IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1380/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 1 November – Friday 19 November 2021

Before:
The Honourable Mr Justice Marcus Smith
Bridget Lucas QC
Professor David Ulph CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BGL (Holdings) Limited

Applicant

v

Competition & Markets Authority **Respondent**

A P P E A R AN C E S

Daniel Beard QC and Alison Berridge (on behalf of BGL)
Marie Demetriou QC. Ben Lask and Michael Armitage (on behalf of the CMA)

Digital Transcription by Opus 2

(10.30 am)

(Proceedings Delayed)

(10.40 am)

CLERK OF THE COURT: Can I ask counsel to identify themselves for the purpose of Opus, please.

MR BEARD: Good morning. Daniel Beard acting for ComparetheMarket.

MS DEMETRIOU: Marie Demetriou acting for the CMA.

CLERK OF THE COURT: Opus, were you able to hear that okay? The Panel will be in a second. As you all know, these are livestreamed, so there will be a slight delay from when the panel actually come in and when we actually start. (Pause).

(10.41 am)

Housekeeping

THE CHAIRMAN: Good morning. We have a couple of things to do before we can even start the hearing. One is to ensure livestream is on and the other is it is to call the case on, but we can at least ensure that we have got communications.

Mr Beard, can you see and hear me?

MR BEARD: Yes ...

THE CHAIRMAN: You are fading in and out. We caught a bit of sound, but not very much so, Mr Beard.

MR BEARD: Is that any better?

THE CHAIRMAN: That is perfect, thank you.

Ms Demetriou, can you see and hear me?

MS DEMETRIOU: I can. Can you hear me and see me?

THE CHAIRMAN: Very good. Yes, thank you very much.

And I will get Ms Lucas and Professor Ulph to do a quick sound test as well, so that you can give them the thumbs up.

MS LUCAS: Good morning, can you hear me? Thank you.

PROF ULPH: Good morning, can you hear me? Thank you.

THE CHAIRMAN: Very good. Are we ready with -- is livestream up and running.

CLERK OF THE COURT: Yes, we are. I will just call the case on. Case 1380, BGL (Holdings) Limited & Others v Competition and Markets Authority.

THE CHAIRMAN: Good morning, everybody, and welcome.

Before I hand over to Mr Beard QC, for his opening submissions, there are a few matters that we would like to raise. They are really mainly housekeeping, but perhaps one topic of a little greater substance.

First of all, as we all can see, this is a remote hearing and for these first three days, we will be entirely remote.

This is a warning that I give at the beginning of all remote hearings: although it is remote, it is as if in public and the usual rules and courtesies apply.

That means, in particular, there can be no recording transmission or photographing of these proceedings and ignoring that directive would have serious consequences.

Obviously, this hearing is being transcribed and transmitted and recorded on my authority, but that is the only transmission recording and transcription that should take place.

Secondly, the first three days, as I said, are going to be entirely remote. Thereafter, we will, I hope, be sitting in person, but Professor Ulph will continue to be attending remotely from Scotland. So when we start Day 4, in Courtroom 1, Professor Ulph will remain in Scotland.

We are going to try not so much to minimise our interruptions, we find interrupting counsel usually very helpful from our point of view, but when attending remotely, we will try and use the yellow hand signal to indicate that we have got something to say rather than intervene orally, because my experiences of these are usually a car crash moment and the disruption is just almost always not worth the effort. So we will raise our hands on screen and leave it to counsel to pause when they see fit for us to ask our question.

By way of disclosure, but unsurprising disclosure, we have, all of us, purchased and sought quotations for

home insurance and I do not imagine that will cause anyone any difficulty. I say it though less by way of declaration of interest and more so that we are all conscious that in varying ways, the markets that we are going to be spending the next three weeks talking about is actually known to us in a greater or lesser way.

If it helps the advocates, I suspect it will not, but if it helps the advocates, we are more than happy to describe how each of us use the market for home insurance products.

The reason I say it, though, is I think it is important that we all recognise that we have got different preconceptions about the market and rather than pretending they do not exist, we should, when appropriate, articulate them and at least make sure that we have some anterior understanding of the way this particular market works.

The Tribunal does not operate in a vacuum, in short, and we are going to keep that in mind, because it is something extra which comes in over and above the evidence. It seems to me, we ought to have a cautionary note in our minds for that reason.

In a similar, but rather less important vein, I think I should mention that my wife is being led by Mr Beard in the Court of Appeal in December. I know

nothing about that case, save for diary issues and she knows nothing about this case, save also for diary issues and save that instead of referring to it by its full title, I tend to refer it as the "naughty meerkats case". That, of course, is no more than a reference to the CMA's decision rather than any indication of views on this appeal.

More importantly, and this is a point of substance, we have done a considerable amount of pre-reading. We have obviously read the decision several times. We have read your written opening statements, for which many thanks, and we have read the witness statements and expert reports that have been submitted as well as the pleadings which, in a sense, are taking more of a back seat in the light of the other evidence. But we have done a good deal of reading, but we are conscious that there was a good deal of reading to do and one of the great merits of the adversarial system is that you will be able to draw to our attention that which we have missed or failed to take full account of.

But it is fair to say that we even now do not find this an easy case. There are, I think, two broad areas where we are going to want, and I am sure we will get, a degree of assistance.

The first is the area of, if I can broadly call it

two-sided markets, and perhaps the extent to which a two-sided market might be said to operate within a broader one-sided market, and the extent to which the usual tools of market definition operate or do not operate in the context of two-sided markets. So that is one area where we feel that a degree of assistance will be helpful.

The second area is the extent to which narrow most-favoured-nation clauses operate so as to define, for instance, the way in which the SSNIP test works when hypothesising an increase in price by the seller of the product under examination and the extent to which an assumption of prevalent narrow MFN clauses effects or operates as a kind of proxy for a wide MFN clause. So that is another area where we are interested to be educated.

Now, we consider those areas are probably likely to be linked and that a great deal is going to be said, both during openings and cross-examination on these topics. That being said, we have, in the course of our preparations, framed a series of questions on the areas that are troubling us and I think that we are minded to put a number of these questions to Dr Walker when he comes to give evidence, because they arise out of the decision and the markets definition aspect of the

decision that he deals with.

Now, it is not to say we are not going to have questions for the other witnesses, in particular, Dr~Niels, but when framing these questions, it seemed to me that the ones I had at least fell most naturally for Dr Walker to answer.

We may very well be able to give you a heads-up as to exactly the areas beyond the more general areas that I have outlined that we will be wanting him to think about.

Now, we could put these questions to Dr Niels and we will certainly consider doing so, but given this is not his decision, he is probably a less helpful interlocutor given the nature of the questions that we have got. But we anticipate that we might have up to about three-quarters of an hour, as it were, of related questions for Dr Walker.

I would be grateful if the parties over the next couple of days could give some thought as to how that intervention could best be accommodated, because we do not want to put anyone off their stride, least of all Dr~Walker, and the extent to which there are questions arising out of our questions, we obviously do not want those to be lost, we want the advocates to have, as it were, the last word in terms of questions arising out of

our questions.

So those are, as it were, two areas of evidential interest. I am sure there are other areas where we will need educating as well, but those are two ones which we have particularly identified.

There is a third point, which is more legal, which I want to flag now. In 11 years of sitting as a chair, this is the first really serious markets definition dispute that I have dealt with, which I found surprising when I thought about it. But normally, market definition lurks in the background and is often agreed and that is certainly the case with the two two-sided market cases that I have done, Sainsburys and Agents' Mutual, both involved two-sided markets where the nature of the markets were actually agreed between the parties and we did not need to probe them any further.

Having got into this case, I have a nasty feeling that a number of rather difficult questions were swept under the carpet in those cases which arise for determination or at least consideration here.

The legal point that I want to address concerns whether there is or whether there is not a margin of appreciation in the context of market definition. Let me explain what I mean by that. Normally, one has points of law or fact, and the Tribunal decides them and

there is no margin of appreciation at all.

Where there are questions of policy, then, for instance, where one has a price control and it is a question of whether it has been properly framed or not, one does have a question of policy. In those cases, the Tribunal accords pretty substantial respect to the decision makers's course of action. Here, of course, the CMA.

My question is really this: the extent to which market definition is simply a question of economic fact with no policy element at all or whether it is more a question of economic analysis on which there is a range of reasonable opinion?

It may not matter but, if, for example, we were to take the view that we disagreed with the CMA's market definition, but considered the CMA's market definition was within the range of, as it were, reasonable definitions, does that mean the CMA wins or does it lose?

Now, I am not in any way trying to prejudge our view of market definitions, that I hope you understand is very much an open question. But it does seem to me that it would be helpful if the parties gave some thought to margin of appreciation in case it matters.

We wanted to raise it now, not to invite immediate

response or even response during the course of openings but it may be something that you want to address in the course of closing submissions or before. I mean, we are in your hands. But we thought it appropriate to raise that point as our third point of interest now.

So that is all I have to say. I apologise for holding things up and before I hand over to Mr Beard substantively, you obviously each must have your say on these housekeeping points and indeed any housekeeping points that you have of your own.

So I will hand over for that purpose first to Mr Beard and then to you, Ms Demetriou.

MR BEARD: I am most grateful, Mr Chairman, and to the Tribunal for those indications. In relation to the first two matters, I will touch on issues to do with market definition in opening, but evidently there are matters that are going to be dealt with in the course of expert evidence and so there will be a split in relation to those issues.

In relation to the questions you may have for Dr~Walker, of course it is entirely a matter for the Tribunal, the extent to which the parties are forwarned about the questions or the areas, I am just thinking about the process that is going to be gone through.

Obviously, Dr Niels and Ms Ralston will give evidence first in relation to these matters. Dr Walker is going to give evidence from next Monday morning due to availability issues on Thursday/Friday. That has been agreed. We will sort out ensuring that the questions can properly be asked and timetabling issues and that causes no concern, but without wishing to press the Tribunal, if there were any indication of the sorts of areas you were thinking of raising with Dr Walker, it might be useful if the ComparetheMarket expert witnesses were broadly aware of those.

I am not trying to press for any list of questions or suggesting it should be comprehensive, but if the Tribunal felt able to, that might be useful. But I obviously do not hold the Tribunal to it, because it is entirely within your discretion.

THE CHAIRMAN: Mr Beard, I think there is a lot of force in what you say and we have got three days effectively to think about that further and without committing, it seems to me there is a great deal in what you say. I think that these are not questions which gain from taking the witnesses by surprise. I think they are actually questions which gain by having them aired as early as possible.

So we will seek to articulate in greater detail what

it is that we are getting at rather than leaving it to the last minute. So that point is well made and we will do our best to do as you suggest.

MR BEARD: I imagine, I leave it to Ms Demetriou, but I imagine in continuing her preparation of cross-examination, she would no doubt be grateful in relation to Dr Niels and Ms Ralston. Obviously, I do not want to assist her in any way, but it seems to me entirely fair in those circumstances.

The matter you raise in relation to market definition, there are cases, there are not lots of cases, but there are cases where market definition has been aired. Whether or not it is strictly into two-sided market matters, I think we will come back to look at. I do not think we have lots of those authorities in the bundle. I will touch on one or two issues in opening, but I think we will need to pick that up in due course. So I am grateful to the Tribunal for highlighting it.

I should stress that I think the Tribunal's question actually involves two issues. The first is the manner in which an assessment is to be made in relation to market definition by a regulator, which is to do with the techniques one uses for market definition.

There is a second question which, with respect, sir,

you were not separating out, which is what is the jurisdictional scope of the powers of this Tribunal to intervene in relation to market definition?

So you could have a situation where there is a margin of appreciation, for example, for a regulator in considering market definition, but that, given that this is a merits appeal, does not mean that this Tribunal should not revisit it.

Now, we can discuss this in due course, but I think there are implicitly two questions within your third issue in relation to those matters.

But I will touch on some of those issues in opening. I think we will need to come back to them and we will also consider what other relevant authority might be useful to the Tribunal in that regard, given the particular issue raised. But again, it does not seem to me that it disrupts anything at all in relation to the next three days and it is of great assistance to know the Tribunal's initial questions in relation to these matters.

THE CHAIRMAN: Thank you very much, Mr Beard. Ms Demetriou, anything to add or supplement?

MS DEMETRIOU: No, I do not have anything to add or supplement to that, but thank you for the indications that you have given.

THE CHAIRMAN: Thank you both very much. I should have added this to my housekeeping, but Mr Beard, if you can identify a mid-morning break, the transcriber has indicated that a ten-minute break, both in the morning and afternoon, would be helpful. I almost always forget. I will try and remind you, but if you find a moment that is convenient, then I am sure we will find it convenient also.

Opening submissions by MR BEARD

MR BEARD: I am conscious that there is a transcript rolling in front of us and therefore I will try and make sure that I do not speak too fast, because I understand that that is quite painful for those transcribing and also that we put in a break in due course.

With that, Mr Chairman, members of the Tribunal, if I may, I will open the case on behalf of ComparetheMarket. You are no doubt aware, but in this matter, I appear for ComparetheMarket with Ms Berridge and the CMA is represented by Ms Demetriou, who is leading Mr Lask and Mr Armitage.

Now, I am not going to start out with a long introduction in relation to this case. Frankly, we have got too much to be getting on with in relation to this opening. We are dealing with an 800-page decision that, frankly, tries to drown the reader in references, so

that when you eventually come up for breath, you think surely if it is this long, it must be right. But, in fact, what we are going to show is that it is wrong in a whole variety of ways.

Now, as you know, the CMA says that ComparetheMarket had in place with various home insurance providers, which we will refer to from time to time as HIPs, the acronym, what are called wide most-favoured-nation status clauses, wide MFNs. Now, the CMA knew full well about the existence of these clauses, in particular, because ComparetheMarket had explained the existence and role of those clauses to the CMA at some length during the digital comparator tools market study, which ran during 2016 and 2017, which I will come back to in due course.

It had tried to explain that the clauses, insofar as they actually did anything, they actually helped give consumers confidence, that you get best prices on ComparetheMarket, and that was important in a world where insurers were essentially able to exploit their position with consumers, who, faced with the prospect of shopping around for deals, would tend to stick with what they knew and simply renew their insurance.

It is the reason why price comparison websites, PCWs, and indeed direct sellers of insurance, invest so

much in marketing. It is because they know the key is to make people look to change, in relation to a transaction that, frankly, most of us consider a little boring.

One thing that PCWs do want to do is give people confidence that they will get a decent deal, if they take that time to look. Of course, the CMA has recognised that these clauses are not by object infringements. So that means it has to show that there were appreciable adverse effects on competition and its theory is that the wide MFNs meant that the home insurance providers, primarily through the means of promotional discounts, didn't reduce their prices on particular PCWs, because if they did, they would also have to drop their prices on ComparetheMarket.

I say "particular PCWs", because, of course, if they drop their prices on all PCWs, that wasn't a problem in relation to the wide MFNs.

So, in other words, the theory that the CMA is putting forward is that because if the home insurers discounted on one PCW, they would have to discount as well on ComparetheMarket, that would deter them from offering selected discounts and because they wouldn't be as interested in offering so many selective discounts, PCWs wouldn't be as incentivised to alter their

commissions they charge to home insurance providers, to try to support such discounts. In fact, that would mean that the way that PCWs developed would be affected.

Now, it is worth bearing in mind at the outset, this sort of discount pricing carries a real risk for insurers, because it may simply shift business from one PCW to another or from its own direct sales to a PCW. None of which may be profitable for the insurer. It can be seen as a form of intra brand competition, which in fact, insurers may not find appealing, something that we will come on to see.

But, in any event, the CMA's theory is that these wide MFN clauses were important and effective in reducing that sort of price competition, the sort of price competition which if the clauses were having any appreciable effect, you might expect to see in higher prices for home insurance.

Testing for that, you might think, wouldn't be unduly difficult. After all, the wide MFNs were actually withdrawn by ComparetheMarket, in November 2017, almost exactly three years before the decision was published. Yet the CMA has put forward no evidence looking at pricing data at all. Apparently, reliable data analysis is impossible here.

Now, a lot of industry participants might find that

a little surprising. A data rich industry with lots of online activity, but you cannot do reliable data analysis. People who are constantly calibrating the price of risk for their products, assessing these matters, drawing on extensive data sources that, according to the CMA, it is impossible to draw anything meaningful from that information. We say that is plainly wrong and to put to one side the suggestion that we are saying the CMA must quantify any effect, we are not. We are not suggesting some spurious degree of precision must be attached to any such analysis.

What we are saying is this is an effects case where you are talking about price competition effects and effects on competition -- on commissions and effects on PCWs. You have a period of years after the withdrawal of the clauses to look at and you should do that. You should use the natural experiment. If you are alleging a generalised market effect, you should test for it, because otherwise what you are left with is selective and anecdotal evidence, what the CMA likes to call qualitative evidence, from which a generalised finding of effect is to be inferred.

Now, the reality is that that evidence, that qualitative evidence, does not provide any good basis for such an inference. The economic analysis that

ComparetheMarket has done shows that there is no basis for a finding of generalised effect, no basis for a finding of appreciable effect. Just to be clear, it is not for ComparetheMarket to prove that there is no effect. It is for the CMA to prove that there is. It needs to show there was an appreciable effect on retail prices in a world where of the 20 million or so home insurance policies that are in force, three-quarters of them are simply renewed each year.

That last quarter, new business, about half of that is dealt with by insurers's own platforms and brokers, not PCWs at all. So PCWs only deal in relation to new business and a subset of new business. Of course, CTM, ComparetheMarket, deals in a subset of that subset.

Then when we come to look at the wide MFNs, even looking at the formal scope of the clauses, the network, as the CMA refers to it, without looking at any of the evidence about how they worked or didn't, looking at the formal scope, those wide MFNs were operating in relation to a subset of the insurers on CTM. It is in those circumstances that we say the qualitative evidence simply does not prove the CMA's case and the CMA's reliance on a formal network does not tell the story of the wide MFNs at all, even though the decision keeps referring to them as if they are some kind of homogenous

entity.

Similarly, the CMA's attempts to suggest that there is something wrong with ComparetheMarket's approach, because it does not put forward a case that the wide MFNs were positively beneficial for competition, is just wrong. When we were talking about the imposition of what, in due process terms, is a penal sanction, we simply do not need to do that. We actually thought the position was pretty clear at the CMC; if there is no appreciable effect proved, there is nothing to argue about in terms of positive impact.

Now, as it happens, during the course of the DCT enquiry, ComparetheMarket did talk about the way that wide MFNs might be beneficial. But now that is not necessary for the way in which this case is put. And as for contentions about what evidence we did and did not put forward, as you will see, we engaged very extensively with the CMA, both during the DCT enquiry and during this investigation, putting forward senior executives and making detailed submissions.

Actually, the problem we have here in this case is that the key evidence that the CMA relies upon, the evidence from the HIPs cannot be properly tested. We do not have witnesses we can test in relation to the insurer evidence and we say it has not been read

correctly by the CMA.

We will look at the law in relation to those issues shortly.

What we see in the decision, in the CMA's defence of it, is very heavy reliance in fact on theory. Theory of how wide MFNs might harm competition. Now, that might work in an object case, but it is insufficient here and it means that the CMA has simply failed to prove adverse appreciable effects. It has failed to meet the relevant legal standards and its approach to evidence has ended up in its lengthy decision having a sense of never mind the quality, feel the width.

Now, as we will say and explain, that was insufficient. I will take our opening submissions explaining that in six parts, if I may. First, I am going to look at some law. Second, I will introduce the issues relating to market definition and ground 1. But I will be conscious that there is expert evidence to be heard in relation to these points. So the second area will be ground 1.

Third, I will look at the coverage and counterfactual issues, which will cover matters pertaining to grounds 2, 5 and 6. In doing so, I will look at the clauses themselves and key elements of the evidence, the so-called qualitative evidence, relied on

by the CMA.

Now, I think in the course of this section of my submissions, it will be necessary to move into confidential session. I will see how far I can get without doing so, by using the anonymised names for home insurers and trying to refer the Tribunal to extracts of documents without reading them out, but there will come a point where in order to make sensible submissions, I think we will need to move into confidential session. So that is the third section.

Then, fourth, and I think this section probably will not need to be confidential, I will then move to look at ground 3 and the issues concerning the analysis of retail pricing and commissions or the lack of it by the CMA.

Fifth, I will look at the promotional deals analysis such as it was, and I will look at the points raised broadly in relation to ground 4, the lack of contextualisation or sense of proportion in relation to promotional deals and the CMA's very limited so-called headcount approach to analysis.

I will also deal there with some of the material pertaining to the FCA findings in relation to their impact on promotional deals and their significance, which the CMA has really failed to grapple with.

Then finally, I will deal briefly with grounds 7 and 8, regarding whether or not there is any basis for any penalty here, in any event.

So that is how I am intending to take matters.

With that, I am going to move on to the first part of my submissions, which is on legal issues, if I may.

Just picking up on legal issues, I will try and deal with this relatively briefly. It has been trailed in the notice of application and reply, but I think it is worth making reference to one or two of the key cases, because I think they do frame importantly some of the key issues that this Tribunal is going to have to grapple with.

I will try and cover the six topics I have relatively quickly, but just to highlight what those topics are. The difference between object and effects cases. The evidence required to make out an effects case. Thirdly, the notion of appreciability in effects cases. Fourthly, issues pertaining to the burden of proof and rights of defence, which I hope I can deal with fairly swiftly. Some case law on the use of section 26 notices and transcripts of interviews in the absence of witness statements by the OFT and the CMA. The jurisdiction of the Tribunal, where I will, in particular, pick up what has been said in the Flynn

Pharma litigation, which is actually material, I think, sir, to the parts of point 3 that you were raising at the outset. It will not be a comprehensive answer, but I think it will be germane to those points.

So if I can just pick up on object and effect.

The basic prohibition we are dealing with, we are also familiar with in the epic authorities bundle, there is not actually a copy of section 2 of the Competition Act. I do not think that will leave anyone at a significant disadvantage, but just to remind everyone where we start.

The prohibition in section 2.1 says:

"Subject to section 3 agreements between undertakings decisions by association of undertakings or concerted practices which a) may affect trade within the UK and b) have as their object or effect the prevention restriction of distortion of competition within the United Kingdom are prohibited unless exempt."

Now, that key distinction in 2.1(b) between object and effect is one that has been recognised throughout the case law, particularly at a European level.

If I could just direct you first to the Societe Technique Miniere case, bundle G, tab 1, page 14 of the electronic page indexing {G/1/14}.

Excellent. Thank you very much. I hope that all of

the panel have now in front of them what should be page 14 and I am going to pick it up at the bottom of the page there.

This is a case which dates back to the 1960s in relation to the operation of what was then Article 85(1) and it says:

"Finally, for the agreement at issue to be caught by the prohibition contained in Article 85 (1) it must have as its 'object or effect the prevention, restriction or distortion of competition within the Common Market'.

The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article 85 (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent."

So that is the distinction between object and effect drawn right at the start.

If we go on to the next page, if we may, just the top of it {G/1/15}:

"The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute."

Then it goes on to talk in more particulars about the agreements that were at issue there, which were exclusive to the arrangements. But it is the actual context and consideration, in fact, that there has been an effect of preventing, restricting and distorting competition, which is the starting point for the analysis.

Then if we could go to the Equifax case, that is {G/48/16}, page 16. This was a case concerning credit information registers. I am just going to pick it up at paragraph 48, if I may. It says there:

"As registers such as that in issue in the main proceedings do not thus have, by their very nature, the object of restricting or distorting competition within the common market within the meaning of Article 81(1) EC, it is for the national court to determine whether they have the effect of doing so.

49. In that regard, it should be emphasised that the

appraisal of the effects of agreements or practices in the light of Article 81 ..."

I should say, just for those that are not familiar by then, Article 85 had changed its numbering, but not its content to 81:

"... Article 81 EC entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question ..."

There are a couple of references there. Real conditions is what is being talked about.

Then it does talk in 50 about:

"However, while Article 81(1) EC does not restrict such an assessment to actual effects alone, as that assessment must also take account of the potential effects of the agreement or practice in question on competition within the common market, an agreement will, however, fall outside the prohibition in Article 81 EC if it has only an insignificant effect on the market~..."

Now, we are undoubtedly dealing here with an actual effects case. CMA have accepted that.

It is, therefore, important that we look at the realities of what is happening in relation to the agreements in question.

Just for your note, so I do not need to go back to it, paragraph 50 is, in fact, the clear articulation of what the standard for appreciability is. You can ignore it if the situation is one which has no significant effect. In other words, it has only an insignificant effect.

There are various points in submissions where the CMA seem to be seeking to gloss that. I will come back to it, but the law is actually very clear. That is Equifax.

If I may, I will just quickly deal with Cartes Bancaires and Mastercard. Cartes Bancaires, bundle B, 38, page 11 {B/38/11}. Cartes Bancaires was a case -- this is the appeal hearing in Cartes Bancaires, which is seen as the leading authority on the way in which one assesses whether or not a case is an object case.

Just to give you a little bit of background in relation to it. This was concerning one of the multilateral card arrangements. It had been suggested that it was an object infringement by the regulator and, of course, regulators tended to look at cases as object cases, because, of course, if they can get them within

the object box, then they do not have to engage with the effects analysis.

The only reason I mention this is because you might have expected that there would be lots and lots of authorities about the analysis of effects and what standards are required and so on, but actually it is much more limited than you anticipate, because so many cases brought by regulators have been object cases.

In any event, Cartes Bancaires spelled out the issues concerning how you characterise object cases. But I just want to pick it up at 52, where it says:

"Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted ..."

There they rely on Allianz Hungária Biztosító. But in those circumstances, it is actually echoing back to the Societe Technique Miniere observations back in the 1960s. It is, in fact, you have to show this.

If we could then go on to Mastercard, which is {G/83/19}. I'm sorry, for the electronic bundle, it will be {B/17/19}. I am sorry, there is a double

reference to that.

PROF ULPH: Mr Beard, can I ask you a question about that last reference you took us to?

MR BEARD: Yes, of course.

PROF ULPH: Paragraph 52, it is not very clear on my screen. Could it be made bigger? Could we go back to it on my screen, please?

MR BEARD: This is B/38, page 11, {B/38/1}. Yes.

PROF ULPH: Paragraph 52.

MR BEARD: Yes.

PROF ULPH: So in reading out paragraph 52, you did not actually talk about those words "restricted" or "distorted to an appreciable extent".

MR BEARD: No.

PROF ULPH: So I wondered if you -- what views you had about what you mean by "appreciable extent" or is that something you are going to cover later?

MR BEARD: Well, appreciable extent, the relevant test is that which was set out in paragraph 50 of the Equifax case. That is the relevant test. I will come back to Expedia shortly, which is the case which the CMA now rely upon saying, "Oh well, so long as there is a perceptible impact, that is sufficient for appreciability." I will show that, in fact, what that case does is simply repeat the Equifax formulation and

then uses "perceptible" in the English translation of it as essentially a synonym, but it is not trying to change the legal approach. Indeed, we have not done the full linguistic review, but actually, in the French version of Expedia, you do not see the word "perceptible". It is just not -- it is used -- they use a "de manière sensible", I think is the translation they use.

So I think nothing turns on it. The point I would make is the CMA in their skeleton are trying to gloss the Equifax standard, which is: is there a significant impact on competition, prevent, restrict or distort? You cannot gloss it. That is the test.

So it is only if the effect is insignificant that you have got to show that you have got a significant impact. In other words, if the impact is insignificant, it is not appreciable. I hope that clarifies the position. I will take you to Expedia in a moment, but that is the position.

PROF ULPH: That was very helpful, thank you.

MR BEARD: Actually, whilst I am here, why do I not deal with Expedia? I am sorry to the bundle operators, but if we could go to Expedia, which is at {B/52/4}, and then I will close off this issue in any event. If we could go to page 4.

It is a slightly funny situation that was being

dealt with in Expedia, but it does not matter for these purposes. I would like to pick it up at 16:

"It is settled case law that an agreement of undertakings falls outside the prohibition in that prohibition [by now 81 has become 101], if it has only an insignificant effect on the market ..."

Then it cites Völk v Vervaecke, John Deere, Bagnasco and the Equifax case, at paragraph 50. So that is the test.

What the CMA then seek to refer to is 17:

"Accordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market ..."

And they say, "Ooh, look, perceptibly. If I can spot a glimmer, that is going to be enough."

If that is what they are saying, it is wrong. The test is that which is set out in paragraphs 16, 17 does not change it, and the fact that slightly loose language was used by the courts in 17 is immaterial here. As I say, it is not the same language that is used in French or I believe the other translations, not that that matters for these purposes.

Thank you, Professor Ulph. I will not -- I have

covered one of the later topics now, so that is all good.

So, if we may, I was going to go to Mastercard at B/38, page 11, {B/38/11}, if I may.

I am so sorry, apologies, I have given you the wrong reference, it is {B/17/19}, B/17, page 19. I am so sorry, I was back in Cartes Bancaires.

Thank you to Ms Berridge.

So Mastercard, another case concerning arrangements between banks, et cetera, in relation to card provision, discussions of object and effect. I will just pick it up at 92.

It is perhaps worth just bearing in mind that what is being discussed here is the potential role of Article 81.3, which is whether or not if there were to be an infringement that was in breach of Article 81.1, which is the equivalent of section 2.1 that I have referred you to, it could be exempted.

So there is a discussion going on in relation to that and 92 says:

"However, that interpretation [of 81.1] 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 the application of Article 81(1) EC -- of a restriction as ancillary, and,

on the other hand, the criterion of the indispensability required under Article 81(3) EC in order for a prohibited restriction to be exempted.

93. In that regard, suffice it to note that those two provisions have different objectives and that the latter criterion relates to the issue whether coordination between undertakings that is liable to have an appreciable adverse impact on the parameters of competition, such as the price, the quantity and quality of the goods or services, which is therefore covered by the prohibition rule laid down in Article 81(1) EC, can none the less, in the context of Article 81(3) EC, be considered indispensable to the improvement of production or distribution or to the promotion of technical or economic progress while allowing consumers a fair share of the resulting benefits."

So I take you to this merely because the CMA refers to this term "liable" in its submissions and on occasion it seems to be suggesting that somehow there is a lowest threshold as to what you have to show for effects and that you do not actually have to show that, in fact, there have been appreciable adverse effects. You just need to show that it is liable for there to be appreciable adverse effects.

Now, it may be that the CMA are not taking any point

on the language. If so, we are not quite clear why they were citing and relying on the point, but if that is what they are saying, this authority does not support that analysis and the reason is obvious: because the discussion here is about the interaction between 81.1, on the one hand, and 81.3, on the other.

All that is being said is, where you have made a finding under 81.1, that something is liable to prevent, restrict or distort competition, you carry out a different analysis from that which is then carried out in relation to 81.3. But they are not trying to characterise what the test is in relation to 81.1 or qualify it by reference to some sort of lesser threshold of liability to effect.

So that is not helpful. What is quite interesting here, however, is the way in which the court emphasises that it is the parameters of competition that actually need to be effected. So price, quantity and quality. As we will go on to say, that is important and that is germane here, because if what you are saying, as the CMA is, you have had an effect on pricing, but you then do not do any analysis in relation to pricing, you have a very significant flaw in the way in which you are analysing the situation. So that is Mastercard.

The next case I want to go to is at B/18 and that is

the Krka case. I will pick it up at page 40 {B/18/40}. Just for your note, this is all under the heading of the fifth plea in law, the headings at page 33, the document does not need to go there, which is alleging that there is no restriction of competition by effect.

This whole analysis in this section is concerned with whether or not there are effects. The Krka case was part of a set of appeals brought in relation to the conduct of a drugs company Sarvaiya and whether or not it was doing deals with generic competitors, in other words, competitors that could make a generic equivalent of Sarvaiya's key drug Perindopril and by entering into agreements with these generic competitors, effectively keep them out of the market. So what was being referred to, it is sometimes referred to as a sort of pay for delay arrangement, that was what was at issue here in competition terms.

I do not think that matters particularly for what we identify in the case itself. If you pick it up at 359, on page 40:

"There is therefore no previous case-law, concerning agreements, decisions and concerted practices, in which the Court of Justice or the General Court has accepted that the Commission may rely only on the potential effects of the measure at issue in order to find that an

infringement has been committed and impose a fine on the infringers on the basis of that finding."

So earlier, we saw that you can have situations where you are allowed to take into account potential effects, but what this case is saying is there are no cases where you just rely on potential effects. In other words, you really do need to prove the actual effects.

Then it says at 360:

"It appears paradoxical — where the clauses of an agreement have been implemented and their impact On competition can be measured by taking into account the relevant factual developments..."

So it is asking about implemented agreements, so that is going to the realities of how the agreement operated and relevant factual developments:

"... including those subsequent to the conclusion of the agreement ..."

So it is not just the formal entry into the facts, it is the facts and the actual implementation that matter:

"... which took place before the Commission issued its decision -- to allow the Commission to demonstrate merely the anticompetitive effects that such clauses are likely to have and, to that end, to make the comparison

mentioned at paragraph 315 above without taking those developments into account."

In other words, you have got to look at the actual developments. There is a slightly odd bit in the defence, I am not going to take you to it, at 34.4, where the commission -- where the CMA seems to be suggesting you should make the assessment at the time the agreement is entered into. I do not think they actually pursue that. If they do, it is plainly wrong. But the main thing you take from this section, you have got to be looking at the actual effect and the factual developments.

36.1:

"It also appears paradoxical to allow the Commission, in order to find that an infringement in the form of a restriction of competition by effect was committed (and can therefore be penalised by a fine), to rely on the mere fact that clauses of an agreement that were implemented are likely to have anticompetitive effects and not on whether they had such effects, even though the Court of Justice has held that the burden of proving the anticompetitive effects of an agreement can be waived only in the case of a restriction of competition by object, which should concern only agreements so likely to have negative effects, in

particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market ... If it were possible for the Commission to rely, in relation to agreements which have been implemented, solely on the effects that they are likely to have, in order to demonstrate that they had an anticompetitive effect, the distinction between restrictions of competition by object and by effect, established by Article 101(1) TFEU, would lose its relevance."

In other words, it is emphatically saying here, you have got to show there were actual effects.

Now, I do not want to get confused about the burden of proof issue. We accept that the burden of proof is, it is more likely than not that there were actual effects. We accept that, of course. But it is actual effects, in the past, by reason of the operation of the agreements having regard to whether or not the agreements were implemented and the relevant factual developments.

If we go on down to the bottom of 366:

"Thus, when the Commission adopts a decision finding an infringement of Article 101(1)... which allows it to impose a fine on the infringers ..."

It is worth noting just the extent to which in all of these judgments, the court is very conscious that because you are imposing a penal sanction, you have got to be extremely cautious that you are imposing on the regulator, the relevant requirement, actually show to a relevant standard these actual effects:

"... which allows it to impose a fine on the infringers on the basis of that finding, the mere fact that the commission has established the existence of potential competition and a limitation of the autonomy of a potential competitor, or even the elimination of that autonomy, does not release it from its obligation to demonstrate an analysis of the actual effects of the measure in question on competition if the case-law cited in paragraphs 345 to 358 is not applicable."

That is not relevant here {B/18/41}:

"It must be borne in mind in that regard that the finding of anticompetitive effects of an agreement requires evidence that the competition has, 'in fact', been prevented, restricted or distorted ..."

So it is a slightly funny use of quotation marks in those circumstances, but they are being used for emphasis:

"Thus, demonstrating that an agreement has anticompetitive effects requires that the Commission, in

the light of the need to be realistic that arises from the case-law of the Court of Justice, take into account, in the context of the comparison referred to in paragraph 315 above, all the relevant factual developments, including those subsequent to the conclusion of the agreement, which took place before it adopts its decision."

If we just keep going down, you will see there is a reference to Mastercard there.

Then if we keep on going down, just to 371:

"The Court of Justice indicated that taking into account developments that were likely to have occurred on the market in the absence of that agreement was necessary when examining the agreement's restrictive effects on competition ...

372 Moreover, the requirement of likelihood and realism applying to the description of the competition that would have occurred had an agreement not been concluded (one side of the comparison mentioned in paragraph 315 above) is consistent with the approach adopted by the Commission in several guidelines ..."

So what the court is here saying is that when you are assessing whether or not there were actual effects, you obviously have to compare what happened with a counterfactual as to what would have happened absent

these agreements that you are testing.

There is another bit in the CMA's submissions in their defence, where they say if it is going to be using a counterfactual, it is all rather a hypothetical exercise and therefore actual evidence is less important. Frankly, that just does not follow and to be fair, in their skeleton argument, they do not pursue that point. But the important point here is that you have got to look at these matters realistically.

Then it goes on to refer to, in paragraphs 373, 374, 375, a number of guidelines that the commission have issued about assessing effects where it is emphasised that you have got to look at the real situation, you have got to look at realities. You have got to look at the particular evidence and assess the actual effects.

Then we come to 377, {B/18/42}, the conclusion:

"In the light of all the foregoing, it must be determined whether, in the present case, the Commission -- despite the hypothetical approach that it adopted as regards the comparative step of the examination of restriction of competition by effect (see paragraphs 317 to 340 above) -- established the sufficiently realistic and probable nature of the restrictive effects of the agreements concluded between Servier and Krka."

In other words, you have got to show, looking at the realities, that there was a significant -- a not insignificant appreciable restriction, prevention or distortion of competition.

So I am not going to go back to these points about liable and so on. But it is worth, in the CMA's defence, but it is just worth picking up and we will see it when we go to the decision. I will just give you an example as a reference, paragraph 9.120, and this is just for your note, so you do not need to bring it up. In bundle A, tab 1, at page 364, {A/1/364}, where the CMA talks about an adverse effect on retail prices, it uses the formulation that they can be expected with a reasonable degree of probability.

That, with respect, is not a sufficient finding that it is more likely than not that there was an adverse effect on retail prices. Now, leaving aside whether or not they have got the evidence to support that, which we say obviously they do not, the language used in the decision is not properly recognising what is required here.

Now, there is one other strand of case law that I do need to deal with, that is highlighted in the defence. In particular, just for your notes, at paragraph 34.3, 34.5, which is for your notes again, bundle A, tab 3,

page 15 {A/3/15}. That is case law relating to article 102 or the chapter 2 prohibition, if we are talking about it in domestic law terms.

Now, of course, you will be well familiar, Tribunal, with the salient difference between 101 and 102; the object and effect distinction is spelled out in article 101. Therefore, the article 101 case law clearly distinguishes the criteria for objects, cases and effects cases. 102 does not do that, it prohibits an abuse of a dominant position. The case law is therefore developed differently, given the absence of that legislative distinction and the fact that the subject matter is the abuse of dominance.

Because the case law, under chapter 2 and article 102, has been identifying certain sorts of conduct, which may have the purpose of undermining the state of competition, given that competition will already have been weakened by the existence of a dominant undertaking in the market. I mean, it is precisely that sort of situation that is being considered in all of this case law.

But, if I may, I will just pick up two or three of the key cases that the CMA rely upon.

If we start at bundle G, tab 121, page 54, {G/121/4}. This is the Tribunal's Socrates case. Here,

the CMA seek to rely on this for a couple of reasons so far as we can see. One is to rely on the notion that likely harm is sufficient, because in abuse cases, a finding of likely harm by reference to the conduct may be sufficient to make out a finding of abuse. Secondly, because they say, "Oh well, you do not have to find any direct harm in relation to consumers."

So let us just pick it up at paragraph 147, Socrates case concerned issues of tying or bundling:

"Tying or bundling will only constitute an abuse if it may have an anti-competitive effect."

So this is one of these instances where the consideration is being made explicit, when you are considering abuse, you do need to think about anti-competitive effects while under a different test:

"In that regard, it is pertinent to note that the object of competition law is to prevent harm to the structure of the market, so that to find an infringement it is not necessary to establish direct harm to customers or consumers."In that regard, it is pertinent to note that the object of competition law is to prevent harm to the structure of the market, so that to find an I think from time to time. It is not necessary to establish direct harm to customers or consumers."

What the CMA say is, "Look, the CAT here refers to

competition law, that is not just 102, it is 101 as well, so we do not need to worry about direct harm to consumers or -- customers or consumers."

Then it says:

"As the ECJ stated in ... GlaxoSmithKline ... at para 63, regarding what was then Art. 81 of the EC Treaty (now Art. 101 ...) but in terms that were expressly of wider application:

'... like other competition rules laid down in the Treaty, art.81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.'"

Now, the first observation I will make about that quote is that it does not say that in relation to 101 or Article 81, or indeed, of course, chapter 1, that you do not need to be identifying actual harm. That is not what it is doing. Indeed it says it is not only the interests of competitors or of consumers, but also the structure of the market that is concerned.

But we actually need to look at what GlaxoSmithKline was in fact saying. For that we go to bundle G, tab 60, {G/60/22}, the relevant paragraph is paragraph 40. I will provide the reference in just a moment. It is page 22.

The first thing to note about this case, I will not

go back through it, is that this concerns an object infringement on the part of GSK. So the allegation was that GSK had breached competition law by object, not by effect, but one needs to be extraordinarily cautious about drawing lessons from this GSK case about what the test is in relation to effects cases.

If we pick it up at paragraph 40, in paragraphs 114 to 147 of the judgment under appeal, because this is the upper court, dealing with an appeal from the general court -- I am sorry, it was called the Court of First Instance at that time:

"... under appeal the Court of First Instance

Considered whether the Commission's principal conclusion, that Clause 4 of the agreement should be regarded as prohibited by Article 81(1) EC in so far as its object is to restrict parallel trade, could be upheld."

So that is what they were considering, an object case.

If we then go on to paragraph 62, which is page 27. {G/60/27}. You will see at 62:

"With respect to the Court of First Instance's statement that, while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of

competition, that applies in so far as it may be presumed to deprive final consumers of the advantages of effective competition in terms of supply or price, the Court notes that neither the wording of Article 81(1) EC nor the case-law lend support to such a position."

So what is being talked about there is whether or not you have a situation where people are being presumed to deprive final consumers of the benefit.

Then we come on to 63 {G/60/28}:

"... there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price."

In other words, where you are dealing with an object case, that is not what needs to be shown, so long as you are finding that there is an impact on the structure of competition, though sufficiently severe. Because you

are making assumptions about how matters work, you do not need to go further.

Now, what the CMA say is that must apply in relation to effects cases as well. So long as you can show that there are effects on the structure of competition, then in those circumstances, you do not need to worry about outputs in relation to consumers or customers. We say, hang on a second, that does not follow, because it is effects you are identifying here and if all you are showing is that there is some modification of the structure of competition in the market, but it is not having an adverse effect on prices, quality, quantity, the parameters of competition, that have been identified in relation to the previous case law relating to effects, then you do not have an appreciable effect on competition.

So we say you cannot just read across from this object case law and suggest that you do not need to identify effects here.

We say that, in fact, there is no evidence that there is an impact on the structure of competition and we will come in due course to look at the plot of the market shares of the PCWs, in particular, that provides zero evidence that there was any impact of these wide MFNs. So, in those circumstances, we do not see it.

If what they are really saying is, it is an impact on the structure of competition, because you formally put in place these agreements, that is not taking matters further forward. That is not the structure of competition, that is a legal provision, and you have to ask yourself whether or not the interactions between the competitive parties within the market or the parties within the market are, in fact, being materially and appreciable affected in any event. We say they do not make that out either.

So just for completeness, there is also reliance in Socrates on the Microsoft litigation. Again, that is not of any assistance to the CMA. Indeed, one of the wonderful ironies about relying on Microsoft in this context was that in relation to this issue that arose in Microsoft about whether Microsoft was in breach by bundling Media Player with its Windows operating system, and whether or not again, it was abusing a dominant position, the commission carried out an actual effects analysis. One of the criticisms that was brought by Microsoft was that was no part of the proper legal test. So it was all somewhat back to front. But the main point was, they did an actual effects analysis there. So it does not assist even in relation to 102.

Then I should just pick up Streetmap which has been

referred to. That is at {B/19/24} and I am going to pick it up at page 24, if I may.

Sorry, I should go back to the previous page {B/19/23}, where there is a discussion of actual or potential effect being needed in the context of assessing whether or not there is an abuse of dominant position.

What you see in those subsequent paragraphs is a different set of considerations being brought to bear, because you are dealing with a situation where you have got a dominant entity in the market.

But what is instructive even here is when you get down to paragraph 90, what the President of the Tribunal is there saying, sitting in his capacity as a judge of the High Court, is that even though under an abuse of dominance test, showing that you would have likely effects may be sufficient, if a party were to come forward and say, "Look, the conduct you are talking about had stopped some time ago", and if we look back at what actually happened, there is no evidence of effect during the period when it was operating.

In those circumstances, I find it pretty hard to reach a conclusion that there were likely effects even for the abuse standards. Obviously, that makes sense. The idea that you have got evidence that there was not

an actual effect, but nonetheless, there was a likely effect is a very, very odd conclusion to reach.

So the point he is making is even in this context, where you are dealing with a different test, if you have got evidence that suggests there is no actual impact when the conduct was in play, then in those circumstances, you have got a very good indication that, in fact, there was no likely effects and no abuse of dominance. That is essentially what is being said in paragraph 90.

Again, even if you go to the abuse of dominance case law, it is not remotely assisting the CMA and it is certainly not attenuating the standard that they have to hit in relation to proof here.

I have highlighted the importance of the actual parameters of competition and I have highlighted the importance of the use of the counterfactual. I have also now dealt, I think, with the appreciability issues. So I have probably wrapped up, I think one way or another, the first three of my topics, albeit not perfectly in the order I was putting them forward.

I was going to move, then, on to issues on the burden of proof and presumption of innocence, unless members of the Tribunal have any particular questions on that case law I have just been running through.

THE CHAIRMAN: No, Mr Beard, but would that be a convenient moment for breaking?

MR BEARD: That is exactly what I was thinking.

THE CHAIRMAN: Very good. We will resume then at ten past 12 and I think if we mute our microphones and cameras, that is probably best rather than lose the connections that are working so well at the moment. So ten past.

MR BEARD: Thank you.

THE CHAIRMAN: Thank you.

(11.58 am)

(A short break)

(12.09 pm)

THE CHAIRMAN: Mr Beard.

MR BEARD: I am grateful, thank you. I was going to move on and I will try and sift through proof and presumption of innocence issues, but they are important.

If we could pick it up in the authorities {G/111/33}, this is Durkan. Just for the Tribunal's notes, we deal with some of these issues in our notice of application, paragraphs 30 to 32, bundle reference {A/2/10}, but let us just pick it up in Durkan, if I may.

Durkan, you may be aware, was one of the cases concerning what was referred to as the construction

cartel, where there were numerous findings of infringements in relation to the construction industry. There were, I can't remember how many, 20-odd appeals, and Durkan was one of them, appealing both on liability and penalty.

If I just pick it up under the heading of "Liability of Durkan Ltd for Infringement 220", which was one of the numerous infringements that had been found. 93:

"It is common ground that the legal burden of proving the existence of an infringement of the Chapter I prohibition lies on the OFT..."

That is as true much for the object as for effect cases. I do not think that is contentious.

There is then, in 94, a discussion about the relevant standard of proof and a discussion about the likelihood of lionesses being spotted in Regent's Park. It is a matter which, again, I do not think is contentious. It is an indication as to the sort of evidence that will be required in order to discharge the relevant burden of proof that falls upon the CMA in relation to those matters and submissions were made by the OFT, as it then was, in relation to those matters and I think broadly accepted.

95:

"It is incumbent on the OFT to adduce precise and

consistent evidence in order to establish the existence of an infringement. But it is sufficient, according to the case law, if the body of evidence rely on by the OFT viewed as a whole meets that requirement."

Again, we do not take any issue with that. Our point is going to be actually looking at the ingredients of the evidence that they refer to, the CMA, actually you see that they are flawed interpretations or there are significant doubts, which must fall to our benefit in relation to those matters and therefore the body of evidence, as a whole, is changed, not how one approaches these things.

If we then go over the page, it is worth just picking up that, at 96:

"Because anti-competitive agreements are usually arrived at covertly, the OFT may have to rely on circumstantial evidence to establish the facts."

Then there is reference to the Aalborg Portland matter. It is quoted at 57:

"In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of an infringement of the competition rules."

There is an extent to which one might say that what the CMA is slightly doing in this case is picking up various bits and pieces of evidence across the relevant period and trying to draw an inference as we say.

It is also worth emphasising that this case law is not applicable here. What is being talked about in Aalborg and indeed in the context of Durkan, which was concerned with cover pricing, was secret cartel activity, whereby the nature of it, you are going to find that there is limited evidential material available. You are in very, very different territory in relation to the sorts of arrangements that we are talking about when they were widely known about. Indeed, during the relevant period, as I have already indicated, there were extensive discussions with the CMA about these matters, let alone the industry. That, of course, all came on the back of an Inquiry in 2015 in relation to motor insurance where wide MFNs had been the subject of discussion previously.

So it was not that sort of situation. Of course, what Aalborg and Durkan are talking about are object cases as well. So it is worth stressing that here.

In addition to these issues on burden and standard of proof, I do want to just move on to paragraph 108 in this judgment, page 37, {A/2/37}, because bearing in

mind, this was an object case concerning cover pricing, you had a situation where there was some witnesses being put forward by the appellants, but the OFT put forward no witness evidence in relation to these matters. Instead, as you will see, at 108: There were witnesses put forward, no witness statement provided by the OFT and therefore no cross-examination to test the OFT's version of events:

"The evidence before us comprised the Claremont Close Report [which was a particular piece of contemporary documentary evidence], the transcript of Mr Goodbun's interview [he was a relevant person that had talked about what had been going on; he wasn't an employee of Durkan if I recall correctly] and an account in the decision of the information given to the OFT by Mansell [which was a counterparty, a construction company to Durkan] by Mansell's solicitors about how cover pricing worked in general.

"The OFT's decision not to lodge witness statements in support of its case caused us some concern. As we made clear at the outset of the hearing in this appeal the OFT was asking us to uphold the finding of infringement for which it had imposed a fine of over £3 million on the basis of a transcript of an interview with a person who was apparently not the person who had

written the notes on the key contemporaneous document."

Counsel for the OFT vainly tried to argue about it.

In 109, {A/2/10}, if we pick it up further down, halfway down, 109:

"If, once the appeal had been lodged, the OFT had gone back to Mr Goodbun to take a witness statement they may well have filled in many of the gaps that currently existed in the account of what happened. Faced with only the transcript of the interview we do not know for example whether Mr Goodbun's evidence was based on what Mr Hart had told him had actually happened or whether he was simply inferring from the marks on the document the same 'facts' as any person familiar with what went on generally in the industry could infer. We do not know what Mr Goodbun's reaction would have been had he been told that Mr Sharpe vehemently denied that he had given a cover price. Mr Goodbun was not asked whether there might be an alternative explanation for marks on the report."

What is being said here, even in relation to an object case, where it looks like you have got a pretty straightforward trajectory towards your infringement finding, what was being said was in relation to liability, even if you think you can read the document and infer from the document, and you can infer from what

is written on the document what that document amounts to, you have got to be extremely careful about it, if you are not going to give the other side the opportunity to test a witness in relation to the meaning of that document.

That is emphasised in 110:

"The second disadvantage of relying on an interview transcript is that Mr Goodbun's evidence has not been tested by cross-examination, a process which might also have generated a better understanding of the strength of the case against Durkan."

So they rejected the OFT's suggestion that it should be allowed to rely on transcript evidence and that turning these things into witness statements was effectively a triumph of form over substance and that proffering individuals as witnesses was not necessary in these circumstances. You can see this further echoed, if we go on to authority {G/113/30}, this is the AH Willis case. AH Willis was another of the catalogue of construction appeals and what is just notable about this is that there was a specific admonition by the Tribunal about the OFT's evidence in relation to Willis, but more generally.

Picking it up at the bottom of the page:

"As we stated in paragraph 19(3) above, difficult

and important questions arise in relation to the 'evidence' adduced by the OFT. We have already noted that the transcript of Mr Russ' interview with the OFT does not appear to have been satisfactorily reviewed and attested to by Mr Russ. Certainly he has not endorsed the transcript with a statement of truth..."

So this was another case where there was a transcript being relied on.

"More fundamentally, we have considerable doubts as to whether material contained in transcripts of interview, even if reviewed and attested, is a satisfactory means of evidencing alleged infringements in cases of this kind. It is one thing to use a transcript of interview as evidence of relevant admissions by the interviewee [in other words if they are faced with an allegation of infringements and they admit it]; it is quite another to attempt to use it as evidence against a third party."

Then it says:

"In paragraph 81 of the Tribunal's decision in Argos ... the Tribunal observed that 'notes of interview are not in our view satisfactory substitutes for witness statements. We agree a witness statement will set out the relevant facts, will be attested to by the witness by a statement of truth and will enable the witness to

be exposed to cross-examination should the accuracy or truth of the facts be disputed. This is not to say that relevant interview transcripts could or should not be put before the Tribunal in support of a witness. It is simply that they are not a substitute for it."

Then, at 68, there is the account given by the Tribunal that the OFT submission, that putting in witness statements would be a triumph of form over substance.

So that is about transcripts. So this is direct testimony from individuals being provided to the OFT or the CMA in interview and potentially being signed off, attested to. The Tribunal is here saying: look, that is not good enough. When there is a dispute of fact, you really need to have someone that can be questioned about these documents.

Next case I want to go to in this regard is {G/128/31}, at page 31, which was one of the Flynn Pharma cases. Here, I am going to pick it up at 83. This was in relation to an excessive pricing case, but I want to pick it up in relation to the evidential matters, page 31, paragraph 83, under the heading, "The weight to be attached to responses to section 26 notices."

Because as we will come on to see, the OFT has --

sorry, the CMA has referred to some interview transcripts, but actually a very limited number, in relation to one home insurance provider. There is a witness statement, but no witness has been proffered. In the main, what is relied on, are either section 26 responses or some contemporaneous documents, but without any witness account to support them and certainly without witnesses that can be tested in relation to these matters.

So paragraph 83:

"In the Decision, the CMA relied significantly on evidence obtained in the form of responses to notices it issued, mainly to pharmacies but also, amongst others, to the DH, using its powers under section 26 CA 98 ('Section 26 Responses'). Pfizer contended that Section 26 Responses constitute 'a very weak evidential ground' on which to base an infringement finding. Similarly, Flynn submitted that the Tribunal should not place any substantial weight on Section 26 Responses In circumstances where no relevant witness had been called to give evidence. Each of Pfizer and Flynn relied primarily on the decision of the Tribunal in Tesco v OFT [2012] CAT 31 ('Tesco') in which the Tribunal essentially held that it would not place substantial weight upon notes of interviews where the individuals in

question were not being called to give evidence before the Tribunal and whose evidence would not, therefore, be tested by cross-examination."

So the same theme that applies in relation to interviews is being specifically highlighted by the Tribunal here, in the context of section 26 notices:

"For its part, the CMA submitted that Pfizer's and Flynn's contentions were without merit ... [they referred to the] London Metal Exchange [case] ... in which it was held, albeit in the context of an interim measures case, that a Section 26 Response had a similar significance to a witness statement ... since, under section 44 ..."

It is an offence to provide misleading material. Well, that is true, but it is very different in an interim measures situation and London Metal Exchange was a very, very different and urgent case in those circumstances:

Counsel for the CMA put forward a slightly more nuanced approach in opening in relation to this:

"'... it's a question of weight. You will not give the same weight to a section 26 notice as you will to a live witness who turns up in the box and gives evidence but when you're considering the weight to give to section 26 notices, what you'll also look to see is the

extent to which they are corroborated by the other evidence. So that's our submission on what's the evidential value of section 26 notices. They clearly have some weight, it's a matter for you to decide and in deciding what weight they have, you'll look at them in their own merits ... but you'll also look at whether they're corroborated by the surrounding evidence. That's how you deal with them.'"

To some extent, we do not take issue with the CMA's counsel's position in relation to section 26 there, which was then broadly accepted in paragraph 85. The problem is that where you have doubts or ambiguities in relation to a section 26 notice, you have no way of properly resolving them. It is fine if you have got absolutely clear corroborative evidence, but if you do not have that, then actually what the CMA's counsel there was saying was there is a limit to how much weight you should place on a section 26 notice.

Now, there is then a further section here, which I just note in paragraphs 86 and 87, where Pfizer and Flynn went so far as to say: you have not put forward any witnesses, CMA, and in those circumstances, we should actually be able to draw inferences against you.

Now, we are not saying this Tribunal needs to go around drawing inferences against the CMA. That is not

the position we adopt. The position we adopt is that when you are talking about section 26 notices or transcripts of interviews, when we do not have the opportunity to test the veracity of those statements, particularly where there are ambiguities or doubts, that is a significant failing on the part of the CMA in terms of it putting forward evidence to support its case.

As I have already emphasised and as is obvious in relation to the key protagonists in this case, the ones whose retail prices are supposed to have been affected, the home insurance providers, we do not have a witness proffered.

So we say, and we will come on to look at some of the materials and some of the ambiguities, because all I need to be doing is identifying where ambiguities lie in the evidence, because so long as there are ambiguities, you cannot rely on that evidence in support of the CMA's case, because we do not have the opportunity to test it.

Just for your notes, it is worth going to authority {G/88/21}, at page 21, Telefonica case. Again, I am not sure that this proposition is actually disputed by the CMA, but it is worth just having the reference and going to paragraph 126. I am most grateful for it being pulled up.

I should say, this was all in the context of an object case and there is case law in Europe that says, well, where the regulators proved an object case, then the defendant effectively has to come forward and put forward a plausible alternative, if they have already proved it.

But 126 is the interesting paragraph:

"In the assessment of the evidence adduced by the Commission, any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in the context of an action for annulment of a decision imposing a fine ..."

So again, we are getting the resonance of the fact that here we are dealing with a penal sanction, so under due process and human rights law, we have to apply the highest standards of due process.

In circumstances where we are dealing with a situation where evidence is being assessed, any doubt must enure to the benefit of the defendant in these proceedings -- obviously, it is the Appellant, but the defendant effectively for these purposes, in

circumstances where you are relying on a body of evidence, as the CMA does, you still have to apply that benefit of doubt principle to each piece of evidence that you are saying makes up the relevant body.

You cannot say, "Oh well, look at how much stuff we have got. Look at how many references we have got." That is enough to make out a case against you. You actually have to look at whether each of those strands sufficiently bears the weight that the CMA is putting upon it.

Now, of course, we accept that if there was one document or one submission in a vast panoply of material, then in those circumstances, it would well be open to the CMA, and indeed the Tribunal, to say: well, actually, hang on a second, that does not make an overall difference. We recognise that. There must be a limit to that submission.

But, on the other hand, if in relation to key elements of the case, what you find is the CMA has left open doubts that cannot properly be resolved, because the evidence cannot properly be tested, then in those circumstances, the benefit of the doubt in relation to all elements of that evidence must go to the defendant.

This is particularly important because of the language of consistency that is used by the CMA.

A great deal in the decision. There are lots and lots of references to the conduct of home insurance providers being consistent with the operation of a wide MFN. In other words, what they are saying is those insurers did not want to vary their prices on a particular PCW, they wanted to offer the same prices for their products across all PCWs. Not, one might expect, a hugely shocking proposition.

THE CHAIRMAN: Mr Beard, your communication has broken down, you have frozen. I think it is a problem at your end, because I can see everybody else nodding in agreement. We will pause for a moment and hope that the matter can be rectified.

(Technical pause). I think they have spotted the problem, because Mr Beard has left the hearing, so give it a minute and let us see if he comes back.

(Technical pause).

Here we are, Mr Beard, you are back.

MR BEARD: I am very sorry, I do not know quite what happened.

THE CHAIRMAN: These things happen. I think we need to pause a moment to let the livestream catch up, so if you just bear with us, I will tell you when we are good to go.

We are good to go, Mr Beard, over to you. You were

just testing the use of the language of consistency in the decision, that is where we lost you.

MR BEARD: Yes, it is a simple point. Given the context we are talking about, you have got a situation where there may be good reasons, completely aside from any wide MFNs, where insurers who are notionally subject to the wide MFNs, apply consistent pricing across PCWs and do not engage in selective discounting.

The reasons for that may be that they would suffer cannibalisation, they may lack the technical systems to do it or they may decide overall, as a strategy, they do not want to do those things. We see those messages coming out in a good deal of the evidence.

But the point I am making is for the CMA to just say: well, it is consistent with -- the pricing is consistent with the operation of a wide MFN, is not proving that the wide MFN is having any effect on that particular insurer. It has to do more than show consistency, because with consistency, there is -- to use the language, going back to Telefonica, there is obviously a very real doubt that the wide MFN is having any causal effect.

So I will be coming back to this. I do not want to just leave the issue in abstract, but I will deal with it when we look at some of the evidence and you will see

the point.

But the main things that I wanted to emphasise were issues to do with the lack of ability to test, the lack of witnesses and the benefit of the doubt enuring to the defendants in relation to consideration of ambiguities in relation to any evidence.

Then I think in relation to the final topic, I was going to go on to the Tribunal's jurisdiction on appeal. We have dealt with this in our --

PROF ULPH: Mr Beard.

MR BEARD: I am sorry, Professor Ulph. I missed your hand, I apologise.

PROF ULPH: Okay, can I just go back to the point you were raising about the factors that may give rise to some form of uniform pricing.

MR BEARD: Yes.

PROF ULPH: So would you accept that perhaps the operation of narrow MFNs might be one such factor that could give rise to such pricing? That may be unclear when we get evidence of home insurance providers, the extent to which they have allowed for that as a possible factor when they give their evidence.

MR BEARD: "Yes" is the simple answer. It is one of those factors. It will vary, as Professor, you rightly anticipate, depending on what they say and how clear

they are about things. But as we see from some evidence, people muddle up narrow and wide MFNs. In principle, of course, a narrow MFN prevents an insurer pricing lower on its own direct mechanism and if it cannot price lower on its own direct mechanism, where it might have lower costs, effectively, then in those circumstances that might well overall affect the economics of these matters.

Indeed, specific home insurers did refer to narrow MFNs as influencing the way they price. I think, in particular, I am just going to refer to the code number for it, but I think Aviva (Quote Me Happy), which was a relatively large MFN -- large HIP, did refer to those sorts of matters.

So that is both a short "yes", and a longer exposition on the point, Professor.

PROF ULPH: Thank you.

MR BEARD: My apologies for missing your hand.

If we could then go to the Tribunal's jurisdiction, just for your notes. We have dealt with some of these issues in our notice of application, electronic bundle A, tab 2, page 10 {A/2/10} and our reply bundle A, tab 4, page 4 {A/4/4}.

I think we are familiar with the idea that the jurisdiction of this Tribunal in this case is a full

merits appeal, including a reconsideration of the findings of fact made by the CMA. It is well recognised and indeed the statutory framework sets this out. Just for your notes, it is the Competition Act 1998, schedule 8, paragraph 3, sub-paragraph 1, that provides the Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

But just to put a little bit of flesh on those bones.

I think it is worth going to the Court of Appeal judgment in Flynn, which is at authorities G/136 and I am going to pick it up at page 42 {G/136/42}.

Now, the reason I particularly do so, is because there is somewhat selective quotation from the judgment in the CMA's defence. I just wanted to pick it up, if I may, at 134, {G/134/42}, because this does touch on generally, but I think will be relevant to, sir, your third question at the outset.

134:

"The CMA argues that having correctly found that the CMA had to be accorded a 'substantial margin of appreciation'..."

This was in relation to some certain economic assessments:

"... it then wrongly interfered in a legitimate exercise of judgment when finding that the investigation of the CMA of comparables was of insufficient depth."

What we are talking about here is a situation where it was an excessive pricing abuse case. The Tribunal had found that in relation to the assessment of these particular prices, there was a wide margin of appreciation or discretion afforded to the CMA.

But then said: actually, even though you have got a wide margin of appreciation, what you fail to do was actually look at comparable products sufficiently. You did not carry out enough of a data analysis by reference to comparable products and therefore even though you have a broad margin of discretion, because you hadn't done that exercise, we are going to quash your decision.

CMA, on appeal, says: well, hang on a second, you said "broad margin of appreciation", that covers what we look at, how we look at it, what conclusions we reach.

You see this in the next part:

"The margin of appreciation applies at each stage of the analysis including the choice of methodology, the assessment of whether a price is excessive and unfair, including consideration of comparators when applying the unfair limb of the United Brands test and the weight attached thereto ... the assessment of economic value

and overall valuation of whether a price bears no reasonable relation to the economic value of the product."

It is because the United Brands test is very, very, very broadly set. I mean, it is actually remarkably different from the sort of structure we see in relation to market definition, but we will come to that in due course:

"The CMA says that these 'are all assessments in relation to which there is no single right or wrong answer but where the competition authority is required to make choices and exercise its judgment."

This is the judgment of the Court of Appeal:

"To determine this ground of appeal it is necessary to be clear from the outset as to the difference between the judgment call that the competition authorities must make under Chapter II and the powers of the courts and Tribunals called upon to supervise the decisions of such authorities. The CMA wrongly elides two quite different principles. I accept the CMA has a 'margin of manoeuvre' ... ['appreciation' or 'discretion' are effectively synonyms] ... This flows from the fact that the legal test under section 18(2)(a) ... is broad brush and necessarily confers a setting latitude on a competition authority as to the methods and evidence

bases that it resorts to. This much is well-established in the case law."

I should say market definition is rather different, because there is so much more learning and structure in relation to it, but we will come back to that.

136:

"But this is quite different in principle to the question whether the Tribunal, as a supervisory judicial body, must pay deference to that exercise of judgment. Under the CA 1998 the Tribunal has a merits jurisdiction as to both law and fact and upon the basis of established case law it is not bound to defer to the judgment call of the competition authority. It is empowered under the legislation to come to its own conclusions on issues of disputed facts in law and can hear fresh evidence not placed before the CMA to enable it to do so. The conferral of the merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and access to court and the fundamental rights such as Article 6 of the convention. The starting point is that competition law is treated as a species of criminal law."

He goes on to cite various authorities in that regard. So the point I am making is, just going back to

my initial response to your third question, sir, is that even if you are dealing with a very broad margin of discretion, which you were in this case, the Court of Appeal is saying: that is interesting, but that does not tell you how an appellate body dealing with these things should look at matters.

It is saying: we can substitute our judgment for your judgment here, even though we recognise that you did have a broad judgment to apply and that is particularly because of the penal nature of the sanction that is being put in place, but also because this is a full merits review.

So you see at the end of that paragraph, reference to Argos:

"The appeals to the Tribunal in the present cases were, in effect, full hearings with such relevant evidence as any party wished to adduce, witnesses being cross-examined if appropriate. That is necessary so as to ensure that Article 6 of the European Convention ... is satisfied.

The consequences of this are significant. There are several cases on point..."

Schindler is cited, then Menarini, we go through those. I am not going to read right through them.

But we come to the conclusion at 140:

"From case law, it is possible to draw various conclusions about the role of judicial bodies in relation to the margin of appreciation of a competition authority. For a non-judicial administrative body lawfully to be able to impose quasi criminal sanctions there must be a right of challenge; [it] must offer guarantees of the type required by Article 6. The subsequent review by a judicial body must be with full jurisdiction. The judicial body must have the power to quash the decision in all respects on questions of fact and law. The judicial body must have the power to substitute its own appraisal for that of decision maker, judicial body must conduct its evaluation of the legality of the decision on the basis of the evidence adduced by the Appellant; the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an in-depth review of the law and of the facts by the supervising judicial body."

It is then right, I should say, to direct the Tribunal to the following paragraphs, which actually talk about the limits of the appellate jurisdiction. You will see there that there are various observations that are made by reference to matters, through 141 through to 147, including a suggestion that if the

assessment of the evidence by the regulatory authority was reasonable, then it may well be that the judicial body would not go behind it.

But in relation to that consideration, there is no suggestion by Lord Justice Green that somehow reasonableness was the relevant threshold for the consideration of an interpretation of evidence on a particular piece of material. It remains the situation where the burden of proof is one of, on the balance of probabilities, not some sort of surrogate judicial review test.

But I will, just in the context of this, pick up 145:

"There is no fixed list of errors that the Tribunal might consider material. Case law indicates that the following might be relevant: failing to take account of relevant evidence; taking into account irrelevant evidence; failing properly to construe significant documents or evidence; drawing inferences of fact from evidence about relevant matters which are illogical or unjustified; failing adequately or sufficiently to investigate an issue that the Tribunal considers to be relevant or potentially relevant to the analysis."

Then KME, which is just for your notes, authority {G/65/34}, page 34 is cited, paragraph 94. I will not

take you to it. So, to be illustrative and analogous. That was in the context of a judicial review. Of course, here, this Tribunal can go further.

But without adumbrating the grounds of our appeal, you can immediately see why it is that the grounds of our appeal fit within those material errors that the Court of Appeal is recognising found an appeal in a case such as this.

I think, in those circumstances, there is probably little more I need to do to draw the Tribunal's attention to, passages in that. I think that is perhaps the most useful authority at the moment in relation to the role and jurisdiction of the Tribunal.

So with that, if I may, I will move on. Though I am conscious of time, if I may, I would like to start the next section of submissions, which is moving on from legal issues and turning effectively to ground 1 and the market definition issues, if I may.

THE CHAIRMAN: Yes.

MR BEARD: I am obviously conscious that there is an awful lot of expert material out there and in the wise counsel of Sir Jeremy Lever, although on his part it was always false modesty, I am in grave danger of taking a header in the shallows of my knowledge in dealing with the economics of market definition.

On the other hand, if I may, I want to make a few preliminary points, some of which are evidential as well as essentially anticipating some of the points that are then dealt with in the expert material.

I think it is right to say that both sides recognise that market definition is not an end in itself; it is a tool for assessing competitive constraints on a product sold in a particular area. I think that is uncontroversial.

But although it is only a tool, the weight that the CMA has placed on its market definition in the decision means that if its market definition is not correct, and is not sustainable, the decision simply cannot stand.

If you just go back to some of the very bald figures that I was outlining in opening, PCWs only deal with new business, but new business sales are less than -- are around a quarter of the total sales of home insurance in the market. Of course, the new business sales by PCWs are, as I said, a subset of that, around 15 per cent maximum and that, of course, is despite the fact that PCWs have been operating for over 15 years.

So you can immediately see, so long as you change the market definition, even just to include home insurer's direct online provision of home insurance within the market, you would completely change the way

in which the commission has approached the framing of its decision, considerations of coverage, considerations of potential impacts and so on.

So we have been touching to some extent on the extent to which the PCWs have engaged in a fight over 15 years, essentially to get the intention of consumers and have invested heavily in marketing to do so. We are all very much familiar with the marketing talisman that the various PCWs have managed to promote.

Of course, we also know that direct providers of insurance have also invested very heavily in relation to these matters and we are talking about hundreds of millions of pounds annually being spent on marketing.

But, in particular, a very large amount of money is spent in relation to online marketing. Hundreds of millions of pounds by the PCWs in 2017 alone. Just for your notes, you can see at paragraph 25 of our SO response in the bundle at {B/33/12}, our own figures, in particular for 2018, for ComparetheMarket's spending on online marketing.

That is broken down. It is confidential, so I am not going to refer to it. I just direct you to those provisions -- sorry, actually, may I -- no, because it will involve calling up an EPE that will be seen by others, is that correct, if I call this up now?

Okay. If the EPE is not going to be seen by anyone else, could we call up bundle B, 33, page 12, {B/33/12}, please. This is a document that is only suitable for those within the confidentiality section.

THE CHAIRMAN: Yes, I think just pausing there, Mr Beard, we had better be assured that it is shown by or seen by a limited group of people. It does not appear on the livestream and, as far as I know, it will simply appear for those who are given access to the particular screens. So provided those watching are the only people watching and perhaps they could ensure that that is the case.

MR BEARD: Yes.

THE CHAIRMAN: We have had recently exploding e-mails where you get an e-mail that just pings across many other people. Similarly here, provided the screens are viewed only by those who are in, that is fine. So I will give just a couple of seconds for someone to squawk saying, "That is not the case" and if we do not hear a squawk, then you can proceed.

MR BEARD: Yes. Obviously, from my end, it is not a problem because these are ComparetheMarket figures.

THE CHAIRMAN: Well, indeed. But ...

MR BEARD: The point is well made. I am sorry, sir.

THE CHAIRMAN: No, of course. Okay, let us press on.

MR BEARD: Just very briefly, if you wouldn't mind, on the EPE, having {B/33/12}.

EPE OPERATOR: Just to confirm, you want that document {B/33/12}?

MR BEARD: Yes, please, thank you. I just ask the Tribunal to read paragraph 25. (Pause).

Since we are here, 26 as well. (Pause).

THE CHAIRMAN: Yes, thank you.

MR BEARD: I will not refer to any of the numbers, but what you can see is the numbers are very large in relation to online marketing and in relation to offline marketing. But particularly in relation to online marketing, there are two categories of spend that we are referring to particularly. Generic search terms, like insurance and also branded search terms. In other words, searching on a brand and that does not just mean searching on ComparetheMarket, for example, it can be searching on other people's brand names and trying to ensure that your entry comes up.

Now, during the teach-in, I know that Ms Gibbs showed you some slides of ads that were returned for searches for generic terms, like contents insurance and ComparetheMarket.

Just for your notes, those slides are in bundle D {D/15/8-10}, but I am not going to go to those, because

back at the time of the SO, ComparetheMarket actually submitted material illustrating how search worked in relation to the investment in marketing.

If I could therefore go to {B/33/115}. This is back in, as you will see from the top, response to the SO, February 2019. You will see at the top, on the left-hand side, what the Google search was, "Cheaper home insurance", that was the search term that was put in. Then below that, on the left-hand side, you will see the return that came in, in relation to it. You will see marked at the top four, a little ad box, and that is because these were ads that were returned by the Google AdWords system, in response to cheaper home insurance being entered.

This is what was referred to and is known as paper click insurance, because if you click through one of those ads, then a payment has to be made by the ad buyer to Google.

Just if you have a look through this, what we see, we see the first one is a PCW, MoneySupermarket. The second one is also a PCW, Confused. The third one is actually an insurance services provider, a sort of hybrid organisation, describes itself as a technology company and a broker, but it is not a PCW in the same way and that is a slice.

Then the fourth one is not a PCW at all. That is Direct Line, who is providing online insurance for its own brand.

So what is this telling us? Well, what we are seeing here in these advertising returns is PCWs and direct providers of insurance competing in the auction, the Google AdWords auction, to attract customers who want home insurance, cheaper home insurance.

In essence, what we say is that you have got direct providers competing with PCWs for eyeballs and clicks and they are putting their money into this. They are bidding in to AdWords sufficiently to ensure that they are right at the top of the first page.

Now, if you wanted a manifestation of competition between PCWs and direct providers, having them compete in an auction for customers' clicks and eyeballs, is perhaps as good a piece of direct evidence as you might expect.

If you go across, the same page, you have got a slightly different one, because obviously the clever Google algorithm does different things, depending on the terms you use. Cheap home insurance, there you get a slightly different outcome, you get MoneySupermarket at the top, then you get London Victoria, direct provision. Now, London Victoria also sells on PCWs,

that is unlike Direct Line in relation to its main brand.

But it is nonetheless not relying just on selling through PCWs, it is bidding into the AdWords auction, so that you get as the second entry on the AdWords words, "London Victoria" popping up, so that you go direct to that site to get your quote, if you click on that. Of course, that may well be, because for London Victoria, it is less costly to be providing that quote and that business directly than it is through PCW.

You then get Confused PCW and you get slice again as your fourth, so you get a real mix there, to two PCW and two direct or hybrid.

So we say that the AdWords auction returns is rather compelling information as to the extent to which direct and PCWs are competing for customers, before we get into any of the clever stuff about SSNIPs and so on, just direct evidence in relation to these issues.

But it is not just actually in relation to AdWords because, of course, what I am emphasising in relation to top four, are where you have actually bid in to be at the top of the screen.

But if we just go back to the left-hand side, the first column, instead of looking at the ones with little ads next to them, we work our way down to the non-ad

returns. Now, of course, the non-ad returns are Google's algorithms trying to return to the person searching what Google thinks will be the most relevant returns for that search enquiry without the entities paying into the AdWords auction.

Now, I think as Ms Gibbs may have mentioned and I think this is well known, companies make sure that their websites are geared up, so that insofar as they can, they will be picked up by the Google algorithms for the sorts of search terms where they want to do business and be seen by consumers.

So there is a constant industry going on of people reconfiguring and configuring their websites, so that the search algorithms that Google is constantly changing itself, nonetheless pick up their company websites when consumers put in an enquiry that they want to do business with.

So this is without the bidding and AdWords. What is Google telling us about how it thinks, with all its knowledge? I am not going to ask for judicial notice as to the cleverness of Google's algorithms, we will leave that to another day, but just looking at this, the first one up, MoneySupermarket again. So it is clearly configured its website rather effectively for cheaper home insurance.

Second up, Admiral. Now, Admiral, again, it is a direct seller here. It is directly selling through its own website.

Next up, PCW. USwitch. Would you mind just moving the document down on the EPE, so we can just see the bottom of this column, please? Thank you.

So then we get uSwitch. Then we get money.co.uk, which is PCW, but then we get Esure, which is a direct supplier.

So it is not just the AdWords auction which tells us how direct and PCWs are competing. Mediated through the means of the Google algorithm, Google is saying: I think that if you enter the term "cheaper insurance", these are the sorts of sites that are going to be most valuable to you in terms of returning what you want.

Again, it seems to us that this is plainly rather clear evidence of the direct impact between PCWs and direct online insurance providers, that is material evidence when one is considering market definition.

I am conscious that it is just past 1 o'clock. I was going to the terms of the decision in relation to this. I have probably got about five more minutes, less than five more minutes on this. It might be, if the Tribunal would indulge me and the transcript writer does not mind, if we did a couple minutes more on the

decision, then I can move on to the next section after lunch.

THE CHAIRMAN: I think that sounds sensible, we will do that.

MR BEARD: I am grateful. On the EPE, could we call up bundle A, tab 1, page 138 {A/1/138}, thank you very much. It is actually paragraph 5.183 that I want to refer to here, because this is the very short section in the decision which deals with or purports to deal with the evidence that I have just been showing you, that we put in, in the course of response to the SO and explained why this was strong direct evidence that actually you had a situation where PCWs and direct insurance suppliers were competing for customers and customers' eyeballs and clicks.

5.183 says:

"While an analysis of Google AdWords impressions data would identify the providers that could, in principle, compete with PCWs for consumers that shop around for home insurance, this would only be useful in the absence of any other evidence on the closeness of competition between PCWs and providers' online direct channel."

This first sentence is quite remarkable. I recognise that it is talking about impressions data,

so it is how many hits you get. Ms Ralston has actually provided information in relation to that. It is clear that even when you go to the impressions data, you get the same sort of pattern of lots of impressions for direct suppliers, lots for PCWs, and so on. It is all mixed up. I will provide the reference after the short adjournment.

But the idea that this evidence is only useful in the absence of other evidence on the closeness of competition between PCWs and providers is a remarkable statement. The idea that you essentially say: well, if we have got other evidence, we can just ignore this stuff, is just plainly wrong.

You may like using the SSNIP analysis, you may want to go down that line. You may want to, as they do, keep emphasising: well, on PCWs, you do comparison and on direct online, you do not. Well, we understand that. Those differences in characteristics do not tell us the market outcome, they are the start of the question. But you cannot just ignore this clear evidence, as they purport to do in the first sentence, when they then go on to say:

"In particular, this analysis would not demonstrate whether home insurance providers and/or consumers who use PCWs would switch to the online direct channel and

hence whether this channel could constrain a hypothetical monopolist PCW's ability to profitably increase commission fees by 5-10%. The CMA therefore does not consider that BGL's submission regarding CTM's paid search advertising strategy when considered with other evidence, demonstrates that sales made through PCWs and providers' direct channels form part of the same relevant market."

I mean, it is an amazing example of buy the theory, sell the facts. You have a situation where you have an auction for customer eyeballs and they are saying: well, that does not prove that the 5 to 10% hypothetical monopolist test would be met here and therefore we ignore it. You simply cannot do that. It is a component of clear evidence that is relevant here.

As we will come on to see after the short adjournment, the approach that the CMA actually took in relation to the SSNIP, again was deeply flawed in any event.

If I may, I will pause there.

THE CHAIRMAN: Thank you very much, Mr Beard. We will resume at five past 2. If we can do what we did before, mute our cameras and microphones, we will be back then.

MR BEARD: Most grateful, thank you.

(1.08 pm)

(The short adjournment)

(2.04 pm)

THE CHAIRMAN: Mr Beard, good afternoon. I think everyone is present, so do continue.

MR BEARD: I am most grateful, thank you very much.

Before the short adjournment, I was simply dealing with the evidence that one can get from the position of the AdWords auction and the search returns, and almost the man or woman on the Clapham omnibus or perhaps actually the Clapham broadband, how you would think about these things, were you thinking that --

THE CHAIRMAN: I am sorry, Mr Beard, I think we have a technical problem with Ms Lucas's headphones. Just bear with us all one moment. (Technical pause).

I think we are on. Do proceed, Mr Beard.

MS LUCAS: Thank you very much.

MR BEARD: No, problem. Yes, please do stop me, if there are further issues.

So I was moving on from those observations about how just stepping back and looking at these things objectively, from a customer's point of view, a consumer's point of view, you might see direct and PCW channels competing.

I was going to then just move on briefly to look at some of the particular SSNIP issues. As I have said,

they will be subject to much more scrutiny in the course of the expert's evidence, but if I may, I think the easiest and quickest way to deal with this might be to turn to the CMA's skeleton, which is at bundle B/44. I was going to pick it up at page 11, paragraph 32. {B/44/11}.

I think it is the next page {B/44/12}. On the EPE, yes, excellent -- oh no, we have gone a couple of pages, now. Page 11, I think it should be. {B/44/11}. Lovely, thank you very much.

I do not know if it is only us, but at the moment, we do not have a live feed on the transcript.

Now that does not mean that we need to stop but I just thought I should raise that. It has been raised with --

THE CHAIRMAN: No, thank you for drawing that to our attention. I do not think we need worry for opening submissions. If it was a witness, I think we would have to pause, but let us continue and hope it catches up.

MR BEARD: That is fine. I thought I would mention it in case it was something that needed dealing with.

32 {B/44/12}. So the first point being made is that:

"The CMA found that direct channels were a poor substitute for PCWs since they did not enable consumers

to compare a large number of quotes quickly and easily~..."

All this is doing is observing that the characteristics of the PCW site are different from an insurer's site, which obviously we accept, but I think we are a long way beyond a situation where we simply take market definition on the basis of characteristics.

After all, what we are doing with the SSNIP test is asking ourselves: are those adjacent products in the same market as the focal products, notwithstanding that they have different characteristics? If they had the same characteristics, they would be part of the focal product group. So it is a slightly strange piece of reasoning there, but we obviously accept there are differences in the characteristics between PCWs and insurers's direct sites.

Then it says {B/44/13}:

"Consistent with this, the substantial majority of PCW users [and I will not read out the numbers] did not even look at a direct channel when shopping around for home insurance, whereas those who did were highly unlikely to find a lower price. Similarly, the CMA found that PCWs themselves regarded other PCWs as their closest competitors. These findings provide powerful support ..."

Well, we see good evidence that the PCWs do see direct insurers as direct competitors as well. In relation to the statistics that are relied upon, about the substantial majority of PCWs did not even look at a direct channel when shopping around for insurance, there is a wonderful irony here that has been picked out by Ms Ralston, that the number of people who look at direct channels from a PCW is almost identical to the number who check other PCWs from a PCW.

On that logic, therefore, you would exclude PCWs from the market and that obviously is not correct. In fact, it turns out that more people, more PCW users, got quotes on direct channels than on a second PCW.

So characteristics are a start, but very far from a conclusion. The statistic referred to is not supportive of a distinction between PCWs and direct channels and the recognition of closest competitors, in a way, the Google material already makes my point in relation to that.

Then if we go on to paragraphs 34 and 35, we are looking here at the role of narrow MFNs, which is one of the points, sir, that you raised at the outset. I think we all understand how the narrow MFNs work. It means direct channels cannot undercut PCW channels sales.

Now, to most people, the existence of a narrow MFN

would be the most clear and compelling signal that direct channels do compete with PCWs and PCWs do compete with direct channels, because if they did not, what would the point of a narrow MFN be?

You only need the protection notionally of a narrow MFN from a competitor. It might be there are very good reasons for the existence of narrow MFNs, for instance, preventing free riding and so on. But if you are not a competitor, then the need from a narrow MFN disappears, because what you are doing is you are essentially ensuring that direct channel vendors online are not able to price their wares lower than you are on a PCW. In doing so, they are ensuring that the PCW is not undercut by the direct channel.

Now, if you were not a competitor, why do you care about someone undercutting a non-competitive product or service?

So the very existence of narrow MFNs, we say, are as highly indicative. Indeed, if we go on to paragraph 35, CMA say:

"Nor is it tenable to argue that NMFNs are themselves evidence of close competition between direct channels and PCWs, where their actual effect is to limit the potential constraint from HIPs by preventing them from offering lower prices on their direct channels than

on PCWs."

We read the words. We do not understand how that works, as a support for the idea that direct channels are not in the same market and are not competing. To us, it seems absolutely clear that you only want to limit the constraint from HIPs when you are competing against HIPs.

So we say the CMA is making a very basic mistake in relation to its treatment of narrow MFNs, because their very existence is indicative of the dynamics of competition. So we say the first point is wrong, but then there is a more technical issue that arises, which is the one I think, sir, that you were picking up at the outset, which is the role of narrow MFNs in relation to the operation of the SSNIP test.

Dr Walker says when you do a SSNIP test, you bake in the effect of the narrow MFNs, so you impose the price increase on the focal products, which are the PCW sales, by a hypothetical monopolist, a PCW home insurance, but because there are prevalent narrow MFNs in the market, you assume that the hypothetical monopolist would have a narrow MFN with all its home insurance providers.

Conceptually, that is quite an odd situation, but it is just the wrong way of approaching these matters and we can see that if we actually go back to what is often

seen as being, at least in legal regulatory terms, the origin of the operation of the SSNIP test, which is the 1992 US Merger Guidelines.

So if we could go to bundle F, 648, at page 6 {F/648/6}. So we just pick it up in the overview, you will see there you have an outline of the consideration of hypothetical monopolist tests being used in the assessment of merger control and whether or not that is going to create a difficulty or problem in relation to these very issues when a merger occurs.

If we could then go on to page 9, {F/648/9}, you will see under the heading, "Product Market Definition", "1.11 General Standards".

You will see:

"Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price."

That is assuming that buyers likely would respond to an increase in price for a tentatively identified product group, only by shifting to other products, what would happen?

So buyers likely to respond to an increase in price:

"If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow."

So the starting point is what you are looking at is, if you push up the price of the focal products, do people diverge to adjacent products on the basis that those adjacent products stay at the same level? Because otherwise, you do not get the differentiation and you do not get any sense of a possible divergence or diversion of people from the focal products in the hypothetical monopolist test.

It says:

"Specifically, the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a 'small but significant and nontransitory' increase in price, but the terms of sale of all other products remained constant."

So (inaudible), the regulatory use of the SSNIP test, just couldn't be clearer. You see it further

down, if you keep going, at the bottom of the page:

"In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following:

(1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables ..."

Then it goes on and considers other possible evidence.

But again, it is the relative price difference that is critical here, because you cannot possibly be testing in your mind, a possible diversion unless you maintain that hypothetical difference. Because what Dr Walker and the CMA are ending up doing is saying, "Well, we are testing a price differential in the absence of any differential."

I mean, I do not know whether it is more Lewis Carroll or Joseph Heller, that formulation, but it is entirely incoherent. You cannot have a situation where you bake in that reaction and you cannot do it by reference to the existence of legal arrangements that exist in the real world, in relation to various PCWs, and carry them across in order to effectively nullify

the effect of the differential that you are hypothesising in order to drive the question of diversion.

You just do not look at the reaction of pricing of adjacent potentially competing products to the shift in price on focal products by the SSNIP, because if you think about it, let us just step aside from legal contractual arrangements, like the narrow MFNs. If this was the right approach, you can have a situation where you had a hypothetical monopolist, absent narrow MFNs, raised its prices and the natural reaction of the adjacent operators, indeed if they were very close competitors, would be potentially, because it is an industry wide price, actually to move their prices up as a sort of umbrella effect.

So even absent narrow MFNs, if you think about this idea that you take into account the actual reaction of parties in the market, changing their prices, the closer the potential substitute group are, the more likely it is you end up with no differential. If you end up with no or a negligible differential, you would end up with a perverse result that you would not expect significant diversion between the focal products and the adjacent product.

So you can leave narrow MFNs to one side, you can

illustrate it that way as well. So there is something conceptually wrong, it is wrong on authority, going back to the US Merger Guidelines, and it undermines the purpose of the hypothetical monopolist in these circumstances, because you are not maintaining a relative price difference.

So it is not that we are saying narrow MFNs are not prevalent in the market as they are. We completely accept that. We do also accept that there are issues to do with what the factual matrix is that you apply in relation to the operation of the SSNIP test. We accept all of that. But in relation to the price differential, you cannot simply erode that by hypothesising the existence of these contractual arrangements, because then you undermine the operation of the test, which is of course why Dr Walker ends up saying: well, if the prices do not change of the nearest rival, because they are bound by narrow MFNs, you would not expect any diversion. Well, you are quite right, I can see how that would happen.

So we say that it is the wrong way of looking at the SSNIP test. Obviously, Dr Niels, who has written extensively on these matters can comment further in relation to it.

Anyway, then we move on to paragraphs 36-38 of the

statement. This is to do with the range of factors that are then taken into account in carrying out the SSNIP test. I think this goes to one of your other questions this morning, sir, about how you carry out these sort of analyses in relation to two-sided markets.

This is an area where I think there is potentially quite a lot of discussion to be had about how these tests work and why. In very simple terms, what you are doing with a SSNIP test is identifying where constraints on the focal product might arise. That is very simply what you are doing.

Now, if you only carry out the SSNIP on one side of a two-sided market, you are only looking at constraints on one side of that market, rather than looking at both sides and where constraints might arise. The consequences of how these constraints might arise and the impact of them, I can see are further questions that no doubt the experts will debate.

But the issue we have here is that CMA did not carry out any sort of assessment of a SSNIP on the consumer side of this two-sided market. Now, what it did do is it said: we will carry out a SSNIP in relation to commissions, which is on the insurer side of the market, and what we will do is we will consider the indirect effect of that commission moving up by a small, but

significant, non-transitory amount of 5 to 10%. We will think about how that might feed through the commission changes, the commission elevation by the PCW hypothetical monopolist might feed through into prices that are then charged on that PCW's website and that will be an indirect effect, because those prices will be the ones that were faced by the consumers.

We say you are right to consider that incorrect effect. No issue with that. But considering the indirect effect of carrying out the SSNIP on only one side of the market is not the same as carrying out a SSNIP directly in relation to consumers.

So, that is essentially the battleground and we say that what is wrong here is you are not identifying constraints on both sides, which is what the exercise of the SSNIP is. Whereas Dr Walker says, "I can conclude that you can profitably raise commissions by 10%, therefore I can tick the box and go home that the focal products themselves are the market in and of themselves." We say that is too simplistic an approach for the analysis of constraints here.

Did I see a hand go up?

THE CHAIRMAN: You did, yes. It seems to be flashing on and off.

In a way, I think one is getting into what are

perhaps terminological questions, but ones that I think matter. You have used the word or phrase "two-sided market" and we all are.

MR BEARD: Yes.

THE CHAIRMAN: But actually what we are talking about, I think, but this is something which we will want to explore with the experts, is not a two-sided market, but a product or a platform that constitutes a product in two markets. So it is actually the platform that has two sides rather than the market.

What you have got, when you look at the way the CMA defines the market in paragraph 5.21 of its decision, you get a market for the sale and purchase of price comparison services, which is one market, where the platform is selling price comparison services to the proposed insureds and then you get second market, but run out of the same platform, which is the provision of insureds, who are seeking a quotation from a given HIP, and the HIP is buying through commission the interest from insurers in its product.

So what you get through the intermediation of a platform, which is selling to both markets, two sets of buyers in what are separate markets. If one articulated that way, at least for my part, I find it rather easier to understand what one is deploying the

SSNIP test for, for example.

MR BEARD: I certainly -- obviously, I do not want to trespass unduly on the expertise of the economists. But I certainly see, sir, that if you see it in those terms as essentially two separate services being mediated by the platform, then the logic and importance of carrying out SSNIP analyses in relation to both sides is made evident and clear.

So conceptually, I can see why that sort of analytical approach would reinforce the importance of carrying out SSNIPs on both sides, as it is referred to or in relation to the two services, as you put it, sir, because you would be wanting to identify the constraints in relation to each of these services.

I think, conceptually, the way it has been looked at is looking at the products of the platform effectively intermediating between the two and because you have those two services being delivered, it is important that you do look at the constraints on both sides in order to capture the constraints on that mediating middle.

I think I will absolutely defer to the economists as to whether that should be seen as a substantive or semantic issue, but certainly the way that you put it would reinforce the absolute need for SSNIP to be carried out in relation to both dimensions, if I might

put it that way, somewhat more neutrally.

In that respect, the simple point that we would be making is if one looks at it that way, one ends up with a situation where the CMA simply did not deal with one of those dimensions when it carried out its SSNIP test.

So that might be a different characterisation of the criticism that is being levelled by Dr Niels and ComparetheMarket.

But, as I say, I wonder whether there is a danger that whether or not this becomes semantic or substantive, is something that we should perhaps defer to the experts. But, as I say, in relation to the two sides, it is the importance of constraints on both sides or in relation to each of the types of service, as you put it, that becomes important to a proper understanding of the competitive dynamics. It is not a matter of ticking a box as to whether or not a 10% SSNIP can be hit on one side or one service and one ends the enquiry there.

And indeed, going back to where I started, the submissions about in particular the Google material, it is somewhat ironic that we end up with a situation where we saw in paragraph 5.183 of the decision, that the CMA simply said: well, given we have got other evidence, we can ignore this Google material, in circumstances where

there is obviously some dispute about the manner in which they carried out the SSNIP test, as if treating the SSNIP test, as they carried it out, were some kind of Gospel handed down on tablets of stone and it clearly is not.

In those circumstances, I think we have a significant issue, both in relation to the use of the evidence overall and their treatment of it, in relation to their application of the narrow MFNs. Then in relation to these issues about where one applies the SSNIP test.

I think I should pick up, however -- and I will do this very briefly by reference -- the further point, which is even if the CMA's approach to doing the SSNIP test is correct and ...

(Mr Beard's screen is frozen).

THE CHAIRMAN: Mr Beard, I fear you have frozen again.

Again, we will pause and hope that either the connection re-establishes itself or you dial out and dial in again. But we will wait.

(Technical pause)

Is it possible to eject him from the meeting so that he can dial in again? Okay, we will hang on then.

Mr Beard, rather disturbingly, on my screen, you appear frozen on one image and moving on the other, but

I hope that will rectify itself. It has.

MR BEARD: I apologise for any trauma. I am very sorry, we went for the switching it on and off again option.

THE CHAIRMAN: Quite right.

MR BEARD: Let me be very brief in relation to this point. Ms Ralston has, in the alternative to the points that have been made by us, by Dr Niels, and indeed by Ms Ralston herself, actually carried out the analysis of the indirect effect on consumers that Dr Walker is hypothesising.

I will give you the references, given time, but it is in Ms Ralston's second report at paragraphs 2.44 to 2.64, that is bundle {A/9/27} onwards. What she does is she analyses the effect that would be expected and actually shows that even in relation to those indirect impacts on consumers, it would render the single-sided SSNIP non-profitable.

So there is a whole series of arguments here in relation to the SSNIP that need to be considered, but even if we accept the CMA's approach, they are still getting it wrong on the numbers.

The final point I want to pick up is in relation to supply-side issues. In many ways, it may be easiest just to deal with this by reference to the decision itself. So the decision is obviously in tab 1 and

I want to look at page 39 {1/139}. I think it is obviously accepted by the CMA that supply-side substitution can act as a constraint in relation to market definition, such that the market has to be expanded to include supply-side competitors who can essentially enter or expand within a year.

If one looks at the section on supply-side substitution by providers. It begins under heading 5.C.VI. As I say, it is bundle {A/1/139}.

I think most people may have it. It is not on the EPE, but I will carry on -- fabulous, thank you very much.

So it says here:

"The CMA has considered whether supply-side substitution ...

5.186 In order to be successful and establish themselves, PCWs need to attract consumers to their site and convert visits into click-throughs to home Insurance providers and sales. This is commonly achieved through significant investment in marketing and advertising activities."

Then if we go over the page {A/1/140}:

"PCWs also need to provide consumers with a broad and appealing range of choice, which can only be achieved by signing up a large number of insurance

providers to their platform [and then integrating them]."

Then there is the CMA discusses the difficulties in signing people up and this creating a "chicken-and-egg" problem.

At 5.188, it says:

"The CMA therefore considers that PCWs in the home insurance sector face material barriers to entry and expansion mainly because of marketing and advertising spending and the integration costs providers need to incur to list on a PCW."

So marketing costs and having large numbers of insurance providers on the site.

Then it says, 189:

"The strength of these barriers is reflected in the fact that businesses with well-known brands and a significant financial capacity and user base, like Tesco Compare and Google, have not been able to successfully challenge the Big Four PCWs."

So it is then said, in 5.190 {A/1/141}:

"The existence of these material barriers to entry and expansion mean that it is unlikely that a 5-10% commission fee increase by a hypothetical monopolist of PCW Services for Home Insurance would be rendered unprofitable ..."

That's it. Now, what is very striking about this is that on the supply-side, what is missed by the CMA is the fact that if you create a hypothetical monopolist of home insurance PCW services, you hypothesise that other PCWs still continue to exist providing other insurance PCW services. That is essentially ignored here.

That, of course, is the closest supply-side entry you would get, because what you are asking yourself is; is a supply of, say, motor insurance, a PCW supplier of motor insurance, well placed as a supplier to be able to provide home insurance PCW services? That is just ignored.

That is the central gap here. There is a hole in the analysis. They talk about Tesco and Google, they are talking about people who do not have existing PCW functionality. So if you think about the two barriers to entry and expansion they identify, marketing -- well, you hypothesise that the remnant PCWs, who have had the home insurance element stripped out, they are still doing lots of marketing for home insurance, credit cards, pet insurance, and whatever else they are doing, they also have a very large roster of insurers that are selling things through them.

So the insurer provider relationship, which is seen as the other barrier to entry, exists with these people.

Therefore, the two reasons that are given for entry and expansion being undermined in relation to them do not apply or certainly do not apply without more in relation to these residual PCWs.

We understand that if you go down and consider those issues, there are a whole range of other factors you need to take into account, but what you cannot do is ignore that supply-side substitute ability when you carry out a supply-side analysis. That is essentially what the CMA has done there. When they talk about other factors, there can be other factors to do with capacity and so on, that the PCWs might have.

But that is a separate question and one that would have to be grappled with. Essentially, what they have done is they have missed the closest supply-side competitors to a monopolist, because you are assuming there is a hypothetical monopolist of home insurance only PCW services.

You do not assume that the hypothetical monopolist of home insurance services is also, for example, the hypothetical monopolist of private motor insurance or pet insurance or credit card PCW services. That is not what you are doing in the SSNIP and it is not what the CMA has done in the SSNIP.

To put it another way, as I think we have done in

the submissions, they focus on the greenfield entry and expansion. They do not focus on adjacent PCW insurance activity entry and expansion.

Now, in the skeleton, it is simply said: well, we have considered expansion, we have considered expansion, we have plainly considered the PCWs, but that is just not true. You can read that section over and over again. It does not deal with the PCWs and what it does not do is spell out reasons why the barriers to entry that they are talking about must apply to those PCWs, because the two barriers are marketing insurance access.

Now, it is true, the insurers you would be using on motor insurance would not be all the same as the home insurance providers, but in terms of barrier to entry, you already have that relationship and therefore the way in which the chicken and egg problem is described would have to be reconsidered.

So again, I will leave that for further consideration by Dr Niels.

I am not going to deal with any other issues in relation to market definition, unless the Tribunal have particular questions in relation to it. I hope I have highlighted both the evidential issues that we have, the conceptual issues with narrow MFNs, and also the problems with the SSNIP approach that has been adopted

and indeed its application.

THE CHAIRMAN: Thank you.

MR BEARD: With that, I am going to move on to my third topic in the submissions, which is going to be dealing with issues to do with coverage and counterfactual matters. Now, we have already noted and stressed in our submission that we say that qualitative evidence does not justify the finding of infringement. We have also emphasised already today the importance of giving the benefit of the doubt in relation to any evidential assessment to the defendant.

As we will see, the CMA hasn't done that.

Of course, there is a whole strand of material that I will come back to in relation to ground 3 and ground 4 about the lack of context and proportionate perspective that the CMA has in relation to these various matters.

But actually, before I turn to the evidence or key parts of it, I thought it might actually be useful just to look at the contract clause term, because the Tribunal may recall that earlier this year, there was a discussion about what was a wide MFN and what was the most wide narrow MFN that could exist.

THE CHAIRMAN: Yes.

MR BEARD: I think it is just instructive to have those clauses in mind, when we come on to consider the

evidence and come on to consider these issues to do with effects.

So, if I may, could we go to bundle {D/18.1/1}, that I would like to pick up at, if that would be okay.

So just to be clear, D18 is actually the cover letter that was sent to the Tribunal, following on from the previous hearing where it had been agreed that we provide these examples. So annex 1 is the list of agreed examples.

If I could just pick up at annex 1, the first of them. So this is insurer A -- I am not even going to attempt to remember what that is in this numbering, but I will come back to that. Let us just look at the clause itself:

"Subject to clause 4.2 and to identical material risk data having been asked of and provided by the customer to calculate the quotation premium and, if applicable from time to time, the provisions of clause 4.13 the insurance provider warrants that it will not provide a quotation for a policy to a customer for BISL [which is ComparetheMarket for these purposes] to display on any price comparison table referred to in clause 2.2 that has a higher premium payable than will be payable by that customer should they have accessed the Insurance Provider Website directly or via any other

aggregator website. For the avoidance of doubt this clause does not apply to an Insurance Provider Motor Policy."

This is what is said to be a paradigm wide MFN. I think the references to 4.12 and 4.13 are not germane for the points that I am going to make.

The first point I am going to make is the wide MFN only applies where identical material risk data have been asked for and provided. As we will come on to see, actually you get variations in pricing, because of the question sets and information that is provided, because different PCWs do things slightly differently.

It also means that if you tailor a product slightly differently, so that you tailor it in relation to certain sorts of risk and get questions accordingly, you can end up varying the products that you offer and therefore being able to differentiate pricing that way, by making marginal changes.

But let us leave that to one side:

"... the Insurance Provider warrants that it will not provide a quotation for a policy ... to display in any price comparison table..."

So it is actually a very limited scope of restriction. You are not allowed to provide a quote that is going to be put in a price comparison table and

you are not allowed to provide that quote, on the face of it, that is lower -- that is higher, I am sorry, than would be provided on the insurance provider website or via any other aggregator. That is covering PCWs and that is why it is said to be a wide MFN.

But it is worth bearing in mind what this does not cover, because of course it is focused on quotation and price comparison table. It does not cover a whole range of other offers that might be available. It is not just soft toys, it might be meal deals or cinema tickets, but it also might go so far as being cash back in relation to these situations. In other words, you can offer all sorts of incentives that are directly attributable to a particular offer on a PCW and you are not stopped by the wide MFN.

So there are two reasons I raise this. First of all, when we are thinking about the dynamics of competition and thinking about range of parameters and potential restrictive effects on competition, we are obviously looking at here not only the possibility of a range of workarounds, but you are also looking at a range of situations where you can offer all sorts of incentives, if you so wish, and you would not be in breach of the wide MFN. It is only that front quote that is going to be constrained if -- and it is a big

"if" as we will come on to see -- you actually comply with this clause.

So what we say is that you have got to be thinking about even if these clauses were to be absolutely watertight, enforced constantly, they are actually limited even in their formal restrictive effect. Actually, what we know is that, in this industry, offers, brand characters, and of course all of the marketing, really do matter.

Ms Ralston, in particular, in her first report -- and I will give you the references, 9B.3, the paragraph 9.30 onwards and just for your notes, that is in bundle A, tab 5, at 165 {A/5/165} discusses that discounts, and so on, are only one way that participants in this market compete. She highlights a range of dynamics of competition here.

So we have already talked about, and she refers to at paragraph 9.36 to 7, marketing and rewards. Of course, that, as we will come back to again, is very much the most significant cost that all of these PCWs incur. That is where their spending dwarfs investment in anything else.

They also compete on ease of use of the site, that is at 9.38, 9.40. They compete in particular on coverage of risks, so quotability, making sure that when

you go to the site with your particular set of demands, you will get a range of quotes out, because if you go to a PCW and you do not get a range of quotes, then that is not going to be useful to you. So PCWs want to be able to offer a range of quotes. That is at paragraphs 9.41-44 in her report. That is at page 167, {A/5/167}.

Then, of course, we have got non-price promotions, such as specific offers or add-ons, like free home emergency cover, so you change -- you give an offer in relation to the nature of the product. She refers to that at 9.45. You have got issues to do with brand strength, as well as what might be referred euphemistically in X factor terms, to the ease of use and the customer journey.

So it is not just the initial interaction, about how easy it is to progress through the website and complete your purchase, because that again is something that matters.

As she also emphasises, you can have all sorts of non-price promotional deals.

So you have got those sorts of dynamics of non-price competition and you have also got aspects of different sorts of price competition undertaken by the home insurers. It is important in those circumstances to bear in mind what the restriction is that we are talking

about. So that is the first issue that I think is important to highlight in relation to this.

But there is a second point here and it is actually about the CMA's evidence gathering and analysis. It is worth just turning up decision paragraph 1.28, which if we could on the EPE, bundle A, tab 1, page 16 {A/1/16}:

"Promotional deals with PCWs are a form of differential pricing or an important way for insurers to compete on price during the relevant period and continue to be."

We will come back to this in ground 4 on the prevalence or importance of promotional deals generally.

The point I want to make is a different one:

"Such deals can take various forms but typically involve an insurer agreeing to lower the prices it quotes on the PCW or provide additional benefits such as free legal cover or cash back for a specific period in return for the PCW lowering its commission fee or agreeing to feature the insurer in a promotional campaign funded by the PCW during that period. The CMA's analysis of 59 promotional deals agreed in the relevant period and subsequently together with other evidence shows that these deals led to lower retail praises for consumers [we say it obviously did not] and an improvement in an insurer's ranking on the relevant

PCW."

It is that bit in the middle. We see in the remainder of this decision, the concern about the impact on promotional deals and what is said by the CMA in the decision is that promotional deals have been impacted by the operation of the wide MFNs. But it is obvious that what they refer to as promotional deals in 1.28 are not all deals that are in fact precluded by the wide MFN. Additional benefits, such as free legal cover or cash back, are not precluded.

Now, I think when it comes to later in the decision, actually a different definition of promotional deals is actually being used by the CMA and they are focusing only on price discounts. But it is not clear exactly what they are saying where in the decision, given this introductory piece, but it is more than that, because when they went to get the evidence from people, they used ambiguous terminology. That is what really matters.

Initially -- and I will just give you this for your notes -- when they started asking questions under section 26, they used the term "exclusive deal" meaning where a PCW offers or agrees with a provider a short-term reduction in commission in return for a lower premium.

That is the term they used initially. Just for your notes, there is an example of that definition at {F/709/7}. It is just an example of the 2017 section 26 notice.

But I would like to go to the version of the 2019 request {F/710/6}. Thank you. If you go down the page, you will see the definition of promotional deal:

"Promotional deal means a deal between a PCW and a HIP which can take various forms. These deals typically involve the PCW agreeing to lower its commission fee or feature a specific HIP in a PCW finance promotional campaign for a specific period in return for that HIP agreeing either to lower the retail prices to offer other ancillary products like free legal cover or cash back or vouchers. The cost of the free product or the cash back is shared between the HIP and the relevant PCW."

So there is a mutual investment in the deal.

The reason I raise this is because obviously in this section 26 request, where it asks about promotional deals and where it gets responses in relation to promotional deals, the CMA is actually asking questions, which are not only in relation to deals that are precluded, on the face of it, by the formal terms of the wide MFN.

In other words, the questions they are asking and the steer they are giving to the respondents, as to how to use the term, is covering matters which are actually permitted under the wide MFN. Therefore, one has to be extremely cautious about how you are reading any references to promotional deals in any responses in respect of promotional deal information in relation to that section 26 request.

There is a looseness in the way the CMA has gone about gathering evidence. Whereas you would expect that what it was asking is: have you had in relation to promotional deals that are falling within the WMFN, some specific experience? They actually ask: have you had experience in relation to promotional deals? Some of which may, some of which may not.

So I am just going to go back now, if I may, to {D/18.2}.

Sorry, I am just pausing for a second, because my EPE hasn't popped up. It does not matter, I have a hardcopy here. Thank you. In relation to the next one, what we have got is a heading on 18.2 -- Widest possible, ie not within the infringements found by the CMA narrow MFN. Here we have got a provision, and I will come back to this, but ironically, when asked about this clause, the home insurer concerned said:

actually, this MFN was a wide MFN. But let us leave that to one side.

I am sorry, Ms Lucas, you had your hand up.

MS LUCAS: Yes, I was hoping to see it on the EPE, I think it came up and then you mentioned you did not have it, and then it has disappeared.

MR BEARD: I'm so sorry, it is up again?

MS LUCAS: Thank you. It is up again now, thank you.

MR BEARD: Yes. There is something with my EPE, everyone else has it, so worry not. So just looking at it, this is the "Widest permissible ie not within the infringement fine by the CMA."

As I said, when actually asked about it, the insurer in question described it as a wide MFN. It says:

"The insurance provider shall always provide the most competitive product pricing structure it operates for its Internet product distribution channels to ComparetheMarket when supplying its specific product specific information."

Now, on the face of it, that would be the same as a wide MFN that we have just seen, but there are a series of carve outs in 5.8:

"ComparetheMarket agrees that 5.7 shall not prevent the insurance provider from offering a product at the lower customer annual premium. Where it does so as

a result of any promotional campaigns or target marketing through any medium other than insurance provider website where the products are offered, whether through insurer or provider website or otherwise at a discount to customers who are already customers of the insurance provider [so that is sort of almost like a renewal bonus type situation] see where the insurance provider runs a tactical price savings campaign of limited duration [either through the provider website or otherwise] where the insurance provider elects to offer products at a lower premium where they are arranged via a different channel where such election is due to the insurance provider's claims experience."

I am so sorry, I am on page 4. I think the EPE is on page 1, I am so sorry. It is my fault. I am so sorry, I have given the wrong reference. It is 18.1, page 4. {D/18.1/4}. It is my notes.

You should have "Insurer D, URN1772", is the~...

THE CHAIRMAN: Yes, we have that.

MR BEARD: I am so sorry, that is what I am referring to. My apologies.

THE CHAIRMAN: No, not at all.

MR BEARD: I am sorry, because I do not have the EPE in front of me, I hadn't noticed. I was just working off a hardcopy.

So 5.7, I have just read. You will see, on the face of it, looks like rather akin to the wider MFN terms that we have just seen.

Then 5.8 involves a series of rather specific carve outs.

So the reason I raise it two-fold: one is because this was treated as a wide MFN by the insurer in question when asked about it, albeit subject to carve outs.

But the second point I want to raise is this: we have looked back at what the intellectual property insurer considered to be the carve outs and we have looked at the terms of this provision, and it is not clear to us on what basis you could do anything but limited promotional campaigns in relation to the operation of this clause.

In other words, if you intended in perpetuity to lower your prices on one of the PCWs, what is sometimes referred to as differential base pricing, on the face of these provisions, we do not see that that is possible. It certainly is not possible within (b), (c) and (d). It would have to be within 5.8(a), but we do not think that differential base pricing falls within the scope of any promotional campaigns or target marketing.

Now, we do not know what the CMA's position in

relation to this is, but it does strike us as something that leaves us in a difficult position in interpreting other parts of the material, because plainly, the insurer in question was not thinking that it could engage in these sort of wider schemes, it talks about specific carve outs.

In those circumstances, if this is permissible, an insurer could understand it that way and indeed we would read it that way, as precluding differential base pricing. We are not clear on what basis the CMA would then say that differential based pricing was not permissible -- sorry, preclusion of differential base pricing was impermissible.

But anyway, the only reason we are doing this is we are looking at the details of how this works a little more in some of the evidence, because these are not matters that are really grappled with by the CMA in relation to these issues. As I say, when it came to look at these matters, it has generally taken something of a blanket view about how all of these clauses work as wide MFNs and how things work as narrow MFNs. In fact, there may be rather more subtle grades involved.

But our primary point in relation to all of this, of course, is that you actually need to look at the reality of how these clauses, whatever their particular form,

how they were actually being operated and what the level of effective coverage of these clauses were, whatever the terms of them.

In that regard, there is a distinction between the CMA and ComparetheMarket, because the CMA are emphatic that when they consider coverage of these clauses, they are entitled to keep repeating the figure that the wide MFNs covered 32 HIPs of the 45 that operated on ComparetheMarket and that those 32 HIPs amounted to provision of 40 per cent of sales of home insurance through PCWs. We say that is plainly the wrong way to look at coverage.

More particularly, it is plainly the wrong way to look at the assessment of the reality of effects, because all you are doing there is effectively treating all the clauses as object clauses. In other words, they are sinful, on their face, and they have this extensive coverage by the CMA. We say, no, in an effects case, you actually have to look at how they work.

Now, I think it is necessary just, first of all, to show that the law in relation to the analysis of coverage of agreements is not saying: do not look at the reality, as the CMA seem to suggest. It is permitting, indeed in the light of all that we have already seen in the case law about effects analysis, it is necessary

that a regulator considering effects looks at the actual operation of these contracts, before deciding whether or not it relies on the coverage of such a network as a key factor in deciding whether or not there might or might not be adverse effects on competition.

So with that could we just pick up one or two authorities on the law of coverage -- in relation to coverage. I am going to start at G/23, which is the Langnese case, and it is {G/23/33}.

Now, for those that have not necessarily enjoyed the long history of competition law, epic fights at a European level, this was all part of a long running litigation saga about exclusivity in relation to ice creams and whether or not ice cream producers could effectively ensure exclusivity for the provision of their ice creams in particular shops. In other words, that they did not sell any other types of ice cream there.

This was particularly important because, at the time, Mars was seeking to enter the market with its Mars branded ice creams, the Mars Snickers, and so on, and it was strongly objecting to the way in which these exclusivity arrangements operated.

So what a number of the incumbents had done was enter into a series of exclusivity agreements with

particular resellers of ice cream. What was being said was that, essentially, when you are considering whether or not Mars is being foreclosed from the market, being made unable to penetrate the market, that you take into account the effect of that network of agreements. You do not just take into account each individual one and ask whether each individual agreement has an appreciable effect on competition.

What you do is you look at the network of them and that is widely accepted as the correct way to consider issues of foreclosure. Indeed, it is appropriate to consider the network of agreements you might have, even when you have to take into account other resellers foreclosing other parts of the market, because if you have two resellers, each with a network of exclusive agreements, you constrain the space for new entrants to come in. So it is absolutely right that you do consider those networks.

But none of this authority says: yes, but if you have got evidence that those networks are not really working or they are only working to a much more limited extent, you ignore that. They do not say that at all.

So if we pick it up, at page 33, in this Langnese case, we will see at paragraph -- we will see that this is under the heading, "Findings of the Court". If we

turn over the page, starting at the bottom of the page:

"As to whether the exclusive purchasing agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, according to the case-law, to consider whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market for new domestic and foreign competitors. If, on examination, that is found not to be the case, the individual agreements making up the bundle of agreements as a whole cannot undermine competition within the meaning of Article 85(1) of the Treaty. If, on the other hand, such examination reveals that it is difficult to gain access to the market, it is necessary to assess the extent to which the contested agreements contribute to the cumulative effect produced, on the basis that only agreements which make a significant contribution to any partitioning of the market are prohibited ..."

Now, as I say, we have no issue with that analysis at all. But the predicate of it is that actually the agreements are implemented and effective.

Now, it might be that when, as a regulator, you come

and look at something and you find a network of agreements, you can start from the position of saying: well, we are going to assume that they do operate, they are in force, they are robust, and so on. If, on the other hand, you get evidence saying: no, actually, that is not the case, you cannot simply ignore it and keep repeating the overall coverage figure for a network of agreements when, in fact, you know that they are not being applied and you have good evidence that shows they are not being effective in relation to the operation of the market, because you are not then having a basis for saying that there is a foreclosure effect by the cumulative impact of all those agreements.

You can see, if we go on to 102:

"As regards the extent of tieing-in, the Court ..."

I am so sorry, on the next page {G/23/34}:

"As regards the extent of tieing-in, the Court considers that it must be determined in this case by reference to the extent to which it is possible to gain access to retailers throughout the relevant market, as previously defined by the Commission that is to say both in the traditional trade and in the grocery trade, the delimitation of the market serving to define the context in which the effects of the contested agreements on competition must be assessed."

So they are saying considering it together, but they are recognising that there may be realities you need to take into account, and they are not saying for a moment you ignore whether or not agreements are actually being implemented.

Now, I need to then just go on in this to the fourth plea, which is on page 42, {G/23/42}. You will see at the top, the fourth part of the plea:

"The commissions alleged obligation to consider individual agreements separately so that some of them escape the prohibition laid down in Article 85.1."

So this was a version of a sort of death by a thousand cuts argument. In other words, each of the individual agreements did not have an appreciable effect on competition, and therefore, if you considered each, there was not a problem, and therefore, since you could tick off each one as not having a problem, you never built a cumulative problem overall.

The court says no, no, that is not the right way to look at it. When they are all being implemented, then, in those circumstances, it is right to consider the overall coverage.

You see that, at 129:

"It must be noted at the outset that settled case law that a network of exclusive purchasing agreements

set up by a single supplier can escape the prohibition laid down..."

I am not quite sure where that noise came from. Can the Tribunal hear me still?

THE CHAIRMAN: We can. I, for one, did not actually hear a noise.

MR BEARD: I am so sorry.

THE CHAIRMAN: Not at all.

MR BEARD: It is our end. I am on page 43, paragraph 129.

THE CHAIRMAN: Yes.

MR BEARD: "Single supplier cannot escape the can only escape the prohibition laid down if it does not significantly contribute with the totality of similar agreements found on the market including those...other suppliers to denying access to the market to new national and foreign competitors in the court's view it follows that where there is a network of similar agreements conclude bid the same producer the assessment...applies to all the individual agreements making up the network furthermore commission is required in assessing the applicable to examine the actual details of the case and cannot rely on factual situations. In that respect, the court considers that it is the commission has observed, it might be arbitrary in the present case to defy the contested different

hypothetical categories."

So no issue there, but that you do consider a network of agreements that are being implemented together. It is worth bearing in mind what is then said in paragraph 130, because the CMA pray this in aid. They say, at 130:

"As regards the order of the President of the Court of First Instance of 16 June 1992 to which the applicant refers in support of its argument that reasons of legal certainty do not preclude a division of its contracts, it must be borne in mind that that order, which suspended operation of the Commission decision ...

Next page:

"... except as regards the applicant's and Scholler's sales outlets at service stations, was made in response to an application for interim measures."

So it says, you do not get anything from that. So what does that mean? What had happened was the commission had said, "You must not operate these exclusivity agreements to Langnese and Scholler." Langnese and Scholler had gone along to the President of the Court of First Instance and said, "We want interim measures lifting this, because otherwise what is going to happen is all of our exclusivity deals are going to be undermined, because Mars will be able to sell

alongside us". We say that this is a wrongful decision.

And the President of the Court of First Instance said, "Well, there is a real problem here."

I am sorry, I am pausing, because there is some noise on this end.

The President of the Court of First Instance had said, "In relation to the position of Langnese and Scholler, I understand that, pending your appeal, you have a real concern that if Mars are allowed to enter, that will just undermine all these agreements where you say they are perfectly lawful."

Mars, on the other hand, said, "If you grant complete interim relief, then this commission decision is totally useless to us during selling season, because we will not be able to get our ice creams into any of the stores that are subject to these extensive exclusivity agreements."

Essentially, the President of the Court of First Instance just split the baby and said, "You can have services stations, but you cannot have other outlets."

What was being said by Langnese and Scholler in this application was, "Well, look, the President of the General Court split the categories of agreements when granting interim relief. You should split the categories of agreement when you carry out the

analysis."

The court said: no, it is interim relief. You know, you have to put in place pragmatic solutions. That is not telling you anything about any of this.

So the point being made here by the CMA is: look, the Court of Justice said, you cannot split up networks of agreements and it rejected the submission by Langnese and Scholler, at 130.

We say it is nothing to do with that. It is all to do with interim relief and none of this still suggests you are blind to the way in which the agreements actually operated. So we refer to those issues.

I would also just provide references to the Neste case, which is at {G/32/7}. That concerns SOLAS agreements, petrol SOLAS agreements. In other words, exclusive supply of petrol to individual petrol stations. There it was accepted that you could consider the network broken between short-term SOLAS agreements and long-term SOLAS agreements.

The CMA relies on paragraph 37, where it is said: well, exceptionally, you can break up a network where a relevant consideration, like duration, means that the foreclosing effects of the two different types of contract might be significant. It said "exceptionally". But again, we do not take any issue with that.

If your network of agreements is active, it is imposed, it is enforced and it is operated, and you do not have contrary evidence, then, of course, it is going to be much harder for you to say, "Oh no, no, we want to take fine grain distinctions to break up the network and then consider appreciability in relation to each subset of agreements." That is why it was exceptional in the Neste case. But that tells you nothing about how you should approach evidence in relation to coverage overall.

After a short pause perhaps, given time, I will turn to dealing with some of the specific evidence, which goes to how the particular insurers considered these wide MFNs, whether or not they considered them to have any effect on them, whether or not they paid them any attention and whether or not it impacted any of their strategic decision-making. But now is perhaps a useful moment.

THE CHAIRMAN: Thank you very much, Mr Beard. We will rise until half past 3. Just for your planning, I will need to rise at 4.15 today. I have something going on at The Rolls Building, which will require a fairly brisk departure from this building. But we can discuss whether you need a little bit more time, we had a slow start this morning, if you need it, we can start, for

instance, at 10 o'clock, if that would make a difference.

So let us know at half past if that would assist.

MR BEARD: I think given the time we started at and I think I had been budgeting on maybe going through to 4.30 today, if we were able to start at 10 o'clock tomorrow, I would be enormously grateful. I think that will suffice to make sure I am done by lunchtime tomorrow, if the Tribunal is amenable to that.

THE CHAIRMAN: We will do that. I am not seeing any shocks or looks of outrage, so we will say 10 o'clock tomorrow and 4.30 -- sorry, 3.30 now. So if you --

MR BEARD: I am sorry, I should have checked, as long as that is okay with the CMA and their counsel and representatives, I do not know.

THE CHAIRMAN: I see nodding. Thank you very much, Ms Demetriou, very grateful. Still the cameras and mute the microphones. We will be back at half past.

(3.23 pm)

(A short break)

(3.30 pm)

THE CHAIRMAN: Thank you very much, Mr Beard.

MR BEARD: So I was going to move on to just consider some of the so-called qualitative evidence for a little. I think there are probably five elements I want to have

in mind when looking at the evidence and particularly at the home insure insurance provider evidence, because it is their evidence that is critical as to what they wanted to do and how they wanted to act, because they are really the trigger for the CMA's theory.

So if I am thinking about the five dimensions, putting it rather roughly, and they do overlap, first it is whether or not there is evidence that the home insurance provider in question considered that the wide MFN, that they were subject to, had any material effect on their strategy or pricing. Because plainly, if the home insurer thinks that it is not making any difference to them, there is no reason to consider that there was any impact by that wide MFN at all.

Second, overlappingly, is whether or not the home insurer at any point thought the wide MFN was actually effective against them. You know, were they just ignoring them, because they did not think that they were effective or they ignored certain contractual clauses.

So both of those questions obviously go to the extent of coverage, effective coverage of the wide MFN, which is what is raised in relation to ground 2.

But there are also issues that are relevant to the question of the counterfactual and evidential points that we raise in relation to grounds 5 and 6, because of

course, if it is the case that with the wide MFNs, there was no impact on strategy or they were being ignored, there is no reason to think that the world would have been different without wide MFNs and therefore in the counterfactual world, you are not having any differential impact on the market. So those two points are the starting points.

Then, I suppose, if you think, thirdly, about whether or not the home insurer was interested in differential base pricing and whether it engaged in any after the wide MFN had been removed or, more exactly, whether they changed the degree to which they were interested in differential base pricing, sort of generalised difference in pricing between PCWs, before or after the withdrawal of the wide MFN in November 2017.

A similar sort of exercise needs to be considered and the evidence considered in relation to whether or not the home insurer was interested in promotional deals and the extent to which they were more or less interested before and after the relevant period.

Then, of course, in amongst all of this, fifthly, you have got the issues about the supposed enforcement of the wide MFNs, but although the CMA likes to try to emphasise this and the incidents it relies upon, what is

striking is simply how few incidents there are, even on the CMA's case.

Then when we look at them in greater context, what we see is actually not some kind of ferocious enforcement of contractual provisions, but actually negotiations to get better prices on CTM.

So we are not saying that the wide MFNs are never referred to in negotiations or discussions or anything as radical as that, but what we are saying is that they are not material to the way in which the strategy of the HIPs overall and the impact of the wide MFNs should be considered.

So I am going to try and work through the various categories of HIP. I will try to use the categories that are identified in relation to ground 2 in relation to coverage, so that there is some alignment with ground 2 and these submissions. But, as I say, the points go to grounds 5 and 6 as well.

Before I do, there is obviously the preliminary point that even if we were to accept the CMA's market definition, as I said, at the outset, there are lots of home insurance providers out there, well over 60, a number of them, including some of the largest like Direct Line and Hiscox. Their branded policies are not on PCWs at all.

So you have a large number of home insurers, you have a large number of home insurers who are active on PCWs, around 60 are active on PCWs, during the relevant period.

On the CTM roster of home insurers, you only had 45, so over 60 HIPs, a significant number and a significant scale not on PCWs, around 60 on PCW, around 45 of those 60 on ComparetheMarket, only 32 of those had a wide MFN clause in the contract.

Because it is important in this context to recognise that when we are looking at the market overall, even in relation to PCW services, we are looking at a limited number of insurers that had wide MFNs in their contract.

Now, of the 32 --

THE CHAIRMAN: Sorry to interrupt you, is there a reason why some HIPs subscribing to ComparetheMarket did not have wide MFNs and some did? I mean, is it just one of those things or was there a pushback or is there anything we can infer from the fact that they are not uniformly across subscribing insurers to ComparetheMarket?

MR BEARD: Certainly, I am cautious not to make a blanket statement in relation to the third of insurers that did not have a wide MFN. But certainly a number of them did push back and say, "We did not want a wider MFN". So one was not agreed with them.

But I will come back with more detail on that probably tomorrow morning, because I do not have to hand references to back that up at the moment.

But I believe that is the position in relation to it. So I do not think it was a matter of coincidence in relation to these things, because I think as you probably know from the history, in relation to wide MFNs, they had been developed in the sort of late 2000s. In fact, it was not initially by ComparetheMarket, it was by other PCWs, but ComparetheMarket took them up. They were then used in order to instill this sort of sense of confidence that you are getting decent pricing on the PCW.

So I do not think it was a question of there being some sort of distinct group in respect of whom CTM said: Well, we are not interested in having them there, because we were always interested in ensuring we could send out signals that we would give people the best prices, because we thought that was in consumers' best interests.

But I will revert, so I think pushback is the main issue, sir.

THE CHAIRMAN: Thank you.

MR BEARD: In any event, in relation to the 32, rather than the other members of the 45 we were just referring to,

in relation to the 32, I think it is probably most sensible to start with the 15, where the CMA have no evidence in relation to whether or not those HIPs took into account, changed their strategy, or did anything to comply with the wide MFNs that were in their contract. They obtained no information in relation to the 15. 15 of the 32.

Now, the CMA says: well, it was entirely proportionate not to make enquiries of 32 insurers. I will leave the Tribunal to make an assessment of the proportionality over a 3-year investigation of gathering evidence from all 32 insurers, but it did not contact 15 of them.

Now, the CMA says that does not matter, because it was not reasonable and proportionate to contact all of them. We can still keep referring to 32 as part of this network of wide MFNs in respect of which there was effective coverage. We simply do not accept that is correct. You cannot in circumstances where the burden is on you, as the CMA, to prove that these contractual arrangements had an adverse effect on competition, effectively to presume that these 15 were being affected by the terms of the wide MFN, you cannot do that. You had to make enquiries of some sort.

Just go back to the very simplest situation: is

there doubt about whether or not those wide MFNs in those 15 home insurers's contracts made any difference to them? Yes, there is obviously an enormous doubt in relation to it, because the CMA gathered no evidence in relation to them.

Now, in the defence at paragraph 123, so this is bundle A/3, at page 62, I think. {A/3/62}.

You will see there, I think it is on the EPE, I am most grateful:

"The written agreements with the 15 providers that BGL seeks to exclude all contained CTM's standard wide MFN, and BGL has not suggested that they operated in a different legal economic context from the others."

Well, since BGL has suggested elsewhere that, in fact, these wide MFNs were not having an impact, people were not complying with them and they were not making any difference, it is a slightly strange point to have made on the part of the CMA. Because insofar as we take into account the legal and economic context, we are saying, actually, they did not make any difference.

Moreover it seems likely that their pricing was consistent with the wide MFNs, given the absence of any enforcement action by BGL and strong incentives to comply.

Now, here we are definitely in Joseph Heller

territory.

If you do not enforce the clause and there is no evidence of enforcement of the clause and there is no evidence as to the pricing undertaken by the 15 providers, then in those circumstances, it should be assumed that the clauses are having an impact on them. That does not follow in any way. The less you do in relation to it, the more it is that it must be presumed that they were all compliant.

Whereas, elsewhere, they say: well, if you enforce, that shows that you were applying these clauses and therefore there is good evidence that they were having an impact. So either way, we lose. If we do not enforce, it is held against us. If we do enforce, it is held against us.

But just going back to those basic propositions I was averting to in the case law at the beginning of the day, there is no basis in the absence of any evidence for an assumption to be made against us in relation to the supposed impact of these wide MFNs in relation to 15 providers.

Going back again to the point I made about consistency; consistent pricing is not enough, but it is so much worse here. It seems likely that their pricing was consistent, so the CMA does not even know whether it

was consistent, it is just assuming the fact.

Then it says:

"Thus, to exclude these providers from the network [the next page] would be wrong. It would not only be contrary to the case law but would underestimate the facts of the networks that they formed part of."

I do not need evidence that they actually did anything. I can just assume it. I can assume they have priced consistently. I can therefore treat it as part of the overall coverage and therefore assume it is part of the impact and in doing so, I will rely on the ice~cream cases as saying: you should not ever break up a network when you are considering coverage and impacts.

Well, I have explained why that latter proposition is not made out from the case law and you can see why there is just a series of unjustified assumptions being made here. This is not proof, this is not showing that the evidence in relation to 15 of the 32, almost half of the people they rely on -- they are some of the smaller ones, I accept that, but 15 of the 32, they just have no evidence in relation to them. That cannot be presumed to constitute evidence of an adverse effect in relation to them.

So that is 15 of the 32. We are then left with 17.

I am going to deal first with six where we have

categorised them as being six, where there is no observable impact. I say we have categorised them as such, but I think it is also true that the CMA recognised that there is no observable impact.

If we go back in the defence to paragraph 120 on page 60 -- I am sorry, {A/3/60}, thank you very much:

"BGL's second category comprises six providers on whom the wide MFNs had no observable effect. As explained above however the absence of an observable impact on an individual provider's behaviour is not conclusive."

You have got no observable impact, but that is not conclusive of whether or not there was an impact. We are talking about non-observable impacts here:

"It is not conclusive of whether the network of which their wide MFNs formed a part had an appreciable effect on competition."

Well, we are trapped in the same fallacy. We have no observable impact by reference to these agreements, but so long as we sum them as part of a wider network, then somehow they count towards an appreciable effect.

Now, that maths does not work. None of the case law supports that approach and it does not fundamentally suggest that in relation to these six, the agreements in question were having any effect. If they are not having

an effect in relation to these three -- six home insurance providers, then, in those circumstances, there is simply no basis to be counting that towards some kind of overall adverse effect on competition, which is what the CMA needs to prove.

All of the providers in question set prices that were generally consistent with the wide MFN obligations and, in some cases, there is evidence that their strategies may, in fact, have been different in the absence of those obligations.

That is as high as it goes. May, in fact, have been different. Now, that is not showing that there was any impact in relation to any six of them. The conclusion is:

"Thus, excluding the providers from the network on the basis contended for by BGL would be wrong ..."

So again, it is all about whether or not you accumulate them within the network. The best that can be said is their strategies may, in fact, have been different in the absence of the obligation.

Not evidence that they were, miles away from actual effects in relation to them. Just go back to where we started today: miles away from actual effects.

But then it is actually worth having a look at some of the evidence that is relied on, even in relation to

that very, very tenuous suggestion. Now, this bit I think I can do by reference to the cipher and just taking the Tribunal to certain extracts from the relevant documentation without reading it out for the public feed.

The first one I am going to deal with -- and I do not know if the Tribunal has the cipher to hand because it is actually useful to have in mind who we are actually talking about.

THE CHAIRMAN: Well, certainly two of us do because it was handed to us in court today. I do not know, Professor, whether you have it to hand.

PROF ULPH: I do not.

THE CHAIRMAN: I wonder if someone could e-mail it to the Professor, just so that it is in your in-tray at least. But I suggest you proceed, Mr Beard, and we will ensure that Professor Ulph has the ability to catch up.

MR BEARD: That is very kind. For general purposes these are the six insurers that we are talking about and I am just going to take you to a couple of references in relation to it. The first one is Zurich if we could go on EPE to {F/331/4}. Most grateful. I am just catching up, if you would not mind giving me one second.

On page 4, one sees at the top of the page an answer to the question and what it says is:

"Neither PCWs paid by 9 nor premiums set by 9 have changed frequently over the last four years. After several years of no changes being made, two PCWs increased Commission amounts by X ... two PCWs increased Commission amounts by [the following] depending on the PWC and policy type. 9 did not adjust its premiums at the time that these commission amounts changed. MFN clauses did not play a factor in 9 not adjusting its premiums at these times. In 2016 and 2017, 9 has focused on changes to its risk model costs rather than distribution commission costs. 9 did not pass on the changes in PCW commissions in other Channels."

So MFN clauses did not play a factor in 9 deciding whether or not to adjust its premiums. So that is the first of the six HIPs. He is actually saying it just did not play a factor in what they were doing in relation to premiums and commissions.

And actually if one goes down in this document to page 7 {F/331/7}, you can see things made rather explicit in the answer to question 16:

"9's approach regarding pricing by a PCW has not changed over the relevant period. It has not been affected by the decision of a PCW to introduce or remove a wide MFN or replace it with a narrow MFN."

I mean, that is as clear as can be. It made no

difference to us; yet, apparently, that is part of the network of agreements which is supposed to have an adverse effect on competition.

Then if we could go to F/302. This is Ageas and I think that is at page 6, {F/302/6}. Actually if we could pick it up at page 5, I am so sorry to the EPE operator, {F/302/5}. If you look under question 13(c):

"The wide MFN in the contract between [CTM] and 35 has never been enforced and ... 35 has never sought to adhere to any wide MFN."

Then if we go on to the next page, if we may, under question 16, {F/302/7}:

"35's strategy concerning the commission in Home Insurance during the Relevant Period has not been affected by the presence of any wide MFN clauses in PCW agreements. The level of commission for the provision of lead generation services for Home Insurance has not been affected by the presence of any wide MFN clauses... 35 has seen no material differences in negotiating commission in motor insurance since ... 2015 when the use of wide MFN clauses was prohibited."

If we go on to question 17:

"During the relevant period 35 has not engaged in any discussions connected to Exclusive Deals relating to Home Insurance."

Question 18:

"During the relevant period 35 has never taken any internal steps to ensure compliance with any wide MFN clause. This approach has not varied dependent on the identity of the PCW."

Then at 19 there is actually reference to the fact that ComparetheMarket sent a small number of e-mails seeking explanation of prices displayed by 35 and it was never followed up.

If we could then go to {F/340/6}. This is the third of the six, and at page 6 -- I am so sorry, could we go to page 17, {F/340/17}. Actually, I apologise. Could we just move back to page 16, it is right at the bottom of page 16, {F/340/16}:

"As further detailed in our responses to Questions 19 and 20 M&S Bank/HSBC did not consider itself bound by the terms of the wide MFN clauses and does not [moving to the next page] consider the wide MFN clauses to have affected its commercial activity in respect of Home Insurance during the relevant period."

{F/340/17}. And then specifically 44 says this is illustrated by no pre-emptive steps to ensure compliance and actually entered into an exclusive deal.

Then if we go down to page 18, {F/340/18}, under question 17, just the latter two paragraphs:

"... as explained in our response to question 15(c) 44 does not consider itself bound. It is also not enforced by ComparetheMarket or Confused. Accordingly 44 does not consider the introduction, removal or replacement of any wide MFN materially affected its selling prices for Home Insurance during the relevant period."

So this is a section 26 notice and it is absolutely clear that this wide MFN was having zero impact. Indeed if you go over the page to page 19, {F/340/19}, the answer to question 18:

"44 considers that 44's strategy for negotiation of commissions and the level of commission paid by PCWs in respect of Home Insurance have not been affected by the presence or possible presence of wide MFNs..."

And that is reiterated on page 20, {F/340/20}, in answer to question 19. The points are reiterated again in relation to question 20.

Now, considering the time, I have covered the first three. For the next three, I am just going to provide the Tribunal with the references -- sorry, for the next two. The next one is Co-op and the relevant material is at {F/298/10}, the answer to question 18. I should note that 46 was not treated as part of the coverage figures because it left ComparetheMarket in early 2016, but

still it is clear that the wide MFN was having no impact.

The next one is Allianz. The reference for that is {F/326/6}. Again question 18 those coverage figures were included in the numbers and then I do just want briefly to go to Liverpool Victoria (LV=), at {F/303/12} at page 12. Under question 16 it says:

"The removal of a wide MFN (and replacement with narrow MFN) has not affected the premiums for Home Insurance set by 39. This is because we do not have an appetite at this time to offer cheaper prices than direct prices on other PCWs. However, if narrow MFNs were not in place then we may seek to offer lower sales prices for customers who choose to purchase directly from us acknowledging higher retention/lifetime value benefits."

So not only is it saying makes no difference to us, but it is also indicating that it is the narrow MFNs that are of real concern to it, which rather goes back to the point that Professor Ulph was referring to earlier on. But I am just going to also pick this up. If we could -- I do not know if you have it loose -- but go back to defence, paragraph 120. You will see there -- I know this is getting into the weeds a little, footnote 157. So this is the footnote that is supposed

to support the evidence that their strategies may in fact have been different in the absence of those obligations. Well, I have just taken you to four of them; that is just not made out at all.

But then if we look at 157 it says:

"Thus 39 has updated its pricing models..."

I am sorry, if it helps the defence citation is bundle A, tab 3, page 60. I am so sorry, I should have got it on the EPE, {A/3/60}.

I am just looking at footnote 157 and it says:

"Thus Liverpool Victoria (LV=) [which is the one I was just directing you to] has updated its pricing models since the wide MFNs were disapplied so as to enable it to adjust its prices to reflect PCW-specific commission fees."

And it sites Annex L to the decision at page 575.

Now, the only citation in Annex L at 575 is to question 16 of that response that I have just taken you to and that talked about no appetite to offer cheaper prices and concerns about narrow MFNs.

So when we said at the outset there was a danger of drowning in references we were not joking. You have to drill through this stuff and these propositions are just not made out because we are now 21 insurers down from 32; we have 15 with no evidence, six where there is

evidence but there is positive evidence that they did not pay any attention to wide MFNs. No attention being paid, no indication that their strategy or pricing was influenced or their dealings on commissions.

So 21 down, amounting to almost 10% of sales through PCWs. So even if we are talking about the CMA's own market definition, even if we are going with this bizarre approach to coverage, you should be wiping out substantial chunks of the sales.

Then we come on to the HIPs who showed no interest in promotional deals before or after the existence of the ComparetheMarket wide MFN.

In the notice of appeal we have mentioned at paragraph 1293 -- I am just doublechecking my notes -- which is for your reference in bundle A, tab 2, page 38 {A/2/38}, the CMA itself accepts that insurers accounting for approximately 15 per cent of sales through PCWs in 27 preferred not to engage in promotional deals, either during the relevant period or afterwards, although ironically it does not specify precisely which insurers they are. There are various figures for who the CMA does accept engaged in uniform pricing and had no interest in promotional deals during or after. So they have said 15 per cent, but we are not quite sure who they were, but we do have various HIPs

where we can see that there is no effect.

Again given time, I am just going to give you some references. Autonet (Homenet) in the key reference {F/536/1}. If we could just turn on to page 2, {F/536/2} under question 3(b):

"34 has always structured its pricing distribution channels separately with its pricing managers acting independently especially from any commercial relationships with PCWs or insurers; 24's pricing strategy is built independently within the business to avoid any potential influence by commercial arrangements; 24's pricing strategy during the period identified as well as more generally has therefore not been influenced by CTM's MFN clause."

Below that:

"... there have not been any changes to pricing strategy since November 2017."

Then if we go to British Gas, that is {F/554/4} at page 4, British Gas:

"As noted above since 2018 33 has acted as [I am not going to say in case it might give something away] ... This has given 33 greater control over pricing offered to customers."

So it has got more control over pricing:

"... but 33's overall pricing strategy has not

changed since 31 November 2017."

I should say 33 did enter into a promotional deal 16 months after disapplication of the ComparetheMarket wide MFN, it did enter into one promotional deal, but it was one it regarded as unsuccessful. So there is no indication that it had any particular appetite, even later on than this response. I should say that this response is dated -- I think this is the 2019 response if I remember rightly -- yes, 26 July 2019.

Then we go on to Paragon (ThamesBank Insurance) and I think the relevant reference is {F/546/2}. In response to question 3(c):

"There have been no changes to our aggregator pricing strategy at all. "

"Aggregator" being the term for PCW. So we are down another three; that is 24 of the 32.

In the last five minutes or so I want to move on to one or two others. However, I am conscious that I do actually want to refer to the entity itself and read out from the material. I will see how far I can get without doing it, but it may be that I will start now and we may start tomorrow morning in closed just so I can deal with this next sort of 20 minutes of submissions. But if I can deal with five minutes now and see how far I can get, is that --

THE CHAIRMAN: Let us do that, yes, that makes sense.

MR BEARD: If I bump into something that I realise I cannot explain to you, then I will pull stumps and we will pick it up tomorrow.

THE CHAIRMAN: Thank you.

MR BEARD: We are now dealing with Legal & General. Legal & General, the nature of which I will pick up at some point in closed, engaged in the investigation in some detail with the CMA, so not only did it respond to section 26 requests; it actually provided a response to the SO and to the letter of facts and provided, in addition, responses to second of section 26 notices.

Now, interestingly, the CMA itself recognises that there is in fact, in its view, a conflict of interest -- conflict of evidence, I am sorry, between responses given in certain documents by Legal & General in relation to the statement of objections of letter and facts and some earlier responses in relation to section 26 requests. If we could go to Annex L which is at {A/1/557}.

You will see the name of Tesco Bank on the left-hand side. You will see the percentage of PCW sales for which it accounted in 2017 in the next column and if we could skip to the right-hand column, starting at the bottom, just under the paragraph, the unnumbered

paragraph in the far right-hand column:

"The statements made by 32 in response to the SO and first letter of facts are [if we could turn over, please] {A/1/558} inconsistent with 32's response to its section 26 statutory notices and with contemporaneous documentary evidence. The CMA places greater weight on the contemporaneous documents submitted during the course of this investigation together with its responses to the CMA statutory notices."

It says: The evidence demonstrates consistently raised and discussed CTM wide MFNs and as part of pricing strategy.

Now the first point I make before we get into the actual material is that the CMA, on its own case, is recognising that there is a conflict of evidence on its own interpretation. It is deciding it can make the call. It can say: Well, I prefer contemporaneous documents to the early section 26s, notwithstanding the full consideration that will have been given to an SO response or a letter of facts response later in the process. Now that is absolutely what you cannot do without enabling us to test this. I go back to the case law I referred to earlier. But, in fact, it gets rather worse than that if we go through this.

It is worth just working backwards. Could we go to

{F/448/3}, page 3. If we look under 3.2, you will see at 3.2.1:

"32 does not consider that, absent wide MFN, it would have had a greater incentive to enter into promotional deals... In [its] experience it is the PCWs who are interested... ideas are suggested. 32 would otherwise be relatively ambivalent to such offers. Additionally, there is always an element of uncertainty about how successful a promotion might be. Generally 32 plans to offer exclusive deals only a couple of times a year and such deals are usually short lived... recent focus has been on profitability and therefore promotions have been a low priority. In the few instances mentioned in the SO where promotions have been proposed and have ostensibly been rejected on the basis that the CTM-wide MFN, this would not necessarily have been the only reason; the wide MFN did not stop 32 from offering free legal cover as this was offered across all PCWs. It is 32's position that at most the wide MFN constrained 32 only on the edges of its actions and had no material impact on pricing strategy or profitability."

That is a very, very clear and detailed response. Then:

"All PCWs negotiate on commission rates including

CTM. As far as 32 is concerned the wide MFN has had little or no impact on PCWs [if we could turn the page, please] {F/448/4} negotiation of commission rates. The fact 32 may have engaged in differential pricing across PCWs taking into account commission rates does not suggest that prices would have been lower absent the MFN. CTM's position in the market meant that it in any event set the lowest price on CTM. In any event it is not likely that any increases in commission would have been passed on to consumers. Additionally to any extent that it was passed on it would in any event have resulted only in a relatively small increase in prices.

"The evidence provided to support their contention that wide MFN prevented other PCWs from growing their market share has been provided by the PCWs."

It does not make observations. And 3.25:

"Underwriters' pricing strategies are largely risk based and, alongside sales volumes, take into account a range of other factors including profitability. The CMA suggests that the wide MFN may have had an impact on providers' pricing as a result of the restriction of the occasional promotional offer and an increase in commission rates. There is little substance to this in the SO and given the main drivers of pricing any impact on retail pricing is likely to have been minimal."

And then:

"For the reasons explained before 32's position is that the wide MFN has had minimal, if any, impact on prices to consumers."

We are going to provide two more references before I finish off because I am conscious I have two minutes left. That was the SO response. For your notes {A/2.5/6}, tab 2.5 at page 6., if you look at the (iii), the final sentence:

"32 considers that the wide MFN had no perceptible impact on its pricing strategy and therefore had minimal, if any, impact on prices to consumers for the reasons noted in 3.2 to 3.7 to its response to the statement of objections."

And then the final one that I want to go to -- two references I want to go to {F/393/23} at page 23, the answer to the question 18:

"32 has not changed its strategy in relation to promotional deals since it received notice from CTM it would cease so enforce the wider MFN. 32's focus on ensuring that the mix of business written is profitable above running discounted rates. This made some pricing increases. These changes are not linked to CTM dropping the wide MFN."

And if I may the last one F/431, page 5, {F/431/5}.

We can pick it up at 14. This is actually a meeting so the last document was the section 26 notice that supposedly was in conflict with the earlier evidence. We say a) it was not and b) it was indicative that 32 thought there was no impact of the wide MFN, so we do not -- we think that the CMA in trying to find conflicts between elements of the evidence is overlooking what is actually said. It does the same here in relation to a meeting that the CMA specifically had with 32.

If we pick it up, paragraph 14, fifth line down:

"Further commented while in his personal view [this is someone from 32] anything that potentially restricted pricing should be removed from the contract. At most the wide MFN had only constrained 32 on the edges of its actions. It has had no material impact on pricing, strategy or profitability."

That is contemporaneous material that is supposed to have been in conflict with the material I showed you from the SO and the letter of facts. It is not. It is only in conflict if you ignore these statements from the contemporaneous and section 26 material. Actually, the CMA did that. That phrase I have just taken you to does not appear anywhere in the decision or the material I have been referring you to. If you ignore statements like that yes, of course you can create conflicts of

evidence.

Is the CMA right to say, in relation to 32, there is good evidence that the wide MFN had impact on its pricing, strategy or profitability? No, it is not. The position of 32 has been consistent, the approach to the CMA in relation to this has been wholly selective.

With that I would finish today and I am grateful for the indulgence of four minutes and I am conscious that the Rolls Building beckons. Thank you very much.

THE CHAIRMAN: Thank you very much, Mr Beard.

We will adjourn until tomorrow at 10 o'clock and we look forward to seeing you all then. Thank you very much.

(4.20 pm)

(The hearing was adjourned to 10 o'clock,
Tuesday, 2 November 2021)

I N D E X

1

2