4.30 or wants to rise at 4.15. I am in your hands. I don't mind.

THE CHAIRMAN: How much longer do you have?

MS DEMETRIOU: What I could do is just take you through what we say the key points are on causation, but in order to deal with Mr O'Donoghue's submissions I think that that will take me a little bit of time so probably I could hold that over until tomorrow.

THE CHAIRMAN: Until Friday.

MS DEMETRIOU: Until Friday.

THE CHAIRMAN: Let's do that then.

MS DEMETRIOU: If that's sensible, okay.

So in terms of our positive case on this, can I take it, please, from our closing submissions at paragraph 69 and following? So paragraph 69 starts on page 28 and it is really paragraph 75 onwards which -- sorry, 69 to 74 set out the issue and then 77 onwards explains -- sets out on the undisputed evidence what the various causes are in -- why one would expect, in any event, if I can put it that way, Ping's custom fitting rates to be higher than those of its competitors.

The first point is the inventory points, which Ping positively accepts at paragraph 125 of its closing submissions. We have what Ping's position is at 78, so Mr Clark said that Ping don't do that. In fact they don't have any minimum requirements at all. Ping even operates a returns policy where, if you have inventory that you can't sell, you can return to Ping. Then the other manufacturers take a very different approach. It is important to see that Mr Dave Clarke accepted in cross-examination that this difference was a major reason why his custom fit rates for Ping clubs were higher than for non-Ping clubs.

Then over the page, Mr Hedges made exactly the same point and he concluded that for non-Ping brands the biggest percentage of non-custom fit was really forced on them by the proposition that the brands created. So

he thought it was the most important reason why there is a differential.

It's a point I will return to tomorrow, but to say that we didn't put any of these points to the witnesses is really not a fair point to make because I cross-examined the witnesses in detail about these different causes and we can see examples there from Mr Clarke's and Mr Hedges' evidence.

Now, moving on, the different business model -- these are points which Ping has positively put forward, so they're not disputed on the evidence and, again, that's important. So we're not in the business of asking the Tribunal to resolve a difficult dispute of fact. This is all Ping's evidence.

Then custom fitting equipment. Now this is an important point because what came out of the evidence is that -- and this is, if you recall, Mr John Clark's table which is exhibit 10 to his first witness statement, where he had a table -- he has that table to demonstrate his point in the witness statement that Ping, as he puts it, goes further down the retail chain than most of the competitors.

Now, when I took him to the table, he made clear that he wasn't saying that those retailers don't carry other brands because we know that no golf retailers are

exclusive, so he accepted that they're likely to carry the other brands, but he made an important point, which is that only a relatively small proportion of them have the specific club heads and shafts from those manufactures which support fitting. So that's an important point. I said to him, "Well, is that a plausible reason why custom fitting might take place to a lesser extent?", and he says, "Well, it can't help". Obviously it can't help. So that's another reason which is undisputed on the evidence.

Then we have the contractual requirements imposed by Ping. So it imposes specific and stringent contractual requirements on its account-holders to be proactive in promoting custom fitting and do everything reasonable to custom fit.

Then we had a lot of evidence about customer loyalty. Again this is common ground. This relates to Ping's pioneering position in terms of developing custom fit clubs. You have seen the various survey,s, again relied on by Ping. These are surveys adduced by Ping, showing that, in terms of the views of customers, customers see Ping as being the custom fitting brand, so a higher proportion of Ping customers think custom fitting is important or very important. We saw all of that in evidence adduced by Ping itself.

We also see it in the evidence of Ping's witnesses and we see, for example, the excerpt from Mr Hedges' first statement, set out at paragraph 90 of our written closing, where he makes exactly this point, that Ping also has the strongest brand loyalty amongst the leading brands. That's because it's always focused on custom fitting. So, again, we say that that's a reason why their rates would be expected to be higher.

Then there was some evidence about some technical differences. Again, this is evidence in Dr Wood's statement and Mr Clark's statement which we didn't challenge. The CMA is not in a position to challenge that evidence and we didn't challenge it and the evidence makes clear that there are some technical differences which mean that Ping's clubs are more appealing to the customer that wants to be custom fit.

Then delivery times, paragraph 92. The Tribunal will recall a distinction drawn by the witnesses between Ping's 48-hour very quick delivery service and the other manufacturers. So Mr Patani said that other manufacturers might take seven to eight working days and Mr Sims said that Ping offers fast industry-leading delivery of between two to three days. So, again, this is evidence that is not disputed.

Finally account-holder support or withdrawal of

support. We see that Ping does react to some extent when a retailer is not complying with its contractual obligations. It either withdraws support and/or it works with them to try and increase its custom fitting rates. So it's easy to see how this approach would incentivise account-holders to custom fit Ping's clubs to a greater extent.

So the evidence of Mr Sims, we say, in relation to Silvermere provides a significant case in point and a significant illustration of the importance of this point because, as Mr Sims explains, Silvermere has significantly increased its custom fitting rates since 2016, [redacted], and that has been due not to anything to do with the online sales ban at all, but due to Silvermere's investments, considerable investments, in custom fitting. [redacted]

Moreover, the increases referred to by Mr Sims are increases which are seen across all brands. He says, "We have increased custom fitting rates across all brands". Indeed, he himself explains the increase in Silvermere's custom fitting rates as being due to "the investment we have made in custom fitting" and "the approach we now take to custom fitting".

So that's Sims 1, paragraphs 9 to 10. The reference for you is B2, tab 2, page 2. You will recall when he gave his oral evidence him saying that Silvermere had carried out considerable investments which have led to their increased custom fitting rates, including, he said, £2.5 million to £3 million on a driving range, £150,000 on custom fitting, replenishing launch monitors and lots of staff. That's his oral evidence. That's transcript Day 4, page 118, lines 1 to 9. That investment has resulted not only in higher custom fitting rates for Silvermere, but in higher footfall to their stores. We see that again from the evidence he gave about Silvermere's turnover, which he says at paragraph 16 of his first statement has gone from £4.2 million to £9.1 million and, of course, only 1 per cent of that he says is accounted for by online

sales.

So we see from this a vivid example of how custom fitting rates are driven by factors other than Ping's online sales ban.

So, sir, if that's a convenient moment I will stop there and I will deal with Mr O'Donoghue's points on Friday morning, if that's all right.

THE CHAIRMAN: Thank you.

(4.30 pm)

(The hearing adjourned until 10.30 am on Friday, 25 May 2018)