

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No.: 1380/1/12/21

APPEAL
TRIBUNAL

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 A N 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

Tuesday, 9 November 2021

(10.32 am)

DR MIKE WALKER (continued)

Cross-examination by MR BEARD (continued)

THE PRESIDENT: Mr Beard.

MR BEARD: Sir, good morning.

Dr Walker, I was asking you a couple of questions about your approach to the theory of harm and the theory of harm in the Decision yesterday, and again I will place the caveat we say you are doing things the wrong way round in relation to market definition but leave that for the moment. At the end of the day I was trying to establish what was the theory of harm in the Decision. You were telling me I had fundamentally misunderstood, and you said that it was key that even if the effect on commissions was not direct, in an exchange with the Chairman you said the essence of theory of harm was that an adverse effect on commissions was inevitable, I think; yes?

A. Yes, that was his word and I agreed with it, yes.

Q. So can I just test this slightly further. Could we go to document {D/19/1}, please.

The Tribunal may remember this. This was subject to an order made in March this year where you asked the CMA to set out its theory of harm and markets affected and

1 so on.

2 THE PRESIDENT: Yes.

3 MR BEARD: If we just go down to paragraph 3, this is the
4 summary, then you expand on it further, but I will just
5 read it:

6 "The wide MFN clauses used by BGL, by their terms,
7 contractually prevented the home insurers subject to
8 such clauses ('the Relevant Insurers') from quoting
9 lower prices on rival PCWs than the prices they quoted
10 on comparethemarket ... CTM's wide MFN clauses therefore
11 restricted the Relevant Insurers' ability and reduced
12 their incentives to compete on price by differentiating
13 their prices across PCWs compared to the
14 counterfactual ..."

15 It refers to the Decision 9.4(a) that we went to
16 yesterday, and 9.8 which was the conclusory paragraph in
17 that section.

18 "Such strategies include entering into promotional
19 deals with rival PCWs and differentiating prices across
20 {D/19/2} PCWs to reflect, for example, differences in
21 commission fees or higher conversion rates ..."

22 If we could just go back -- I am so sorry, I am
23 going to jump backwards and forwards between these two
24 because I am looking at the last sentence. So the
25 strategies that you set out there --

- 1 A. What is this document, sorry?
- 2 Q. Sorry, this is a document provided by the CMA to the
3 Tribunal by reason of a Tribunal order earlier this
4 year. Sorry, I should have been clearer, Dr Walker.
5 You have not seen this before?
- 6 A. No.
- 7 Q. Just to be clear, it says {D/19/1}:
8 "Such strategies include ..."
9 The first one is entering into promotional deals
10 with rival PCWs. We know that sometimes promotional
11 deals can involve -- there are not many of them, but can
12 involve a PCW dropping its commission as a sort of
13 contribution to the insurer dropping its price. Do you
14 agree with that?
- 15 A. Yes.
- 16 Q. So that would involve a commission reduction, agreed.
17 But they can also involve, for example, what is known as
18 ATL, above the line investment, in other words the PCW
19 will invest in say TV advertising or some kind of online
20 advertising, and that will then be something that the
21 insurer effectively relies on and moves its price
22 downwards; correct?
- 23 A. Yes.
- 24 Q. Just to be clear, if it is an ATL deal, there is no
25 flexing of commissions, is there?

1 A. Yes.

2 Q. Then the next strategy that is referred to is
3 differentiating prices across -- sorry, can we just flip
4 over again? Thank you -- oh you have both up, thank
5 you. You are well ahead of me. I was monomaniacally
6 focusing on the one page I was reading. Thank you
7 {D/19/2}:

8 "... differentiating prices across PCWs to reflect,
9 for example ..."

10 So there are two strategies now being referred to
11 for differentiating prices: possibly differentiating
12 commission fees, which you have obviously emphasised, or
13 higher conversion rates.

14 Now, higher conversion rates, if you are varying
15 prices to reflect higher conversion rates, that is not
16 involving changes in commissions, is it?

17 A. No, sorry, I am not quite sure, so what is -- so this is
18 the price promotion is going to lead to higher
19 conversion, is that what that is saying; is that right?

20 Q. No, look --

21 MS DEMETRIOU: I am just interrupting to say I cannot see
22 the whole of the second page on my screen.

23 MR BEARD: Sorry, yes, of course. Are you able to just
24 shrink that second page? Yes, sorry. It just says
25 "higher conversion rates", I am so sorry.

1 It is talking about promotional deals and
2 differentiating prices, so it is three strategies, is it
3 not, here, to reflect, for example, differences in
4 commission fees or higher conversion rates. Higher
5 conversion rates, do you know what that means?

6 A. Well, that you are getting more -- if you are the HIP
7 you are getting more sales on that PCW relative to
8 others.

9 Q. Quite right. Nothing to do with commission?

10 A. No.

11 Q. So you have three strategies here. The first one,
12 promotional deals, might --

13 A. Well, sorry -- sorry, can I just make sure we understand
14 each other. Nothing directly to do with commissions.
15 Obviously why might you get higher conversion rates?
16 One reason because if prices are lower which lower
17 commission rates would facilitate, but I agree with what
18 Mr Beard said, there is no direct relationship there.

19 Q. So you have three strategies. The first might or might
20 not involve flexing commission rates, promotional deals;
21 correct?

22 A. Yes.

23 Q. The second does, and the third on its face does not; is
24 that correct?

25 A. I mean, I refer to my comment to the Chair and to the

1 Tribunal a minute ago.

2 Q. You are speculating that there might have been higher
3 conversion rates in relation to lower prices because
4 commissions were lower. That is right, is it not?

5 A. Yes.

6 Q. But obviously here what it is talking about is whether
7 or not you could flex prices because of higher
8 conversion rates. That is what this is saying, is it
9 not?

10 A. I think that is right. As I say, I have not seen the
11 document before, but that makes perfect sense.

12 Q. It is a relatively simple point: this is your -- not
13 your personal, I quite accept -- the CMA's encapsulation
14 of the theory of harm. Now, caveat, market definition
15 not dependent on theory of harm, but this is all about
16 retail prices being affected and setting out three
17 mechanisms, only one of which necessarily involves
18 commissions. I just want to go back and check, you said
19 the theory of harm is all about commissions. It is not,
20 is it?

21 A. The theory of harm is all about the PCWs' ability to
22 exercise market power. The place they can exercise
23 market power primarily, as we said, is through the
24 commission rates they charge. So that is why primarily,
25 when we are thinking about how wide MFNs might be

1 a problem, that is why we are focusing on the price that
2 the PCWs set and their ability to increase that or to
3 reduce -- or their ability -- I mean, their ability to
4 restrict competition between PCWs in commission charges.

5 Q. Looking at this, the theory of harm set out by the CMA
6 when asked by the Tribunal is not inevitably about
7 commissions, is it?

8 A. Okay, so that is a different question because I did not
9 say the theory of harm was inevitably about commissions.
10 What I said, agreed with the Chair, is that if you
11 restrict price competition through the wide MFN, that is
12 going to change the incentives of the PCW when it is
13 setting its commission rates, that was explained
14 yesterday, and that will tend to lead to commission
15 rates increasing.

16 Q. That is a very, very different language from
17 inevitability. I will leave the Tribunal to review
18 that, but we say it is clear the theory of harm that the
19 CMA has articulated here is about an impact on retail
20 prices and you then refer to various strategies,
21 including of course commission changes. We have never
22 said that your theory of harm is not at all concerned
23 with commission changes, but the reason we emphasise
24 this is because you, in talking about the SSNIP, have
25 emphasised that the only price of relevance is the

1 commission, and you link that back to your theory of
2 harm, and the point I am making here is your theory of
3 harm is not just about commissions; it is actually about
4 retail prices, is it not?

5 A. No, our theory of harm is about the competition between
6 the PCWs which is primarily competition on commissions.

7 Mr Beard, let me give you an example, see if this
8 helps us. Suppose we have a merger between two
9 manufacturers of grocery products, okay, so what is our
10 concern here? Our concern is that after the merger
11 Pepsi and Coke we will say to keep it simple, Pepsi and
12 Coke, they are going to merge, they are going to raise
13 prices to supermarkets. Now, does that -- do Pepsi and
14 Coke set the retail price for supermarkets? No, they do
15 not. Okay, is our concern in a standard merger case
16 like that that Pepsi and Coke will raise prices to
17 supermarkets because we really care about supermarkets?
18 No. Our concern is that we are concerned about that
19 because they will raise wholesale prices to supermarkets
20 and that will lead to consumer prices rising. I think
21 that is entirely standard. So the concern is ultimately
22 consumer prices will rise.

23 The place where we are concerned about the loss of
24 competition is between Pepsi and Coke which is
25 a wholesale competition, or manufacturer competition,

1 and of course actually, you know, maybe in addition to
2 raising prices, the wholesale prices to supermarkets,
3 they might also decide to reduce promotional spend.
4 Okay, the focus is still on that competition between
5 Pepsi and Coke where they compete upstream.

6 So the fact that the harm is manifested and we worry
7 about the harm to consumers is not the same as saying
8 therefore that is where the market power is, or
9 anything. The market power in that case is upstream
10 Pepsi and Coke. Here, the market power we are concerned
11 about is that market power between the PCWs who do not
12 set retail prices or premium charges. You know, they
13 get to set the commission rate.

14 Q. I understand. Your concern in the end is about the
15 PCWs, competition, you say that, but what I am testing
16 is when we come to look at SSNIPs whether or not, when
17 you are saying I need to focus on the theory of harm,
18 the theory of harm is only about commissions, and what
19 I am saying here is that that is not what is said. You
20 will see on the second page that you then break down
21 three theories of harm. There are two other references
22 to commission fees in there. In paragraph 7 there is
23 a reference to {D/19/2}:

24 "As a result of these effects on the ability of and
25 incentives on PCWs to compete on price, price

1 competition ... was reduced ... such that negative
2 effects on the level of retail prices and commission
3 fees could be expected ..."

4 So it is all framed through price, and then if we
5 can keep going down, if we go on to -- I think it is in
6 the third theory of harm, the same phraseology is -- no,
7 I am sorry, it is in the second theory of harm, final
8 sentence, "The effects on competition ...". So this is:

9 "The ... second 'theory of harm' [which is really
10 what you are articulating] is that CTM's network of wide
11 MFNs, by restricting the ability of and reducing the
12 incentives on rival PCWs to compete on price ...
13 restricted the ability of such rival PCWs to expand and
14 enabled CTM to maintain or strengthen ... market
15 power ..."

16 So that is really what you are focusing on, is it
17 not?

18 A. I will have to read that. I cannot (overspeaking) read.

19 Q. Sorry, I will give you a chance to read it.

20 A. (Pause) Okay.

21 Q. It is that second theory of harm that you have just been
22 identifying, is it not?

23 A. Yes, that is part of it. Can I look at the other, the
24 third theory of harm before you take me as ruling that
25 out, if you see what I mean.

- 1 Q. Yes, of course.
- 2 A. (Pause) Okay, thank you.
- 3 Q. All I was just saying was that what you have just been
4 articulating to me by reference to the Pepsi/Coke is
5 essentially the second theory of harm, is it not? That
6 is right?
- 7 A. Yes.
- 8 Q. Thanks. There, there is a reference to retail prices
9 and commission fees in the last sentence, because I am
10 just completing where the references are for you since
11 you have not seen that document. There are no other
12 references to commission fees here.
- 13 Okay, I think we can leave that.
- 14 I am going to go on to something different now. If
15 we could turn up {F/722}. I am sure you will be well
16 aware of this document. You know that -- presumably you
17 do liaison with the European Commission even though we
18 are no part of the European Union, you talk to them from
19 time to time or at least are aware of documents they
20 promulgate, and you are aware that they have been doing
21 a review of their own market definition guidelines; yes?
- 22 A. Yes, I know they are doing a review.
- 23 Q. This is the study accompanying it. There is a -- just
24 for the Tribunal's notes we have included the staff
25 working document evaluation of the relevant market that

1 was published in July this year. Just for your notes it
2 is in the next tab at {F/723} but I am not going to go
3 to that. This was an underlying study that was
4 commissioned by the European Commission into market
5 definition, and in particular it picks up various issues
6 to do with digitalisation in two-sided markets.

7 So what I just wanted to do was go through one or
8 two of the paragraphs in here and ask you one or two
9 questions about the issues. I am not going to ask you
10 about detailed matters to do with the literature that is
11 referred to and so on.

12 A. Okay.

13 Q. If you do not mind. So this is the study accompanying
14 the evaluation notice. I think it is from June this
15 year, it may have been July. I apologise if I have the
16 date wrong, but it is just before the summer.

17 The section I am going to start at is at page
18 {F/722/38} which is actually entitled "Digitalisation".

19 THE PRESIDENT: You have bundle 38 rather than page 38.

20 MR BEARD: I have, I am so sorry. Could we move on five
21 pages, so I think {F/722/43}. Yes. If I call my notes
22 back up I probably have the right reference, anyway, it
23 is plus five.

24 You will see from the top of the page:

25 "This chapter provides an overview of how the legal

1 and economic literature, the Guidelines, as well as NCA
2 decisions in EEA and selected non-EEA jurisdictions,
3 define relevant markets in the context of
4 digitalisation."

5 You will see the first topic they get to at 3.1 is:

6 "Defining relevant markets for multi-sided markets."

7 This to some extent reflects some of the debate that
8 has been going on in this case. First of all the second
9 paragraph under there:

10 "There are many definitions of multi-sided or
11 two-sided markets."

12 I am not going to read it all out, but please feel
13 free to read it to yourself.

14 It is the next paragraph I want to come to. I am
15 just giving you some context here, Dr Walker. If we go
16 to the next paragraph:

17 "At the heart of the interdependence between the
18 various market sides are direct and indirect network
19 effects."

20 I think you agree with that proposition, that that
21 is key to --

22 A. Yes.

23 Q. -- identifying something as a two-sided market. Then it
24 talks about direct network effects where there is an
25 immediate increase in value due to the number of users

1 which is telephone networks, for example, I think that
2 is the uncontroversial example.

3 Then indirect network effects which occur
4 {F/722/44}:

5 "... when a platform or service depends on the
6 interaction of two or more user groups, such as
7 producers and consumers ... buyers and sellers ... users
8 and developers."

9 That is what we are looking at in relation to this
10 case, is it not? It is indirect network effects;
11 correct?

12 A. Yes, we are.

13 Q. Then it talks about them being unidirectional or
14 bidirectional. Then it talks about:

15 "Positive indirect network effects are those related
16 to the increase [in] value of the service for one user
17 group when additional users in a different user group
18 ... join the network."

19 So I think all of this is probably uncontroversial.

20 Then the next paragraph talks about the
21 characteristic of two-sided markets or multi-sided
22 markets being pricing strategies are not akin to single
23 markets because you set your prices on the platform to
24 maximise value to the platform on both sides.

25 A. Yes.

1 Q. Then if we go over the page {F/722/45}, this is more for
2 the Tribunal than it is for you, but you will be aware
3 of it, there is a discussion about the categorisation of
4 two-sided markets, whether they are transactional or
5 non-transactional and so on.

6 Then if we go over the page again to page {F/722/46}
7 it says:

8 "There is broad disagreement on when it is best or
9 more appropriate to adopt a single market approach
10 versus a separate market approach depending on how
11 multi-sided markets are classified based on platform
12 typology."

13 It is a slightly strange question, but do you agree
14 that there is a broad disagreement about this?

15 A. Do I agree with that ... (Pause) I mean, if you want
16 to try to come up with a single typology that allows you
17 to say one side are here, two sides are here, yes, I am
18 sure we are not going to agree on that because I think
19 that is a wrong approach and so I would agree there is
20 broad disagreement.

21 If it means there is broad disagreement about what
22 on earth to do when we are faced with a two-sided
23 market, no, I do not think that is right. We know what
24 to do, we focus on what is the exercise of the market
25 power with which we might be concerned and then we try

1 to think about what the constraints are there and that
2 may lead us to one market or two markets.

3 That said, you know, we obviously have an example
4 here of three economists disagreeing violently on this
5 in some aspects. So ...

6 Q. Here the broad disagreement is whether you adopt
7 a single market approach versus a two market approach.
8 I am just testing whether or not --

9 A. Hang on, the question in itself is -- and this is -- if
10 that is a question that this is referring to, then that
11 is an entirely meaningless question because of course
12 the answer is it depends on the facts, and you can make
13 fairly broad categorisations, you know, there is
14 argument, you know, a transactional market, that is one
15 side, non-transactional two-sided, and there is some
16 logic to that, quite often that will be right. But you
17 cannot make a broad categorisation if it is a two-sided
18 market, you know, you have two markets, or a two-sided
19 market you have one market. So if that is what the
20 claim is then that is just wrong.

21 Q. Well, look, this is the conclusion of the study. I was
22 asking whether you agreed with it or not or the
23 assertion by the study.

24 There is then discussion about typology of markets.
25 If you go over the page to {F/722/47}, you will see

1 there is a reference in the first full paragraph to the
2 Amex case where it said a single market approach was
3 adopted, and you are aware of the Amex v Ohio case,
4 I think?

5 A. I am aware of the US case.

6 Q. It is all right, Dr Walker, I am not going to test you
7 on Amex's findings. You are safe thus far.

8 Then it says:

9 "Some literature points to drawbacks in the single
10 market approach. For example, according to Niels and
11 Katz and Sallet, when markets are defined separately,
12 authorities [and] courts can capture the competitive
13 constraints more accurately on each market side, where
14 relevant substitutes may differ (including
15 geographically). Defining the market in this way also
16 makes a competition assessment of both sides possible
17 ([and in particular] at the later stage of the effects'
18 analysis)."

19 So there there are two things that are being
20 identified. One is some of the literature talks to the
21 problems of just using a single market approach, and
22 some of that literature talks about the benefits of
23 defining a market on either side to make sure you are
24 capturing both constraints. That is right, is it not?

25 A. Well, that is what this says here. I do not think it is

1 an actual characterisation to say that there is a bunch
2 of literature out there that says, as I think this seems
3 to suggest, that you should always have two markets
4 because that is the better approach, and that is of
5 course not what Gunnar says in his article. I mean,
6 that article that is quoted, his point there is that you
7 just should not assume that where it is a transaction
8 market therefore you should define one market. Okay, we
9 can argue that point, but Dr Niels is not saying, no,
10 no, you should always find two markets.

11 Q. Actually, if you go down to the footnote at 40, to
12 Dr Niels, which refers to the transaction versus
13 non-transaction, the point you have just made is
14 actually set out. So what Dr Niels is saying is it is
15 very important that you consider properly the
16 constraints on both sides independently, and it is to
17 that extent that he is being identified as pointing out
18 drawbacks in the single market approach, you are right.

19 A. Well that is a non sequitur on the part of the
20 Commission because looking at the constraints on both
21 sides of the market does not -- on both sides of the
22 platform does not therefore mean you have two separate
23 markets, and if that is what the Commission is
24 suggesting there, then again I just think they are
25 wrong, because we have a case here where you look at the

1 constraints on both sides of the market, you define
2 a single market.

3 Q. Let us just pause there for a moment. What he is saying
4 is there is a debate whether or not you are better off
5 doing two markets, or rather just doing the single
6 market approach, but it is identifying there are
7 drawbacks in the single market approach because you
8 might miss out on the constraints on both sides.

9 A. No, I do not think that is a fair characterisation. It
10 is not saying that defining just a single market is
11 always the wrong thing to do or it is --

12 Q. It is not saying that, just to be clear.

13 A. Okay, well, then, I am unclear what your point is,
14 Mr Beard, sorry.

15 Q. It is saying that the risk in focusing on a perhaps
16 single market approach, in the literature there are
17 suggestions you should do a two market approach, but if
18 you are doing a single market approach you need to be
19 extremely careful to ensure that you are looking at the
20 constraints on both sides. That is what this is saying,
21 is it not?

22 A. Okay, well I am afraid that is not what that is saying,
23 but I do agree with what you have just said, Mr Beard,
24 that, you know, however -- where you have a two-sided
25 platform, yes, of course you have to look at the

1 constraints on both sides.

2 Q. If we just flip on to page {F/722/55} -- I should say
3 between then and page 55 there is a set of specific
4 considerations. Actually, we should just pick up at
5 {F/722/50}, I am so sorry, just to track back, the first
6 consideration is the typology of the market which you
7 have just touched on and then at 50 it is emphasising
8 the importance of the substitution possibilities on each
9 user side as a relevant criterion.

10 What this is emphasising is the importance that you
11 have actually analysed substitution possibilities on
12 each user side when you are doing this, but you do not
13 think that is necessary in the sense that you do not
14 consider it necessary to do a SSNIP or SSNIP equivalent
15 on both user sides, do you?

16 A. Okay, so that is conflating two issues. I do agree you
17 should understand the substitution on both sides of the
18 market, yes, or the competitive constraints on both
19 sides of the market. Do I agree that therefore you need
20 to SSNIP on both sides of the market? No. Those are
21 two separate issues.

22 Q. Just to be clear, I think this is again not
23 controversial. What you are doing you say is the
24 appropriate approach to test the user side of the market
25 is not to SSNIP; it is effectively to take an indirect

1 passthrough of the commission and consider the impact of
2 that on the consumer side, is it not?

3 A. Yes, because we are trying to understand whether the
4 PCWs or a hypothetical monopoly PCW would have market
5 power and the ability to raise commissions, so you have
6 to think about what might constrain it from raising --
7 this hypothetical monopolist from raising commissions.
8 One constraint would be that HIPs would say we are not
9 paying that commission, we will all delist, that is one
10 constraint. Another constraint is that consumers would
11 face higher prices and would say, well, we are not going
12 to buy from PCWs any more. So you are looking at the
13 constraints on both sides of the market in order to
14 understand whether this hypothetical monopolist could
15 properly raise commission rates.

16 Q. It is obviously clear that you are not carrying out
17 a SSNIP on the user side, are you, or a SSNIP
18 equivalent?

19 A. On the consumer side, no, we are not.

20 Q. You are also looking at that indirect passthrough, you
21 are not actually looking at indirect network effects as
22 they are properly so-called, are they? That is not an
23 indirect network effect, is it?

24 A. No, it is not.

25 Q. It is a passthrough. Just to conclude on this section,

1 page {F/722/55} there is a sort of summary where it
2 picks up at (i) I think a point that you and Dr Niels
3 actually agree on, that the platform typology is not
4 sufficient to define relevant markets because, in
5 particular, that ignores the nature and strength of
6 network effects. That is right?

7 A. Well, that might be one reason -- well, sorry, no, I am
8 not sure. So what that says -- so I agree that you
9 cannot just do this on the base of platform typology.

10 Then it says some NCAs have done that. That is
11 a bad thing because you are not -- "in particular ... it
12 ignores the nature and strength of network effects".
13 Defining it on the basis of a typology is not ignoring
14 the indirect network -- or network effects because that
15 typology is based on thinking about network effects in
16 different types of a two-sided market. The problem is
17 it is just not related to the facts of specific cases so
18 there is no typology which perfectly captures where you
19 should have one relevant market versus two relevant
20 markets.

21 Q. Yes, it says "nature and strength of network effects"
22 and I think you actually agree with that proposition?

23 A. Well, that is certainly something you have to take into
24 account, absolutely.

25 Q. The typology does not capture that.

- 1 A. Well --
- 2 Q. The difficulty with typology is it is not necessarily
3 capturing the nature and strength of indirect network
4 effects or the direct network effects that exist on
5 a platform.
- 6 A. Among other things, yes, it is not related to the facts
7 of specific cases.
- 8 Q. Therefore using typology is not appropriate because it
9 is so important to capture the nature and strength of
10 those indirect network effects. That is correct?
- 11 A. Using typology is not the right approach because you
12 risk not looking at the facts of the particular case,
13 which will include indirect and direct network effects.
- 14 Q. The reasoning there is emphasising the importance of the
15 indirect network effects which define, as we have
16 already agreed, whether or not --
- 17 A. That is the reasoning in that document.
- 18 Q. But you do not agree with that reasoning?
- 19 A. Well, I mean, I have not sort of read the whole document
20 to see exactly what is behind that.
- 21 Q. No, sorry --
- 22 A. That strikes me as not a very precise, I have to say,
23 statement.
- 24 Q. Then if we just go over the page {F/722/56}:
25 "It is appropriate to look at both market sides

1 regardless of whether a single market or a multi-market
2 approach is chosen. The case practice confirms that
3 usually, regardless of whether markets are defined as
4 a whole or separately for each side of the market, the
5 NCAs' analysis appropriately accounts for
6 interdependencies -- such as indirect network effects --
7 and for all competitive forces on each 'side' of the
8 market, such as substitution possibilities."

9 Do you agree with that?

10 A. Yes, absolutely.

11 Q. What you are agreeing with there is that it is
12 important, if you were to carry out a multi-market
13 approach, to capture substitution possibilities on both
14 sides, you have just agreed to that?

15 A. You have to capture substitution possibilities on both
16 sides, whichever approach you use, you have to look at
17 competitive --

18 Q. I agree.

19 A. Fine.

20 Q. I am just testing whether you are agreeing that you do
21 it on a single market or a multi-market approach and you
22 are agreeing with that?

23 A. You still have to look at the competitive circumstances
24 on both sides, yes.

25 Q. If you were doing it on a multi-market approach basis,

1 you would carry out a SSNIP on each side as an orthodox
2 approach, would you not?

3 A. If you are going to be defining separate markets, yes,
4 you carry out a SSNIP on both sides.

5 Q. That is what a multi-market approach means, is it not?

6 A. Oh, sorry, is that a question? Yes.

7 Q. What this is saying is that if you are going to follow
8 a multi-market approach you must do a SSNIP on each
9 side, if you are following orthodoxy. I accept that
10 there are later points about whether or not a SSNIP is
11 feasible in this document. I am not disputing that.

12 A. I am not sure that is -- where you say if you are
13 following orthodoxy. If you are just following the
14 economic logic of what you are trying to do, yes.

15 Q. Fine, but as soon as you decide that it is a single
16 market, you say, no, you do not have to SSNIP on both
17 sides.

18 A. Yes, because you are trying to understand the
19 constraints on -- well, in this case commission charges.

20 Q. That is not what this is saying, is it? It is saying
21 regardless of whether it is single or multi-market
22 approach?

23 A. No, I do not think that says even in a single market you
24 do a SSNIP on both sides.

25 "... appropriately accounts for interdependencies

1 ... and for all competitive forces on each 'side' of the
2 market, such as substitution possibilities."

3 Yes, I agree with that. That is not saying you have
4 to do a SSNIP on both sides. We do not do a SSNIP on
5 both sides, but we do take account of competitive forces
6 on each side of the market.

7 THE PRESIDENT: How do you evaluate substitution
8 possibilities if you recognise that you have to assess
9 those on the two markets?

10 A. So in this case, what we --

11 THE PRESIDENT: No, just generally. Not this case.

12 A. Okay, so if you are thinking about could our
13 hypothetical monopolist raise a price on one side of the
14 market, the price it sets, you look at the constraints
15 that would stop that happening on both sides of the
16 market, and that constraint -- those constraints are
17 about substitution, those constraints are about,
18 you know, for instance, insurers delisting or consumers
19 going and not buying on a PCW.

20 THE PRESIDENT: Right, we have two markets, A and B, and
21 they are two sides intermediated by a platform. I am
22 not going to tell you what A and B are, because that is
23 the point of my question. You want to know how they
24 work and so the first thing to do is to ascertain the
25 products in each market and to see the substitutability

1 in relation to those products to see what the ambit of
2 the market is. That is bread and butter, is it not?
3 That is how you start out understanding the terrain in
4 which you operate.

5 A. Well, that is -- that may be how you want to understand
6 the terrain in which you operate. That is not the same
7 as defining the market, the relevant market, in order to
8 understand whether the conduct in question is
9 anti-competitive or not. So --

10 THE PRESIDENT: No, I am a million miles away from
11 anti-competitive.

12 A. Then I am struggling a little bit then, Chairman, I am
13 sorry for being slow here, but I do not think that
14 market definition is about generally understanding the
15 terrain. I think market definition, as it says in
16 paragraph 1, I am pretty sure of the market definition
17 note, it is certainly very early on, market definition
18 is about understanding the competitive constraints that
19 are acting on the focal product.

20 THE PRESIDENT: Sure, but if you focus on the competitive
21 constraints first, are you not in danger of getting it
22 wrong?

23 A. On getting it ...?

24 THE PRESIDENT: Wrong.

25 A. No, if you want to understand what the competitive

1 constraints are you should focus on them. I think you
2 are --

3 THE PRESIDENT: Competitive constraints surely operate
4 within a market and you need to understand what I am
5 referring to as the terrain, even if the investigations
6 prove to show that the constraints operate in
7 a particular side.

8 A. Yes, so you need to do the analysis to understand what
9 those constraints are and that will lead you to looking
10 in a two-sided market at both sides of the market and
11 then coming to whatever your overall conclusions are.
12 What I am pushing back on -- and maybe we do not
13 disagree here, but what I am pushing back on is this
14 idea that in some sense you have to -- you define the
15 relevant market in terms of understanding the terrain.
16 Okay, we have done that, and now we are going to see
17 what the -- try and see what the conduct is and the
18 effect of that conduct, and you cannot -- I do not think
19 you can divorce those two, because we are only defining
20 the market in order to understand the effect of the
21 conduct.

22 THE PRESIDENT: Yes, I think we are agreeing that the role
23 of market definition is as it were an intermediate stage
24 in order to understand what it is you are trying to
25 determine at the end of the process. So giving you two

1 markets which I am telling you are connected by
2 a platform, but I am telling you nothing more, they are
3 A and B, if you are seeking to understand the terrain
4 before seeking to evaluate the anti-competitive conduct
5 within those markets, what do you do to give yourself
6 context? You have been presented with a potential
7 problem, we are worried about clause X and its operation
8 in market B, but market B is connected to market A
9 because they are two sides of one market, if you want to
10 use that terminology. So you have been handed this
11 problem. Analytically speaking what do you do to get
12 yourself context?

13 A. So analytically speaking I need to understand -- okay,
14 so I have the conduct in question and the question is
15 whether that is poor conduct, so I have to understand
16 whether in order for something to be anti-competitive
17 obviously it must be the case that the firms involved
18 are able to exercise market power, so I need to
19 understand the context within -- can they exercise
20 market power, you know, and that is what the market
21 definition exercise is, and can they exercise market
22 power that -- with respect to that conduct in a sense.
23 Can they exercise market power that allows them to
24 engage in conduct that is going to have anti-competitive
25 effects. That is where I start.

1 So if we have two markets, you know A and B, what
2 the relevant market is depends, that we need to worry
3 about, depends on what the conduct is in question.

4 So suppose your concern is either in market A, your
5 concern is whether the people who -- the platform
6 that -- okay actually I am going to go back to this
7 case.

8 If you were thinking, well, do HIPs have market
9 power if all the HIPs got together, a hypothetical
10 monopolist of HIPs, could they profitably raise prices
11 just online. Suppose for some reason that was so. Then
12 of course your starting point is, okay, do the HIPs have
13 market power online, and then you would start on that
14 side of the market, and you would end up with a market
15 definition that is relevant to that question, but that
16 is not the conduct we have been asked. We have been
17 asked about different conduct, and so that is why we
18 have a different market definition.

19 It is not the case that market definitions exist in
20 my view independently of the concern, and that is why,
21 for instance, you have a different market definition in
22 a merger case than you might have in an abuse of
23 dominance case in the same market. So I think they are
24 all context specific to the particular conduct we are
25 concerned about.

1 THE PRESIDENT: Thank you very much. I am sorry, Mr Beard.

2 MR BEARD: I am just going to move on to a slightly separate
3 but related topic. It is about network effects.

4 You have agreed that the existence of direct or
5 indirect network effects is key to defining a market as
6 two-sided, and so it is crucial in this case to the
7 categorisation of the markets being two-sided, and in
8 this case the positive indirect network effects --
9 I think this is not controversial -- are potentially
10 PCWs being less appealing to customers if fewer HIPs
11 quote competitively on them, is that correct?

12 A. Yes.

13 Q. One of them. Secondly, if fewer HIPs quote
14 competitively or quote less then fewer customers will
15 want to use them; correct?

16 A. Yes.

17 Q. Just to be clear, you said yesterday you had not looked
18 at the Section 26 notices, but in relation to this sort
19 of crucial aspect, there were no specific questions
20 about network effects in any of the Section 26 notices,
21 were there?

22 A. Well, I am happy to believe there were not. That is not
23 the same as saying you cannot think about what those
24 network effects are.

25 Q. I do not doubt you can think enormously about them.

1 I will come on to think about them.

2 A. I am happy to give you an analysis of them in this case.

3 Q. Dr Walker, your capacity to think about these things
4 I am sure is limitless. That is not the question. The
5 question is whether or not you, as the CMA, asked any
6 questions about them, and you do not know whether you
7 did.

8 A. I do not know whether we did. I would say, however,
9 again it is not the sort of -- it is not the sort of
10 question I would expect us to ask to a party. It is
11 like if you go to party and say, "Tell me what the
12 indirect network effects are in your market" your
13 average marketing person is going to look at me and say,
14 "What do you even mean by that?" So, you know, you ask
15 questions to understand the nature of competition in the
16 market, and that will tell you something about network
17 effects.

18 Q. Yes, I completely understand that may not be the most
19 charming introduction to a party and you may be left
20 somewhat in the corner with a cake. That I can see
21 entirely. That is not the question I am asking you.

22 Did you check whether any of the specific questions
23 being asked by the CMA related to indirect network
24 effects, and I think the answer is going to be "no"?

25 A. And you are right.

1 Q. Thank you. So this is a critical aspect, and you did
2 not check whether or not any of the questions were being
3 asked?

4 A. I am afraid it is not a critical aspect. The critical
5 aspect is understanding whether there are indirect
6 network effects and their effect on market definition.
7 The critical aspect is not exactly where that
8 information might have been got from. So I think you
9 could legitimately berate us if we had not thought about
10 indirect network effects, but we have.

11 Q. I am not going to say you did not think about it,
12 because there is of course a section in the Decision
13 where you talk about indirect network effects, but what
14 I was asking was whether you had actually gathered any
15 evidence in relation to indirect network effects.
16 I think you have made it clear that certainly so far as
17 you know you did not specifically ask any questions
18 about indirect network effects and furthermore you did
19 not check whether or not you were asking any questions
20 related to network effects. I think we have established
21 that. So let us come to the Decision.

22 A. I am sorry, I am going to have to pick you up.

23 Q. Of course, Dr Walker.

24 A. I think you said I think we have established that you
25 did not collect any evidence on indirect network

1 effects. That is an incorrect statement. Then you went
2 on to say specifically in the Section 26 notices. That
3 is a different question. I am happy to say -- to agree
4 with you on the second, I do not know the answer to it,
5 and I disagree violently on the first.

6 Q. Well, let us deal with your violence, then, shall we,
7 Dr Walker. Let us go to page 86 in bundle A/1 {A/1/86}.

8 You see here this is the section in the Decision on
9 indirect network effects. It runs from paragraph 5.34
10 to paragraph 5.43, so there are nine paragraphs.

11 I am sure you are vaguely familiar with this. I am
12 not going to ask you to read through it, but if you want
13 to you can. The first set of paragraphs discusses
14 network effects and the nature of them. I do not think
15 there is anything controversial, so if we could flip
16 over the page {A/1/87}, it then says at 5.39:

17 "The CMA finds, however, that during the Relevant
18 Period, due to the significant number of consumers and
19 providers already using PCWs, indirect network effects
20 were not strong in relation to ... PCWs in home
21 insurance and, therefore, in relation to a hypothetical
22 monopolist ..."

23 Now, this is a matter of an assertion at this stage
24 and it is something that Dr Niels dealt with in his
25 report at paragraph 3.45 on which he was not

1 cross-examined. I am going to leave that for the
2 moment. I am going to come on to the evidence that you
3 have relied on which is in the next paragraph, 5.40:

4 "While indirect network effects may have been
5 stronger for the Big Four PCWs in the past (... when
6 [they] started operating ...),] the CMA notes that they
7 did not appear to be particularly strong in the
8 competitive landscape during the Relevant Period. For
9 example, one of the Big Four PCWs (Confused) told the
10 CMA that it had consolidated its panel of providers
11 during the Relevant Period but the reduction in the
12 number of providers had not had any material impact on
13 the number of customers introduced. This PCW told the
14 CMA that this was because, in home insurance, consumers
15 focus on price rather than on breadth of the panel and
16 would not look further than the top ten providers
17 appearing on the results page."

18 So we just have to go down to footnote 269 here.
19 Can you just bump the page up, I am sorry, thank you.
20 Then there is a reference to a note of a CMA call with
21 Confused 12 December 2017 and a reference to
22 paragraphs 4 and 5.

23 That is the only piece of evidence that is referred
24 to as suggesting there are not indirect network effects
25 that was gathered as part of this enquiry that we have

1 found in the report. Are we wrong, Dr Walker?

2 A. Yes, you are. So why are you wrong? So the indirect
3 network effects, how would they work here on this --

4 Q. No, not speculation. Which piece of evidence,
5 Dr Walker?

6 A. I am going to give you the piece of evidence. I want to
7 frame the question first. So the argument would be that
8 if you raise prices to -- on the consumer side people
9 would stop buying their insurance on PCWs, and,
10 therefore, HIPs would stop using PCWs, and, therefore,
11 there would be fewer HIPs on PCWs, so more consumers
12 would think I am not going to use PCWs, and that is your
13 indirect network effect.

14 However, what we see is that all the PCWs have way
15 more HIPs quoting on them than consumers seem to be
16 interested in looking at, and what is the evidence for
17 that? The evidence is, it is in the report, that
18 consumers only look at the very top few searches
19 typically. Typically they will buy from one of the top
20 five searches, and so if you have 50 HIPs, 44 HIPs,
21 whatever, on your platform, you are going to have to
22 lose an awful lot of those before that is going to lead
23 to consumers deciding there are not enough HIPs in that
24 market and so leaving. So that is evidence there.

25 You also -- I think there is lots of evidence there

1 in the Decision about how important HIPs think being on
2 a PCW is. So, again, that to my mind indicates that if
3 there is a price rise and some consumers stopped using
4 PCWs, that is not going to lead to HIPs delisting from
5 PCWs because those PCWs are very important to them, and
6 that is of course consistent with the fact that no one
7 has delisted even though commission rates have been
8 increasing.

9 THE PRESIDENT: Dr Walker, one of the problems --

10 PROF ULPH: Dr Walker --

11 THE PRESIDENT: Professor, you go first.

12 PROF ULPH: Could I just ask a question about that? Even if
13 it were the case that consumers only buy from the top
14 four or five offers that are put to them on the website,
15 the fact that they do that might arise because they have
16 confidence that they are indeed getting the lowest
17 price, and that would depend on the extent to which they
18 felt the website or the PCW was capturing the prices of
19 a very large number of HIPs.

20 If they felt that each PCW was only investigating
21 a small number of HIPs, then they may have less
22 confidence and still go to another PCW and still buy the
23 top offers that come through to them, but the issue is
24 not -- there is a separate issue as to whether they buy
25 from the top four or five and whether they have

1 confidence that they are indeed getting the lowest
2 price, which is why they choose to buy that, and that
3 confidence comes from their belief that they are
4 actually getting quotes from a very large number of
5 HIPs.

6 If that confidence was eroded you might see
7 a different pattern of behaviour. So you cannot just
8 infer from the fact that they buy from the top five that
9 having a large number of HIPs does not matter to
10 consumers.

11 A. No, I do not think I said it does not matter to
12 consumers. I think your point, Professor, is that, you
13 know, consumers need to -- you are hypothesising
14 consumers need to feel that they are choosing from
15 a very wide number of HIPs. Absolutely. But given that
16 what they focus on -- you know, the choice that they
17 look at is a relatively small subset from the number of
18 HIPs that are there, you would have to lose an awful lot
19 of HIPs I would think where we would get to the position
20 whereby consumers would be thinking, "Oh, I am not sure
21 I have had very much choice here", which is I think the
22 position you would have to get to for you to think --
23 for consumers to then think, "I am not going to use
24 PCWs, there is not enough choice here".

25 MR BEARD: Professor, if it helps, I do have some further

1 questions that are going to pick up a number of these
2 points and related points to your question, but I do not
3 know if you have further follow-ups at this stage.

4 PROF ULPH: No, I do not.

5 THE PRESIDENT: I am going to go to a much more mundane
6 question, which is I think given that you are an
7 economist in a legal environment it probably will help
8 you to answer Mr Beard's question if I sort of
9 articulate how I see the difference between evidence and
10 as it were reasoning and abstraction from the evidence
11 because it may help you, I think, give a clear answer to
12 Mr Beard's question.

13 To take your answer there, the evidence, as I see
14 it, is the fact that you have a large number of HIPs
15 subscribing but a limited number of those HIPs being as
16 it were listed for the eyes of consumers looking on the
17 price comparison website, and so you have a large number
18 of quotations which are simply not produced or
19 significantly produced, to the viewer.

20 A. Well, they are not looked at.

21 THE PRESIDENT: Fair enough.

22 MR BEARD: They are produced. I think it is important to --

23 THE PRESIDENT: One does not get past the first ten.

24 MR BEARD: I think Dr Walker's point is you may get a list
25 of 45 for example but actually you only focus on, his

1 position is, on the top five or the top 10.

2 A. Because they are ranked in order depending on what you
3 have chosen to base your ranking on.

4 THE PRESIDENT: So how these websites operate is to my mind
5 evidence. What you make of it is not evidence but as
6 important. It is the reasoning from that.

7 I think Mr Beard was getting at what enquiries in
8 order to generate evidence did you undertake, and
9 I understood your answer earlier to say questions were
10 not asked in the Section 26 notices, but we did an awful
11 lot of work aside from that.

12 It may assist -- it may not -- if in answering
13 Mr Beard's question you sought to differentiate between
14 as it were the evidence, that is to say the raw
15 material, the data, the facts that you are working with
16 and then the reasoning or analysis that you made from
17 that evidence in order to draw the conclusions that you
18 did.

19 I say that simply because I am detecting a certain
20 elision in those two matters and it is a very
21 understandable elision.

22 MR BEARD: If I ask the questions on these paragraphs I will
23 work through systematically the evidence that was relied
24 upon in this section by the CMA, so Dr Walker can
25 comment on it specifically. That might help with

1 dealing with the elision. It was perhaps an unhelpfully
2 open question and therefore a cross-examination crime
3 that I asked Dr Walker about other sorts of evidence.

4 THE PRESIDENT: We certainly will not indict you for that at
5 the moment, Mr Beard, but I think Dr Walker, as long as
6 you are aware that that is a distinction that is
7 operating at least in my mind it may help you to answer
8 Mr Beard's question.

9 A. Okay.

10 MR BEARD: So let us go to the one piece of evidence that is
11 cited in paragraph 5.40. I should say I am going to
12 come to 5.41 which is the material that you refer to
13 about HIPs and the DCT Kantar material.

14 Let us look at the single piece of evidence relied
15 on in 5.40. {F/328}.

16 This is you see December 2017, so quite early on in
17 the process of your investigation, and it is a call with
18 Confused.

19 You will see the people referred to by initials, so
20 CP is the CMA introducing, seeking clarifications on
21 a few aspects of Confused's previous Section 26
22 submission, which would have been submitted in
23 November 2017.

24 Point 2, what you see there is CP noting that:

25 "... in response to Question 1 ... Confused stated

1 that the number of home insurance providers able to
2 quote on Confused.com has recently reduced from 74 to
3 65. CP asked Confused to explain why the panel is now
4 smaller and which providers have left Confused's panel.
5 Confused said that they have recently implemented
6 a strategy focused on growing their motor insurance
7 business."

8 So they were asked about home insurers and Confused
9 said we have "recently implemented a strategy focused on
10 growing ... motor insurance".

11 "There are no specific reasons for the reduction in
12 the number of insurers ... this is just natural business
13 streamlining: some of them have simply left the market,
14 some have changed IT platform. Confused went on to
15 explain that ... their current focus on motor insurance,
16 replacing {F/328/2} the insurers that left the home
17 insurance panel was not an immediate priority for
18 Confused. However, there are plans to increase the
19 number of insurers on Confused's home insurance panel
20 going forward."

21 So they had lost nine, but in this interview what
22 they actually say is, no, no, no, we have 65 on, but we
23 are going to push them up again.

24 On the reasoning that you are putting forward, that
25 would seem pointless, would it not, because they have 65

1 already on, but they actually want more. That is what
2 they are saying there, is it not?

3 A. Well, yes, they say that they have plans to increase the
4 number of insurers going forwards, yes.

5 Q. Then paragraph 3:

6 "CP asked the reasons why Confused decided to focus
7 on its motor insurance business. Confused explained
8 that its strategy is broader than just motor insurance,
9 and is focused on promoting all its driver-related
10 comparison products (eg also being a comparison tool for
11 parking and petrol prices) and not just motor insurance.
12 As part of this strategy, Confused also launched ...
13 a car finance ... Confused noted that it would like to
14 position itself as the leading PCW for drivers."

15 So they have a different strategic focus, so they
16 are not at the moment so worried about home insurance
17 numbers, but they will be coming back to them.

18 Then 4:

19 "BS [another CMA person] asked to what extent the
20 reduction in the number of insurers in Confused's home
21 insurance panel have had an impact on the number of
22 leads generated ... Confused said that the impact was
23 marginal, mainly because in home insurance ... focus is
24 on price rather than breadth of the panel, and insurers
25 ranked after position 10 on Confused ... are unlikely to

1 get considered by the consumers."

2 Then:

3 "CP queried whether only the top 10 motor insurance
4 providers that appears on consumers' comparison page
5 receive their attention. Confused said that things are
6 a bit different in motor insurance, where it is
7 important to have a large panel and where the variance
8 of prices is higher compared to home insurance. A large
9 panel is important because customers' history of claims
10 can affect substantially the premium charged ..."

11 So the two paragraphs that are relied on are 4 and
12 5. Paragraph 2 is just ignored in the Commission
13 decision, even though when asked Confused said actually
14 we are going to add back in home insurance providers.

15 That on its face is not good evidence that they were
16 ambivalent to how many home insurance providers they had
17 on their app, is it?

18 A. It is -- well, I mean, it is slightly contradictory
19 evidence, in one sense. What it is is they were asked
20 a straight question, you know, what has happened to the
21 number of leads generated and they said very little,
22 marginal. Okay, that is the key point, because that is
23 highlighting the fact that --

24 Q. Just pause.

25 A. Let me finish, please -- when you have this number of

1 insurers on your PCW a loss of -- I mean, that is quite
2 a lot, nine, was it? -- does not seem to have an impact
3 on the number of sales that are made.

4 Then your next -- then your question about their
5 plans to increase the number of insurers on Confused
6 home insurance panel going forwards, I do not know why
7 they want to do that since they also say that actually
8 having fewer has not led to fewer sales, but I cannot
9 answer for their thinking there. What I can do is focus
10 on the factual question to which they gave a factual
11 answer.

12 Q. Right, so it is self-contradictory, there was no
13 follow-up question, we have no one here from Confused.
14 You are confident you know what marginal means here?

15 A. Well, it means small.

16 Q. How small?

17 A. I do not know --

18 Q. Exactly.

19 A. -- how small.

20 Q. You do not know and you do not know the reason why they
21 were thinking of getting more insurers back on to the
22 site, do you?

23 A. No, I do not. What I do know from this is the reason
24 they have given for it being marginal, as they put it,
25 is that insurers only typically look at -- consumers

1 only typically look at the top ten and they are way over
2 that number. So if consumers are only typically looking
3 at that top ten it is hardly surprising that the effect
4 is very small.

5 Q. As you rightly say, there is an internal contradiction
6 in this evidence on your own account and reading of it,
7 is there not?

8 A. Well, take Confused. Well, there is a tension.

9 I genuinely do not understand why they want to increase
10 the panel size if they are saying here that it has no
11 effect, but the key point for us is it had no effect.

12 Q. I see. The key point you selected from this evidence is
13 that although there is a tension, you decided that is
14 what you take from it, and you will not ask any more
15 questions. The investigation went on for another
16 two years. That was never clarified, and yet this is
17 the sole piece of evidence from an insurer or a PCW that
18 is relied on here in this Decision to say there are no
19 substantial indirect network effects.

20 A. No, the -- okay, I will come to that second part in
21 a minute. The first part, it is not right that there is
22 a lack of clarity over the important piece of evidence
23 here which is -- it is a factual response to a factual
24 question which is what is the impact of having fewer
25 people on your panel? Answer, you know, very little,

1 and then a reason why that is very little, because
2 consumers only look at the top ten, they say.

3 So that seems to me to be a very good piece of
4 evidence suggesting that for Confused they do not seem
5 to be -- there is not a concern that their panel is
6 getting so small or in any danger of getting so small
7 that they would start to see consumers drifting away.
8 That suggests the indirect network effects are rather
9 small.

10 Q. That is the indirect network effects from full
11 delisting, is it not? That is what is being talked
12 about here: a HIP completely dropping off the website;
13 correct?

14 A. Yes.

15 Q. There is no consideration here of the impact of partial
16 delisting or what is known as quotability, is there?

17 A. No, there is not.

18 Q. You would accept that you could have a significant
19 indirect network effect in relation to quotability where
20 lower quotability means that fewer customers are
21 interested and fewer customers -- in the quotes being
22 offered and fewer customers interested means in term
23 that insurers may quote less or at a less competitive
24 level?

25 A. As a hypothetical possibility, that is of course true.

1 You know, the evidence is that is not what we have seen
2 happening.

3 Q. You say the evidence is that we do not see that
4 happening. You know that quotability is critically
5 important for PCWs, do you not?

6 A. What do you mean by critically important?

7 Q. It is a vital part of their strategy, ensuring extensive
8 quotability by insurers on their website. You know
9 that, do you not?

10 A. Yes, so that they can potentially maximise the sales.

11 Q. No, it is so that they are ensuring that they are
12 offering best prices for risks from insurers on their
13 website.

14 A. Okay, yes, they are not doing that for the fun of it.
15 They are doing that in order to maximise their sales.
16 We agree.

17 Q. So it is critical to PCWs that they have what is called
18 high quotability, is it not?

19 A. Yes, they want to have competitive products that cover
20 the full risk spectrum. Therefore, get high sales.

21 THE PRESIDENT: Just to be absolutely clear, Mr Beard, high
22 quotability means a large number of insurers providing
23 quotations on the website.

24 MR BEARD: It means a large number of insurers returning
25 quotes for particular risks on a website, and it will

1 also mean the quality of those issues. As we explored
2 a little with Ms Glasgow, it is not just how many
3 insurers, it is the quality of the quotes you are
4 getting back. I will not go into the evidence there in
5 case it is confidential, but I think the Tribunal has
6 that very clearly in mind.

7 THE PRESIDENT: No, I want to be clear so that I know what
8 we are talking about in terms of --

9 MR BEARD: Yes, I am so sorry if I was being unclear about
10 that. That is where I am going. The point I am making
11 is the evidence such as it is goes to a full delisting
12 indirect network effect. We say it is not clear
13 evidence and was not tested, but what it does not do at
14 all is consider the indirect network effect in relation
15 to partial delisting or quotability, and this Tribunal
16 has very clear evidence about the importance of that
17 quotability. You accept that this evidence does not go
18 to quotability and partial delisting, do you not?

19 A. This evidence does not, no.

20 Q. Of course. I am going to come on to delisting, but this
21 is the section of the Decision dealing with indirect
22 network effects. You have accepted, at least in theory,
23 that partial delisting can create a significant indirect
24 network effect, and yet it is not considered here at
25 all, is it?

1 A. Okay, it is not -- I mean, you could put the section
2 back up. I am happy to believe it is not referred to,
3 but we do --

4 Q. I am sorry, it is unfair to leave that up there. I am
5 sorry, could we have {A/1/87}, please.

6 A. But we do know that we do not see, we do not seem to see
7 significant partial delisting, and there is
8 a conversation yesterday, and there is evidence from
9 Ms Ralston about the fact that HIPs had the ability to
10 partially delist, but there is no evidence that they
11 have done that in response to the increase in commission
12 charges.

13 Q. We will come to partial delisting. The point I am
14 making here is that the Decision does not consider
15 partial delisting indirect network effects at all, does
16 it?

17 A. It is not referred to here, no.

18 Q. That is all we have, is it not, Dr Walker? Let us go on
19 to 5.41. You say:

20 "This is corroborated by findings from the CMA's
21 consumer research in its DCTs Market Study ..."

22 So this was not research that was done in this case.
23 You did not carry out any research in relation to
24 indirect effects in this case; you used material that
25 had been taken in the DCTs study.

1 "... which showed that only 9% of PCW users in home
2 insurance have considered 10 results or more when
3 obtaining quotes. It is also consistent with data
4 obtained in the DCTs Market Study [again] ... which
5 showed that in home insurance in 2016 a substantial
6 majority (over 70%) ... of unique visitors clicked
7 through to the top five providers and more than
8 70% ... of unique visitors purchased from the top five
9 providers."

10 That was the evidence you were referring to earlier,
11 I think, about the top five providers on a website being
12 the ones that people clicked through and bought from; is
13 that right?

14 A. Yes.

15 Q. Is that evidence as set out in this paragraph correct?

16 A. Well, that is the evidence in our DCT study.

17 Q. I think I am not going to be unduly cruel, the last
18 clause of that, more than 70% of unique visitors
19 purchased from the top five providers, is not correct,
20 but it is also I think essentially a broad typographical
21 error because if you go to paragraph 7.25 we actually
22 see the relevant material which is on page {A/1/169}:

23 "Finally, home insurance products are listed in
24 retail price order ... with the lowest priced product
25 being listed first ..."

1 THE PRESIDENT: Sorry, where am I looking?

2 MR BEARD: Sorry, 7.25. I am just starting there.

3 "Evidence obtained by the CMA in the DCTs Market
4 Study ..."

5 So this is just repetition. If we turn over the
6 page, thank you {A/1/170}:

7 "... from three of the Big Four ... In particular,
8 the evidence shows that [this is just a repetition of
9 what we saw earlier] in home insurance in 2016 the vast
10 majority ... of consumers who click-through to
11 a provider's website clicked through to the providers
12 ranked in the top [X] results [bizarrely it is redacted
13 here] and more than 70% ... of consumers who purchased
14 through a PCW clicked-through to and purchased from
15 providers ranked in the top five results."

16 So it is not unique visitors, the alliances clause,
17 and it would be quite a remarkable return if you think
18 about 70% of unique visitors purchasing from a PCW.

19 THE PRESIDENT: I wonder if we could have the two paragraphs
20 set up side by side so we could see the difference?

21 MR BEARD: Yes, is that possible? If we leave that one on
22 the screen and then we go back to 5.41 {A/1/87}. If you
23 just read them next to one another. It is because when
24 you read that paragraph on 5.41, you think that cannot
25 be right, and that is what leads you to check.

1 A. Do you want me to respond?

2 THE PRESIDENT: Yes, by all means, Dr Walker.

3 MR BEARD: It is the 7.25 that is the correct figure, is it
4 not?

5 A. 7 point?

6 Q. Sorry, the figures and analysis given in 7.25, that is
7 the correct figures, is it not?

8 A. Yes, and I presume that is right, but the key thing here
9 is what matters is we think about indirect network
10 effects on PCWs and the key point is for there to be
11 significant indirect network effects consumers who are
12 using PCWs would have to care about there being a broad
13 panel. This evidence, in terms of consumers who
14 purchased, this evidence is that the vast majority of
15 those consumers just focus on the top five, so the
16 evidence is not that they are very concerned about the
17 panel is not big enough because they are getting however
18 many quotations back, way more than five, and yet they
19 are focusing on the top five.

20 Q. There are two issues --

21 A. That is consistent with the previous evidence we talked
22 about which is when Confused dropped its panel, it did
23 not seem to lose sales as a result.

24 Q. I see.

25 THE PRESIDENT: Dr Walker, just so that I am clear --

1 MR BEARD: I am sorry.

2 THE PRESIDENT: No, not at all. I am, speaking
3 provisionally at the moment, pretty untroubled about
4 what are typographical questions. What I am more
5 interested in is you obviously regarded the DCT market
6 study as providing relevant and correct material on
7 which you could rely?

8 A. Yes.

9 THE PRESIDENT: Thank you.

10 MR BEARD: That is the question I was going to come to, sir.

11 THE PRESIDENT: Sorry.

12 MR BEARD: You are ahead of me.

13 Just going back to the answer you gave in relation
14 to that evidence and the consistency with the
15 contradictory or confusing Confused evidence, what you
16 are saying here is that it does not matter for these
17 purposes if there is full delisting of a number of HIPs
18 because you are still getting at least five returns,
19 probably many more. Sorry, you are nodding, but --

20 A. Sorry, because we know they were talking -- Confused
21 were talking about --

22 Q. But that does not deal with the issue that
23 Professor Ulph raised with you about the sense of
24 confidence that a customer might have in the quality of
25 those returns if you are getting fewer HIPs on the site,

1 does it?

2 A. No, but if consumers felt the need to have let us say 30
3 quotes in order to feel happy that they are getting the
4 best offer, then we would expect them to look through
5 all of those but that is not what we see. We see them
6 typically making their purchase decision from the top
7 five hits.

8 Q. Make a purchasing decision from the top five hits. That
9 is not the point that the Professor was putting to you.
10 Might the account the Professor was putting to you
11 provide precisely the reason why Confused, even though
12 it had 65 HIPs on its site for providing home insurance,
13 was still talking about wanting to have more, would that
14 make sense?

15 A. Well, I cannot tell you what Confused were thinking.
16 What I can tell you, though, is that on the basis of the
17 factual answer to the factual question, we lost nine, it
18 did not affect our sales, that suggests rather low
19 indirect network effects.

20 Q. That is in relation to full delisting, and the other
21 issue is the quality of the quotes that you are getting
22 within your five from which you actually purchase or the
23 ten that you consider or the universe of 20 or 30 that
24 you at least see, the quality of the range of those
25 quotes for particular risks, that is not taken into

1 account here at all, is it?

2 A. Well, this evidence does not talk specifically about the
3 quality of those quotations, no.

4 MR BEARD: I wonder if that is a convenient moment.

5 THE PRESIDENT: Yes. Thank you very much, Mr Beard. We
6 will resume at midday, thank you.

7 (11.48 am)

8 (A short break)

9 (12.06 pm)

10 MR BEARD: I am going to start picking up a few points on
11 SSNIP if I may now.

12 A. Can I interrupt a moment and just ask does that mean we
13 are finished on indirect network effects?

14 Q. I am sure we are never going to finish on indirect
15 network effects, and I may have some other questions
16 later on, but Dr Walker if you have something you want
17 to say in relation to it I do not want to stop you.

18 A. When we talk about indirect network effects of course it
19 requires two-way feedback and because of the narrow
20 MFNs, there is no feedback loop at all on the consumer
21 side, so we do not have this loop whereby if commission
22 charges go up and therefore premia go up and some
23 consumers drop out and therefore some insurers decide it
24 is no longer worth being on a PCW and therefore more
25 consumers drop out, we do not have that because that is

1 just cut short by the narrow MFNs.

2 Q. I see. That is interesting.

3 THE PRESIDENT: Just so I understand, this is the point you
4 are making about the fact that there is not a price
5 differential on the consumer side?

6 A. Yes.

7 THE PRESIDENT: Thank you.

8 MR BEARD: Just to be clear, that is not one of the reasons
9 given in the Decision, is it?

10 A. It is not in that set of paragraphs. I mean, it is
11 obviously entirely -- I mean, that is not difficult
12 logic I just went through.

13 THE PRESIDENT: Well, Mr Beard, I do not think we want to
14 take either of your time up about what is or is not in
15 the Decision, because that will come in submission
16 later.

17 MR BEARD: Can we go back to the Decision, though, because
18 there is a paragraph I do want it look at. Page 81, so
19 it is {A/1/81} if we could.

20 This is where there is a discussion about what the
21 price of interest is to SSNIP. I just want to look at
22 5.23:

23 "PCWs do not, however, set retail prices for home
24 insurance products and nor do they charge consumers for
25 using the services they provide. Changing the pricing

1 structure of PCWs to consider such hypothetical charges
2 would require assuming a fundamental change in the
3 business model that the Big Four PCWs used in the
4 Relevant Period [it is a point you made the other day]
5 and therefore it is unlikely that PCWs could do this by
6 starting to charge consumers within a short time frame.
7 On this basis, the CMA does not consider it appropriate
8 to consider the impact of a hypothetical monopolist PCW
9 charging consumers."

10 So what you are saying here is it would require
11 a change, that change could not happen quickly enough,
12 and therefore on that basis we exclude it from the
13 hypothetical monopoly approach; is that right?

14 A. That is what that says.

15 Q. Can we just go down to footnote 247:

16 "BGL submitted that, although charging consumers is
17 not one of the options suggested in its submissions, the
18 introduction of a paywall on the CTM website and
19 reaching an agreement with a company such as PayPal to
20 collect fees from consumers could be completed within
21 six months ..."

22 That is what BGL set out in Section 26 notice,
23 10 May 2019, question 5 {F/468/4}. I can provide the
24 Tribunal with the reference, I do not have it in front
25 of me.

1 It then says:

2 "The CMA however considers that were BGL to charge
3 consumers for using CTM's platform then consumers would
4 likely switch to another one of [the] Big Four PCWs (as
5 alternative suppliers of price comparison services for
6 home insurance) rather than switching away from the PCW
7 channel."

8 So here the CMA does not suggest that BGL's response
9 that actually they could set this stuff up pretty
10 rapidly, within six months, is wrong. They are not
11 doubting that.

12 A. I am not aware of any reason to doubt that.

13 Q. Thank you. Then they say but if you were to set up
14 a system of charging a little bit more, then that would
15 be effectively competed away because if you were CTM
16 people would shift over to the other PCWs. That is what
17 is being said there, is it not?

18 A. Yes.

19 Q. That is right. Could we go to Dr Niels' first report,
20 {A/6/27}, please. If you could just read 3.48 through
21 to 3.49. (Pause)

22 A. Yes.

23 Q. You have not I think taken issue with Dr Niels' 3.49 in
24 your report, and that is actually correct, is it not?

25 A. Yes, what he says is correct. It is, however, not

1 relevant, but it is correct.

2 Q. I think we may differ on the issue of relevance. The
3 point I am making is that the reason given in the
4 Decision why it is that you could not do a SSNIP on
5 price is actually wrong, but we will come back to that
6 in due course in submission.

7 A. Okay, but as we discussed yesterday, the important point
8 here is it is not necessary, because this whole argument
9 about you have got to look at a reduction in quality of
10 marketing or a reduction in quality of adverts or what
11 would happen if they increased a price, none of that is
12 relevant because we have done the SSNIP on the price --
13 on the commissions that were changed and we can see that
14 gives us a narrow market. It may well be that PCWs in
15 addition could have worsened other terms of trade. That
16 only serves to further emphasise the narrowness of the
17 market. It does not help you to widen the market.

18 Q. We do not agree on what the process is, but I think that
19 is not an argument for now.

20 The next document I want to go to is at {F/648},
21 please. If I may, you are familiar with these. These
22 are the US 1992 merger guidelines which I think were
23 probably the first document that really set out --

24 A. I think the 1984 ones were the first ones.

25 Q. I am sorry, you are quite right, it is the 1984 ones.

1 But the 1992 I think were referred to and have been
2 referred to by you elsewhere and I think by numerous
3 people. The limits of our history stops at 1992.

4 If I may, what this does is -- it is obviously to do
5 with merger control. If we go down to page {F/648/6}
6 you see the overview:

7 "The Guidelines describe the analytical process that
8 the Agency will employ in determining whether to
9 challenge a horizontal merger. First, the Agency
10 assesses whether the merger would significantly increase
11 concentration and result in a concentrated market,
12 properly defined and measured. Second, the Agency
13 assesses whether the merger, in light of market
14 concentration and other factors that characterise the
15 market, raises concern about potential adverse
16 competitive effects. Third, the Agency assesses whether
17 entry would be timely, likely ..." etc, and fourth
18 considers efficiency gains.

19 So that is the framework that they use. That is
20 well understood, I think. Is that correct?

21 A. Yes.

22 Q. So they start with market definition, then they look at
23 adverse competitive effects, then entry, then efficiency
24 gains, yes? That is the --

25 A. Yes.

1 Q. If we then move down to product market definition on
2 page {F/648/9}:

3 "The Agency will first define the relevant ...
4 market with respect to each of the products of each of
5 the merging firms."

6 So they just neutrally start with the products of
7 the merging firms and look at the relevant markets, that
8 is what they are doing here; yes?

9 A. You say neutrally. These are horizontal merger
10 guidelines, it is a horizontal merger, so you are
11 concerned about the loss of competition between those
12 products as a result of the merger. So it is not
13 neutral in the sense of let us just look at these
14 products for the fun of it. Look at those products
15 because that is where the competitive concern is. Do
16 they impose a competitive constraint on each other.

17 Q. Then if we go down through the first paragraph:

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

24 So that is what the small but significant
25 non-transitory increase in price test is doing, looking

1 at the focal group and then considering the alternatives
2 and asking whether they are sufficiently attractive at
3 their existing terms of sale to consider whether or not
4 people would switch away or if there would be other
5 entry. That is correct, is it not?

6 A. Yes.

7 Q. I anticipate that your view is that in the present case
8 you treat the terms of sale as incorporating the narrow
9 MFN; is that right?

10 A. I mean I guess that is where they would fit into this
11 framework, yes.

12 Q. But when an insurer sells a product to someone, the
13 narrow MFN is no part of the terms of sale of that
14 product to a consumer, is it?

15 A. No, and I hope we are not going to get into a discussion
16 of terms of sale, exactly what that means, because --

17 Q. I am not going to be quite that cruel.

18 A. -- the key point about the narrow MFNs is they are
19 a competitive -- they remove a competitive constraint.
20 That is the key point.

21 Q. We see they are not part of the terms of sale, and what
22 is being done here is putting forward a test that
23 ensures that you look at shifts in response to relative
24 price changes between the focal group and the other
25 competitive, potentially competitive products. You are

1 obviously testing that.

2 A. Absolutely, and normally, you know, in most merger
3 cases, that is absolutely what you do is you look --
4 you know, you change the price the hypothetical
5 monopolist would charge and you leave all other prices
6 the same. That is what you would normally do.

7 However, as I explained yesterday, that does not
8 make sense here because actually that is a ceteris
9 paribus assumption, we leave everything else the same.
10 We cannot leave everything else the same here. Either
11 you have to get rid of narrow MFNs and allow relative
12 prices to change, or you have to keep narrow MFNs, in
13 which case relative prices do not change. So given we
14 are in this world, we have to ask ourselves the question
15 when I think about the competitive constraints acting on
16 the PCWs, what are those constraints. One of those
17 constraints that is in there is a narrow MFN, and that
18 is a constraint, and I think this is -- you know,
19 actually, I think this is uncontroversial. That is
20 a constraint that is going to make it more likely that
21 the PCWs are able to profitably raise commission
22 charges. You can have an argument as to whether or not
23 they can, but it will certainly make it more likely,
24 because you have removed a constraint, and it seems to
25 me given that market definition is all about

1 understanding the competitive constraints acting on
2 a firm, or the focal product, we have to include narrow
3 MFNs in this case.

4 Q. Let us just break that down. Market definition is about
5 setting out a framework to analyse competitive
6 constraints. You identify narrow MFNs as a competitive
7 constraint, therefore they must be included in the
8 market definition. Is that the right syllogism?

9 A. We are trying to understand what the competitive
10 constraints are, that is what market definition is all
11 about. Narrow MFNs are a competitive constraint so we
12 have to take -- we have to take account of their
13 existence when we are trying to understand the
14 competitive constraints, and in particular, in this
15 case, they remove a competitive constraint from PCWs.

16 Q. I am not for a moment suggesting that in the overall
17 process of considering effects on whether or not the
18 existence of the wide MFNs have appreciable adverse
19 effects, the CMA should just totally ignore narrow MFNs.
20 We are on a much much narrower question here. We are
21 asking whether or not for the purposes of carrying out
22 a SSNIP for market definition you should treat the
23 narrow MFNs as constraining the prices of the nearest
24 rivals in such a way that you remove the relative
25 difference that exists otherwise in the SSNIP. That is

- 1 what we are focused on. You understand that, Dr Walker?
- 2 A. I understand that is what you are focused on.
- 3 Q. What is critical in a SSNIP and what you are asking
- 4 about is what the reaction of consumers and producers
- 5 will be to a relative price difference between focal
- 6 product and the non-focal product, is it not?
- 7 A. That is absolutely what you are doing in a standard
- 8 SSNIP, but it makes no sense to us, that question here,
- 9 because we are not going to see that relative price
- 10 change. So by all means ask the question, but it sheds
- 11 no light on the competitive constraints faced by the
- 12 PCWs and, therefore, I do not know why you would do it.
- 13 Q. Let us take it in stages. You could define the market
- 14 applying the relative changes in price methodology that
- 15 the SSNIP actually requires and then you may consider
- 16 the impact/interaction of narrow MFNs with wide MFNs
- 17 when it comes to the assessment of effect. You could do
- 18 that, could you not?
- 19 A. Well, and, look, in a merger, absolutely, you can
- 20 absolutely do that, you can have an argument as to
- 21 whether this is a competitive effect that actually
- 22 should be part of the relevant market or it is not part
- 23 of the relevant market but you are going to take account
- 24 of it later because it will be constraining (inaudible).
- 25 I do not think we can do that here because we are --

1 look, I fear I might be treading on legal grounds in
2 which case I am sure I will get shouted at, and that is
3 fine. We are in a world of vertical restraint, which is
4 this whole sort of stricture of competition, but it is
5 a vertical restraint, and so we have things like VABER
6 around and actually if you widen the market by assuming
7 away competitive constraints, saying "Oh no, we will
8 come and look at that later", I worry that what happens
9 is you widen the market, you lower your market shares
10 and then you say "Oh VABER comes in" and we never
11 actually get to think about that competitive constraint.

12 So it seems to me we need to look at that
13 competitive constraint at the first available
14 opportunity, which is market definition.

15 Q. Just to be clear, it is very important to include the
16 narrow MFNs because otherwise other market guidance
17 could mean you cannot get your teeth into what you think
18 is a problem here?

19 A. If there is any danger that what happens is you are not
20 going to be able to do a proper competitive effects
21 analysis of the conduct because you have omitted
22 a competitive constraint or actually the absence of
23 a competitive constraint, that seems to me to be
24 a significant problem.

25 Q. Let us take VABER out of it for a minute, because after

1 all it is a block exemption and block exemptions can be
2 disapplied, but let us just take that out of account for
3 the moment. Absent VABER, you are saying you could do
4 the market definition without narrow MFNs and then think
5 about the effects subsequently taking into account the
6 narrow MFNs and the wide MFNs. That is what you are
7 saying, as I understand it?

8 A. In theory, you could. However, however, you are
9 undermining the value of market definition there because
10 the market definition is not focusing -- allowing you to
11 focus on the competitive constraints. You are having to
12 do that again later, and that seems to me -- that makes
13 market definition a useless step, you know, and of
14 course you can say in any case it does not really matter
15 how we define the market as long as we take account of
16 the competitive effects and the constraints. Well, yes,
17 of course that is right, but that is not what -- we
18 think it is a useful step to define the market so that
19 we narrow the scope of our focus to the competitive
20 constraints that the focal products face. Therefore,
21 you need to include the narrow MFN.

22 Q. So the essence of the problem is you think there is
23 a problem there, therefore you have to include the
24 narrow MFNs because otherwise the orthodox SSNIP
25 approach of looking at relative price changes will not

1 give you the market definition you want in order to
2 analyse effect. Is that fair?

3 A. Nearly fair. I think there may be a problem that we
4 ought to be looking at, wide MFNs. I think it will be
5 unhelpful to ignore relevant competitive constraints, or
6 absence in a case of relevant competitive constraints
7 when you analyse wide MFNs, and I would not want to be
8 in a position where we never got round to the analysis
9 of wide MFNs because we have pretended there is
10 a constraint in the market that actually does not exist,
11 and the purpose of market definition is only to help us
12 do the competitive assessment.

13 Q. Are you saying that if market definition here included
14 direct channel HIPs you could not consider narrow MFNs
15 when you came to consider effects?

16 A. No, I am not saying that because apart from anything
17 I am not saying that direct constraints on the direct
18 channel would be a significant competitive constraint.
19 That is a question to be argued about in the absence of
20 narrow MFNs. What I am saying is we want our market
21 definition to be as helpful as possible, and saying that
22 I am going to start off with a market definition that
23 omits important competitive constraints or includes
24 competitive constraints that do not really exist and
25 then going on to the competitive analysis and saying "Oh

1 well, actually now I will take them into account" makes
2 no sense.

3 We need to define the market in order to be helpful.
4 Market definition is about understanding whether a firm
5 has market power. It does not help us to understand
6 whether firms have market power if we assume there is
7 a competitive constraint in place that actually is not
8 in place because of this contractual provision. That is
9 just unhelpful.

10 Q. Right, well let us just go down to page 9 in the merger
11 guidance if we could, please {F/648/9}. It is where we
12 were, apologies. You see:

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

19 If we just go down, it says:

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

24 "[The] evidence that buyers have shifted or have
25 considered shifting purchases between products in

1 response to relative changes in price or other
2 competitive variables ..."

3 So what the essence of a SSNIP test is is you
4 hypothesise a relative difference in order to have
5 a sense of where people would divert to in order to work
6 out whether adjacent product groups are part of the same
7 market or are not part of the same market. That
8 relativity is critical, is it not, Dr Walker?

9 A. In general, that is what you are doing, but you seem to
10 be trying to say -- I do not know, give this more stats
11 than it should. This is just a reasonable explanation
12 of what we normally do. I think what you just said
13 there -- in fact actually could you just -- sorry, could
14 I just see the transcript, because actually I think
15 I agreed with the beginning of your sentence there.

16 Q. Yes. What the essence of the SSNIP is is you have to
17 hypothesise a relative difference in order to have
18 a sense of where people would divert to in order to work
19 out where --

20 A. Thank you, that is a key point. In a SSNIP we want to
21 know what happens if a hypothetical monopolist raises
22 prices where people will divert to. We know, because of
23 narrow MFNs, they are not going to divert to the direct
24 channel on the basis of that price increase because
25 there is no price differential. So if we want to

1 understand the constraints, we cannot assume a diversion
2 which we know actually will not happen.

3 Q. Can I just test a hypothetical, then. So you are
4 thinking about a market -- you are thinking about the
5 situation where you have a producer of chocolate in red
6 packets and a producer of chocolate in green packets,
7 okay, so on the face of it these are remarkably similar
8 products except for the colour of the wrapping. You can
9 think about it as cardboard or foil, it does not matter.
10 If you have a SSNIP -- if you are asking yourself
11 whether the red wrapper chocolate might be constrained
12 by green wrapper chocolate, you do a SSNIP in relation
13 to the red wrapper chocolate. That is the correct
14 approach, is it not?

15 A. Okay.

16 Q. You would have a situation there where if you imposed
17 a SSNIP in those circumstances and in fact green wrapper
18 chocolate was a very close competitor of red wrapper
19 chocolate, the real world reaction may well be that
20 green wrapper chocolate moves up almost to the same
21 level of price as the red wrapper chocolate. In other
22 words, you might get a 5 to 10% increase in red wrapper
23 chocolate and the green wrapper chocolate moved up to
24 perhaps 9% or 9.9%. Is that correct? That is possible.

25 A. That is possible, yes.

1 Q. At that point, if you were carrying out the SSNIP, you
2 would be asking about diversion at a 0.1% difference in
3 price between the two products, would you not?

4 A. No, hang about, so the SSNIP you want to say is
5 a hypothetical monopolist raises its price, but you now
6 want to take account of the market reaction.

7 Q. Yes.

8 A. Okay, fine, but what we are trying to understand
9 there -- I mean, that is only going to narrow your
10 market definition by doing that because that is only
11 going to give the firm raising its price more market
12 power.

13 Q. Yes, and that will be a false positive, would it not,
14 because --

15 A. But here, that is a world in which you are trying to
16 understand diversion that could occur between products
17 that are independently priced. Here, on the consumer
18 side, there is no possibility of that diversion, and it
19 makes no sense therefore to ask that question about it.

20 Q. Let us just stick with the hypothetical. The point I am
21 making is if your approach of saying what actually
22 happens to the other focal -- the non-focal product
23 prices when you carry out the SSNIP and you do not hold
24 the relativity is you completely distort the way that
25 the SSNIP operates, and I am giving you an example where

1 there is no legal connection between the two, so you
2 would end up doing the SSNIP on a 0.1% price difference
3 diversion, and that would be totally misleading in terms
4 of the operation of the SSNIP, would it not, because if
5 at 10% people would switch in droves from red to green,
6 actually what that is telling you is that they are
7 inordinately close substitutes and should be part of the
8 market?

9 A. Yes, I disagree with your conclusion there. You are
10 right that if the price rises 10% and that would lead to
11 lots of people switching, that tells you they are close
12 competitors, okay, and, therefore, you want to think
13 about that competitive constraint. But here we are in
14 a world where that competitive constraint has just been
15 removed, so I am afraid your analogy is not a good
16 analogy.

17 Q. The difference between the example I am giving and the
18 one you are relying upon is that in the one you are
19 relying upon there are a series of agreements in place
20 and in the example I am giving I am just talking about
21 a market reaction, and you are saying in a market
22 reaction case that is not what you do, and you are
23 absolutely right, but you are saying there is
24 a difference when there are agreements in place, are you
25 not?

1 A. No. So the purpose of it is to understand where people
2 would divert, if there was this price difference. So
3 you can understand where competitive constraint comes
4 from. You are absolutely right that in reality actually
5 close competitors will often follow each other up,
6 absolutely, but we are trying to understand where that
7 competitive constraint comes from.

8 Now, here, we are also trying to understand where
9 the competitive constraint comes from on PCWs, and that
10 competitive constraint does not come from the ability of
11 consumers to divert in response to a relative price
12 change. So you will be taking into account a constraint
13 that in reality does not exist.

14 Q. Let us move backwards. Let us assume there are no
15 narrow MFNs here but it turns out that as a matter of
16 economics it is much better for HIPs actually just not
17 to undercut PCWs, which is not an outlandish proposition
18 because, for instance, it may be that the PCW's
19 investment in advertising and so on is so great that it
20 is just much better for the HIPs always to price at the
21 same level.

22 So in practice, you have a market where you have an
23 identical outcome to the situation with a narrow MFN.
24 Do you include that market reaction or not in a SSNIP,
25 because in practice there is no constraint from the HIPs

1 there, is there?

2 A. Yes, so you are not including that market reaction

3 because you are trying to understand what the

4 competitive constraints are, and in that case what you

5 would show, in your hypothetical case, is, you know,

6 your two chocolate bars, your A and B, you would show if

7 A raised its price and B did not raise its price, that

8 would be unprofitable, and that would tell you they are

9 close competitors, and that might then be borne out by

10 the fact that, yes, they are close competitors, so when

11 A raised its price so did B because the competitive

12 constraint on B has been relaxed by A raising its price,

13 so it raises its price. That is all about identifying

14 competitive constraints.

15 What I think Mr Beard wants us to do by ignoring the

16 narrow MFNs is to actually add in a competitive

17 constraint that we know does not exist. I do not see

18 how that helps us to think about the competitive

19 constraints that PCWs face and, therefore, I do not see

20 how that helps us with market definition.

21 Q. You did not deal with the situation that I articulated

22 which is without narrow MFNs the same market outcome, so

23 you have no practical competitive constraint by dint of

24 just the situation of the economics. When you do the

25 SSNIP in those circumstances, do you make the assumption

1 that when you impose a 10% or 5% SSNIP on the focal
2 product, the PCW products, do you assume in those
3 circumstances that the HIPs all follow up because in
4 practice that is the way the economics would work and
5 therefore they would follow them and not operate as
6 a competitive constraint, so would you treat them as
7 moving up 10%, will you treat them as staying at zero
8 and maintaining a relative price differential?

9 A. Obviously in the absence of narrow MFNs you would carry
10 out the standard SSNIP, so you will assume no movement
11 in the prices charged in the direct channel, and you
12 would then think about substitution.

13 Q. Right.

14 A. It is not about the market outcome here. That is to
15 tell you about the competitive constraints. So that
16 tells you something about the behaviour of or the
17 pricing power of our PCWs in that case would be to some
18 extent constrained by the direct channel. That
19 constraint is removed by narrow MFNs.

20 Q. I am putting a hypothetical to you where the reaction of
21 the HIPs is identical to the outcome of the narrow MFN.
22 They will always follow because of the economics. There
23 are no narrow MFNs, and you are saying in that case you
24 do retain the differential, but in the narrow MFN case
25 even though the market position is the same you do not.

1 A. Yes, because you are misunderstanding the whole purpose
2 here of the SSNIP test. I think you now think the
3 purpose of the SSNIP test is to work out actually what
4 the market outcome will be. No, it is not. The purpose
5 of the SSNIP test is to understand what the competitive
6 constraints are. You then, once you have understood
7 those competitive constraints, can discuss, well, what
8 the conduct might be. In Mr Beard's hypothetical merger
9 it seems to be that product B decides to follow up A
10 after the merger, that might be a concern, but it is all
11 about -- it is not understanding market outcomes. It is
12 about understanding at this point the competitive
13 constraints.

14 Mr Beard's example shows that B is a substitute for
15 A, imposes a competitive constraint. In this case, to
16 some extent I am sure that will be true. In the absence
17 of narrow MFNs, direct will impose some constraint on
18 PCW prices and we can have an argument about how great
19 that is, I am sure we will later, but that constraint is
20 removed by the narrow MFNs. So when we are thinking
21 about competitive constraints and a market definition
22 that reflects competitive constraints, we have to take
23 into account narrow MFNs because they remove
24 a competitive constraint.

25 Q. What if the narrow MFNs were not lawful, would that

- 1 change your analysis?
- 2 A. Well, they still remove a competitive constraint.
- 3 Q. Right. So if they are not lawful, you would still take
4 them into account?
- 5 A. If I am trying to understand the market power of the
6 PCWs with those narrow MFNs in place, yes, I would. If
7 someone then says oh well they are not lawful, they
8 should be got rid of then the analysis would change,
9 yes. They are got rid of, now there is a constraint
10 from direct.
- 11 Q. Let me just test this. I am not saying for a moment
12 that narrow MFNs were unlawful at all, but let us just
13 test this. If you do an analysis and you assume the
14 narrow MFNs are lawful at the moment and reach
15 a conclusion that the PCWs and the HIPs do not compete
16 but then in two months' time you conduct an
17 investigation and decide the narrow MFNs are unlawful,
18 then in those circumstances you would reach a completely
19 different conclusion in relation to the definition of
20 this market?
- 21 A. Well -- no, I am not -- if the narrow MFNs were removed,
22 then we might get a different definition, okay, that is
23 to be discussed. It is not clear to me from the
24 evidence we would, it is really not clear, but we might
25 get. But, I mean, I do not think that is relevant to

1 the competitive constraint faced by the PCWs three years
2 ago when they actually faced -- sorry, when narrow MFNs
3 were actually in place.

4 Q. Just let me read your answer. (Pause)

5 I do not think the time matters for the purposes of
6 this hypothetical. What I am asking you is you are
7 presuming that narrow MFNs are lawful and therefore you
8 take them into account in carrying out the SSNIP and you
9 undermine the orthodox maintenance of relativity of
10 prices by reference to them. You then say if they are
11 not lawful, then in those circumstances I would take
12 them out and I would do the market definition completely
13 differently. That is true, is it not?

14 A. No, no. I mean, that is not true. Whether they are
15 lawful or not is not relevant, and the question of in
16 a situation in which they are in place do they remove
17 a potential competitive constraint on PCWs? Yes, they
18 do. I am just dealing with the facts. They were in
19 place. If they were taken away and they were not in
20 place, we might get a different answer, of course,
21 market definition is dependent on the facts. Whether it
22 is lawful or not is not relevant to thinking about
23 competitive constraints that firms face at that point.

24 Q. I see. So if you considered wide MFNs and narrow MFNs
25 together in this enquiry, you would have done the market

1 definition completely differently?

2 A. I mean, that is not the case we have, so I would want to
3 think that through.

4 Q. We have had evidence --

5 A. It would still remain the case that the competition on
6 PCWs is reduced by the presence of narrow MFNs and that
7 would remain a very relevant factor because that would
8 remain key to the market power of the PCWs. So I think
9 the answer to your question is, no, I disagree with you.

10 Q. We have very clear evidence from the witness called on
11 behalf of the CMA that the HIPs are seen as close
12 competitors to the PCWs. You have seen that evidence?

13 A. I have not seen the evidence that was given, the
14 transcript. I would like to see that.

15 Q. Let us go to it. Is it possible to bring up transcript
16 {Day4/13:20}.

17 I am sorry. If I may, may I just speak to the EPE
18 operator?

19 THE PRESIDENT: Of course. You want to ascertain whether we
20 were in private or not, do you not?

21 MR BEARD: Yes. Can you tell whether we were in private
22 during that part of the --

23 THE EPE OPERATOR: No.

24 MR BEARD: It is fine, you can keep it up on the screen,
25 I am sorry. The only people with screens, it is whether

1 or not I read it out, I am sorry.

2 THE PRESIDENT: Let us see if we can do it without reading
3 it out.

4 MR BEARD: Yes, I am just going to ask you to read, if
5 I may, from line -- this is something to do with
6 investment, but if you pick it up at line 20 and read
7 down, and then if you ask the EPE operator to turn over
8 when you are ready. (Pause)

9 You can stop just over the page on line 2.

10 So what is being said there by her --

11 A. Sorry, by who, sorry?

12 Q. It is by -- her name was Ms Glasgow. She was the
13 witness for the CMA from MoneySupermarket.

14 A. Okay.

15 Q. What she is making very clear there is the notion that
16 the insurers are her close competitors, you see that?

17 A. Yes, that is what she says.

18 Q. Just to be clear, what we are asking ourselves is
19 whether or not for the purposes of market definition we
20 should think about these people as competitors. You
21 have talked about competitive constraints. It is
22 competitors that can exercise competitive constraints,
23 is it not?

24 A. Yes.

25 Q. The problem you have with your market definition is

1 actually a conceptual one, is it not, because if you are
2 right that you include narrow MFNs in the market so you
3 do not get a positive SSNIP on your approach, and so you
4 end up defining the market separately from direct
5 channel insurers, what you are concluding is that direct
6 channel insurers are not close competitors to PCWs for
7 these purposes. That is correct, is it not?

8 A. Well, what I am concluding is they do not impose
9 a competitive constraint on the PCWs because of the
10 narrow MFN. In the absence of the narrow MFN, they
11 would be competing, we can argue about how closely.

12 Q. If they were not to be -- if you have defined the
13 markets in this way so you have got a PCW market, an
14 insurer market, what you would end up with, strangely
15 enough, is a conclusion that the two markets were
16 separate and then hypothetically in those circumstances
17 you would not actually need the narrow MFN. So it would
18 be a slightly perverse outcome, would it not?

19 A. Sorry, I do not understand. What are the two markets
20 there?

21 Q. You would have on your basis a PCW services market and
22 a direct online services market, would you not?

23 A. No, on my basis I have a PCW services market and that is
24 all I care about, and I have no view on the direct
25 services market, who may well face a competitive

1 constraint from PCWs in that direction because of course
2 PCWs are not bound by the MFNs, narrow MFNs, in the same
3 way, but it is not the -- we are not making -- I am not
4 making any claims about that market, I am merely
5 focusing on the market that matters to this case.

6 Q. The reality is it would have been better to follow the
7 orthodox SSNIP approach, maintain the relativities and
8 then consider the narrow MFNs when you came to effects
9 analysis, would it not?

10 A. No, and you say it is the orthodox approach. The
11 orthodox approach is you put, or the approach in, these
12 are the 1992 guidelines, but the language is the same in
13 the European Commission 1997 guidelines, is about -- you
14 know, a ceteris paribus, you leave everything else the
15 same, and as I have explained we do not have that
16 luxury. We cannot leave everything else the same. We
17 either have to have narrow MFNs, no relative price
18 change, or we get rid of narrow MFNs to allow relative
19 price change, but either way we have to break that
20 ceteris paribus assumption. So we do it in a way that
21 actually sheds light on the issue of concern.

22 Q. I suggest to you you are not breaking the ceteris
23 paribus assumption because the ceteris paribus
24 assumption is about maintaining a relative difference in
25 pricing because you are dealing with a price relativity

1 test.

2 A. I do not think that is true because we would normally --
3 you assume -- I mean, I think, going back to the 1992
4 guidelines, it said terms of trade, but either way
5 I think we have to break the ceteris paribus assumption,
6 I think we have to make market definition useful for
7 what we actually care about, and I am still a bit --
8 I am still a bit bemused that we are having this
9 discussion because it clearly to my mind makes no sense
10 to assume a competitive constraint that contractually
11 has been removed. It makes no sense to me.

12 Q. I think I am going to move on.

13 THE PRESIDENT: Since you are, Mr Beard, perhaps you will
14 permit an interruption on this topic.

15 MR BEARD: Yes, of course.

16 THE PRESIDENT: I am really trying to get a grip on
17 methodology in terms of how one approaches these
18 questions without any kind of assumption as to where one
19 is going. In other words, what one does when one does
20 not know actually the parameters of the question that
21 one is seeking to answer. So you know something is
22 deserving of investigation, but you do not know anything
23 more than that, and of course that is not this case, you
24 have reached a decision and you are defending the
25 outcome of the decision.

1 A. It was a position we were in in the past.

2 THE PRESIDENT: It was the position at the beginning.

3 A. Yes.

4 THE PRESIDENT: But of course we are now at the end point,
5 and I entirely understand that what you are articulating
6 is why the decision has been reached in the terms it has
7 been with the outcome that it has, so in a sense your
8 mindset is after all the work has been done, so I am
9 trying to dial back to a situation where you have not
10 made the decision, you are just trying to investigate
11 what is going on. So that is where I am at.

12 What we have here -- and it might be worth bringing
13 up for the sake of tedium diagram 2 that is {F/718/2},
14 and you have it on paper as well.

15 Terminology is always the enemy of clarity, but I am
16 going to say that we have two markets here, the yellow
17 one and the green one, and that is the terminology I am
18 going to use. I am not expecting you to agree or
19 disagree. That is just the language I am using. We
20 have two markets. What matters is that we have two
21 markets and a linkage.

22 Now, it seems to me that it would be sensible, given
23 that one is groping one's way towards an answer that one
24 does not know what it is, to start by defining each
25 market using a SSNIP but also to define the nature of

1 the linkage between those markets because it affects the
2 way those markets operate. In other words, actually the
3 exercise one has is an altogether more sophisticated or
4 difficult one or complex one than one would have in an
5 ordinary market, because you have my two markets and you
6 have a thing that one never really articulates which is
7 the linkage between the two.

8 Would you say that is a sort of analysis that you
9 can recognise at least or understand where I am coming
10 from?

11 A. Well, I can understand what you are saying. I very
12 significantly disagree with the approach.

13 THE PRESIDENT: What I will do is I will set out the
14 approach and then I will ask you to articulate the
15 disagreement because I think that would assist me.

16 If one were to apply a SSNIP on both sides of the
17 market in the heterodox way that I think Dr Niels and
18 you would say of saying let us increase the price of the
19 quote from 0 to 50p, what would happen? Now, I think it
20 is common ground using common sense that what would
21 happen is that there would be a massive shift away from
22 price comparison websites to the alternative channels of
23 placing business because the free quotation really does
24 matter. So you may say that the question is obvious or
25 does not need asking, but that it seems to me would be

1 the likely result of the SSNIP being applied on the
2 yellow side of the market to the price of the price
3 comparison service.

4 A. Well, I mean, I do not really have a view as to whether
5 if you charge people 50p to use -- to make a purchase on
6 a price comparison website and on all PCWs, all 50p,
7 whether they would switch or not. I do not know.
8 I mean, they might do, they might not do. It is
9 obviously an empirical matter to be considered in your
10 world.

11 THE PRESIDENT: Fair enough. It is something that you have
12 not explored so you do not know the answer to it.

13 A. No.

14 THE PRESIDENT: So let us proceed on the basis of
15 hypothetically speaking the answer is that there would
16 be a massive shift away.

17 A. Okay.

18 THE PRESIDENT: What you would also be doing is articulating
19 the linkages as I call it, and one of those links would
20 be that in this particular market one is gaining
21 commission which is the name of the game for the price
22 comparator, you are trying to maximise your commission,
23 and the way you do that is by maximising eyeballs on
24 your website and click-throughs in respect of quotes.
25 So what you want is you want a very large number of

1 eyeballs and ideally people who are going to go through
2 and click and buy insurance because that way is where
3 you get your commission.

4 So one of the linkages one might want to articulate,
5 and I think it has been articulated in the Decision but
6 we can come to that in submissions, but one of the
7 linkages would be that there is a very real purpose in
8 pricing at zero because you are trying to attract people
9 through the zero price, they are getting something for
10 nothing they think, by maximising your revenues on the
11 other side and that is something which needs to be
12 articulated. It is nothing to do with market
13 definition; it is everything to do with the link between
14 the two markets. Do you follow?

15 A. Well, I understand what you are saying, and I agree I do
16 not think it is anything to do with market definition,
17 as you say.

18 THE PRESIDENT: My analytical question of approach is why
19 does one not do, for what it is worth, the SSNIP on the
20 yellow side of the market, understand therefore that
21 there is hypothetically speaking this extreme
22 sensitivity to price on the part of the buyers of price
23 comparison services, which enables you to understand the
24 nature of the constraints in the round that operate on
25 the price comparators. Because one of the functions

1 I think of that is we absolutely cannot shift our price
2 because horrible things will happen to our market on the
3 yellow side. But although it may be that that outcome
4 of the SSNIP, if that is indeed the outcome, is affected
5 by the overall nature of the market, is it not worth
6 knowing that the actual consumers are extremely
7 sensitive to price?

8 I say that irrespective of the question that one
9 comes to later on which is the way in which price is
10 adjusted which is, as you say, through what I call the
11 indirect SSNIP, through the articulation of the
12 increased commission into what is quoted on the website.
13 I see that as a separate question, but why is it not
14 important to know this constraint on the price
15 comparators?

16 A. Because it does not help us answer the question that we
17 need to answer which is, you know, we are trying to
18 understand whether wide MFNs might be anti-competitive.
19 If they are anti-competitive, we need to understand
20 within what market is the market power being exercised
21 by the PCWs that makes those wide MFNs anti-competitive.
22 So that is what we have done, we have looked at
23 commissions, that is the effect of the wide MFNs on --
24 relaxes competition in commissions, so we look at what
25 the constraints are on commission charges, and as part

1 of that of course we care about the extent to which
2 there is a constraint imposed on PCW commission charges
3 by consumers being price sensitive.

4 However, in this world, because of the narrow MFNs,
5 that price sensitivity, that substitution effect, has
6 been removed. There will not be substitution to direct
7 channels. So it does not help us to understand the
8 competitive constraints or the market power of the PCWs
9 to understand what might happen if the narrow MFNs were
10 not in place.

11 There is a separate question about if the PCWs
12 raised commission charges they might lose HIPs, they
13 might lose insurers who go through direct channel and
14 then there is another question about all those other
15 insurers, the renewal insurers. So there is a question
16 there why narrow MFNs do not affect them. So you do
17 want to think about that substitutability to them, which
18 we do in the Decision.

19 THE PRESIDENT: Dr Niels in his approach tries to have
20 a variant on the SSNIP, not what I am still going to
21 call, I am sorry, the indirect SSNIP that you have, but
22 he has a SSNIP that is conditioned not on the price that
23 the buyers of price comparison services have but one
24 which is in some way articulated on quality which is --
25 I am sure he will not take it unkindly if I say this --

1 a rather slippery concept because quality is an
2 intrinsically subjective thing. But is one of the
3 benefits of assessing the sensitivity to price a measure
4 of what the consumers are expecting to get in terms of
5 the quality of the price comparison services? In other
6 words, if contrary to my hypothesis you were to say it
7 is £5 a quote and the price comparison buyers do not
8 move, then something clearly rather interesting is going
9 on in terms of the value of the price comparison that is
10 being offered.

11 A. Yes, so you are saying if you just increase the cost to
12 consumers by £5 and nobody switches, that will tell you
13 something about substitutability, yes.

14 THE PRESIDENT: Well, yes. If there were switches. Frankly
15 my hypothesis is if you put 50p on the quote there will
16 be massive switches. I am asking actually the converse
17 question. Hypothetically speaking suppose you say it
18 is £5 a quote and there were not switches, that would
19 tell you, I would suggest, a great deal about the nature
20 of the offering of the price comparison service to the
21 buyer of that service.

22 A. It would tell you something about substitutability, but
23 we look at substitutability, so I am not sure it is
24 adding information to what we already have. So it would
25 look at substitutability under a different charging

1 mechanism, so it is not directly relevant, but it tells
2 us something, I agree. But I am not sure it is not
3 something that we have not already captured. Well, no,
4 I will rephrase that. It is something that I think we
5 have already captured, that substitutability on the
6 consumer side.

7 MR BEARD: Could I just ask -- oh sorry, sir.

8 THE PRESIDENT: Save that the SSNIP I am hypothesising,
9 increasing price to the quotation, will not be
10 constrained by the narrow or indeed the wide
11 most-favoured-nation clauses, they simply cannot be
12 relevant to an increase in quotation price.

13 A. No, okay, that is true. So in your -- I am not quite
14 sure where this is going, but in your world suppose they
15 imposed £5 and nobody switches. Then in that world that
16 is sort of suggesting there is not a competitive
17 constraint from direct and say actually narrow MFNs do
18 not really have an effect. Okay, but that is entirely
19 a hypothesis. What we do know is that narrow MFNs
20 remove that competitive constraint.

21 THE PRESIDENT: Yes, thank you Dr Walker. To be clear, I am
22 not going anywhere. I am just trying to understand the
23 methodology on where we are going in terms of these very
24 difficult markets, so thank you very much.

25 MR BEARD: I am conscious of the time. I was going to move

1 on to another topic, so now may be a convenient moment.

2 I should say I am well behind time in terms of the
3 allocation. I indicated to Dr Walker earlier that
4 I would necessarily be crossing over into the afternoon
5 so it will not come as a shock although not a pleasant
6 one to Dr Walker.

7 I will try and speed things up this afternoon.
8 There is one issue which arises which is in relation to
9 Professor Ulph's diagrams and so on. I think given
10 time, and I confess my limited algebraic skills, I think
11 it is unlikely that I am going to increase the
12 efficiency of this process by asking questions about
13 that set of equations and thinking, and in those
14 circumstances I thought it might be sensible to just
15 alert Professor Ulph that it may be better if he asks
16 his questions in relation to that in due course when we
17 come on to the critical loss analysis section if he is
18 content with that.

19 THE PRESIDENT: I am very grateful for that.

20 PROF ULPH: Yes, I am happy to do that.

21 MR BEARD: I am most grateful, sir.

22 THE PRESIDENT: That is very helpful. We had discussed it.

23 What we will do is sweep up any points that we feel need
24 to be covered at the end and this will therefore be one
25 of those.

1 MR BEARD: Certainly. I can pause when I get to the
2 critical loss analysis material. It might actually be
3 sensible if they are asked then, but that is entirely up
4 to the Tribunal.

5 THE PRESIDENT: I am grateful.

6 MR BEARD: I will pause, offer the opportunity. If you do
7 not want to do that, that is absolutely fine.

8 THE PRESIDENT: That would be very helpful Mr Beard.

9 In terms of timing, Dr Walker provided you are
10 feeling at the top of your game and not tired in any
11 way, I am minded to give you and Mr Beard as much time
12 as you want. I do not want either of you to feel
13 constrained by time in terms of the answers. Speaking
14 for myself I think more is better than less. I am not
15 sure what I make of it all, but that is the point of
16 evidence; it is to provide us with the material with
17 which in due course to decide, so if there is something
18 you want to say or something that Mr Beard wants to ask
19 I am inclined to let you both run because I am finding
20 this interesting and helpful. I say that by way of an
21 indication Mr Beard to you, and we will sort out the
22 timetabling issues later on, but I do not want either of
23 you to worry about the clock.

24 MR BEARD: I will try and move things along in any event --

25 THE PRESIDENT: No, of course.

1 MR BEARD: -- because I am conscious that I have moved
2 beyond the allocation notwithstanding, Mr Chairman, your
3 kind indication.

4 THE PRESIDENT: Thank you very much. We will rise until
5 2.00.

6 (1.05 pm)

7 (The luncheon adjournment)

8 (2.04 pm)

9 THE PRESIDENT: Mr Beard.

10 MR BEARD: I am grateful, thank you.

11 MS LUCAS: Mr Beard, I had a couple of questions arising
12 from this morning's cross-examination.

13 MR BEARD: Please.

14 MS LUCAS: Dr Walker, I wanted to ask you about narrow MFNs
15 a bit more, and I think your SSNIP, you assumed that
16 they apply, you cannot discount their existence, so am
17 I to take it that your assumption is that all HIPs have
18 narrow MFNs?

19 A. Well, nearly all. 95%.

20 Q. So how does your SSNIP take account of the fact that
21 some of the HIPs do not have narrow MFNs?

22 A. So in theory you are right that the hypothetical
23 monopolist raising commissions could lead to a price
24 differential for those HIPs and therefore some
25 substitution from PCWs to those HIPs. As I think we

1 discussed yesterday, those HIPs, I think there are four
2 of them, they do not have narrow MFNs with all of the
3 PCWs, but they still have narrow MFNs with some of the
4 PCWs. I am not sure if there is any HIP who quotes on
5 PCWs that has no narrow MFNs, I may be wrong about that,
6 but those who have some narrow MFNs will still be
7 affected by the narrow MFN.

8 MS LUCAS: So that is because it is the hypothetical
9 monopolist, you assume that they all come under one
10 head?

11 A. Yes.

12 MS LUCAS: So we have the direct insurers who sell directly.
13 They would still fall outside your SSNIP test in the
14 terms of the effect of the outstanding --

15 A. Yes, a small number, yes.

16 MS LUCAS: Then the other question I have is a slightly
17 different one. I do not know if you gave any thought to
18 whether if a contract between a HIP and a PCW had
19 a narrow MFN how long the term of that contract was. It
20 may be you will tell me it is not particularly relevant
21 in this instance, but it just occurred to me if you had
22 for example a 12-month contract that had three months
23 left to run, would that have any impacts on how you
24 would assess the constraint and the MFN?

25 A. Okay, we did not think about that, I do not think we

1 needed to think about that because the MFNs -- because
2 we were looking at a past period and the narrow MFNs
3 were in place throughout that period. In a world in
4 which that had not been the case, so after six months
5 for instance all the narrow MFNs died, well then there
6 would suddenly be an increased competitive constraint on
7 the PCWs, and you would want to take that into account.
8 We do not need to because that was not the factual
9 situation.

10 MS LUCAS: So you would assume that there would be at least
11 a chance that it could be negotiated away for any new
12 contract and you would not assume it would continue in
13 effect?

14 A. We do not have to make any assumption because we are
15 looking backwards. If we are in a merger and we are
16 looking forwards we might have to think about these
17 questions.

18 MS LUCAS: Thank you.

19 MR BEARD: I was going to pick up one or two related points.
20 I might as well deal with them now following on.

21 In relation to major brands not on PCWs at all and
22 therefore not subject to narrow MFNs, you accept that
23 the Direct Line brand of DLG is not on PCWs and not
24 subject to any narrow MFN?

25 A. Yes.

- 1 Q. That is a very significant brand?
- 2 A. It is a significant brand, yes.
- 3 Q. The Aviva brand is not on PCWs and therefore not subject
4 to a narrow MFN?
- 5 A. Okay.
- 6 Q. You do not know, but you will accept that?
- 7 A. The Direct Line one I am absolutely aware of.
- 8 Q. Aviva has other brands on PCWs but not --
- 9 A. As does Direct Line, yes.
- 10 Q. NFU Mutual no brands at all on PCWs.
- 11 A. Okay.
- 12 Q. Hiscox, another major insurer, not on PCWs at all. So
13 just to be clear, your narrow MFN assumption is extended
14 to all of those, is it not?
- 15 A. If you are not bound by a narrow MFN, then you would
16 expect for those insurers potentially the SSNIP test
17 would suggest a price differential.
- 18 Q. Just so I understand what you are saying, in relation to
19 those insurers when you carried out the SSNIP did you or
20 did you not apply an assumption of a narrow MFN applying
21 to them?
- 22 A. I mean, I presume we assume not because they do have the
23 ability to have a price differential.
- 24 Q. So you assume you assume not.
- 25 A. I have to say I have not thought about it before you

1 mention it. I would have to go back and look.

2 Q. If and insofar as a SSNIP were to refer to narrow MFNs
3 applying to all insurers, your SSNIP would be in error,
4 would that be right?

5 A. I think you would look at the -- I mean, the whole logic
6 of what we discussed this morning is that you will look
7 at the actual competitive constraints. So if you have
8 an insurer that does not have a narrow MFN in place,
9 then it is in a position whereby it can have a price
10 differential.

11 Q. When you carry out the SSNIP, your SSNIP on commissions,
12 what you need to do is assume narrow MFN covered all of
13 the direct online insurers that had narrow MFNs but not
14 those that did not have narrow MFNs, and you would have
15 to look at the diversion to those non-narrow MFN
16 insurers?

17 MS DEMETRIOU: Sir, I am really sorry to rise, but this
18 point is dealt with in the Decision and I think it would
19 only be fair of Mr Beard to take Dr Walker to it because
20 it is not a memory test.

21 THE PRESIDENT: No, of course it is not.

22 MS DEMETRIOU: Could we go to {A/1/104}, paragraphs 5.89 to
23 5.90, and could Dr Walker please just have the
24 opportunity to read those. There may be other parts,
25 but those are the paragraphs that come to mind.

1 THE PRESIDENT: No, that is entirely fair, Ms Demetriou. Do
2 you want to read those, Dr Walker. (Pause)

3 A. Should I answer now?

4 MR BEARD: Yes, please.

5 A. Okay, so that is the evidence we also discussed briefly
6 yesterday that for those insurers who are not on the
7 online channel, actually they are targeting less price
8 sensitive consumers, so whilst they are not covered by
9 narrow MFN we expect them to not have very much
10 competitive constraint on PCWs, which was as I say the
11 point made in Professor Ulph's question yesterday.

12 Q. Your point is that those are not significant competitive
13 constraints because on the basis of the evidence that is
14 relied on here, which you have not reviewed

15 I understand --

16 A. No, no, I have. This is from the Decision. This is
17 from the market definition chapter.

18 Q. But did you look at the underlying evidence?

19 A. No.

20 Q. I am not going to take you to that, but on the basis of
21 that evidence you say these large brands are brands that
22 were targeting non-price sensitive or less price
23 sensitive customers?

24 A. Yes, so I mean Direct Line, it is Churchill and whoever
25 the other one is, are targeting price sensitive segment

1 and then Direct Line the less price sensitive.

2 Q. We will come back to the evidence in due course. I am
3 going to move on to a different topic if I may.

4 I just want to look at delisting again, if I may.

5 Your statement -- do you have it in front of you,
6 paragraph 62, so for the EPE it is {A/8/16}. It will
7 come up on the screen.

8 Would you mind reading 62?

9 A. Yes, if you could flick to the next page, please.

10 Q. Now here you are saying first of all that full delisting
11 would not be viable. We do not accept the CMA's
12 evidential analysis on that, but I want to focus on
13 partial delisting here. In here you say:

14 "While delisting partially rather than fully would
15 likely reduce the costs of replicating the lost sales,
16 any benefits ... would be reduced in {A/8/17}
17 proportion. It is therefore difficult to see -- and
18 Ms Ralston has made no attempt to explain -- why this
19 would not make partial delisting an equally unviable
20 response ..."

21 What you are saying here is I can essentially treat
22 partial delisting as akin to full delisting. It is not
23 a viable response?

24 A. Well, I am not treating it as akin, I mean it is partial
25 versus full, but I am making the point that the costs

1 and benefits would seem to be broadly similar, and if
2 they are not, if the cost outweighs the benefit for full
3 it was not clear to me why they would not also outweigh
4 it for partial.

5 Q. So let us just -- you refer to paragraph 5.25 in the
6 Decision. If we could just go to that, {A/1/82}. 5.25,
7 and here you see it says:

8 "The CMA's analysis has, therefore ..."

9 This is -- I do not mind if you want to read the
10 earlier paragraph, but I do not think it is necessary.

11 "... focussed on the commission fees charged by the
12 PCWs to providers when applying the hypothetical
13 monopolist test. The CMA has taken into account the
14 constraints that PCWs face on both sides of the market,
15 which means that a commission fee increase across all
16 PCWs may be rendered unprofitable ..."

17 Then you have got:

18 "Providers. In response to common commission fee
19 increase across all PCWs, providers might decide to stop
20 or reduce their use of PCWs as a channel, especially if
21 such an increase were to make the PCW channel less
22 profitable than other channels for attracting and
23 selling to some or all consumers ..."

24 That is what is called the direct impact.

25 A. Yes.

- 1 Q. That is the bit that you are referring to in your
2 witness statement, is it?
- 3 A. Well, that is the effect, yes.
- 4 Q. But you only refer to Decision paragraph 5.25, so
5 presumably this is the right paragraph I have gone to.
- 6 A. Yes, this is the right paragraph.
- 7 Q. So the only other thing in 5.25, because then it goes on
8 and talks about consumers which is obviously different
9 in this context, but then the only other material is in
10 footnote 250 which is:
- 11 "As noted by BGL, providers could, in principle,
12 also react to commission fee increases by reducing the
13 number of products they offer on PCWs ... or by
14 withdrawing certain of their brands from PCWs (i.e.
15 'Partially delist') ..."
- 16 Then the Decision goes on to refer to two HIPs
17 there. Now, I will come back to those two in a second.
- 18 We know that you did not actually ask the insurers
19 about how they would react to an increase in commissions
20 across all the PCWs, and we know that you did not
21 specifically ask about quotability at all, but actually
22 you did have evidence on the importance of quotability
23 which is a synonym for partial listing or partial
24 delisting, did you not, from MoneySupermarket?
- 25 A. Okay, remind me.

1 Q. Well, what you had was consideration by MoneySupermarket
2 of the high importance of quotability in relation to
3 ensuring that as a PCW you provided a competitive
4 offering. Do you recall that?

5 A. Yes.

6 Q. What MoneySupermarket were saying was that quotability
7 is critical to making a PCW an effective competitor and
8 if insurers did not like what a PCW was offering in
9 terms of standard of service, the way in which things
10 were presented, question sets and so on, then they could
11 quote less, and that was actually the problem that MSM
12 had encountered, was it not?

13 A. Again, you would have to point me to that piece of
14 evidence.

15 Q. Let us then go -- it is probably easiest just to go to
16 the transcript. I think it is at page 11 of the private
17 section on Day 4. I do not know whether or not the EPE
18 can provide that.

19 MS DEMETRIOU: Can I just double-check because Mr Beard --
20 the question Mr Beard has put relates to what evidence
21 was before the CMA at the time of its investigation, but
22 what he is now proposing to do is go to the transcript
23 of the evidence that was given, so I am not quite clear
24 what the direction -- if the question is going to be
25 about what was before the CMA, then it ought to be

1 a reference to the Decision.

2 THE PRESIDENT: We will see where we go. I am not going to
3 confine Mr Beard --

4 MR BEARD: I am only going to the transcript because it
5 summarises material that was provided in various
6 interviews by people from MSM. All of that material was
7 before the CMA before it took its decision, and the fact
8 that it is compressed and dealt with here is referring
9 back to material that was all before the CMA.

10 THE PRESIDENT: Dr Walker, you have heard the debate. If
11 you want to see the underlying material after you have
12 been shown the synthesis, then you obviously say so.

13 A. Sure.

14 THE PRESIDENT: We will see where we go, but let us start
15 with the synthesis, recognising that it is a synthesis
16 created after the event.

17 MR BEARD: Thank you very much for calling up {Day4/11:1}.
18 Unfortunately I think that is the open transcript. Do
19 you have a private transcript? No.

20 THE PRESIDENT: It may be that you will have to take the
21 witness either to the underlying material or a sample of
22 it or we can perhaps produce the printed page.

23 MR BEARD: Let me see if those behind me actually have
24 a clean printed version.

25 THE PRESIDENT: We will see what we can do as well. It is

1 Day 4, which page?

2 MR BEARD: The difficulty I have is that I can ask questions
3 that go to the same point which are broadly referring to
4 underlying material, but I am pretty confident that
5 those would be confidential questions.

6 THE PRESIDENT: Yes, I understand. One moment. (Pause)

7 I have it here. What I will do is I will pass this
8 folder. We will give the witness an unmarked copy.

9 MR BEARD: I am very grateful.

10 THE PRESIDENT: I hope we can proceed in that way.

11 MR BEARD: Just to give you context so that you understand,
12 Dr Walker, I was asking the witness questions about --

13 THE PRESIDENT: Let us make sure you are on the right page.
14 A. I am not on any page at the moment.

15 THE PRESIDENT: Page 11 of the private transcript which
16 I think has at the top of the page an answer saying,
17 "That is correct"?

18 A. Yes, I have it.

19 MR BEARD: What I was doing was I was asking this witness
20 about the strategy that had been set out in documents
21 that were provided to you by MSM. The reason I was
22 going to the transcript is just because this summarises
23 the position. The witness was Ms Glasgow from
24 MoneySupermarket.

25 I am not going to read this out because we are in

- 1 public session.
- 2 A. So you want me to read page 11?
- 3 Q. If you would not mind, please, yes. (Pause)
- 4 A. So when do you want me to stop?
- 5 Q. Could you keep going through to line 22 on page 12 or
6 actually to the end of page 12.
- 7 A. Okay. (Pause)
- 8 Q. Could you keep going down to the bottom of page 13 just
9 because it includes various quotes from the
10 contemporaneous documents that CMA had. That was why
11 I was going to the transcript.
- 12 A. (Pause) Yes.
- 13 Q. I am going to try to be cautious about the questions
14 I put because I do not want to trespass on
15 confidentiality, but what is plain from this is that
16 a concern about quotability was a very important dynamic
17 of competition for PCWs. You would accept that?
- 18 A. Well, I accept that is the evidence from this PCW, and
19 that makes sense, quotability is clearly important to
20 them.
- 21 Q. What it shows is also that insurers, if they are not
22 happy with the way a PCW is presenting them or dealing
23 with them, can flex their quotability?
- 24 A. Yes.
- 25 Q. In those circumstances it is also plain that if one of

1 the ways they were not happy about the way a PCW was
2 operating, for instance because it was increasing
3 a commission, in those circumstances they would have
4 a similar power to flex their quotability, would they
5 not?

6 A. They have that option.

7 Q. In those circumstances, PCWs would have to do something
8 in order to restore quotability because otherwise it has
9 a significant impact on their competitiveness. Do you
10 accept that?

11 A. Were quotability to go down on a PCW, it would want to
12 do something to change that.

13 Q. What you see is in practice the significance of
14 quotability, the flexibility of quotability and the
15 ability of insurers as it might be put to partially
16 delist when they are not happy with the quality of what
17 is offered on a PCW, do you not?

18 A. They clearly have the option to partially delist.

19 Q. This was very, very clear evidence about the importance
20 of quotability and as you say the option of insurers to
21 partially delist, and actually what you had seen in this
22 evidence was insurers in fact reducing quotability over
23 the relevant period -- sorry, the relevant period of
24 this evidence. It may have been non -- absolutely
25 coterminous with the relevant period of infringement.

- 1 A. Okay, yes.
- 2 Q. In those circumstances for you to assume, when you had
3 not asked about quotability, that partial delisting was
4 not a significant threat was unfortunate or an omission
5 on the part of the CMA. You would agree?
- 6 A. So the question of relevance here is would we see this
7 behaviour in response to a SSNIP for an increase in
8 commissions, and we have seen increase in commission
9 by -- commissions by particular PCWs where -- and that
10 means of course the HIPs have the option to partially
11 delist at that point, they have the options --
12 particularly if they had the options of the other PCWs,
13 yet we have not seen that happening to any significant
14 extent, so it is very hard to understand why when you
15 had a commission price increase by all the PCWs you
16 would suddenly see firms partially delisting.
- 17 Q. You just said there you had not seen evidence of partial
18 delisting, but what we are actually seeing here is
19 evidence of a reduction in quotability at the relevant
20 time that then had to be fought back against, are we
21 not?
- 22 A. Not in response to changes in commission charges. Maybe
23 I have just misread it, but I did not see --
- 24 Q. No, I agree.
- 25 A. That is of course a question of interest here.

1 Q. But if what you are seeing is a change in quotability
2 because an insurer is not content with what is being
3 offered on a website, a PCW, the fact that what it is
4 not happy about is a commission or the quality of
5 delivery or the investment in advertising does not
6 matter for these purposes, does it? You have accepted
7 that in relation to degradation in quality or increase
8 in price in relation to a website the insurers have the
9 flexibility to reduce quotability, do they not?

10 A. Of course it matters. The question here is about market
11 power from PCWs over commission charges. So what we are
12 interested in, when we are doing a SSNIP test, is what
13 PCWs would do -- sorry, what insurers would do in
14 response to that hypothetical monopoly commission
15 charge.

16 My point is I do not see here and I am not aware of
17 any evidence that commission charges going up has led to
18 partial delisting on a widespread basis, and certainly
19 not enough to defeat a SSNIP, and that is the question
20 of interest.

21 Q. That was a question of interest that you did not ask in
22 any of the Section 26 notices, am I correct?

23 A. For the hypothetical monopolist test we did not, but, as
24 I explained yesterday, because we asked that question
25 for the individual HIPs, we also know the answer for

1 a hypothetical monopolist. Just to go through that
2 logic again --

3 Q. No, I understand the logic. I want to --

4 A. But you just re-asked the question so I am not sure
5 about that.

6 Q. -- test you on your predicate which is whether or not
7 you actually asked the question. There is no reference
8 to quotability in any of your questions in Section 26s,
9 are there?

10 A. You know I have not looked at the documents. I cannot
11 tell you if there is.

12 Q. You are asserting that you asked these questions, but
13 actually --

14 A. Sorry, I thought you were referring to the hypothetical
15 monopolist question.

16 Q. Let us go to the two examples you actually refer to in
17 the footnote. If we could pull up {F/428}, please,
18 paragraph 14. Page {F/428/4}.

19 A. What is this document, please?

20 Q. This document -- let us go back to page {F/428/1} and
21 then you can see, but it is a conversation between --
22 this one I am going to just refer to the code name. It
23 is Tesco Bank. You can read it on the screen, you will
24 see it all, but I am just going to refer to it for
25 transcript purposes as "Tesco Bank", a call between the

1 CMA and Tesco Bank April 2018.

2 If we could then go down to paragraph 14 which
3 I think is the paragraph that is relied upon in the
4 footnote in the Decision {F/428/4}:

5 "AR [from CMA] asked [Tesco Bank] for more detail
6 about how [they] might resist a commission increase by
7 tactically reducing its footprint ..."

8 So this is the right question being asked.

9 A. Okay, let me read the paragraph, please. (Pause)

10 Okay.

11 Q. So Tesco Bank says -- is asked this question:

12 "[It] noted that it [had] adjusted its footprint on
13 a PCW by adjusting the minimum and maximum premiums ..."

14 So it is altering the quotability and also one might
15 say the sort of quality of the quotes that are being
16 returned.

17 "By varying these across PCWs [Tesco Bank] would
18 provide a quote for certain risks on certain PCWs, but
19 not others. In terms of how effective this was, [Tesco
20 Bank] noted that it has only made small changes to its
21 footprint and this has not been successful."

22 So what it says is in the face of a commission
23 increase it could and did make changes, but that had not
24 been successful?

25 A. I do not think it says it did make changes in response

1 to a commission increase. I said it might do that, and
2 then it talked about other times where it had reduced
3 its footprint, so I am not sure you can make that link
4 to commissions.

5 Q. You are perfectly right and I am glossing that, that is
6 a perfectly fair correction, Dr Walker.

7 "In terms of how effective this was ... noted that
8 it has only made small changes to its footprint and this
9 has not been successful. In particular, the impact on
10 PCWs is probably limited given the number of other
11 insurers quoting ..."

12 So here you have an indication that it has flexed in
13 relation to certain matters, but you are right, there is
14 no follow-up to ask why did you change, was it in fact
15 in relation to a commission increase or was it in
16 relation to other matters? So there is no follow-up in
17 relation to that. So you are completely right, but we
18 do not know that.

19 Then:

20 "... the impact ... is probably limited ..."

21 But noted that:

22 "... [Tesco Bank] has not made severe reductions or
23 ceased quoting for a particular risk."

24 So here we have the right question being asked,
25 a somewhat general answer, which says well we have done

1 it a little bit, it has not been effective, but it is
2 indicating that you can do it but no follow-up in
3 relation to commission.

4 So we do know that even though you did not ask
5 generally about quotability or partial delisting when
6 a specific question was raised you did get some comeback
7 but you did not follow up on it and it is somewhat
8 inconclusive. Is that fair?

9 A. No, that does not seem fair at all. So what Tesco Bank
10 has said is, yes, we can change our footprint
11 quotability, and actually we have done that, do not know
12 why but we have done that, but it has not been very
13 successful. It actually does not matter why they have
14 done that. The point is it was not very successful. So
15 it seems unlikely, given it was not very successful,
16 that they would do it on a wide scale for whatever
17 reason.

18 Q. There is no follow-up. We do not know the answer to
19 that, you are speculating about whether or not there
20 were in fact larger commission changes it might do more
21 or whether or not there might be more substantial issues
22 in relation to quotability, do we?

23 A. Okay, I mean, I am not sure how I am meant to answer the
24 question there might be more substantial issues in
25 relation to quotability. I mean, that is not really

1 very precise. What this evidence is, is that Tesco Bank
2 made some changes to quotability, it did not have any
3 significant effect, they suggested the reason why it was
4 not. That seems to me to be reasonable evidence that we
5 would not expect to see widespread delisting, partial
6 delisting.

7 Q. I understand your answer to the interpretation of the
8 evidence. Let us go to {F/304/5} if we may. Question
9 5, this is interesting, no indication in the question
10 of --

11 A. Can I -- I know we talked about it yesterday but --

12 Q. Please read it and please read the answer as well.

13 (Pause)

14 A. Okay.

15 Q. I think you will agree nothing in the question raising
16 issues of -- specifically asking about delisting or
17 quotability. This is a standard question.

18 Then you have in the middle or the third paragraph:

19 "Alternatively, suppliers could choose to (1) only
20 quote on consumer risks that are [more] profitable
21 within the more expensive channel ..."

22 So this is this AA indicating that, yes, it could
23 delist in relation to a change in commissions. That is
24 correct, is it not, that is how you read that?

25 A. It is entirely hypothetical. They then go on to say it

- 1 would be a bad idea.
- 2 Q. No, it said it would be a bad idea for consumers and
3 their business, and they did not want to do that, but
4 that is available to them as an opportunity, and
5 implicit in that is also the answer to the last part of
6 your paragraph 62 that partial delisting is entirely
7 possible and differently possible from full delisting
8 because you can selectively quote on more profitable
9 risks only and drop less profitable risks?
- 10 A. Yes, and that was Helen's response in her second report.
- 11 Q. Yes. You accept that?
- 12 A. As a possibility, yes. This is all entirely
13 hypothetical. I am still to see any evidence of anybody
14 doing it in response to a commission change.
- 15 Q. Just to be clear, I do not think you challenge it, but
16 Ms Ralston in her report -- and she was questioned on
17 it -- identified other HIPs who talked about the
18 possibility of partial delisting. I can take you to the
19 footnote where she deals with that.
- 20 A. Yes, I think we ended up with five who had talked about
21 the possibility of partial delisting.
- 22 Q. Also we have the evidence about the importance of
23 quotability.
- 24 A. We have that evidence. We have no evidence in relation
25 to the question of whether HIPs in response to

1 a commission price increase actually partially delisted.
2 They do not seem to have done so.

3 Q. But, as we have been through, that was not actually
4 a question you specifically asked. Other than in [Tesco
5 Bank], I must be fair, in that conversation in the
6 [Tesco Bank].

7 A. However, as I said yesterday, if we are talking about
8 asking the commission question to a -- to HIPs, asking
9 whether an individual PCW increases its commission, and
10 we fail to ask whether -- what would happen if all four
11 raised it, the point I made yesterday was that of course
12 if you would not switch when one raises the price, you
13 would not delist, you certainly would not delist when
14 all four did, because at least when one raises a price
15 you still have the option of using the other three.

16 Q. I understand your point in relation to that, this is to
17 do with specific questions in relation to a commission
18 rising and issues to do with quotability.

19 A. Okay.

20 MR BEARD: I am going to move to another topic unless the
21 Tribunal has any particular questions in relation to
22 that.

23 THE PRESIDENT: I do not think so, Mr Beard, thank you.

24 MR BEARD: Could we go to the Decision at {A/1/139}.

25 This is the issue of supply-side substitution,

1 Dr Walker. I am sure you have re-read this section
2 relatively recently. If we could therefore flick over
3 the page, please {A/1/140}.

4 What you are essentially saying in this section is
5 that there are barriers to entry on the supply side,
6 material barriers to entry, and broadly speaking those
7 barriers to entry concern marketing expenditure and
8 having a portfolio of insurers. Is that broadly fair?

9 A. If by portfolio of insurers you mean the chicken and egg
10 issue, then, yes, that is fair.

11 Q. Having enough insurers on your website that will attract
12 customers and then, because you get customers, you get
13 more insurers, but you need to have a portfolio of
14 insurers in order to attract customers. Am I capturing
15 chickens and eggs correctly there?

16 A. Yes, you need to have customers in order to get insurers
17 to be interested in quoting on you.

18 THE PRESIDENT: It is the linkage between the two markets
19 again. The fact is insurers will want to sign up if you
20 have the eyeballs and the eyeballs are only interested
21 if you have something to show them?

22 A. Yes.

23 MR BEARD: I understand the point. I am just going to focus
24 on a subset of potential supply-side entrants, because
25 the way that we model the hypothetical monopolist, what

1 we are doing is we are taking all the home insurance PCW
2 activity and essentially treating it under single
3 ownership, single control. That is correct, is it not?

4 A. Yes.

5 Q. The other activities of the Big Four PCWs, particularly
6 not ComparetheMarket, that is not brought within the
7 ambit of the hypothetical monopolist, is it?

8 A. No.

9 Q. So what we have in a hypothetical monopoly situation is
10 essentially the hypothetical monopolist with all home
11 insurance on PCW activity and then you have three other
12 PCWs here who have PCW functionality, you would agree?

13 A. There are other PCWs that are not present in home
14 insurance, yes.

15 Q. They have PCW functionality? I am sorry, you are
16 nodding but you just have to say "Yes" if you are
17 agreeing.

18 A. Yes.

19 Q. They have powerful brands in the market?

20 A. Well, they have powerful brands in the markets in which
21 they operate, some of them.

22 Q. They are offering comparison services in relation to
23 a range of insurance and financial products; is that
24 fair?

25 A. They are offering comparison services, yes.

1 Q. In relation to those, they both have a well-recognised
2 PCW brand identity and they are dealing with a large
3 number of insurers albeit not in relation to home
4 insurance; is that correct?

5 A. Well, okay, some of them will be dealing with an
6 insurer, some of them will not be dealing with insurers,
7 they will be dealing with energy companies or whatever.

8 Q. Hold on.

9 A. You are going to have to specify which of your PCWs we
10 are referring to, then.

11 Q. Let us deal with the three largest PCWs apart from
12 ComparetheMarket.

13 A. So you mean ones who are already in the market? Oh,
14 I understand, sorry. Yes, okay.

15 Q. Three PCWs.

16 A. Yes.

17 Q. So under hypothetical monopolist --

18 A. So we are talking about the firms who are already in the
19 home insurance market but excluding for some reason CTM
20 in what you just say.

21 Q. No, CTM and the other three are already in the home
22 insurance market, but you are hypothesising that
23 effectively a hypothetical monopolist controls the
24 business of those other three PCWs, do you not?

25 A. Well, it controls the business of all four.

- 1 Q. But in terms of supply-side entry, you have non-home
2 insurance providing PCWs in your hypothesis who have
3 strong brand identity and are providing price comparison
4 services in relation to insurance. That is how the
5 hypothesis works, is it not?
- 6 A. You are confusing me. You are now talking about PCWs
7 which are not part of the home insurance market but
8 potentially could become part of it. Is that the
9 question you are asking?
- 10 Q. I am sorry, just to be clear, I am thinking about
11 Gocompare, Confused and MoneySupermarket effectively not
12 having their home insurance business because that is
13 controlled by the hypothetical monopolist.
- 14 A. No, I am sorry, no, you completely -- they do not have
15 their home insurance business because it is controlled
16 by the hypothetical monopolist? No, sorry, I mean,
17 maybe I am being really stupid here, but the
18 hypothetical monopolist test looks at those providers
19 who are providing the product or service and ask whether
20 hypothetically they all raise their prices by 5 to 10%.
21 It does not ask well what would happen if there is
22 a hypothetical monopolist who did this and those firms
23 who are already in the market are excluded. No, they
24 are part of the hypothetical monopolist.
- 25 Q. I asked you originally whether or not within the

1 hypothetical monopolist you took into account all the
2 other business of the other companies, and I think --
3 I will go back and check the transcript, but my
4 understanding was you said you did not take those into
5 account as being monopolised by the hypothetical
6 monopolist. That is correct, is it not?

7 A. Okay, so --

8 THE PRESIDENT: I think we need to be quite clear what we
9 are asking here. Are you asking about the elements of
10 the business on the PCW market that are going into the
11 hypothetical monopolist, or are you asking about
12 barriers to entry into that market which it seems to me
13 a rather different question.

14 MR BEARD: I am asking two questions. I was initially
15 asking what goes into the hypothetical monopolist.

16 THE PRESIDENT: Right, let us get that nailed first.

17 MR BEARD: What goes into the hypothetical monopolist. My
18 understanding was you only hypothesise the
19 monopolisation of the focal product. You do not
20 hypothesise the monopolisation of for instance motor
21 insurance, pet insurance, credit card comparison
22 services?

23 A. Obviously not if we are looking at hypothetical
24 monopolist for home insurance.

25 Q. In relation to all those other functions, those continue

1 to exist as autonomous non-monopolised entities offering
2 those services, the three other PCWs, do they not?

3 A. Well, again, it is four. I do not know why you keep
4 saying three other PCWs, but anyway I am not really sure
5 what -- you mean -- yes, they carry on doing their pet
6 insurance business or whatever, yes.

7 Q. They do their motor insurance business?

8 A. Yes.

9 Q. They are effectively -- in the hypothesis you are
10 treating those as just separated out, not under common
11 control, are you not?

12 A. You are not even -- I guess, but you are not even
13 thinking about it, because you are trying to understand,
14 you know, what are the competitive constraints, which
15 firms are in this market, so you have done
16 a hypothetical monopolist of those four firms, okay, and
17 then if that hypothetical monopolist was able to
18 profitably raise prices -- sorry, was not able to
19 profitably raise prices, you would then ask, oh, why can
20 it not profitably raise prices, where has the sales gone
21 to, and then you would find, okay, it has gone to two
22 other firms and you would say they should also be part
23 of the market. That is what you do.

24 Q. I think I am suggesting to you that that may not be what
25 you do. What you do instead is you look at the

1 hypothetical monopolisation of home insurance and you
2 say if that particular product is controlled by the
3 hypothetical monopolist and there is a price rise in
4 relation to it, (a) you ask yourself will consumers
5 switch away, we have been dealing with that, but the
6 other question you ask yourself is will someone else
7 compete against you so as to create competitive
8 pressure, and the point I am putting to you essentially
9 is this: you have there large -- let us just treat it
10 for the moment as motor and pet insurers. You have
11 major brand identity, you have close relationships with
12 the insurers who are effectively supply-side substitutes
13 to the hypothetically monopolised product?

14 A. But they are already -- those entities are already in
15 the market.

16 Q. Not for the purposes of the SSNIP, not that part of
17 them.

18 A. No, not that part, but those firms are in the market.

19 So what you are hypothesising here is the hypothetical
20 monopolist who raises prices, who will try to think what
21 the competitive constraints are, then you seem to be
22 hypothesising, I have never heard it discussed this way
23 before, hypothesising is that firms also owned by the
24 hypothetical monopolist, because they are party to that
25 group, acting as competitive constraints on the

1 hypothetical monopolist. So what you have is you have
2 the same firms undermining themselves. I mean, I am
3 sorry, Mr Beard, this is pretty incoherent.

4 Supply-side substitutability is all about
5 understanding whether there are other firms out there
6 who do not currently provide the product but could do so
7 very quickly. It is not entry, but could do so very
8 quickly. To ask whether, for instance, Confused motor
9 insurance could suddenly enter the market for home
10 insurance, no, Confused is in the market for home
11 insurance.

12 Q. Sorry, Dr Walker, what you do with the hypothetical
13 monopolist test is you assume that there is single
14 control of the supply of all the products. That is what
15 we have seen repeatedly as being the exercise that is
16 required.

17 Now, if you have single control of the products,
18 that is not the same as having single control of the
19 firms. If you had single controls of the firms, you
20 would be impliedly hypothetically monopolising all of
21 the other products that they have that overlapped with
22 one another, would you not, and you are not doing that?

23 A. No, I am sorry, Mr Beard, I think -- I mean, I genuinely
24 think you misunderstand the test here. Let us think
25 what we normally do. Suppose we were thinking about --

1 let me think of a good product.

2 THE PRESIDENT: I do not want to interrupt but I am quite
3 anxious that you do not proceed on cross-purposes.
4 Ultimately, the framing of the hypothetical monopolist
5 test is a matter for the Tribunal.

6 MR BEARD: Of course.

7 THE PRESIDENT: I say that to help both of you rather than
8 to hinder, but I think it is important that you have the
9 opportunity of developing the evidence from the witness
10 that you need for your closing submissions.

11 MR BEARD: Yes.

12 THE PRESIDENT: The point, I think, of divergence between
13 the two is that Dr Walker is saying that when one is
14 assessing the substitutability of a particular product
15 you hypothesise a single monopolist and you say what
16 will happen to demand for the product if you increase
17 the price by a material amount, by 5 or 10%, and you use
18 the significant increase in price to just see where the
19 demand switches.

20 Now, of course you can do the same thing on the
21 supply side, but that would be a different test. You
22 are here ascertaining substitutability of the product on
23 the demand side, and I think that is the point you are
24 making in terms of how the SSNIP works on your
25 understanding.

1 A. Okay, so sort of yes.

2 THE PRESIDENT: Sort of yes. Okay, well, let us --

3 A. It is true that primarily when we are doing SSNIP tests
4 we are focusing on the demand side because that is where
5 we would expect to see substitution most quickly.

6 We also, at least we do in Europe and the UK, we do
7 not do it in the US, their guidelines are different in
8 this respect as I recall, we also do allow for
9 supply-side substitutability which is this idea that
10 firms that are not in the market but could become in the
11 market really quickly, you should include them in the
12 market.

13 So the example that they have in the European
14 Commission's notice on market definition is paper
15 manufacture. Paper manufacture, it is the same example
16 Gunnar Niels used. If you are a paper manufacturer and
17 you produce high quality paper, you know, it is the same
18 machine as you use for low quality paper, so you could
19 very quickly enter the low quality paper market if
20 actually prices went up. So it is for firms who are not
21 in the market, could they very rapidly enter. It is not
22 for bits of firms who are already in the market could
23 they rapidly enter.

24 THE PRESIDENT: Well, yes, I think your second formulation
25 of the supply side is very close to what is sometimes

1 called contestable market theory, in other words the
2 extent to which there are or are not barriers to entry
3 operating as a constraint on competition, because if it
4 is hard to get into a market, then you have a protected
5 position, whereas if it is easy to get into a market
6 then your position is correspondingly less protected.
7 The very simple point I am making is that these are
8 different questions and the reason I think you were
9 having such difficulty with Mr Beard's questions is that
10 you are saying that it is one thing to test for
11 substitution away from a given product; it is another
12 thing to say who would come into the market if the price
13 increased by 5 to 10%. Really my simple question is is
14 that the reason we are having ships passing in the
15 night, or have I got it wrong?

16 A. No, I do not think that is the reason. I think the
17 reason that Mr Beard and I are having a difficulty is
18 because he wants to say that a firm -- what he wants to
19 do is he wants to say we have four firms in our
20 hypothetical monopoly and he wants to then say actually
21 there is a bunch of other firms out there that could
22 really also enter who happen to be called
23 ComparetheMarket, Confused, etc, etc, and in a sense
24 double count them, bring them in again. I mean, they
25 are already in the market. The purpose of supply-side

1 substitution it seems to me would be suppose there was
2 a PCW that did not do home insurance, it did not do home
3 insurance, but, you know, it has PCW stuff. Then the
4 question would be, ah, if the hypothetical monopolist of
5 home insurance increases its prices by 5 or 10% could
6 that firm that is not selling home insurance already,
7 could that firm very, very rapidly enter the market.
8 I mean, so rapidly, it is a similar effect to
9 demand-side substitution. So almost immediately. That
10 would be a supply-side substitution question, but that
11 is not the question that Mr Beard is asking.

12 THE PRESIDENT: The reason we do not do those things at the
13 same time is because you are conflating two separate
14 tests. You are going to assess either demand-side
15 substitution or supply side, but you are not going to do
16 both at the same time, or am I wrong?

17 A. Well, normally you would only look at the supply-side
18 substitution if it is so -- if it is as rapid as
19 demand-side substitution. You are absolutely right that
20 most of the time, the vast majority of the time, you do
21 not look at the market definition stage, you look at it
22 at the entry stage, and that is, you know -- I mean,
23 that is what we do most of the time. Supply-side
24 substitution is a very special case where you can enter
25 very rapidly.

1 THE PRESIDENT: Sorry, Mr Beard, I hope that helped. I am
2 not sure it did.

3 MR BEARD: Thank you. Very rapidly I think is within the
4 period of a year, or one to two years normally, is it
5 not, for supply side?

6 A. No. I see that you said that, your expert said that.
7 What we normally think is that entry, for entry to be
8 considered in the competitive effects analysis in the
9 merger, it has to have -- the entry has to have an
10 effect on the market within one to two years. That is
11 entry. Supply-side substitution should be much quicker,
12 hence the European Commission example about a paper
13 manufacturer. We are talking about and they explicitly
14 say it should be -- supply-side substitution should be
15 able to happen over the same time period as demand-side
16 substitution. People --

17 Q. I am going to leave the time issue to Ms Ralston and the
18 evidence that we provided. We do not accept it has to
19 be as vast as demand side, but certainly it needs to be
20 within -- it needs to be reasonably timely. We accept
21 that. I think the difference may be that what we are
22 focusing on is the question whether or not you are
23 hypothetically monopolising products or firms and we are
24 clear in this hypothesis that is what I am testing with
25 these questions. If you are hypothetically monopolising

1 products and here the products are PCW services in
2 relation to home insurance, the question on the supply
3 side is what group of products being provided might
4 switch over and enter quickly, and what I am
5 hypothesising is that PCW services in relation to say
6 motor and pet insurance might well switch over quickly
7 because in those circumstances you will have established
8 brands and close relationships with insurers and in fact
9 we know that in practice the negotiations for insurance
10 products are not done home, motor, pet, etc. They are
11 all done in the round.

12 A. Okay, so it is a different question than you were asking
13 earlier.

14 Q. It is a different version. It is the same issue.

15 A. No, it is not. So there you are saying if there is
16 a supplier of pet insurance, a PCW of pet insurance,
17 you know, it is not in home insurance, it is a PCW of
18 pet insurance, and you hypothesise it could enter really
19 quickly, then should that be included in the market?

20 Well, we can have an argument about the evidence of how
21 quickly a pet insurer could come into the market.

22 However, what you started off by saying is you wanted to
23 say that I want to include Confused's pet insurance
24 business in the market and I was just saying, no, sorry,
25 Confused is already in the market and we are not

1 actually trying to include pet insurance in the market,
2 we are asking whether a pet insurer who currently does
3 not provide home insurance could quickly start to
4 provide home insurance.

5 It therefore does not help to say oh but Confused
6 has pet insurance. They already provide pet insurance.

7 Q. I think the difference here is that you say as soon as
8 you take the element of PCW home insurance activity
9 from, say, Confused and you include it within the power
10 of the hypothetical monopolist, you then do not consider
11 the rump of activities that remain with Confused as
12 a supply-side substitute. That is what you are saying,
13 is it not?

14 A. Because it is not going to be a competitive constraint.
15 We are not going to have part of our hypothetical
16 monopolist choosing to undermine our sort of
17 hypothetical monopolist. I mean, it is the same firms
18 and you are suggesting that -- the same firms would
19 choose to be a competitive constraint on itself for
20 that --

21 Q. No, Dr Walker, because the firm is not within the
22 hypothetical monopoly. You do not hypothesise that all
23 of Confused is within the hypothetical monopoly.
24 I think we have the lines between us, I think I have put
25 the point to you, you understand the difference. I am

1 going to move on at this point.

2 Now I am going to move to the joys of critical loss
3 analysis if I may.

4 If we could pick it up at -- well, perhaps in
5 Ms Ralston's report, second report, at {A/9/32}. I just
6 want to pick up table 2.3.

7 A. Can I say one thing before you ask me a question about
8 this?

9 Q. Of course.

10 A. Which is just for clarification.

11 Q. Please.

12 A. I think I know the answer, but it suddenly became
13 unclear to me yesterday. Those 5% and 10% figures --

14 Q. I am sorry, can we just stop?

15 A. The hypothetical price increases.

16 Q. Oh, I am so sorry, I thought you were referring to --
17 apologies, Dr Walker. Given that I have made
18 faux pas --

19 THE PRESIDENT: You were worried about confidential
20 information.

21 MR BEARD: I am so sorry, that was me being overcautious.

22 A. Thank you. The 5% and 10% SSNIP there, just to be
23 clear, that is a 5% or 10% increase in the commission
24 charge and not in the retail price, and so if you wanted
25 to read this table and look on a retail prices basis,

1 you would have to include 1.8% and 3.6% across the top.

2 I am just checking that is correct.

3 Q. Would you give me one moment, because I need to confirm
4 that with Ms Ralston rather than off the cuff.

5 A. Absolutely.

6 THE PRESIDENT: An excellent idea. Yes, I agree.

7 MR BEARD: (Pause) I am comforted to know I did get the
8 answer at least implicitly right. It is on commission,
9 the 5 to 10%. Thank you, I was just checking.

10 A. Thank you for checking.

11 Q. I am going to ask you one or two basic questions.

12 First of all, I do not think you disagree with any
13 of the arithmetic in this table, do you?

14 A. No, the arithmetic is fine.

15 Q. The arithmetic is fine. I think you also recognise that
16 using some sort of margin reflecting variable costs in
17 the critical loss analysis is a correct approach to this
18 exercise?

19 A. Yes, the correct approach is to use some sort of gross
20 margin.

21 Q. Your disagreement, then, is with the assessments of what
22 the relevant variable costs are and what, therefore, the
23 gross margin is that is used in relation to this; is
24 that fair?

25 A. Well, that is a comment about -- you know, the CMA has

1 disagreed with that. Personally I have not said
2 anything about these margins. All I did was point out
3 initially that Ms Ralston had made a mistake, in effect
4 rather than putting a 45% margin in the Facebook margin
5 which is not confidential here she had put in 100%.
6 That is all I noted. The CMA, you had that discussion
7 yesterday, is, and I am as well, a little bit surprised
8 that it is considered, oh, okay, so I will just go back
9 and find another margin that sort of seemed to give me
10 the answer that I am happy with, because apparently it
11 was not a material error to get the margin wrong by
12 a factor of more than 2.

13 So that is where I stand.

14 Q. I am not going to go into a factor of more than 2
15 because even with my arithmetic some of those margins
16 are to a factor of 2.

17 A. It was 45 to 100%.

18 Q. I understand that you were referring to the Facebook
19 which I think Ms Ralston explained why she moved away
20 from Facebook and I think she also fairly explained why
21 it was she selected the different parameters. There are
22 a range of possible margins trying to take into account
23 different levels of variability. You do not disagree
24 with that approach?

25 A. I absolutely understand the reason that she has moved

- 1 away from 45%.
- 2 Q. But you do not disagree with the approach of trying to
3 look at what relevant variable margins, variable cost
4 margins would be?
- 5 A. No, I mean that is what the 45% originally was purported
6 to be, a gross margin. That is exactly what you should
7 be doing.
- 8 Q. Just one other question in relation to this because
9 I know Professor Ulph is going to have some questions,
10 but during the course of cross-examination with
11 Ms Ralston, an issue about the inclusion of TV
12 advertising was raised. I am not asking you to deal
13 with Ms Ralston's response where she explained how that
14 sort of issue would be dealt with within the relevant
15 margins, but can I just check you -- and I am pretty
16 confident I know the answer -- you and the CMA did not
17 assess whether any of that sort of major branded TV
18 advertising campaign should be treated as variable costs
19 for these purposes, did you?
- 20 A. Well, I have not done that, no. So I do not know
21 what -- so I am speaking for myself there, Mr Beard,
22 I do not know what CMA might have done that I am not
23 aware of, but, no, I am not aware of that.
- 24 MR BEARD: I do not have any further questions for you in
25 relation to this, but this was the point at which I was

1 actually going to invite Professor Ulph if he wanted to,
2 and given the time that might be an opportune moment to
3 deal with those questions, but it is somewhat up to the
4 Tribunal.

5 THE PRESIDENT: No, thank you, Mr Beard.

6 Professor, is that a good time?

7 PROF ULPH: Yes, I am happy to proceed now.

8 THE PRESIDENT: Let us just get the relevant page up.

9 I think it is {F/727/1}.

10 MR BEARD: I am most grateful. I am sorry, I should have
11 done that beforehand.

12 THE PRESIDENT: I think you have it in writing --

13 A. I have a hard copy, thank you.

14 THE PRESIDENT: -- Dr Walker. I will hand over to you,
15 Professor.

16 Questions by THE TRIBUNAL

17 PROF ULPH: Could we also maybe get up on the screen the
18 section of Dr Walker's report at paragraph 67. I think
19 it is on page 18 of his report {A/8/18}.

20 So at paragraph 67 and can we put the two side by
21 side, please. No, sorry, could you put my note side by
22 side with Dr Walker's one? {F/727/1}. Thank you very
23 much.

24 I would like to take this slowly and step by step if
25 possible.

1 I want to start with your formula which you say is
2 the conventional formula for critical loss analysis.

3 So I just want to check what you mean by
4 "conventional formula". Are you referring to a kind of
5 conventional hypothetical monopolist test when you start
6 with a hypothetical monopolist, you increase the
7 hypothetical monopolist price by 5 to 10%, and what you
8 are trying to work out is the percentage of consumers
9 that will have to switch away in response to that price
10 increase in order to make that price increase
11 unprofitable, is that what you mean by the conventional
12 formula?

13 A. Well, yes, that is what critical loss does and of course
14 this is not a hypothetical monopolist-specific formula,
15 this is a standard formula that any firm would be using
16 if it was thinking of raising its price trying to
17 understand what effect that would have on its
18 profitability or ...

19 PROF ULPH: Okay, so what --

20 A. Sorry, it is the same formula that Ms Ralston used. We
21 have no disagreement between me and Ms Ralston on that
22 formula.

23 PROF ULPH: Can we just come to that in a minute. So what
24 I was trying to do was once I saw that just to assure
25 myself that I understood where your formula came from.

1 I tried to calculate -- I tried to work out for myself
2 what such a formula would be.

3 If you turn to my note now and look at the top of
4 that. So what I hypothesised was you would have a firm
5 that has a variable unit cost c and the assumption here
6 is that those costs are constantly dependent on the
7 amount of work which with fixed costs F , it sells at the
8 product sum price p , which is above the margin or unit
9 costs, so it makes a profit per unit of output of p
10 minus c on each unit of output it sells.

11 If it is a demand which depends on that price, and
12 (inaudible) earns profits which are just the profit
13 produced of output p minus c multiplied by the total
14 output it sells, which depends on the price minus any
15 fixed costs it has, would you agree with that?

16 A. Yes, that is where -- and then you derive the critical
17 loss formula, yes, that is where it comes from.

18 PROF ULPH: Yes, I am sorry, I am going through this slowly
19 just for the benefit of other people in the court who
20 are not quite so familiar with this type of formulation
21 analysis.

22 THE PRESIDENT: Yes, Dr Walker, just to be clear, that means
23 Ms Lucas, myself and most importantly the counsel teams
24 so that if there is anything they want to ask they can
25 follow.

1 A. I will be quiet.

2 THE PRESIDENT: So both of you take your time because
3 I would not want it to be said later on that there was
4 a crucial question that had to be asked, but because we
5 got lost in the maths, which for me is very easy, it was
6 not asked, so do bear with us.

7 A. I apologise.

8 PROF ULPH: So we hypothesise an increase in price Δp .
9 Then there are two effects of that.

10 First of all, we get a higher profit per unit of
11 output when you sell that on a lower amount. So you
12 will have an increase in profits Δp , that will
13 apply to a smaller total demand which is D minus ΔD
14 which is the amount of demand you lose.

15 The second effect of that increase in price is that
16 you lose the existing profit p minus c on that demand
17 that you lost as a result of the price increase.

18 So those are the two components of your critical
19 loss.

20 A. Yes.

21 PROF ULPH: So you then have to calculate how large does
22 that loss demand have to be in order for that change in
23 profits to be negative or at least zero, and if you just
24 take that formula for what that has to be and you
25 re-arrange it, then you get the formula in the middle of

1 the page there, which says that the critical loss of
2 demand, ΔD over D , is just the percentage change in
3 price, Δp over p , divided by the percentage change
4 in price which is Δp over p , plus a measure of
5 profits which is the profit produced for output divided
6 by the price, so it is the retail profit per unit of
7 price, so units of output sold, okay?

8 That I thought was what you were getting at in your
9 formula which had X as the percentage change in price
10 and Y as a measure of profitability. So my first
11 question is have I captured what it was you were getting
12 at in your formula?

13 A. Yes, you have captured what both Ms Ralston and myself
14 were getting at.

15 PROF ULPH: So the thing that started to give me some
16 concern was that this gives the critical loss to the
17 firm whose price has increased, okay? But in the
18 concepts we are dealing with here, we are not dealing
19 with quite such a conventional analysis because the
20 demand that we are talking about is the demand for home
21 insurance policies sold by HIPs through PCWs, and the
22 price that drives that demand is the price that HIPs
23 quote the policies sold by them on PCWs.

24 That is right, is it not?

25 A. That is true, yes.

1 PROF ULPH: So the concern was that if you had a formula
2 which had demand which depended on a particular price,
3 this is demand for home insurance products, depending on
4 the price that is set by HIPs on PCWs, if that was the
5 interpretation of price and of demand, one
6 interpretation of this formula could be this is the
7 critical loss on a hypothetical monopoly HIP because the
8 quantities and the prices are all the quantities and
9 prices which are relevant to HIPs.

10 So we are dealing with a different context. We are
11 dealing with the context of a hypothetical monopoly PCW
12 which increases its commission rate that gets passed
13 through to the price of the HIP's quote on PCWs for
14 their insurance. That creates a loss of demand, and
15 that then goes back and affects the revenue and the
16 potential of variable costs of PCWs. So there are two
17 prices, and there are two levels of profits that we need
18 to think about, okay?

19 So what I then did was I just tried to rework the
20 analysis distinguishing carefully between the price in
21 the form of a commission, the cost through to the PCW
22 rather than to the HIP, and then you see down towards
23 the bottom of the page I am saying that the profits
24 accruing to the PCW are just commission minus the
25 variable or marginal costs of the PCW, multiplied by the

1 sales made of home insurance policies by HIPs on PCWs,
2 which are a function of the price that HIPs charge minus
3 the fixed costs of the PCW.

4 So do you agree that that is the right expression
5 for profits?

6 A. Yes, because the expression at the bottom is the same as
7 your expression in the middle of the page just with q
8 replacing p and k replacing c , and that equation at the
9 bottom is the one that Ms Ralston has used. She has
10 looked at -- she can shout if I am wrong at any point --
11 she has looked at the margin of PCWs, so q minus k over
12 q , and she has looked at the price set by PCWs and the
13 change in that Δq over q .

14 PROF ULPH: She does not express that in quite that same
15 formulaic way in her first report, but then the thought
16 occurred to me that if a HIP was to sell some more
17 insurance policies it would have to incur certain costs
18 of those policies. It would have to cater for all the
19 claims made under those policies, so the marginal cost
20 to a HIP of selling additional policies would be quite
21 significant. I asked myself the question would the
22 marginal cost to a PCW of there being more sales by HIPs
23 on that PCW be significant or not. I thought well
24 supposing the margin or the variable costs was actually
25 zero or close to zero for a PCW, then that formula

1 I have given there would be identical to the formula in
2 paragraph 68 of your report which you criticised
3 Ms Ralston for using. It would be the HIP -- the SSNIP
4 increase in price Δq over q , plus -- there would be
5 that price increase plus 1. If k was equal to zero, or
6 very close to zero, that second term would be very close
7 to 1.

8 So I think this just goes back to the point you were
9 making just before we started, that -- would you agree
10 that the central issue of debate between you and
11 Ms Ralston is the significance of these variable or
12 margin costs to PCWs versus HIPs in selling additional
13 policies, is that the essential point of difference
14 between you?

15 A. Okay, so there are a number of points there. So first
16 of all I completely agree with what you have done here,
17 and if the marginal cost of a sale by a PCW is zero, so
18 the margin is 100%, then Ms Ralston's equation she used
19 in her first report is correct because then the margin
20 would be 100%. She was not claiming it was 100%, she
21 was claiming it was 45%, just an arithmetic mistake, we
22 all make those. So your logic is right.

23 So two more points. Second point is I do not think
24 even Ms Ralston is arguing for a 100% margin, and when
25 you look at those figures that I was shown a minute ago

1 and that Ms Ralston was cross-examined on yesterday,
2 you know, I cannot see because it is confidential, but
3 there is a range of possible gross margins, but it is --
4 I hope this is okay -- above 45%, below 1, and so it is
5 not 100%. Okay, we can have an argument as to exactly
6 where it is, but actually all of that is true.

7 A much more fundamental point I have with this whole
8 analysis that Ms Ralston has done is it is relevant
9 because it is predicated on, you know, a price change by
10 the HIPs leading to a price differential between the
11 price on the PCW and the direct price which, as we have
12 argued at length, we said would not happen.

13 So her analysis is absolutely fine. The arithmetic
14 and so on, in a world in which there are no narrow MFNs.
15 Then you still have to have an argument. Even in that
16 world would you have that many customers going to a
17 direct channel in response to a 1.8% increase in retail
18 prices or 3.6, but, you know, my biggest concern with
19 that analysis is it is just not relevant because of
20 narrow MFNs.

21 PROF ULPH: No, I fully understand your position on that
22 Dr Walker. We have trailed that at quite some length
23 this morning. I just want to make sure I have fully
24 understood where your formula had come from, how it
25 compared to the formula that Ms Ralston was using and

1 whether I had identified that in some sense a point of
2 difference between you resides in this question of how
3 large are these marginal costs to PCWs of processing
4 sales on (inaudible) by HIPs on the PCW. Would you
5 agree that that is a separate question?

6 A. Yes, it is a separate question, but the gross margin is
7 key, yes.

8 PROF ULPH: But the gross margin does not include fixed
9 costs. You are just looking at profit per unit of
10 output in terms of --

11 A. So when I say gross margin, I mean the variable cost
12 margin.

13 PROF ULPH: I think we are now clear. I think you are
14 agreeing with all of my analysis.

15 A. Your analysis is fine, yes.

16 PROF ULPH: Thank you.

17 THE PRESIDENT: Thank you, Professor.

18 PROF ULPH: Okay, Mr Beard.

19 THE PRESIDENT: If I can just throw in the lay understanding
20 so that I can summarise what I got from that and you can
21 tell me just how badly I have passed the examination.
22 What you are saying is, first point, you do not accept
23 that this analysis is particularly helpful in this
24 context?

25 A. Correct.

1 THE PRESIDENT: Because of the deployment of narrow MFNs and
2 so we are talking about something which just does not
3 happen in your view of the market as we are talking
4 about it. So take that as read. We have that.

5 Subject to that, you are, I think, saying -- and
6 these are my unflattering words, not yours -- that
7 Ms Ralston may have got it right in paragraph 68 of your
8 report for the wrong reasons in the sense that the
9 margin of 100%, if you take Professor Ulph's assessment
10 of costs, might actually be a defensible figure and not
11 a mistake. Have I got that right?

12 A. Well, if the margin is 100%, then, yes, Ms Ralston's
13 original figures were correct. I mean, it is --

14 THE PRESIDENT: I entirely accept that is not what she was
15 saying in her report. Obviously we will be hearing from
16 her in due course.

17 A. Yes.

18 THE PRESIDENT: But what for my purposes is important to
19 understand is whether the use -- whether we go down this
20 route is entirely not for now, it is a question of
21 ascertaining the nature of the error, but I think what
22 you are saying is that the use of a margin of 100%,
23 whilst it may have been an error on the face of
24 Ms Ralston's report, is a defensible figure to use as
25 the Professor has taken you through.

1 A. Professor Ulph has said that. I am not saying it is
2 defensible.

3 THE PRESIDENT: No.

4 A. But, yes, fine.

5 THE PRESIDENT: I know what you are saying and not saying.

6 A. Okay.

7 THE PRESIDENT: What I am anxious to ensure is to the extent
8 that there is a statement that there is an incorrect use
9 of the formula, we are operating on the basis of the
10 correct formula because if you were disagreeing with
11 this analysis, then I would want to know how and why.

12 A. Okay, and to be clear, the analysis that Ms Ralston has
13 done in her second report is perfectly standard SSNIP
14 analysis in a world in which you can get a price
15 differential, and then it is a question of arguing over
16 the level of the margin and then what it tells you is
17 how many consumers would have to switch in response to
18 our 1.8% or 3.6% premium price increase to make the
19 commission price increase unprofitable. I think that
20 is, you know, uncontroversial.

21 THE PRESIDENT: Dr Walker, thank you very much. What I am
22 going to suggest is we take our break now and, Mr Beard,
23 you can then have a word with Ms Ralston.

24 Cross-examination by MR BEARD (continued)

25 MR BEARD: That is fine, I only have one question. Might

1 I deliver it now and then we can sort of just move on
2 after the short break?

3 THE PRESIDENT: Of course, indeed.

4 MR BEARD: On this issue about margins, you have obviously
5 focused on the narrow MFN point, we entirely take that,
6 but if you were thinking about on the consumer side
7 a booking fee which could be a percentage of the retail
8 price or some kind of flat fee being introduced on the
9 consumer side, that would have a margin of 100% for the
10 purposes of the SSNIP calculation as well, would it not?

11 A. Well, if it was costless for the PCWs to start charging
12 consumers directly, then, yes, I guess it would have a
13 100% margin. If it was costless. That is an empirical
14 question.

15 MR BEARD: Understood. I put to you a hypothetical. I see
16 the point on empirical. Thank you, I do not have any
17 further questions.

18 THE PRESIDENT: Sorry, any further questions at all?

19 MR BEARD: No, sadly I do have some further questions at
20 all. I apologise.

21 THE PRESIDENT: I thought that. Not at all. We will resume
22 at 3.40. Thank you very much.

23 (3.32 pm)

24 (A short break)

25 (3.47 pm)

1 MR BEARD: Dr Walker, can we pick it up in your statement,
2 paragraph 77, paragraph 78. This is the SSNDQ on
3 marketing {A/8/21}. I will not comment on how slippery
4 or otherwise it is, but let us just look at your
5 paragraph 78 if I may.

6 In 77 I should say you are saying none of this is
7 necessary. We take that as read.

8 78:

9 "In any event, the evidence discussed by Ms Ralston
10 does not show that an SSNDQ on marketing would be
11 unprofitable ... it only goes as far as to show at best
12 that some HIPs target the same customers as PCWs with
13 their marketing. The evidence shows that both PCWs and
14 some HIPs bid to appear as advertised links when
15 consumers search on Google ... (such as 'home insurance'
16 or 'contents insurance'), a form of marketing that
17 accounted for 20% of quotes generated on CTM. It also
18 shows that one HIP appeared more often in such search
19 results than CTM, Gocompare and ... Supermarket, while
20 a number of other HIPs appeared in significant
21 proportions of search results albeit substantially less
22 often than these PCWs."

23 Our case in relation to this, as I think you know,
24 is that actually this aspect of the HIPs activity is
25 very significant and that were they to decline marketing

1 spend that would be a significant issue for them.

2 Can we just start with your 20% in this paragraph.
3 Can we go to {F/472}, please. This has to come up as an
4 Excel spreadsheet.

5 There are two tabs, I will take you to both insofar
6 as it is relevant, but at the bottom 12bi is quotes and
7 12bii is sales. What this gives is a breakdown of
8 quotes and sales by root as it were for
9 ComparetheMarket. As you see it does it for a long
10 period. I am not going to ask for it to be dragged
11 right, but it covers a long period starting in
12 December 2015. You will see on the left-hand side
13 a series of titles, "Generic Search", "Branded Search",
14 "Meerkat Search", "Affiliates", "Direct ...", "SEO" --
15 and SEO stands for search engine optimisation, I think
16 you know that -- "Online Display", "Partnerships", "MM
17 App", "Other", and then "Total" at the bottom.

18 But to aid us there is also a mirror table below
19 which provides the percentages of quotes, and could we
20 just click on "Sales" just so we can see something
21 similar in relation to sales, and there you see
22 a similar sort of thing in terms of the rows, and what
23 you also see are lower total numbers, not surprisingly
24 the number of sales converted are going to be lower than
25 the number of quotes provided.

1 You said in your witness statement the evidence
2 shows that both PCWs and some HIPs bid to appear as
3 advertised links when consumers search on Google, a form
4 of marketing that accounted for 20% of quotes generated,
5 and that is why I started with the bi table. So if we
6 go back to the bi table quotes, I think you are getting
7 that 20% as a sort of broad average taking into account
8 the top row generic search. Is that fair?

9 A. That is where it comes from, yes.

10 Q. Just in terms of your 20%, what we see there is actually
11 that is a very small part -- well, no, not very small;
12 a part of the total amount of quotes generated via
13 online searching because I think you will not disagree
14 the generic searches falls within online searches, as
15 you have said. Branded search also falls within online
16 searches, so it is when people put in a brand albeit it
17 may not be ComparetheMarket.

18 A. Yes.

19 Q. Meerkat search, pretty straightforward. I will leave
20 affiliates and so on. The next one, SEO, search engine
21 optimisation, that is when you are not going through the
22 ads, you are going through the other returns.

23 A. Yes.

24 Q. Just as a starting point, you would accept that when one
25 comes to consider SSNDQ, it is not the 20% of quotes

1 that are generated just by the generic home insurance
2 search terms that matter; it is all of the online search
3 quotes that are generated that matter. Do you agree?

4 A. Well, you could reduce your marketing across all those
5 headings, yes.

6 Q. Yes, but the point we are making here is that actually
7 you have got a very, very significant investment being
8 made not just by CTM but by all of the PCWs in online
9 marketing and actually the majority, the significant
10 majority, of quotes and sales that they secure come
11 through those online routes. That is what this table is
12 showing; correct?

13 A. This is all the sales, and there is online routes, SEO,
14 meerkat, brand (inaudible) are more than 50%, yes, that
15 is right.

16 Q. So actually the vast majority of quotes, and indeed
17 sales -- I can take you to it, but you saw the broad
18 pattern --

19 A. Yes.

20 Q. -- come through online searches that are undertaken by
21 people, and so to refer to 20% is potentially strictly
22 accurate but missing actually the majority of quotes
23 that come through the online route.

24 A. Well, the generic searches where you think you might be
25 sort of competing against each other, is that not fair?

1 In branded searches, if I put in CTM, then that is what
2 I am going to get or if I put in -- well, actually, you
3 are absolutely right, you will get others, but,
4 you know, on the branded search you are definitely going
5 to get yourself, if you have paid for it, you are
6 definitely going to be at the top of that list.

7 Q. You do not actually know that, do you?

8 A. Well, I agree there is some dodginess that goes on in
9 that market, but, yes.

10 Q. I am not remotely suggesting it is dodgy. I would not
11 do anything so bold as that, Dr Walker. But if you pay
12 enough to turn up as the first on the list when someone
13 types in "ComparetheMarket", you may not be
14 ComparetheMarket?

15 A. You are right, yes.

16 Q. There is nothing dodgy about that, is there?

17 A. There is something very dodgy about that, but that is
18 not this case.

19 Q. We will leave that for another day. Nevertheless, what
20 we are looking at in relation to generic search, branded
21 search and meerkat search is investment in ad words on
22 Google in order to secure high rankings in order to have
23 people click on you, do you agree?

24 A. Yes.

25 Q. Then in relation to SEO it is the investment in

1 configuring your website so that the Google algorithm
2 picks you up and throws you high up?

3 A. You want to be at the top of the organic search results.

4 Q. Yes. If I may, I would like briefly just to go to the
5 transcript of Ms Glasgow starting at {Day4/16:16}.

6 I hope that is the right reference and I hope it is all
7 open.

8 If you could just read through from line 16 on this
9 page down to line 18 on the next page, if you would not
10 mind. (Pause)

11 A. How far do you want me to read?

12 Q. Just down to the figure of 90 million.

13 A. Okay.

14 Q. What we see is the recognition here which is reflected
15 in other material of the scale of investment in online
16 marketing by the PCWs but also that it is a crucial
17 component of their competitive offering, and so when we
18 are thinking about an SSNDQ it is not difficult, is it,
19 to think about a small but significant reduction in that
20 marketing spend and how it might significantly impact
21 your ranking either in the various ad word searches or
22 in the organic searches if you declined the amount of
23 investment you put into SEO, you accept that?

24 A. Yes, I think that is a perfectly coherent question to
25 ask.

1 Q. What you need to do is look at the totality at least of
2 the online marketing spend, possibly also the other
3 marketing spend in relation to these issues, and take
4 those into account when you carry out the SSNDQ?

5 A. Sorry, I missed that, could you say that question again?

6 Q. What you need to do is take the totality, you do not
7 just focus for instance on the home insurance generic
8 search when you are carrying out an SSNDQ.

9 A. Okay.

10 Q. You accept that?

11 A. Yes, if you are looking at a significant reduction in
12 your quality of your marketing, you should look across
13 your whole marketing, yes.

14 Q. So what the evidence is showing is that not only is this
15 very important but it is also showing a direct conflict
16 with the direct online insurance sales as well, is it
17 not?

18 A. Well, yes, some of them will also be bidding in for
19 these search placements, yes.

20 Q. So they are competing on marketing and advertising spend
21 and you could carry out an SSNDQ in relation to the
22 hypothetical monopolist of PCW home insurance services,
23 and you could think about how that might impact on how
24 they got ranked in relation to this critical format and
25 you would not need to think about narrow MFNs in

- 1 relation to that, would you?
- 2 A. No, you would not need to think about narrow MFNs.
- 3 Q. In fact you have used this sort of Google-related
4 material in considering --
- 5 A. I am sorry, you are right, you would not have to think
6 about narrow MFNs in carrying out that analysis. Of
7 course they would nonetheless have an impact on actually
8 what the answer is because they have an impact on the
9 fact there is no price differential in addition, you
10 know, but --
- 11 Q. On your scenario, sorry, I should have said on your
12 scenario, and you are saying, no, not in relation to the
13 principal analysis, but then in relation to the
14 subsequent impact you would take them into account. We
15 leave that for a further debate. But you can carry out
16 the primary analysis, and in fact in your appendix H in
17 your Decision you did say that you carried out an SSNDQ
18 on marketing. I am not going to take you to it. Do you
19 remember that? Or I can do.
- 20 A. No, if you want me to comment on it could you take me to
21 it, please?
- 22 Q. Yes, of course. So if we start with just your
23 paragraph 36 in your witness statement because that is
24 where you refer to it {A/8/10}.
- 25 A. Okay.

1 Q. Yes?

2 A. That does not seem to say anything about carrying out an
3 SSNDQ test.

4 Q. Okay, if we go to page {A/1/470}, do you see that is
5 under the heading "Assessment of evidence on the
6 marketing and advertising ..."

7 If we could go to {A/1/480}, I am going to accept
8 that there is the use of the subjunctive in H.32, so
9 whether or not this is actually carrying out or
10 subjunctively carrying out an SSNDQ, it says:

11 "This means that [taking into account various
12 figures], were the CMA to conduct a SSNIP-equivalent
13 test on this dimension of competition, CTM's overall
14 marketing and advertising expenditure would have fallen
15 by around 1% ... and by 1-3% ... in [2015] following
16 a 5-10% decrease in CTM's non-brand (i.e. generic)
17 search advertising spend ... The CMA considers that,
18 were a similar SSNIP-equivalent test applied to
19 a hypothetical monopolist provider of PCW Services for
20 Home Insurance, this is unlikely to lead to a sufficient
21 number of consumers who use PCWs switching away ..."

22 Could you read it?

23 A. Yes, could I also have paragraph H.31, please, the
24 paragraph above?

25 Q. Sure. That is the numbers it is generating. Sorry,

1 I was going to take you back to this, but it is fine.

2 A. Thank you. (Pause)

3 Q. You can probably anticipate the question I am going to
4 ask you, Dr Walker. You see there what has been done in
5 H.32 is to attempt a type of SSNDQ test in relation to
6 marketing and ad words, but the inputs that are put in
7 are entirely skewed and minimised because you have only
8 there focused on the generic search advertising numbers,
9 and, as you rightly accepted earlier, that is the wrong
10 approach here, is it not?

11 A. Yes, so that is just focusing on non-brand generic
12 search advertising spend.

13 Q. That is the wrong approach to take in relation to SSNDQ
14 on marketing, is it not?

15 MS DEMETRIOU: Sir, sorry to rise, but might Dr Walker be
16 shown the submissions that this responded to because it
17 is all part of a piece and I think it would be fair for
18 him to see those at H.21 and H.22 {A/1/476} just to
19 provide context?

20 THE PRESIDENT: Well, context is always important.

21 MR BEARD: I am entirely happy with that.

22 THE PRESIDENT: If you would benefit from that.

23 A. Yes, I will see the context. (Pause) Okay, and the
24 next paragraph, please {A/1/1/477}. Thank you. (Pause)

25 MR BEARD: I think, we will confirm, but I think what had

1 been submitted was apart from evidence saying, look,
2 these are directly conflicting, there is a competition
3 between PCWs and direct channels, and, therefore, you
4 are misconstruing the market, one of the pieces of
5 evidence that was put in was ad words impressions.
6 I think, and I will confirm, that it is akin to the
7 table, or it was the table that is replicated in
8 Ms Ralston's report that we went to earlier. I will
9 turn that up if that is useful, but I think that is an
10 impressions table that is illustrative and refers to
11 generic search terms, but the fact that in relation to
12 that what you are doing is showing that in relation to
13 one category you have high competition we would say has
14 no impact at all on how you then do an SSNDQ.

15 THE PRESIDENT: Yes, and the question is, in the light of
16 this, is that a wrong approach to take in relation to an
17 SSNDQ or not. I think that is where we were at before
18 Ms Demetriou's helpful intervention.

19 A. Okay, and so -- I mean, I do not actually know really
20 how you would carry out an SSNDQ on -- well, on
21 marketing spend. You know, lower it by 5, 10% and look
22 at what the effect of that is on substitution patterns.
23 So to the extent, subject to that subjunctive, that we
24 did carry out a SSNIP test, yes, you could argue that we
25 were focusing on too little of the marketing spend, but

1 I have to say I am not very familiar with this analysis,
2 so I may stand corrected, there may be other bits in the
3 Decision that have good arguments as to why we did this,
4 but on the face of it, it does not look -- it does look
5 like we missed out some marketing that would be relevant
6 if you were going to carry out an SSNDQ test on
7 marketing in this way.

8 Of course all within the context of -- my
9 fundamental point is I do not know why we are doing any
10 of this, you know, we are only narrowing the market more
11 if we do find they can restrict quality in some other
12 dimension.

13 MR BEARD: I think the point I was making was you did try
14 and carry something out here and you did it wrongly.

15 A. The point I am making is that I do not feel close enough
16 to the detail to be clear on that, but I do not think
17 I disagree with the sort of the direction line you are
18 taking.

19 THE PRESIDENT: It is too granular, this matter, basically.

20 A. Well, if I thought the question was important, then it
21 is not too granular. It is just I do not think the
22 question is important because we have already got
23 a narrow MFN, we do not need to worry about whether we
24 can narrow it even further.

25 MR BEARD: Just very briefly on another topic, price

1 correlation analysis you say is not relevant, and
2 I think your primary argument there is that because of
3 the existence of narrow MFNs you cannot take anything
4 from a price correlation analysis. Is that broadly
5 fair?

6 A. Yes.

7 Q. Can we just turn up table 2.4 in {A/9/36}, please.

8 This is the commissions paid to each PCW in 2016 by
9 HIPs that were not covered by a narrow MFN, so this is
10 a consideration of a particular aspect of the price
11 correlation analysis that Ms Ralston has given evidence
12 on.

13 I just want to check as far as I understand it you
14 do not actually dispute any of the numbers in that
15 table, do you?

16 A. No, I am not disputing the numbers. I am disputing the
17 interpretation.

18 Q. On a number of occasions you have talked about the
19 increase in commission fees, and actually in
20 paragraph 18 of your statement {A/8/5} you have a table
21 of weighted average commission fees. Do you have that
22 in front of you?

23 A. No.

24 Q. Do you have your statement in front of you?

25 A. Could you give me that reference again, please,

- 1 Mr Beard?
- 2 Q. Yes, it is your paragraph 18 which I think is on page
3 {A/8/6} of your statement.
- 4 MS DEMETRIOU: It is 5.
- 5 MR BEARD: I was going to go to the diagram, I am grateful.
- 6 A. So it is the figure, not the --
- 7 Q. You do the narrative in there, I was just trying to skip
8 quickly through.
- 9 A. Yes.
- 10 Q. You say look this is showing commission fees have risen
11 over time, but can we just go to -- if you have that in
12 front of you, on the EPE could we go to {A/9/20}. Could
13 you just read paragraph 2.21. I just want to confirm
14 I do not think you disagree with any of these figures
15 but I just wanted to check. You are shaking your head.
- 16 A. No, I think the figures I am sure are fine.
- 17 Q. So the compound annual growth rate you are talking about
18 here is just 0.86%, is that right?
- 19 A. Yes, for the average, I am sure that is right.
- 20 Q. I am sorry, just to check, you focused on the period up
21 to 2017. Did you do any analysis of commissions
22 subsequently during the enquiry up through 2018 or 2019?
- 23 A. I have not done any analysis of the question personally,
24 no.
- 25 Q. Can I just move briefly on to renewals. There obviously

1 was a discussion yesterday about renewals with the
2 Tribunal.

3 Is it not relatively simple to see HIPs as having
4 two strategies, one to win new customers and the other
5 not to lose their existing customers, and that thinking
6 about renewals is thinking about the second of those two
7 strategies?

8 A. Yes.

9 Q. We know that they try to protect their existing
10 customers because they put in place the
11 non-resolicitation clauses?

12 A. Yes.

13 Q. Those I suppose show that those HIPs have real
14 bargaining power with the PCWs, do they not?

15 A. No, I think what they show is that the PCWs are a --
16 will be a significant competitive constraint on the HIPs
17 and the non-resolicitation clauses are a way of removing
18 that. So they are part of the discussion that the HIPs
19 have with the PCWs.

20 Q. I said do they have real bargaining power by the PCWs.
21 I am not sure you are actually disagreeing with me.

22 A. I mean, yes, they have some bargaining power. I mean,
23 we can argue about how much. I mean, non-resolicitation
24 clauses are -- came into the market when the PCWs were
25 much smaller. I think the evidence in the FCA is that

1 they are beginning to leave the market, it would make
2 sense, PCWs now are relatively stronger. So, yes, there
3 is obviously some level of bargaining power there.

4 Q. Yes. Just dealing with renewals in general terms, we
5 know that if an existing customer faced with the
6 prospect of renewal shops around, obviously the HIPs
7 know that they may go elsewhere, but if PCWs started
8 raising their commissions we have to recognise that the
9 HIPs might make more of an effort to retain those
10 customers as compared with the present position since it
11 would be one of their two major strategies. You agree
12 with that?

13 A. I am not sure particularly why they would make more
14 effort to. If the price of a PCW went up relative to
15 the renewal price, then one would imagine that would
16 make it easier to keep some of your customers, those who
17 are sort of on the margin. If that is your point then
18 I would agree with you. I am not sure why they would
19 spend more time trying to keep the renewals, it is
20 already of course a really important part of their
21 business because it is when people start to be
22 profitable for them.

23 Q. Just to remind ourselves, it is only about 25% of the
24 around 20 million home insurance policies out there
25 I think that are being sold through PCWs, is that

- 1 correct, do you recall, about 25%?
- 2 A. Well, it is about 25% of home insurance contracts each
3 year are new business. That is not all -- that does not
4 all go through PCWs.
- 5 Q. So it is a subset of the 25 --
- 6 A. It is about 60%, I think.
- 7 Q. -- of that. So there is a huge pool of people out there
8 who might well be switchers to PCWs which will be very
9 valuable for the HIPs to hang on to?
- 10 A. Yes.
- 11 Q. So it is not just those that actually bought through
12 a PCW initially, there are the potential users of PCWs
13 amongst that large pool. That is correct, is it not?
- 14 A. Yes, there will be some who originally bought direct
15 who, you know, a year or two years later potentially
16 might go to a PCW or renew through a PCW.
- 17 Q. Can we turn up {A/9/50}, please. I think you were in
18 court when Ms Ralston was being cross-examined.
19 Ms Demetriou raised various points about
20 paragraph 2.115, the discussion of different data sets.
- 21 A. Yes.
- 22 Q. "... the CMA's DCT market study survey [so some of the
23 material from which we were referring to earlier] finds
24 that 87% of ... home insurance users already had the
25 product and were looking to update, renew or switch.

1 87% is not directly comparable to the 36% referred to
2 above, as it refers to the proportion of PCW users, not
3 only those that went on to purchase ... However, it is
4 informative of the extent of the potential
5 underestimation."

6 So this is the debate which was being had about you
7 are underestimating the number of people that might well
8 be within the pool of relevant I suppose switchers for
9 these purposes.

10 "The Consumer Behaviour dataset suggests the
11 proportion of PCW users that had received a renewal
12 offer to be even lower ..."

13 Now, you say that 36% of PCW users, ie those that
14 purchased through a PCW, had a renewal, and that was
15 actually a relatively low number of renewal customers,
16 but you did not find that in some way surprising given
17 the importance of non-resolicitation clauses and the
18 price walking strategies that are so crucial to
19 insurers?

20 A. I cannot tell you what my immediate reaction to that
21 figure was. That is a figure that came out of looking
22 at actual sort of transaction data.

23 Now, as I presume you are going to come on to,
24 you know, there is a very legitimate argument that 36%
25 is an underestimate because that transaction data

1 accounted for all the PCWs but only 80% of the non-PCW
2 market, so that is a perfectly reasonable argument to
3 say you should increase that 36% perhaps to 45%, which
4 I think was a discussion yesterday, but it is data that
5 comes out of transactions, what people actually did or
6 had, as opposed to survey data which is -- survey data
7 is great, but if we have a choice between stated
8 preference, what people say they did or would do, and
9 revealed preference, what they actually did, then you go
10 for revealed preference.

11 Q. Fine. You have saved me some questions in relation to
12 20% so thank you for that, but let us just go to the
13 data.

14 Now, as Ms Ralston I think explained yesterday, the
15 data set that the CMA has only identified 13 million
16 unique customers, but we know that there are 19 million
17 plus policies in force in relation to home insurance, do
18 we not?

19 A. Well, yes, I mean, that is a figure that comes from ABI
20 I think it is.

21 Q. So what is likely is that almost 30% of the data is
22 missing and Ms Ralston suggested that it is very likely
23 those are going to be renewal customers that get missed
24 in that data set or there is a greater likelihood that
25 they are renewal customers. Would you accept that?

1 A. Well, you would have to point me to her evidence, I am
2 afraid.

3 Q. I will go back to --

4 A. Or remind me what her argument is as to why we would
5 expect that 6 million to be a biased sample or the
6 13 million that we have to be a biased sample.

7 Q. Well, there are two points here, are there not? First
8 of all your data set is hugely undercounting because it
9 is missing out 6 million, so that is the first thing to
10 bear in mind. So the absolute numbers that you are
11 talking about may be undercounted, but then if you are
12 looking at what you, I think have just called a bias in
13 relation to the 6 million, is it not likely that in
14 relation to those 6 million they are more likely to be
15 renewal customers who were not picked up by the
16 mechanisms used by the CMA to compile its data set when
17 if someone was entering into a new policy that was more
18 likely to be detected by the CMA's analysis?

19 A. Okay, and as I said you will have to show me the
20 reasoning behind that as to why that is the case.
21 I cannot comment otherwise.

22 Q. We can go to {A/1/497} which I think is the source of
23 the data. That is not the right reference and given
24 time it may be something I will have to come back to in
25 submissions in due course as to the cause of bias, but

1 I think quite fairly in those circumstances it is not
2 appropriate for me to pursue that further with you.

3 You mentioned the FCA just now. As you know, the
4 FCA has been carrying out its general insurance pricing
5 practices study. Did you speak to the FCA about their
6 study at any point during the investigation? I believe
7 it started some time in 2018.

8 A. I did not. I believe members of the case team did.

9 Q. Members of the case team did?

10 A. Well, sorry, I did not. I think that is true, but you
11 should confirm that.

12 Q. I wish I could, Dr Walker. So when did you find out
13 they were intending to carry out behavioural research
14 into the beneficial or detrimental results of new
15 business pricing discounts?

16 A. Oh, of price walking, after they published their report.

17 Q. After they published their report.

18 Are you aware that the result of the FCA's findings
19 appears to be that new business discounting is
20 detrimental to consumers and undermines effective
21 competition and that key industry participants consider
22 that promotional deals will effectively be ended this
23 year?

24 A. I am aware of that, yes.

25 Q. Can I just ask you one other question which is not --

1 A. Well, hang on, before we leave that, sorry, I thought
2 you were going to ask more questions. You know, price
3 walking -- we have known for some time that price
4 walking is a problem in that market. We, in our
5 responding to the Which super-complaint 2016/2017, noted
6 price walking and that is a problem, and it is a problem
7 in that market.

8 However, you should not conflate that with therefore
9 saying, oh, price promotions that we are talking about
10 in our case are not a good metric of the level of
11 competition because actually they are bad, because price
12 promotions are not bad. What is bad is price walking,
13 and there is absolutely no reason why you should not
14 have in an effectively functioning PCW market firms able
15 to offer price promotions whilst simultaneously not
16 engaging in price walking. Those are separate issues.

17 So I really would not want the Tribunal to think
18 that because price walking is a problem therefore
19 ComparetheMarket or BGL's wide MFNs reducing the number
20 of price promotion was actually a good thing, because if
21 actually BGL were -- you know, they are doing us
22 a social service, that is not true. BGL, in my view,
23 using wide most-favoured-nation clauses were reducing
24 competitive constraints. One way in which we see that
25 is the ability to use price promotions was reduced.

1 That is a separate question, a really important
2 question, but it is a separate question from the price
3 walking question.

4 Q. I think I will make submissions in due course on that.

5 We do not accept your position in relation to it. We do
6 say that it is clear from the FCA material that what was
7 being said, that new business only discounts, which
8 I think you accept is what we are dealing with in
9 relation to promotional deals, are not generating
10 effective competition.

11 A. Well, hang about, the lack of effective competition is
12 the ability for the HIPs to price walk, which relates to
13 consumer inertia and auto renewals and some pretty poor
14 practices. You should not conflate that with whether
15 competition was reduced by wide MFNs and whether an
16 illustration or a way in which competition took place,
17 price promotions, therefore should be discounted,
18 because there is absolutely no reason why you cannot
19 have a perfectly healthy HIP market in which we do not
20 see lots of price walking but you would still want to
21 have firms being able to offer price promotions.

22 Q. Let us just be clear, the price promotions you are
23 talking about in the Decision are new business only
24 price promotions, are you not?

25 A. Yes.

1 Q. Those are part of the problem that the FCA has
2 identified in relation to price walking generally in the
3 insurance market, are they not?

4 A. Price walking is a problem.

5 Q. That was not the question, Dr Walker.

6 A. I know it was not the question. The answer to your
7 question is, no, you are wrong. Price walking is
8 a problem. Price walking is a problem. What is not
9 a problem is allowing HIPs to compete for first year
10 business on PCWs unrestrained by wide
11 most-favoured-nation clauses.

12 Q. So your position is that although you have accepted that
13 new business promotional deals will be effectively
14 prevented from this by the FCA rules this year, there is
15 not a problem with them; that is what I understand your
16 evidence to be?

17 A. There is not a problem with competition between HIPs and
18 that was a manifestation of competition in the market at
19 that time. Now, if they are outlawed because of
20 outlawing price walking, you know, I expect we would see
21 competition between HIPs continue. What we will not see
22 is this price walking.

23 All of that, it is not a get out of jail free card
24 to say, yes, I know we were restricting competition,
25 but, look, they are awful as well. That really is not

1 a get out of jail free card, but that seems to be what
2 you are trying to play.

3 Q. No, it is not a get out of jail free card. We do not
4 accept there was any effect on competition, we do not
5 accept that there was any impact on promotional deals,
6 but what we do say is that in relation to promotional
7 deals you have failed to recognise that in fact they are
8 contributing to adverse effects on consumers and the
9 competition in the market more generally. That is the
10 position, and we do say that they form part of the
11 problem that the FCA is identifying. But I want to pick
12 up a different point in relation to them.

13 Could we go to {B/28/4}, please.

14 THE PRESIDENT: Just pausing there.

15 A. Can I respond very quickly?

16 THE PRESIDENT: Yes, you come back.

17 A. The problem with price walking, I mean, a bit off topic
18 here, is not that prices go up after the first year and
19 the second year, it is that they continue to go up. The
20 problem with price walking is inert customers who
21 typically are older, more vulnerable, less tech savvy
22 are the ones who lose out. That is all in our
23 super-complaint response to which, you know, so that is
24 absolutely stuff that we have been aware of some time,
25 we have done work in this area.

1 The problem is not offering price discounts. The
2 problem is -- of price walking is taking advantage of
3 inert customers.

4 MR BEARD: Well, let us just look at B -- I am so sorry.

5 THE PRESIDENT: So taking it in stages, you have no issue
6 with what the FCA found in terms of price walking in
7 their report?

8 A. We highlighted price walking in home insurance as
9 a problem as I said back in 2016.

10 THE PRESIDENT: But this falls into your category of
11 interesting but irrelevant, would that be fair? I will
12 unpack that. What you say is that whilst the effects we
13 are talking about in terms of the effects of wide
14 most-favoured-nation clauses affect the prices of what
15 we have called new business and do not, cannot, affect
16 renewal business such that those people who do not go
17 into the market and turn themselves into new customers
18 but renew year on year may be subject to price walking,
19 that is an issue that you see as a separate problem
20 entirely unrelated to the issue that you are addressing
21 in this Decision, and that is all we are interested in
22 for this purpose?

23 A. That is a perfect articulation of my view.

24 THE PRESIDENT: Well, thank you very much. That assists
25 because we can then deal with that in submissions, but

1 thank you for articulating your position so clearly.

2 Mr Beard.

3 MR BEARD: There is just one wrinkle in relation to this.

4 Could we go to {B/28/4}, please.

5 This is the research note that was undertaken --
6 sorry, the research was undertaken on behalf of the CMA
7 in relation to the impact of discount cashback soft
8 toys, the impact of promotions on consumer decisions
9 in -- FCA, I am so sorry. I was miscrediting you there.
10 The FCA.

11 "Discounts, Cashbacks, and Soft Toys: The Impact of
12 Promotions on Consumer Decisions in the General
13 Insurance Markets."

14 Have you seen this document?

15 A. I am aware of it, but I have not read it, no. It is a
16 research note.

17 Q. It is a research note.

18 A. Not an FCA decision or anything.

19 Q. No, it is not an FCA decision but it is a research note,
20 and I just want to take issue with the point that you
21 were making that you only considered the difficulties
22 with promotional deals in the context of price walking.

23 "We conducted an online experiment simulating the
24 experience of purchasing insurance, to understand how
25 promotions could impact price comprehension and decision

1 making in the general insurance market. We find that
2 cash discounts and promotions that closely resemble
3 cash, such as retail vouchers, loyalty points and
4 cashbacks, significantly undermined participants'
5 ability to select the best insurance deal and correctly
6 assess policy premiums. Participants in the experiment
7 were particularly attracted to promotions that included
8 a pound sign or a percent sign ..."

9 A. Actually, I have read this, yes.

10 Q. I recognise this is all sorts of insurance, it is not
11 home insurance focused, so it is much more general than
12 that, but you do not dispute anything that they found in
13 relation to this research, do you?

14 A. No.

15 Q. So what this research is showing is that actually
16 promotional deals, never mind the price walking, are
17 problematic in terms of what they do for consumers.
18 That is correct, is it not?

19 A. No, what they are finding is that consumers may be bad
20 at judging value and consumers have lots of biases, we
21 all have lots of biases when we make decisions. What
22 they are not saying is that price discounts are
23 therefore a bad thing, I do not think. They are noting
24 the fact that people are bad at evaluating those, and it
25 is much -- they are bad at evaluating those tradeoffs,

1 but price discounts are a form of competition and we do
2 not want to stop firms being able to compete.

3 Q. I certainly agree we do not want to stop firms being
4 able to compete. We will make submissions in relation
5 to the interpretation of this document in due course.

6 I have one final question for you.

7 I think, from what you have said throughout your
8 evidence, you would accept that if you had evidence that
9 ComparetheMarket was on average pricing more cheaply
10 than the other PCWs for the same risks during the
11 relevant period that would be indicative evidence that
12 the wide MFN was not having an immediate effect. Do you
13 agree with that?

14 A. Well, I would be -- if you have correctly allowed for
15 all of the risk factors, I would be surprised at that
16 result, but the point here is not that the wide MFNs
17 only mean that ComparetheMarket raises its commissions.
18 The point is that the wide MFNs reduce competition
19 between PCWs over commissions. So they increase the
20 commission rates that all the PCWs charge. That is the
21 effect.

22 They remove the ability to enter or compete a very
23 low commission model. They increase -- they lower the
24 risk of increasing commission rates because you are not
25 losing business from doing that. So generally they

1 soften the competition that leads to all commission
2 rates increasing.

3 Q. I understand your caveats, but I think the first part of
4 your answer is if you are controlling for risk factors
5 so you are dealing in average risks, actually that would
6 be evidence that the wide MFNs were not having an
7 adverse effect on competition.

8 A. No, that is absolutely not what I said. No, that is
9 absolutely not what I said. I said I would be surprised
10 at that result. You know, my prior(?) is I would not
11 expect that, but I absolutely did not say that would be
12 therefore evidence that the wide MFNs were having no
13 effect, and it would not be because you would expect the
14 wide MFNs to lead to the commission charge by all the
15 PCWs to increase.

16 Q. Even if ComparetheMarket is undercutting other people?

17 A. The purpose of the wide MFNs is to relax competition
18 commissions and to push prices up.

19 MR BEARD: That will be a matter for submission in due
20 course.

21 Unless I can assist the Tribunal any further, those
22 are the only questions I had for the witness.

23 Ms Demetriou, I do not know, may have re-examination,
24 and the Tribunal --

25 THE PRESIDENT: We will just do a round of the Tribunal in

1 case there are questions there. Professor, do you have
2 any questions?

3 PROF ULPH: Yes, can I just ask one final question to
4 Dr Walker?

5 Questions by THE TRIBUNAL

6 PROF ULPH: I asked Ms Ralston a question yesterday about
7 how you may weigh up possibly conflicting evidence when
8 you do a SSNIP on the HIP side of the market and you do
9 a separate SSNIP on the consumer side of the market.
10 I just want to be clear I understand your position. Is
11 it your position that first of all you think that the
12 single SSNIP you have done on the HIP side of the market
13 you have actually tested the competitive constraints on
14 the consumer side of the market as well?

15 A. Yes.

16 PROF ULPH: Not one SSNIP (inaudible) done that. Your
17 second position is that that there is no need to
18 contemplate doing a further SSNIP on the consumer side
19 because you have already answered the question about
20 what the nature of the market is through the SSNIP that
21 you have done on the HIP side. Is that your position?

22 A. Yes.

23 PROF ULPH: Thank you.

24 MS LUCAS: Nothing from me.

25 THE PRESIDENT: And nothing from me. Mr Beard, anything

1 arising out of that?

2 MR BEARD: No, thank you.

3 THE PRESIDENT: Ms Demetriou, there is re-examination now.

4 My experience of re-examination with witnesses who have
5 been in the box all day is that it often misfires due to
6 tiredness, so if you are feeling tired then I will draw
7 matters to a close, but it would mean you are in purdah
8 a further night.

9 MS DEMETRIOU: Sir, I can actually -- it is a hypothetical
10 problem in that -- a hypothesis we do not need to test
11 because I do not have any re-examination for Dr Walker.

12 THE PRESIDENT: Well, that answers that, thank you very
13 much, Ms Demetriou. Dr Walker, many thanks for your
14 evidence. You are released, thank you very much.

15 A. Thank you.

16 Housekeeping

17 MR BEARD: I think it is plainly time to --

18 THE PRESIDENT: It is time to draw stumps. I appreciate
19 that the timing that we are behind by half a day is
20 entirely due to the Tribunal, and we want to manage the
21 problem so that the parties are not in any way
22 inconvenienced.

23 Do we want to start earlier tomorrow? Would that
24 assist?

25 MR BEARD: I will leave that to Ms Demetriou because it is

1 Ms Demetriou who is cross-examining.

2 THE PRESIDENT: Indeed.

3 MS DEMETRIOU: Sir, thank you. We are actually, I think,
4 more than half a day out because I think we were -- on
5 the timetable we had, I think that Dr Walker was
6 supposed to have finished yesterday lunchtime, so we are
7 one and a half days out on our timetable. I am just
8 mentioning that so the Tribunal is aware of where we
9 are.

10 THE PRESIDENT: Could we have the timetable up? I have not
11 brought my paper copy in so we had better have a look at
12 this and manage. Oh, I am being handed one now. No
13 worries, thank you. (Handed).

14 MS DEMETRIOU: I am not making any complaint or any kind of
15 point. I just want to be sure that we are all
16 understanding.

17 THE PRESIDENT: On the same page, yes, exactly.

18 MS DEMETRIOU: Yes.

19 THE PRESIDENT: So what you are saying is we should have had
20 Ms Ralston in yesterday on her second round of evidence.

21 MS DEMETRIOU: Yes, so we are behind. I am sure that we can
22 make up time, but I think it might be -- if the Tribunal
23 and if everybody else is amenable, then if we could
24 start a little bit earlier tomorrow I think that may
25 help, and I will do my best to try and catch up as far

1 as I can.

2 THE PRESIDENT: Well, Ms Demetriou, first of all we will
3 start earlier. Should we go for the 9.30 that we opted
4 earlier?

5 MR BEARD: Can I just check with Ms Ralston?

6 THE PRESIDENT: Indeed, please do. It obviously
7 inconveniences all of those who are providing support
8 here, and I do not say it lightly.

9 MR BEARD: May I briefly take instructions?

10 THE PRESIDENT: Do.

11 MR BEARD: (Pause) Ms Ralston is more than happy to start
12 at 9.30. I think what we will need to do is make sure
13 that there is a proper break around 11.00/11.15 for
14 perhaps 15 minutes rather than 10.

15 THE PRESIDENT: That goes without saying. We will
16 accommodate and think about the breaks that are
17 required.

18 Ms Demetriou, I do not want you to feel under any
19 pressure time-wise. I think I am going to operate on
20 the basis that it will be a full day and a half
21 cross-examination which means that whatever we do to
22 extend the day -- and we cannot do very much -- we are
23 going to be behind anyway.

24 That puts the squeeze on your preparations for
25 closing submissions. We have no issue about finishing

1 the evidence, that will not be a problem. The problem
2 is that you are going to have a diminishing amount of
3 time to produce closings, and I do not think it is fair
4 to impose that at least without discussion.

5 I do not know whether we want that discussion
6 tonight or to see where we go, but for our part we would
7 be minded to be as flexible as diaries allow to permit
8 closing submissions to take place at a different time,
9 but I underline the "as diaries allow" because I know
10 that all of us have other things in our diary, and there
11 may be a squeeze imposed by external events.

12 I interrupted you there, Ms Demetriou.

13 MS DEMETRIOU: No, I am so sorry, I interrupted you. So two
14 responses, really.

15 One is in relation to the evidence, may I just make
16 two points to throw in the mix or rather raise two
17 things to throw in the mix.

18 The first is that Professor Baker is flying back to
19 the US on Saturday so he is here on Friday, but in the
20 morning first thing he has an appointment relating to
21 COVID and testing and his ability to fly back, which he
22 should be here at 10.30, but it is not completely
23 implausible that there is a delay to the appointment and
24 he is a little bit late. He has an appointment at
25 9.00 am somewhere across town.

1 THE PRESIDENT: Ms Demetriou, thank you for raising that
2 point, and I will answer it right away. Given that the
3 timetabling delay is as I say a matter of the
4 questioning, which personally I found very valuable but
5 has been caused by our questioning, the delay, we will
6 be fully flexible and understanding of any issues that
7 the Professor has about his availability and we are very
8 grateful that he is able to make himself available for
9 the Friday, which would be deeply inconvenient if that
10 could not happen.

11 So we will work around that. That is not a problem.

12 MS DEMETRIOU: I am very grateful. The other point I just
13 wanted to raise relates to we had discussed slotting
14 in -- I am now speaking without any knowledge as to what
15 has gone on because it is one thing I have not been
16 focusing on, but we had talked about slotting in
17 confidentiality which now looks challenging.

18 THE PRESIDENT: We have discussed that amongst ourselves,
19 and we were going to get a grip on that issue on
20 Wednesday, but it does seem to me that the idea of
21 wasting -- and I say that without in any way dismissing
22 the points, but wasting Thursday afternoon on something
23 when we could be hearing evidence is not going to
24 happen, and we will give some thought to clearing the
25 week.

1 The fact is I do not anticipate that you are going
2 to be wanting, either of you, to go into closed session
3 for the experts.

4 MS DEMETRIOU: I think in relation to my cross-examination
5 of Ms Ralston I will need to go into closed session for
6 some of it. I am hoping to organise things so that
7 I can do that in one block rather than inconveniencing
8 everyone by switching backwards and forwards.

9 THE PRESIDENT: That is helpful. Given that the horse of
10 confidentiality has somewhat bolted in that we have
11 already gone into private session and I do not think we
12 can resolve matters in a way to avoid that without
13 putting you in the same position that Mr Beard was in
14 about having to pick and choose that which you think you
15 can refer to and that which you cannot, the real reason
16 I am concerned about ensuring that we hear from third
17 parties on the evidence is the extent it affects in part
18 the closing submissions that you make but also the way
19 we craft the judgment because if we have to navigate the
20 shoals of the very extensive yellowing that exists it is
21 going to be a real fetter on how the matter is crafted.

22 So we will kick this hearing out but have it as part
23 of these proceedings at a time that suits the advocates
24 in the main part of the case.

25 MS DEMETRIOU: Sir, thank you. I certainly understand the

1 point you make about the judgment. I do hope that
2 Mr Beard and I, rather like we did in opening, can
3 navigate around it in our closing submissions.

4 May I just say in relation to closings perhaps
5 Mr Beard and I can speak after court today and see if
6 there is any proposal that we can -- whether there is
7 any possible proposal in terms of reorganising things.
8 Speaking for myself, I do not think that I am available
9 any time soon to push back, and I am sure it would be
10 hard to coordinate diaries, but I just wonder if there
11 is anything we can do on the timetable, if there is
12 anything we can do to --

13 THE PRESIDENT: I think you should certainly be given the
14 opportunity. I am very conscious in these cases, as
15 with IP cases, that the talent in the area is booked end
16 to end and that your diaries are likely to be a problem,
17 and obviously so is the diary of the Tribunal. So see
18 what you can do.

19 MS DEMETRIOU: Yes.

20 THE PRESIDENT: We would for our part be minded to be as
21 accommodating as our diaries would allow if you came up
22 with a proposal, but I think the first thing is to see
23 just what can be done.

24 MS DEMETRIOU: Thank you.

25 THE PRESIDENT: I do think that it is something of

1 a problem. We are talking about two and a half days'
2 writing time plus the weekend, and that is liable to be
3 shortened by at least a day at the moment, but I will
4 leave that problem for the moment, and we can address it
5 at a convenient point tomorrow.

6 MS DEMETRIOU: Thank you very much.

7 MR BEARD: Just in order that Ms Demetriou and I may
8 discuss, does the Tribunal know whether or not it is
9 able to sit into the following week, because I think
10 that there is probably no point in Ms Demetriou and
11 I discussing further those sorts of changes if in fact
12 it is not feasible for the Tribunal. I am not
13 suggesting that is the way we should go, but I just
14 wonder whether it is a sensible thing.

15 If it is not something that can be answered now, it
16 may be something that can be picked up by email in due
17 course.

18 THE PRESIDENT: That is certainly something which we can
19 maybe look at now. Just one moment.

20 MR BEARD: I should stress I am not suggesting we should go
21 into the following week.

22 THE PRESIDENT: Look, what we will do is we will all consult
23 our diaries. I think there are a variety of ways in
24 which one can do this. For example, one of the things
25 I must say might bear contemplation in future cases is

Wednesday, 10 November 2021)

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

PAGE

DR MIKE WALKER (continued)1

 Cross-examination by MR BEARD (continued)1

 Questions by THE TRIBUNAL138

 Cross-examination by MR BEARD (continued)149

 Questions by THE TRIBUNAL180

Housekeeping182