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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

1 (10.00 am)

2 THE CHAIRMAN: Good morning, if we just wait for the live
3 feed to start, and I will let you know when we can
4 begin.

5 CLERK OF THE COURT: We are live.

6 Housekeeping

7 THE CHAIRMAN: Thank you very much. Mr Beard, before you
8 resume, I had one point which I just want to float
9 across both your desks for consideration. It was
10 prompted by your suggestion that we might have to go
11 into private session and I understand you are going to
12 try to avoid that, but the thought still remains.

13 I quite understand why the CMA has done its best to
14 preserve the confidentiality of the identity of third
15 parties in the decision and in the papers that we are
16 referring to.

17 I have to say when, Mr Beard, you were going through
18 the various HIPs yesterday, I was becoming increasingly
19 uncomfortable about using codes in what are after all
20 open proceedings, where I could not see the
21 justification in terms of commercial protection. As
22 I say, I have considerable sympathy for regulators who
23 are wanting to ensure that their decisions are as
24 undisturbing of the third-party environment as possible.

25 But I think that when one gets to litigation in

1 public, the test probably needs to be something rather
2 different. I apologise for raising it now, it is
3 probably something I should have got onto in the run-up
4 to this hearing, but I think seeing it in action
5 yesterday opened my eyes, and I am not going to direct
6 any change now, but I think I would rather begin to
7 start applying a test that one only protects for
8 confidentiality where there is a risk of material
9 commercial harm to the person one is referring to rather
10 than simply they would rather have their name not
11 mentioned at all.

12 Now, I do not think, Mr Beard, you should change
13 your practice, because I think that would be unfair to
14 the CMA's established course, which I have certainly
15 endorsed if only by silence so far. But I would like
16 the CMA to think about this, not least because when one
17 looks at, say, Helen Ralston's reports, there is so much
18 yellow that if we were to try to substantively refer to
19 those paragraphs in any judgment, I do not see how we
20 actually could.

21 That is not, to my mind, the way we ought to be
22 thinking about writing our judgments. We should be
23 writing our judgments without worrying about
24 confidentiality and then one considers very narrow
25 issues of confidence and excision at the end of the

1 process rather than at the beginning. At the moment,
2 I think we are allowing the confidentiality horse, as it
3 were, to drive the matter when we should not be.

4 I do not -- if either of you want to say something
5 in response, do, please, but I kind of think we ought to
6 put that on the burner for further consideration.

7 MR BEARD: Look, I avoided any reference to this yesterday.

8 You probably cannot quite hear the cheering in the
9 distance from those in my solicitors team, who have been
10 trying to grapple with the CMA's approach to
11 confidentiality and trying to say: look, there is not
12 a serious risk to commercial confidentiality here.

13 Indeed, the approach the CMA, as I understand it, has
14 ended up with situation where even material that had
15 previously been made available to BGL, ie
16 ComparetheMarket, is now being treated as confidential
17 which, to our mind, is simply bizarre.

18 Now, we have tried to engage with the CMA on these
19 matters. We do understand the CMA has concerns. We do
20 not think that the nature of the concerns are being
21 reasonably expressed by the CMA. We do also understand,
22 however, that these sorts of confidentiality mark-up
23 exercises can be heavy, so I understand there is
24 a proportionality issue as well as a reasonable
25 threshold issue.

1 We do not think they have been applying a reasonable
2 threshold. We do not think that actually what has ended
3 up being done is really proportionate. We think a lot
4 more could be out. We are trying to play the game. I
5 did not make any complaints yesterday. I will keep
6 going on the same basis today and we will try to reach
7 a resolution.

8 Because, as you say, the situation is that most of
9 this material is utterly anodyne and much of it is quite
10 old. It has been made available to people within the
11 market already and therefore sensitivity in relation to
12 it cannot be that serious and yet here we are having to
13 grapple with screeds and screeds of yellow mark-up.

14 But I vent that on behalf of those that have been
15 seeking to deal with it. I will carry on as I did.

16 THE CHAIRMAN: Well, thank you. I mean, Ms Demetriou, you
17 can obviously push back on that. I will just say this:
18 having had sight of a number of -- it's usually
19 commission decisions, where the little cut and paste
20 scissors appear, reading those gives you a very
21 unfortunate sense of exclusion from the thinking of the
22 decision maker and actually it is an unfair impression,
23 because when you look at the unredacted decision and
24 peer through the highlighting, as it were, actually what
25 is redacted is completely anodyne and there is an

1 excessive mystery, which actually, to my mind, damages
2 the integrity of the process that is intended to be
3 essentially a public form of regulation.

4 What I do not want to have happen is for there to be
5 a huge debate in a month or two's time, when we have got
6 a judgment, because I am not going to have a judgment
7 that is covered with little scissors where there are
8 going to be as few as we possibly can manage. I think
9 that nettle needs to be grasped now and that is why I am
10 raising it now.

11 But, Ms Demetriou, do, please, push back in whatever
12 way you wish.

13 MS DEMETRIOU: Sir, I think the best thing for me to do --
14 we have heard what you have said and I think the best
15 thing for me to do is to go back to those instructing me
16 now and take further instructions in light of what you
17 have said.

18 I mean, I know that one issue that the CMA was
19 concerned about was the procedural one in the sense that
20 these HIPs, were told that their information would be
21 protected and indeed their identity would be protected
22 during the process, and they have not had an opportunity
23 to make any submissions on whether or not that should
24 now be lifted.

25 But I do understand the point you are making about

1 the litigation stage being separate and that
2 the Tribunal has to reach its own view, ultimately, on
3 confidentiality.

4 So could you please leave that with us and we will
5 do what we can to consider the remarks that you have
6 just made and come back with a substantive response.

7 THE CHAIRMAN: No, absolutely. Let me be clear, first of
8 all, I am not making any kind of ruling now. I am
9 raising it as something for consideration. I do
10 understand the very difficult position that the CMA is
11 in. When you are asking some fairly intrusive questions
12 of third parties, you want their co-operation, you do
13 not want to use at every instance the formal powers that
14 you have got to extract information and you find that
15 people are incredibly sensitive about even the most
16 mundane thing.

17 So do not get me wrong, I understand where you are
18 coming from. But there is a point in time when I think
19 it begins to look unfortunate. I think if it helps the
20 CMA, you can feel entirely free to raise with any third
21 parties, who might be concerned, exactly what I have
22 said, that I am minded to do a significant amount of
23 de-blanking or de-yellowing, so that any objections can
24 be dealt with in the course of these proceedings.

25 So I do not want, as it were, the CMA to feel

1 obliged to fight someone else's corner. You can, if you
2 wish, and it is entirely a matter for you to say: look,
3 the judge has said this. If you want to get
4 the Tribunal to roll back from that indication, you had
5 better turn up yourself and we will hear why Endsleigh
6 does not want to be referred to as whatever Endsleigh
7 is.

8 MS DEMETRIOU: Sir, thank you very much. I will take that
9 away and I will update the Tribunal as soon as I can in
10 relation to this matter.

11 THE CHAIRMAN: Thank you very much, Ms Demetriou, I am
12 really much obliged. Mr Beard, over to you.

13 Opening submissions by MR BEARD (continued)

14 MR BEARD: Thank you. So yesterday, where I left off was
15 I was dealing with Legal & General, but in a process of
16 working through the 32 HIPs that are subject formally to
17 a wide MFN clause in their contracts and identifying how
18 there were significant weaknesses in the evidence that
19 the CMA was relying on and selectivity in the way that
20 they had dealt with that evidence.

21 So I was -- Legal & General was, I think, the 25th
22 of those 32 HIPs, and the other 24, I had explained
23 really there was no impact of the wide MFN in relation
24 to them and no evidence to support that contention.

25 Legal & General is a significant HIP and, as I said,

1 what the CMA had done was identified in their view
2 a conflict of evidence between section 26 notices and
3 responses to the statement of objections we were saying
4 a) if that is the case, then you cannot take that as
5 inculpatory evidence, as it were, because there are
6 significant doubts on your own case.

7 In fact, when we went through that material, we
8 showed that on the salient issue, there is not
9 a contradiction. Frankly, what is most astonishing
10 about that HIP is the fact that it says, in terms, in
11 the material that the CMA says it is relying on, that
12 the wide MFN had no material impact on pricing strategy
13 or profitability for it and yet that phrase, that key
14 piece of evidence, it is not anywhere in the decision.

15 So now I am going to move on to HIP number 4, which
16 is also a relatively significant HIP in scale in terms
17 of the sales through PCWs. I want to pick up on this
18 HIP for a couple of reasons. One is because we say the
19 evidence has either been ignored or not properly
20 interpreted and it is also one where there is an
21 allegation that we were enforcing the wide MFN against
22 them and that this was a significant matter in relation
23 to how this HIP behaved. I am going to show you that is
24 just not the case.

25 Now, it is particularly interesting, this HIP,

1 because this HIP actually gave to the CMA, it gave to
2 the CMA a plot of its own pricing data. Now, it is
3 quite unusual, because you would have thought given we
4 were talking about a pricing effects case, the CMA would
5 have asked each of the HIPs to provide this, but they
6 did not.

7 However, this HIP number 4 did do it and we can
8 actually find the plot at bundle F, tab 711 {F/711}.
9 This is actually an Excel document, so I think you have
10 to click through it. I am sorry, I have got the wrong
11 reference. It is 712, I have got my references muddled
12 up. It is 712 is the Excel document that I want to take
13 you to. {F/712/1}.

14 I think the EPE -- are you able to -- fabulous.
15 Excellent, thank you very much.

16 This is one where you do have to squint slightly,
17 I am not going to say anything else. What you have
18 along the bottom are the months from January 2016
19 through to September 2018 and, up the side, you have
20 various percentages.

21 Now, this is the material provided by Qmetric
22 (Policy Expert), which they said was their account of
23 their pricing. Now, I should be absolutely clear about
24 this. What you actually see on the left-hand side is an
25 analysis of their commission charged on sales in the

1 relevant periods split out by month and also the four
2 tracks are by PCW.

3 The reason they use commission as their price is
4 because that is cutting out insurance premium tax and
5 their risk price. One can assume, for these purposes,
6 that the risk price is not materially varying or it is
7 not materially varying in any consistent way, which is
8 why they use this as their effective price data.

9 Now, what is interesting is that the dotted line is
10 ComparetheMarket and you will see there that
11 ComparetheMarket is not always the lowest commission,
12 lowest price product. But what I would draw from this,
13 more particularly, is that you have a divergence of
14 prices between the PCWs. You have it all the way
15 through, ironically, to November 2017.

16 Now, the irony, of course, is that that plot might
17 suggest that if you had wide MFNs, they were being
18 introduced in November 2017 and therefore compressing
19 the pricing differences between the PCWs. But, of
20 course, the CMA's case is obviously not that.

21 It is that they were withdrawn in 2017 and prior to
22 that they were having an actual effect.

23 So the starting point is that this plot is entirely
24 contrary to the CMA's case that wide MFNs were having an
25 impact. It shows that Qmetric (Policy Expert) was not

1 compliant with the wide MFN, but it is also I think more
2 importantly explaining or showing why the wide MFN did
3 not have any material effect on pricing.

4 Now, the thing to also note here is that the point
5 at which it is alleged by the CMA that there was
6 enforcement by ComparetheMarket in relation to the wide
7 MFN, was actually in May 2017, in May 2017. Now, it is
8 right, I think, that after May 2017, the gaps between
9 the four PCWs were slightly smaller, but they are
10 nothing like as small as the situation after the
11 withdrawal of the wide MFNs.

12 What did Qmetric (Policy Expert) say about this
13 plot? Because they put it to the -- they gave it to the
14 CMA and explained it. The explanation is in document
15 {F/711/1}, if we could go back to that, if that were
16 possible, please.

17 Go to the second page {F/711/2}. At the top of that
18 page, what it says is that:

19 "What our analysis shows us is:

20 In the entire period Jan 16 to Sept 18 QMetric was
21 pricing on a general downward trend across all PCWs."

22 We saw that from the plot, that is true:

23 "QMetric priced differentially between PCWs
24 before May 2017.

25 QMetric continued to price differentially

1 after May 17 but less so than before."

2 So this is the notional heavy-handed enforcement of
3 this price -- wide MFN. So not saying: we did not
4 differentiate after May 2017, it is just we did it a bit
5 less:

6 "There was no sustained pattern as to pricing higher
7 or lower on one PCW compared with another across the
8 period."

9 Now, there is nothing from that data that supports
10 the CMA's analysis that the wide MFNs were having
11 a material effect during the relevant period up
12 to November 2017. The most that could be said is that
13 there was a slight reduction in the level of
14 differentiation from May 2017 to November 2017. But
15 equally, that is not telling of any adverse effect in
16 circumstances where the strategy of this Qmetric (Policy
17 Expert) was actually to go closer afterwards and less
18 differentiated in terms of its overall pricing.

19 When you do before and after comparison, in relation
20 to the HIP's own data, you are not finding or
21 identifying any material effect at all. But it is
22 further than that, because there are two issues to
23 raise. One is there is a dispute of fact about whether
24 or not there was real enforcement in May 2017 and in the
25 course of the submissions made by BGL -- and I will just

1 give you the note reference, it is {B/33/74}. We do not
2 need to go to the document.

3 It is just at paragraph 283, [Redacted], who was at
4 ComparetheMarket, at the time, he subsequently left, but
5 entirely amicably, I should say. [Redacted] said he did
6 not recall making any threats about the enforcement of
7 the wide MFN to Qmetric (Policy Expert). Qmetric
8 (Policy Expert) suggests he had that there might be some
9 delisting and he says, no, that is not the case.

10 Now, funnily enough, [Redacted] was actually then in
11 a meeting with the CMA, on 4 April 2019. Just for your
12 notes, the transcript of that is in {F/475}. He was
13 never asked about this.

14 But let us leave that aside for a moment. So there
15 is a dispute of evidence. Let us go back, however, to
16 what people from Qmetric (Policy Expert) said and if we
17 could pull up the document {F/545/10} and go to page 10.
18 This is a meeting between the CMA and the
19 representatives of Q4.

20 If you pick it up at line 11:

21 "DEACON: Pricing amongst the different aggregators
22 varies. Compare The Market has been consistently cheaper
23 than GoCompare, but that's purely based on the
24 information that we receive from Compare The Market
25 versus GoCompare and the type of customers that we

1 obtain from either of those channels. Every customer
2 has a slightly different profile, but you will know that
3 based on the information that we've already sent to
4 you."

5 So this is a sort of broad indication of why it is
6 actually you can end up being cheaper on CTM although
7 that is not always the case.

8 Then the CMA specifically asks the representatives,
9 at line 21:

10 "ADAMS: So obviously, at one point, [Qmetric
11 (Policy Expert) was party to an agreement with Compare
12 The Market that it had a wide MFN in it. To what extent
13 was that taken into account in [Qmetric's (Policy
14 Experts) strategy?

15 DEACON: It never was until we were informed that we
16 breached the contract with CTM. It was never a factor
17 until that point, which was May 2017. It was certainly
18 in the contract but we had never regarded it as such.
19 We'd never particularly followed it."

20 Which is obviously borne out by the material we have
21 already seen.

22 If we go, carry on down, page 11, so the next page
23 {F/545/11} -- sorry, I have just read into there. But
24 the next paragraph from the Qmetric (Policy Expert):

25 "DEACON: We felt that the MFN, like most other home

1 insurance providers, was unfair, but we didn't take it
2 into account when pulling together our pricing to push
3 back to Compare The Market versus the other aggregators
4 until such point that we were informed that we were in
5 breach of the contract."

6 So this is the CMA asking about this enforcement.

7 If we go to {F/545/16}, page 16, there the CMA are
8 asking about whether or not the Qmetric (Policy Expert)
9 asked for the wide MFN to come out and whether there was
10 significance to that.

11 You will see at line 14, they say:

12 "BUNYAN: That was the only reason, really [that
13 they asked to take it out]; to keep the contracts in
14 line with each other."

15 So there was no great significance being attached to
16 that.

17 Then we go down to page 18, if we may {F/545/18},
18 where the CMA are asking about whether or not references
19 to the wide MFN were problematic. What was being
20 discussed was a note, you see at the top of this page,
21 this was one of the Qmetric (Policy Expert) individuals:

22 "BUNYAN: We had the MFN clause in the contract and
23 they wanted the best possible pricing."

24 So what had been said was, by ComparetheMarket, "We
25 want the best possible pricing", and what was being

1 tested by the CMA was whether or not the wide MFN clause
2 in the contract was really the driver for that.

3 Then another Qmetric (Policy Expert) 4 person says:

4 "DEACON: Or were they reminding us that they wanted
5 the best possible pricing? Is that what it was?"

6 Then Qmetric (Policy Expert) person, who had been
7 answering before:

8 "BUNYAN: Yeah. I mean, there was over the years,
9 there was regular... That must have been
10 a clarification, that they want the best pricing."

11 So although CMA are fishing for Qmetric (Policy
12 Expert) to suggest that the wide MFN was significant,
13 they are just saying, "No, we know that ComparetheMarket
14 was interested in best pricing." That was what was
15 significant.

16 You can see this further, if we go down to page 27
17 {F/545/27}, because at page 27, at line 21, you have got
18 the CMA asking about the impact of the wide MFN:

19 "ADAMS: Can you just elaborate on the extent to
20 which the wide MFN was a factor in rejecting promotional
21 deals after that [May 17] episode?

22 DEACON: A big reason for not entering into these
23 promotional deals was probably me because I've never
24 liked them. And we had to experiment with them to
25 figure out whether the customers that we gained from

1 those promotions made a profit or were valuable
2 customers for the business. And ... it turned out that
3 they weren't. So, internally, we'd already made the
4 decision not to enter promotional deals.

5 Whether or not an MFN existed or not within CTM
6 would not have been a major factor in entering into a
7 promotional deal; it was -- it was whether the business
8 was going to benefit or not. And I'm the arbiter of
9 whether the business benefits or not. And, having been
10 through the experience of two promotional deals with
11 Confused I didn't like them at all. I didn't like the
12 way they were structured, the way they operated, the
13 business that we got out of it, how much of that we
14 renewed at the end of the first year, how profitable it
15 was, how many claims it had, what the loss ratio was
16 generated out of that business."

17 {F/545/28}. He is absolutely emphatic. He could
18 try promotional deals. He had tried promotional deals.
19 He considered them a total waste of time and
20 unproductive.

21 Again, this is not evidence that the CMA ever really
22 deals with, because what you have got here is a clear
23 expression by a major HIP, that PDs are a waste of time
24 and they end up cannibalising your own profits.

25 THE CHAIRMAN: Mr Beard, just looking at my key of HIPs.

1 MR BEARD: Yes.

2 THE CHAIRMAN: Qmetric (Policy Expert), I see, is described
3 as a [Redacted]. I take it that is wrong.

4 MR BEARD: I think we will come back to that. That is
5 something I will have to explain subsequently.

6 THE CHAIRMAN: Okay.

7 MR BEARD: But let us leave that for a moment.

8 THE CHAIRMAN: Sure.

9 MR BEARD: I think that is something I will have to explain
10 to you offline, if I may.

11 THE CHAIRMAN: Very good. Understood.

12 MR BEARD: I think we do not refer to Qmetric (Policy
13 Expert) as having any particular role or name attached
14 to it and I will explain that afterwards, if I may.

15 THE CHAIRMAN: No, of course.

16 MR BEARD: It may actually be easiest if we simply send
17 a note to the Tribunal when we have a break for the
18 translators and I can explain that.

19 THE CHAIRMAN: That is absolutely fine. It is simply that
20 there seems to be a mismatch between, for instance, what
21 has just been said on this page of the transcript and
22 the very short description in the key, and I would not
23 want us to be misevaluating the material we are getting.

24 MR BEARD: You are not. I think you can be absolutely
25 confident that I am referring to the right person and we

1 can deal with the terminology afterwards.

2 THE CHAIRMAN: I am grateful.

3 MR BEARD: I am sure Ms Demetriou understands what I am
4 referring to implicitly here.

5 So then the final bit of this transcript and I do
6 not want to ...

7 So just to conclude, on page 28, {F/545/28}:

8 "DEACON: So, that's the main reason. The fact that
9 we were picked up on the second experiment with Confused
10 [so second experiment, they had tried one earlier] with
11 the wide MFN, well, you know ... it didn't make any
12 difference whether we did any more because that decision
13 had pretty much already been made."

14 Then someone else chimes in on the next page:

15 "GILDERSLEEVES: And we still haven't done any."

16 If we could just go down to 32 {F/545/32}. I am
17 mainly going to pick up on -- I apologise, page 31.
18 I am so sorry {F/545/31}.

19 31, at 16, there are then some slightly odd
20 questions about what CTM's approach to price parity has
21 been since that point, since the removal of the wide
22 MFN. But it is worth picking up the question at 31,
23 because what is asked by the CMA is:

24 "ADAMS: Have you noticed any changes in CTM's
25 approach to price parity since [the removal the wide

1 MFN]?"

2 What Qmetric (Policy Expert) says is, "No". In
3 other words, CTM was always interested in getting best
4 prices. That was still true after the withdrawal of the
5 wide MFN, because it has always said it wants to get the
6 best prices and then when it is referring to price
7 parity, what it is meaning is CTM wants to get the best
8 prices. There is no change there.

9 This matters because, of course, the CMA holds
10 against us things like, well, we conduct price
11 monitoring. Of course, we conduct price monitoring,
12 everyone conducts price monitoring, because that is
13 a vital part of the way in which we think about how we
14 are positioning ourselves in the market. But that has
15 gone on throughout and has continued subsequently. Yes,
16 of course, we want to get the best prices.

17 So Qmetric (Policy Expert) is saying, no, no nothing
18 has changed there. If we go to the next page, you get
19 a truly odd question {F/545/32}, midway down the page,
20 at line 14:

21 "ADAMS: Okay, because I mean, obviously, before May
22 2017, I know you were generally pricing within the
23 tolerances, but you did get some contact from CTM
24 querying certain issues with pricing. I think that is
25 probably a fair way of characterising this notional

1 enforcement. You got some contact from CTM querying the
2 issues with pricing, so the question is really if those
3 have continued?"

4 The irony about that question is if you had actually
5 looked at the plot that I showed you beforehand, you
6 would know the answer to that already. Because you
7 would know that Qmetric (Policy Expert) were not doing
8 that at all. They were not differentially pricing and
9 so you would not expect CTM to be querying anything at
10 all, because you would know that all the pricing had
11 been essentially bunched together after the withdrawal
12 of the wide MFN.

13 So the points to draw from this are: significant
14 HIP, no impact on its appetite for promotional deals at
15 all, the wide MFN, not interested in doing them
16 subsequently, was not interested in doing them before,
17 tested them, did not like them, was able to test them.
18 In relation to differential pricing had differentially
19 priced for most of the period, in fact all of the
20 relevant period, it slightly reduced the extent of that
21 differential pricing towards the end of it, but actually
22 got rid of differential pricing as a strategy
23 subsequently.

24 There is no basis for suggesting there is any impact
25 of the wide MFN here, even though this is a poster child

1 for the CMA, because it says this is an enforcement
2 case.

3 Now, given time, I am going to a few more of these
4 HIPs to zip through. I am going to provide you with
5 some references, if I may, just for the purposes of the
6 transcript and we will sweep them up. They are
7 references we have provided in documents, but just so
8 you have them.

9 In relation to Deeside (Aim 4), we would refer you
10 to bundle {F/489/1}. It does not need to come up.

11 THE CHAIRMAN: Mr Beard, no, I am simply going to suggest if
12 it is more convenient for you, we are very happy to have
13 a separate note and we will chase up the references
14 ourselves in due course of time rather than your reading
15 it into the transcript, because frankly, we can do it
16 that way, if you prefer.

17 MR BEARD: Yes, I am happy to do that, because the ones
18 I was going to provide references to are essentially
19 saying: look, there is evidence here that they are
20 giving that the wide MFN had no impact on the way they
21 negotiated commissions and the way they dealt with
22 aggregators.

23 So we are down to the last five or six of these HIPs
24 of the 32. We are saying, look, even in this last
25 portion, nothing doing here, the evidence does not

1 support it.

2 I will just briefly pick up Grove and Dean, if I
3 may, because this is another enforcement case, so it is
4 another of the examples that are as particularly held
5 against us. If we could go to bundle F/504, page 1,
6 {F/504/1}.

7 This, with Grove and Dean, what is said is that
8 during the course of 2017, Qmetric (Policy Expert)
9 decided it would apply a price uplift on CTM relative to
10 other PCWs and that CTM was not happy about this.

11 PROF ULPH: Mr Beard.

12 MR BEARD: Yes, I am so sorry.

13 PROF ULPH: You referred to Qmetric (Policy Expert) a minute
14 ago, did you mean Qmetric (Policy Expert) or Grove and
15 Dean?

16 MR BEARD: Am I in the wrong document? I mean Grove and
17 Dean, I am so sorry, Professor Ulph. I am confusing you
18 and myself. It is using these ciphers, because in front
19 of me, I have the names and therefore I am trying to
20 translate into numbers. I am sorry. We were dealing
21 with Qmetric (Policy Expert), we are now on Grove and
22 Dean. I am very sorry. Thank you for taking me up on
23 it.

24 Grove and Dean, not 4, it is not Qmetric (Policy
25 Expert) -- 29 imposed in 2017, an uplift on the prices

1 it was offering on ComparetheMarket.

2 Needless to say, ComparetheMarket was not happy
3 about that and went back to them and said: well, hang on
4 a second, we want to be out in the market with the best
5 prices. We want you to get rid of that loading, as it
6 is referred to. I think the wide MFN was referred to,
7 but it is entirely at peace with the general position of
8 ComparetheMarket that it wants to ensure that it is
9 offering best prices.

10 So this is held out as some kind of great
11 enforcement, but even if you had no wide MFN, it is
12 obvious that ComparetheMarket is not going to be happy
13 with an insurer on its site, effectively loading up the
14 price of products on its site, something that it will be
15 able to monitor.

16 Now, the interesting thing here is that although 29
17 recognised that there was concern here, on the part of
18 ComparetheMarket, and was backed out of the loading,
19 what is interesting is the answers that are given to
20 questions 5, 6 and 7 in this context:

21 "5. We have no evidence to support the claim that
22 G&D's negotiations with our insurance partners regarding
23 commission fees has been affected by the presence of a
24 wide MFN with CTM over the relevant period.

25 6. We do not offer any promotional deals specific to

1 one PCW and have not considered doing so.

2 7. Since Dec 2017 we have continued with the same
3 consistent pricing strategy across all PCWs for Home
4 Insurance."

5 This is a response to a section 26 request in 2019.
6 So you have got this situation where the CMA are saying:
7 look, this is an example of enforcement. This is how
8 these wide MFNs were really having an impact on an
9 insurer and what the insurer had done is essentially
10 lumped a bunch of price increase onto CTM particularly
11 and CTM was not happy.

12 Now, that is something that it would have complained
13 about anyway, but what is instructive is notwithstanding
14 that particular incident on which the CMA places such
15 great weight, actually the evidence of the insurers, it
16 made no difference to it, both in relation to levels of
17 general pricing or in relation to promotional deals.

18 Now, I am on to the last two that I am going to
19 refer you to documents on. If we could go to tab
20 {F/447/1}. This is interesting for a number of reasons.
21 It is headed, "Witness Statement", so this is the one
22 example we have seen where the CMA actually went and got
23 a witness statement from an insurer. But needless to
24 say, this person has not been proffered as a witness we
25 can test. We obviously do not know why that is.

1 This is Aviva (Quote Me Happy), this is said to be
2 a HIP in relation to whom there was an impact in
3 relation to the operation of the wide MFNs, particularly
4 in relation to promotional discounts, promotional deals.
5 I should say there is no suggestion that it had any
6 impact at all in relation to general comparative levels
7 of pricing, it is only in relation to promotional deals.

8 What is interesting is that the statement here, that
9 obviously we cannot test, makes that absence of any
10 strategy to engage in differential pricing very clear at
11 page 3, paragraph 16 {F/447/3}.

12 Pick it up at:

13 "As a result [that particular brand, because it is
14 only one brand of that insurer's portfolio, particular
15 brand] current pricing model does not differentiate
16 between PCWs ..."

17 If we go over the page, {F/447/4}, it confirms:

18 "... there are no confirmed plans to change that
19 approach."

20 Then he moves on to deal with promotional deals.

21 If we could go down to paragraph 22, this is in
22 a way, the high point of the CMA's evidence in relation
23 to promotional deals, I think, {F/447/5}. It says from
24 home insurers, the actual insurance providers:

25 "There have been several requests from PCWs other

1 than CTM for Aviva (Quote Me Happy) to enter into
2 promotional deals in home insurance over the last two
3 years, but the wide MFN has stopped Aviva (Quote Me
4 Happy) from participating."

5 There were requests and:

6 "... over the last two years, but the wide MFN has
7 stopped [us] from participating."

8 Well, we would have an awful lot of questions about
9 that proposition and the evidence that is then relied
10 upon, but we would like to ask this witness, because we
11 do not accept that that is a fair characterisation of
12 what was going on in the market at all. But I cannot do
13 that. What I can say is the proposition is bizarre.

14 If you just look at the sixth page of this witness
15 statement {F/447/6}, 26 October 2018, that is a year
16 after the withdrawal of the wide MFNs. He is saying in
17 paragraph 22, "In the past two years, we have not been
18 able to enter into promotional deals because of the wide
19 MFNs."

20 Well, in one of those years, there were no wide
21 MFNs, so that proposition does not make sense. If what
22 he meant was prior to November 2017, in the preceding
23 two years, that is not what this witness statement says.
24 Obviously, that would be one of the very basic questions
25 you would want to ask of this witness, because at the

1 moment, his witness statement simply does not make
2 sense.

3 I should add, if we track back, it actually works on
4 that page, paragraph 23, you note that -- he notes that
5 price monitoring is standard practice.

6 So this is the high point of the CMA's evidence.
7 But even there it is highly ambiguous and what they have
8 done is gone and got a witness statement, but not
9 proffered it as a witness to the Tribunal. I am not
10 going to reiterate how unsatisfactory that is in all of
11 the circumstances.

12 But it illustrates that the CMA knew that they
13 actually needed to be going off and getting witness
14 statements and they have made a decision in relation to
15 this that has meant we cannot test ambiguities. They
16 presumably went and got the witness statement, because
17 they thought this was the high point of their evidence,
18 because we do not see it in relation to anyone else.

19 The last one I want to deal with is AXA. This is
20 one where they say there was a real impact, because of
21 the wide MFNs. In particular, what is said is that
22 there were two rejections of promotional deals by this
23 insurer, because of the operation of the wide MFNs.

24 What is said in the section 26 notice by this
25 insurer is: well, we did not actually tell the PCW that

1 we were concerned about the existence of the wide MFNs,
2 but we rejected them on that basis. Okay. Two
3 promotional deals, they say.

4 I am not going to get into the fact that we are
5 talking about tiny numbers. I will come back to that on
6 ground 4. But let us just focus on that for a moment.

7 Two promotional deals and they say we did not tell
8 them that we were relying on this. I am sorry, we did
9 not tell them, the PCWs, that it was because of the wide
10 MFN that we were rejecting the promotional deal that PCW
11 was offering.

12 So we went and looked at the underlying evidence
13 that the insurer put forward to support this assertion
14 because, of course, we do not have a witness we can test
15 in relation to it, but we thought we would look at the
16 contemporaneous documentary material. So if we could
17 pick it up at F/330, page 4 {F/330/4}. I am grateful.

18 Page 4, you will see here that this is an e-mail
19 from someone at MoneySupermarket, so one of the PCWs and
20 it was MoneySupermarket, who AXA says they rejected
21 a promotional deal offer from them, attributable to the
22 wide MFN.

23 It is August 2017, they say:

24 "Just to write a bit more on this - as one of our
25 strategic partners, we want to work with you so that

1 we're at the very least, at pricing parity with other
2 competitors in the market."

3 I am just going to pause there for a second.

4 The approach from MoneySupermarket was: we want to
5 deal with you, so that we are at least at pricing
6 parity. In other words, at the moment, we are not.
7 Your products are more expensive on us than they are on
8 other PCWs and we want to enter into a deal with you, so
9 we are at least at pricing parity. It is, of course,
10 right that if they wanted to go further than pricing
11 parity, then in formal terms, that would have been
12 contrary to the wide MFN. I completely accept that.
13 But that is not what is invited here. It is at least
14 pricing parity. "Could we do a deal to at least reach
15 pricing parity?"

16 Now, the critical thing here is having a deal to
17 reach pricing parity is not contrary to the wide MFN, on
18 any reading, however formalistic you are about it.

19 Then if you move up, you will see the initial
20 response from the insurer 19 individual -- sorry, when
21 I say "move up", it is just rolling up the page. Yes,
22 at the top, I am very grateful. I am sorry, it is still
23 page 4. I am so sorry, I was confusing the EPE.

24 {F/330/4}:

25 "Thanks for your e-mail, and your interest in

1 working with [AXA].

2 We see our partnership with MSM as being both
3 a strong and strategic, and will always be interested in
4 reviewing any kind of offer/collaboration MSM would like
5 to put in front of us.

6 Where at the moment we wouldn't be looking at an
7 [above the line] offer, if you have ideas around
8 possible co-funded or other strategic offers, I'd be
9 happy to discuss with our Commercial and Pricing teams.

10 Let me know your thoughts."

11 Now, there is nothing in there that is suggesting
12 that this insurer is somehow blocked from engaging in
13 relation to offers or indeed the particular proposed
14 offer that has been put forward by MSM.

15 That continues right the way through the chain of
16 e-mails.

17 If you go back up to page 1 {F/330/1}, the bottom of
18 the page, there is:

19 "Morning X [X being the person at MoneySupermarket]

20 I understand the disappointment from your side, and
21 fully understand MSM's strategy to have the best price
22 or at least price parity. However we need time to
23 review internally what these offers do to our own book
24 and the types of customers they attract. A number of
25 departments are working together to understand the

1 impact of any offers we do, and at this time we won't be
2 moving forward with any offers on Home."

3 Now, the point we make here is that there is
4 a perfectly sensible story being set out in this
5 contemporaneous e-mail, saying, "We are thinking about
6 our book overall. We are looking at the way in which we
7 would consider these matters and we are not going to do
8 any offers in home. Even if the offer is, as you are
9 proposing, just getting to parity."

10 So we have real scepticism, it must be said, about
11 the response from this insurer in its section 26 that
12 actually it was the wide MFN that was driving the
13 rejection of this offer, because it does not make sense,
14 given the nature of the offer, and in fact the account
15 that has been given here is not to do with that. But we
16 would want to test that.

17 As I say, the reason we are raising this is we are
18 not just sitting here in abstract saying, "We would
19 quite like to test all this evidence, because it would
20 be quite fun. We have not got anything to get our claws
21 into here, but we just think as a matter of
22 principle~..."

23 What I am explaining to you is there are real doubts
24 in relation to the contemporaneous evidence and the
25 accounts being given that suggest there are

1 inconsistencies that do need testing and mean the CMA
2 cannot rely on this. So it cannot say here that it
3 reaches a conclusion on the balance of probabilities
4 that there was a rejection of that offer on the basis of
5 the wide MFN, when the contemporaneous documents do not
6 refer to it. It is those that are cited by the insurer
7 in support of its position and all we have is
8 a section 26 statement saying: and, in fact, we did rely
9 on the wide MFN, in circumstances where that is not
10 consistent with the nature of the offer that is being
11 proposed and the rationale coming back.

12 There are very, very significant doubts about it.
13 All of those doubts must enure to the benefit of
14 ComparetheMarket in the analysis of this document.

15 I am just going to deal with, finally, the last one
16 of these, which is at {F/292/1}. This is cited by the
17 CMA as being the other instance. I said there were two,
18 where AXA rejected an offer on the basis -- an offer to
19 do a promotional deal on the basis of the wide MFNs and
20 --

21 THE CHAIRMAN: I see the yellow on this, should we read it
22 to ourselves and then you can make submissions in
23 relation to it? Is that the best course?

24 MR BEARD: No, because there is so much -- because this is
25 minutes of a meeting between AXA and Confused,

1 in November 2017, and most of it is nothing to do with
2 anything remotely related to what we are dealing with
3 today.

4 THE CHAIRMAN: Right.

5 MR BEARD: So the only bit is actually the bit that is not
6 in yellow as far as we know ...

7 So it saves you some reading.

8 THE CHAIRMAN: Very good.

9 MR BEARD: It is the:

10 "No interest in home offers from [AXA] -- If [AXA]
11 are interested in the Home offer, this will push up the
12 priority of the multitiered product through
13 Confused.com -- [and X pounds] customer discount
14 mentioned."

15 This apparently, according to AXA, was a specific
16 rejection of a promotional deal being offered by
17 Confused.

18 Now, with respect, that is just not evidenced on
19 this document at all. First of all, the minutes say
20 "home offers" and as we have already discussed, the
21 scope for offers is way, way beyond simple price
22 discounting. It is true that the minutes also note that
23 a specific customer discount was mentioned, but the idea
24 that that was all that was being discussed or in the
25 frame in relation to any deals is just far from

1 evidenced by this document.

2 But it is more than that. It really is. This
3 document is quite odd, because if you go back up to the
4 top of it, you can see it on the screen, just look at
5 the date of it. It is 4 December 2017, so it is after
6 the date when all of these insurers were notified by
7 ComparetheMarket that ComparetheMarket was not going to
8 be applying -- that it was effectively withdrawing the
9 wide MFN.

10 Now, this is a set of minutes from Confused to
11 insurer 19. If you cared about promotional deals, that
12 had been discussed two or three weeks' earlier, and you
13 got those minutes and you really were essentially
14 saying, "No, no, we cannot do these deals, because of
15 the wide MFN", you receive these minutes and you would
16 be turning around and going, "All right, we can now."

17 If the wide MFN really was the motive for you
18 deciding, as an insurer, that you were not going to
19 pursue any home offers at all, a) that does not make
20 sense given the scope of the term, and b) even if you
21 were focused only on discounting, you would have
22 expected a totally different reaction in relation to it.

23 Actually, what it suggests is what we have mentioned
24 in that e-mail, in relation to the other chain of
25 correspondence, that the insurers were looking much more

1 broadly at the way that it considered its book and it
2 was not interested in doing promotional deals for
3 entirely separate commercial reasons.

4 That is the plausible reading here. Not that it was
5 the wide MFNs motivating a rejection.

6 So we are sceptical and we would have questions for
7 this insurer in relation to their assertion that there
8 were deals rejected because of the wide MFN.

9 Just for your notes, the actual statement of
10 rejection is at bundle F, tab 291, page 14. It might be
11 worth just pulling it up {F/291/14}.

12 You see in question 12:

13 "[19] can provide excerpts from the most recent
14 examples of rejected Exclusive Deals on Home Insurance
15 in 2017.

16 1. MoneySupermarket/[19] discussion ..."

17 Then it refers to this "Word Doc", that was the
18 chain of e-mails I took you to first:

19 "The offer had to be rejected as ComparetheMarket
20 had enforced wide MFN. This was not disclosed to
21 [MSM]."

22 It is just not borne out by the evidence. The CMA
23 did not test it.

24 The next one:

25 "Confused/[19] discussion to support Home Insurance

1 (Word Doc -- 'Rejected confused Home offer Nov 2017')."

2 That is just what I have taken you to:

3 "E-mail attached confirms minutes taken within
4 monthly partnership review meeting on 15 November (prior
5 to comparethemarket's notice on wide MFNs). It confirms
6 [19] is unable to support confused with an Exclusive
7 Deal on Home Insurance due to comparethemarket enforcing
8 wide MFN."

9 It does nothing of the sort. So you look at those
10 documents and think: I have got real questions about
11 these assertions here. I have got real doubts that this
12 stacks up. Not tested.

13 I will give you the references, as I say, separately
14 to the other four. That is the 32. That is the 32.

15 I should say in relation to 19, there is another
16 issue, which is that they did a deal, they did do one
17 promotional deal with MSM. When ComparetheMarket found
18 out about it, they said that they had spotted these
19 lower prices and they wanted those lower prices for
20 their customers and essentially a parallel deal was done
21 with CTM.

22 Now, the CMA says: well, that is another example of
23 ferocious enforcement by CTM. We say, no, it is not.
24 It is just what we do. We want the best prices and
25 there is nothing wrong with that.

1 As I have said, we have referred to the wide MFN in
2 the course of negotiations, but it is not, in the light
3 of all the evidence from the HIPs, something that
4 influenced materially the way in which the HIPs were
5 operating in relation to their pricing. If it did not
6 influence them in relation to their pricing, there is no
7 basis for the suggestion that there is an appreciable
8 effect here. There is no basis for the suggestion that
9 the PCWs were somehow stymied in their incentives to
10 reduce or change commissions. There is no basis to
11 suggest that the PCWs's growth and expansion plans were
12 adversely affected at all.

13 I picked up on the issues to do with price
14 monitoring. I should mention before I finish, we have
15 dealt with the PCW evidence, and I will just give you
16 a reference to that. In our response to the letter of
17 facts, bundle B, tab 35, paragraphs 46-51 {B/35},
18 obviously there is an awful lot of weight placed on
19 MoneySupermarket evidence, and we will make further
20 submissions on that in due course. But we say none of
21 that evidence is a substitute for the evidence of the
22 insurers, who are supposed to be the ones that are being
23 directly affected, because they are the ones that are
24 party to these clauses.

25 In fact, when you look at the other two PCWs, the

1 evidence of any appetite for promotional deals or indeed
2 differential based pricing is strikingly limited. So
3 even in relation to two of the PCWs, you are not getting
4 any material support for the case. As I say, we say it
5 is the HIPs that matter most, PCW evidence from those
6 other two PCWs are supportive of that in any event.

7 With that, I am now going to move on, unless you,
8 the Tribunal, has questions in relation to the
9 evidential matters. Because I have been trying to pick
10 up grounds 2, 5 and 6, in doing that, I am not going to
11 work my way back through all the details, it is in the
12 application reply.

13 But you can see why it is one should not just take
14 multiple repetitions of references to particular home
15 insurers and particular incidents, without actually
16 going back and considering whether or not the evidence
17 has been considered in a balanced manner. The danger
18 is, we think, that that is exactly what the CMA has
19 done. It has sprinkled references and selective quotes
20 across this very long decision.

21 What you see is a lot of those instances being
22 recycled and recycled and recycled, as if they are
23 somehow supportive of one another. I think it was
24 Wittgenstein that said, you do not check the veracity of
25 the news by buying a second copy of the same newspaper,

1 and there is a degree to which that is what the CMA has
2 been doing in relation to repetition of incidents within
3 the long decision.

4 Let us go, then, to ground 3, if I may. I am
5 conscious of the need for a break for the shorthand
6 writer and I am aim to do that at about 11.30, if that
7 is all right.

8 THE CHAIRMAN: Of course.

9 MR BEARD: Ground 3, we are in different territory to some
10 extent, albeit Ms Ralston, who engages in the work in
11 relation to ground 3, does not ignore the evidence that
12 she sees from the material before her. She looks at
13 that and considers the evidential context when she is
14 carrying out her economic analysis.

15 But, as we know, in relation to what we have said in
16 relation to ground 3, the CMA has concluded that the
17 effect of these wide MFNs was to restrict competition
18 with the result that there were higher retail prices and
19 commission fees. At least, as I highlighted in the
20 opening, they say that that can be expected with
21 a reasonable degree of probability.

22 Just for your notes, that is the phraseology used at
23 decision paragraph 9.5, 9.43 and 9.120. But as we have
24 already said, no attempt was actually made to analyse
25 whether prices were actually higher using data and

1 instead it is based on an inference from that notional
2 qualitative evidence we have been looking for and an
3 expectation, which is really only based on the theory of
4 how wide MFNs might be adverse.

5 As we have already set out, that is merely carrying
6 out an object analysis, which is not applicable here in
7 circumstances where the wide MFNs are not objects
8 infringements.

9 Now, we say there were lots of opportunities to
10 examine the impact on pricing. The CMA had plenty of
11 data, including on retail prices and commission rates.
12 There was a commission fees data set and there was
13 retail pricing data set, but more than that, if there
14 were problems with either of those data sets, you have
15 a remarkably data rich industry with which you are
16 dealing here.

17 Online provision of insurance is something that is
18 subject to data gathering and monitoring by all of the
19 participants all of the time. Even in relation to more
20 traditional broking of insurance, you are dealing with
21 a very rich data field being available.

22 Of course, this is all in the circumstances where we
23 have, what economists refer to as a natural experiment,
24 the end of the wide MFNs in November 2017 and three
25 years, the decision comes out.

1 Now, of course, we accept that there must be a lead
2 time to the publication of a decision and you have to
3 stop the analysis at some point, that is true. But you
4 had a very, very long natural experiment in the life of
5 insurance policies to deal with.

6 What Ms Ralston essentially does, which I think in
7 most other areas of competition law is non-radical in
8 the extreme, is say that in these circumstances,
9 economic analysis can assist in understanding whether or
10 not there was likely to have been an effect here and
11 whether there was actually an effect here. As I have
12 said, it is not matter of trying to quantify an effect,
13 it is to identify techniques to try and assist in
14 identifying whether there is evidence of an effect.

15 Now, the CMA has two responses to the econometric
16 and economic analysis that Ms Ralston carries out. The
17 first is that it was not required to demonstrate, still
18 less quantify, an actual effect on prices. That is
19 their position in their defence, at paragraph 161. The
20 second point is that none of Ms Ralston's econometric
21 analysis provides a reliable basis for drawing
22 conclusions about the competitive effects of
23 ComparetheMarket's wide MFNs.

24 Indeed, it goes rather further and it says reliable
25 econometric analysis was not possible in the present

1 case.

2 Now, that is defence at paragraph 174. Let us just
3 deal with those two arguments. The legal argument,
4 I have actually dealt with that to great extent in
5 opening on the law. The effects that you need to
6 identify are actual effects. If you are talking about
7 an effect on price competition, we really do not
8 understand on what basis it is said you do not look at
9 pricing. How you can affect price competition without
10 affecting pricing is a conceptual conundrum that we have
11 not yet cracked.

12 Essentially, you did, if you are saying there were
13 actual effects on pricing, need to look at pricing.
14 Otherwise, you are merely dealing in inferences and as
15 I have said, the inferences from the material that they
16 are relying on are not adequate. But, in any event,
17 even if you were dealing in inferences, you would want
18 to cross-check the matter against the pricing data. Are
19 your inferences sound, given what is actually happening?

20 We say you do need evidence when you are asserting
21 a generalised pricing effect on price competition.

22 You do need evidence to see whether or not there
23 were actual effects to the clauses and the CMA simply
24 has not done that by reference to pricing data or
25 commissions data.

1 It is worth taking a step back. The assertion in
2 this decision is that there was an effect on retail
3 prices, there was an effect on commissions, but we are
4 not going to actually show it in relation to either of
5 those ... we are going to rely on inferences.

6 We say that is just not meeting the legal test and
7 to say: well, there is not one size fits all in relation
8 to how you carry out evidential assessments in relation
9 to competition cases, we accept that.

10 Our submission here is not, in every case, you must
11 always carry out econometric analysis. It is not in
12 every case, you must carry out any particular economic
13 analysis. Cases differ. What evidence is relevant
14 differs. But in a case where you are seeking to make
15 these assertions about generalised pricing effects,
16 commission effects, and you do have that data rich
17 material and evidence is put before you in these
18 circumstances, to say you do not need to do anything
19 with it is quite inappropriate.

20 That really takes us to the impossibility issue as
21 I refer to it. Ms Ralston explains why it is, in
22 general terms, we should seek to use sorts of economic
23 and econometric tools that are available to analyse the
24 situation. If I may, could I pick it up at tab
25 {A/5/105}.

1 This is where she, in section 6, talks about the
2 approach to assessing economic evidence on effects of
3 CTM's wide MFNs.

4 If we could go over the page to 6.5 {A/5/106}:

5 "To allow for a more conclusive picture, one can
6 complement the interview evidence with evidence from
7 market data. The use of empirical analysis, in
8 particular econometrics, is good practice for any
9 economic expert where data is available. It is
10 particularly relevant in this case, where there is an
11 abundance of relevant data and there is the opportunity
12 to analyse what actually happened in the market when CTM
13 formally disapplied its wide MFNs in November 2017."

14 If we then go over the page, if we may {A/6/106}, to
15 paragraph 6.10:

16 "The remainder of this section [so section 6] is
17 structured as follows.

18 -- Section 6B provides an overview of the role and
19 relevance of econometrics and its extensive applications
20 when assessing potentially anticompetitive effects in
21 competition policy.

22 -- Section 6C sets out how econometric analysis is a
23 particularly valuable tool in the present case, and the
24 key advantages of using such an approach compared to
25 anecdotal evidence to assess whether CTM's wide MFNs had

1 an appreciable effect on competition."

2 So specifically thinking about how these techniques
3 can be useful:

4 "Section 6D responds to the concerns raised by the
5 CMA on the use of econometrics in this case ..."

6 Then in 6.11, she just outlines what comes after
7 section 6, because section 6 is introducing the use of
8 the economics and econometrics.

9 Then 7, 8 and 9 in her report are the sections where
10 she actually carries out the analysis. Section 7 is
11 testing whether the wide MFNs restricted differential
12 pricing, so any price variation, so it is a restriction
13 on price competition. Do you have any evidence of that
14 using econometric techniques? 8 is doing the same
15 thing, but in relation to the PCW commissions. So it is
16 directed at precisely the theories of harm that the CMA
17 have articulated. 9 is responding particularly to the
18 evidence on promotional deals that have been put forward
19 using these econometric techniques.

20 So that is the framework of the report. I am
21 obviously not going to take you through all of it. What
22 I would do is if we could move down to page 111,
23 paragraph 6.27, {A/5/111}, this is just an articulation
24 of how she goes about dealing with the matters in
25 relation to retail pricing.

1 Indeed, this is useful to note:

2 "... I use regression analysis to perform a test
3 that is called 'difference-in-differences'. This
4 compares data both over time and across HIP-PCW
5 pairings. In particular, this approach takes advantage
6 of the panel structure of the data (i.e. observations of
7 the same groups of HIPs over time) for HIPs covered by
8 CTM's wide MFNs [that is the treated group] and HIPs
9 that were not covered by CTM's wide MFNs (control group)
10 to provide an appropriate counterfactual to identify and
11 estimate the effect of CTM's wide MFNs ..."

12 Now, it is quite timely that Ms Ralston is engaging
13 in this sort of exercise. It is after all only a couple
14 of weeks ago that the Nobel Prize for Economics was
15 actually conferred on the economists who use
16 difference-in-differences techniques in order to deal
17 with analysis of real world problems using data.

18 They did it in relation to minimum wages in
19 New Jersey, by comparing the impact of minimum wage
20 changes in New Jersey against Pennsylvania. The reason
21 they used difference-in-differences technique, and
22 obviously Professor Ulph is very well aware of these
23 issues, is because difference-in-differences essentially
24 enables you to control for wider trends that might
25 otherwise be affecting changes that are going on in

1 a relevant market.

2 Therefore, it is entirely appropriate that
3 difference-in-differences techniques would be used in
4 this sort of situation, where what you want to capture
5 are the changes in relation to the particular feature
6 you are dealing with, rather than broader economic
7 trends which might be influential.

8 Now, we say it means this is an ideal technique to
9 be using in relation to this sort of data rich industry,
10 where you have a natural experiment. But before I go on
11 to look at Ms Ralston's work further, I actually want to
12 take a step backwards and I want to go back to the DCT
13 market study. That is the digital comparison tools
14 market study, I referred to it previously.

15 It was the enquiry that followed on from the
16 investigation into private motor insurance and it was
17 more broadly looking at how digital comparison tools
18 might give rise to competition concerns or not.

19 Obviously, one of those digital comparison tools are
20 PCWs, so obviously they fell within the scope of that
21 enquiry. I will come back to talk about the study
22 itself and how it was carried out in relation to ground
23 7 rather briefly.

24 The study itself, and we do not need to open it now,
25 just for your notes, is at bundle F, tab 608, {F/608},

1 but actually that is not the main study that I want to
2 go to. It is paper E, which was annexed to that study,
3 which is at B/16 and it is at page 1. {B/16/1}.

4 So this is an attachment to the final report and it
5 is paper E, "Competitive Landscape and Effectiveness of
6 Competition." If we could go to page 42, {B/16/42}.

7 You will see at 3.27, it says -- so this has been
8 talking about the general issues here, it says, 3.27:

9 "Our concern remains that wide MFNs soften
10 competition between DCTs and between DCTs and competing
11 channels, through reducing DCTs' incentives to compete
12 on commissions and to innovate. In the context of this
13 market study we have found further evidence in relation
14 to motor insurance to support this. The evidence we
15 have gathered, and particularly our econometric analysis
16 shows that the prohibition of wide MFNs has led to an
17 increase in competition between DCTs."

18 I am just going to pause there for a second. What
19 they are saying there is: we have got this kind of
20 residual theoretical concern about wide MFNs, but we had
21 an enquiry into motor insurance and the conclusion of
22 that enquiry was, we are going to stop in the motor
23 insurance field, the operation of wide MFNs.

24 That means that by the time we reach the DCT study,
25 there has been a period of time under which you can

1 carry out a natural experiment analysis using
2 econometrics. Because you had wide MFNs in the motor
3 insurance market, indeed you had much wider coverage on
4 a formal basis, over 80% of the motor insurance market
5 was covered by wide MFNs, and they were got rid of.

6 So have we got evidence that actually those wide
7 MFNs in relation to motor insurance had given rise to an
8 adverse effect? In other words, have we now got
9 evidence after that natural experiment that we can see
10 that, in fact, those wide MFNs were pushing up prices or
11 commissions, because it is actually the commissions
12 element the DCT study considers here? How do we do
13 that? Well, we use econometrics.

14 If we could go to page 95 {B/16/95}, because this is
15 really the core of the submission in relation to DCT.

16 Appendix 2:

17 "This appendix presents the methodology and results
18 from an econometric analysis of the impact of wide MFN
19 clauses on the commissions charged by digital comparison
20 tools (DCTs) to insurance companies. The analysis uses
21 data on commissions and MFN clauses in the motor
22 insurance market collected from four large DCTs over the
23 period 2010 to 2016."

24 So a six-year period, including the period when
25 these wide MFNs were in place, and the period when they

1 were not in place.

2 If we go down to page 97 {B/16/97}, you see:

3 "We collected data from the four DCTs covering the
4 period 2010 to 2016. For each DCT, we collected data on
5 the revenues (in £) and volumes (number of
6 transactions), for each insurance brand and for each
7 year. From this, we calculated the commission (in £) as
8 revenues divided by volume."

9 That is what they were doing. Then if we go on to
10 page 102 {B/16/102}. I will not go through all the data
11 specification here, but page 102. You see they carried
12 out a series of robustness checks in relation to it.

13 What they did was they carried out an econometric
14 analysis of whether or not in the motor insurance field,
15 the removal of the wide MFNs could be tested
16 econometrically to identify whether or not there had
17 been an adverse effect from those wide MFNs and they
18 concluded there was. They did. Carrying out their
19 robustness checks, carrying out their econometrics, they
20 did.

21 But apparently, in home insurance, it is impossible
22 to do that meaningfully. We simply do not understand
23 that. The defence is rather wonderful. Could we go to
24 it, it is bundle A, tab 3, page 84, {A/3/84}.

25 The CMA -- I have lost the correct reference --

1 refers to the fact -- sorry, thank you -- yes, it is
2 paragraph 169, I am sorry, it is on the page 85
3 {A/3/85}. I am grateful to Ms Berridge.

4 Tellingly -- so this is the criticism being levelled
5 by the CMA at the idea that there is a legal obligation
6 to carry out econometric analysis. We are saying we are
7 not talking about legal obligations, we are saying that
8 we have put forward evidence that is material and you
9 have failed to take it into account. But the language
10 here is just very interesting:

11 "Tellingly, BGL is able to point to no authority for
12 the proposition that econometric analysis is required to
13 be carried out to establish an 'effects' infringement.
14 BGL's reliance on what Ms Ralston regards as 'good
15 practice' is nothing to the point. The fact the CMA
16 happened to conduct econometric analysis in a different
17 investigation, namely the [DCT market study] is
18 similarly irrelevant to the question of whether the CMA
19 was entitled to find, on the basis of the body of
20 evidence in the Decision, that CTM's wide MFNs were
21 reasonably likely to, and did in fact, have adverse
22 effects on competition." {A/3/86}.

23 It happened to carry it out. Well, happening to
24 carry it out somewhat undermines the idea that it is
25 impossible to do so. Not only does it show that it is

1 far from impossible to carry out econometric analysis,
2 what it did in relation to the DCT study was indicated
3 that you can get meaningful information about whether or
4 not there is an effect.

5 The wonderful irony of all of this is, of course,
6 that in relation to PMI and in relation to DCT, the CMA
7 was not going round imposing penalties on people. Here,
8 it is imposing penalties, it is imposing penal
9 sanctions, and yet it is saying it is impossible to
10 carry out the sort of exercise that it did in relation
11 to DCT.

12 As we will come on to see, the sorts of concerns and
13 objections that are levelled against the econometrics in
14 this case: persistence issues, spillover issues,
15 heterogeneity issues, as we will come on to see, we do
16 not understand in what way it can be suggested those are
17 materially different in the motor insurance situation.

18 Yet that DCT study is unequivocal in its
19 consideration of the outcome, and indeed, so proud of it
20 was the CMA, that at the International Association of
21 Competition Economists, when the CMA decided what work
22 it would present to the world, as to an example of its
23 excellence in relation to econometric and economic
24 analysis, it was this DCT study in appendix 2 that it
25 presented.

1 I am going to go on and deal a little more with
2 Ms Ralston's evidence in a moment. I am conscious of
3 the time. I wonder if now is a good moment and we come
4 back at 25 to.

5 THE CHAIRMAN: Yes, indeed. Just looking at the time, I see
6 we will start again at 20 to, I think. The transcribers
7 sought, as it were, a mid-morning break of ten minutes,
8 so we will give them a little more than that.

9 MR BEARD: That is fine.

10 THE CHAIRMAN: Mr Beard, if you need to run into the short
11 adjournment, then, for 10 or 15 minutes, I do not think
12 we will have a problem with that.

13 MR BEARD: That is very kind of you. I will try not to
14 intrude on people's lunches, thank you.

15 THE CHAIRMAN: Thank you. We are now going to try, because
16 it ensures that our technical infrastructure works, to
17 move into the retiring room that we have got virtually.
18 So it may be that we leave the hearing, but we will be
19 back at 20 to. So we are not going to just mute our
20 cameras and microphones in case you are alarmed at our
21 departure, so that is what we will do.

22 MR BEARD: Thank you very much.

23 THE CHAIRMAN: Thank you.

24 (11.28 am)

25 (A short break)

1 (11.42 am)

2 CLERK OF THE COURT: We are live.

3 THE CHAIRMAN: Mr Beard, I can only see you. Yes, here is
4 everybody else. I thought it was just you and me, and
5 I was feeling very lonely. But, welcome back. We are
6 live and good to go. Mr Beard, over to you.

7 MR BEARD: Sir, I had just been referring to the DCT
8 appendix 2, paper E material on the notional
9 impossibility of econometrics.

10 I think that takes us back, if I may, to
11 Ms Ralston's analysis. If we could pick it up, bundle
12 A, tab 5, page 115 {A/5/115}.

13 Actually, just so that the Tribunal has context,
14 could we go back one page, please, {A/5/114}. Yes.

15 In 6D, just for your notes, Ms Ralston looks at the
16 CMA's various objections to carrying out econometric
17 analysis and those in the decision can be seen as being
18 the phenomenon of persistence, which is the idea that
19 the impact of the wide MFNs carried on in relation to
20 covered entities for a while after they were withdrawn.

21 The second is spillovers, and this is the idea that
22 the impact of the wide MFNs was so great, that it did
23 not just impact those covered by the wide MFNs, but it
24 hugely impacted on or materially impacted on non-covered
25 insurers, so people with narrow MFNs or no MFNs at all.

1 Then the third is heterogeneity, which is a special
2 category all of its own.

3 Now, I am not going to refer again to the fact that
4 none of these issues appeared to trouble the CMA when it
5 was doing the DCT analysis or certainly are not things
6 that it considered could not be dealt with and
7 considered adequately in DCT analysis.

8 But if we could deal with the first of the issues,
9 it is the persistence issue. You will see, if we go
10 back over the page, to 115 {A/5/115}, you will see that
11 Ms Ralston there engages with what the CMA says is this
12 apparent persistent effect. What they have referred to
13 is the idea that there is a gradual change in the
14 dynamics of the conditions of competition. So you have
15 got a persistent issue, particularly in relation to the
16 operation of promotional deals and that in those
17 circumstances, a significant issue arises as to the use
18 of difference-in-differences methodologies.

19 There are two things to say about this one. First
20 of all, the high point of the CMA's objection is that it
21 would underestimate any apparent effect. It would
22 underestimate it. So it is not saying it is a useless
23 tool, it is saying it would underestimate any apparent
24 effect.

25 So if they had carried out the analysis and there

1 was a persistence effect, but they had found some kind
2 of positive indication of effect on prices or
3 commissions, then the CMA might be able to say: well, it
4 might be underestimated because of this persistence
5 effect. As it is, because Ms Ralston finds nothing,
6 they say: ahh, then it is in no way probative, because
7 there could be something and this is just an
8 underestimation. But, of course, you cannot really win
9 there because if in fact the truth is that there was no
10 effect and there was no impact of a persistence effect,
11 then you would be neglecting the useful information you
12 could glean from the econometrics.

13 Of course, economists haven't just left stuff at
14 that point of general speculation. They have come up
15 with tests for whether or not there is in fact
16 persistence. That is then what Ms Ralston undertakes,
17 empirical test for persistence, is what she is
18 undertaking, from page 116 onwards. She sets out her
19 results and she says, "This notion of persistence that
20 has been put forward, it is not borne out by the
21 empirical persistence tests that I put forward and
22 analyse."

23 So persistence, apart from it having a catch-22
24 element, is only a question of underestimation, but in
25 any event, is something that can be tested for and was

1 tested for by Ms Ralston.

2 The next objection is the so-called spillovers. As
3 I have said, this is the hypothesis from the CMA and it
4 is a theoretical possibility. We can understand the
5 theory of these things, that the effect from some
6 clauses, like the wide MFNs, is so great that it did not
7 just affect the wide MFN-covered HIPs, but it affected
8 others, including the non-wide MFN HIPs, the narrow MFN
9 HIPs. So using that narrow MFN group, as the control
10 group, is somehow damaged or tainted in relation to the
11 difference-in-differences analysis.

12 Now, given the material we have been looking at, it
13 must be said that this feels like a totally speculative
14 approach by CMA, and we say it is. But, again, this is
15 something where there are empirical tests that can be
16 run by economists in order to assess whether or not
17 there is a spillover effect that could therefore damage
18 the operation or influence the operation of
19 a difference-in-differences analysis.

20 Ms Ralston carries out those empirical tests.
21 Professor Baker, I should say, takes issue with the way
22 she has carried out those tests and so she runs further
23 tests to confirm the position.

24 I will just give you the reference for these. We
25 will not go to it. It is in Ms Ralston's second report,

1 which is bundle A, tab 9, at pages 113 to 130,
2 {A/9/113-130}.

3 She shows there is no spillover or -- actually to be
4 perfectly accurate, what she says is that those tests
5 show there is no spillover unless, unless, the so-called
6 spillover effect of the wide MFNs into the control
7 group, the narrow MFN HIPs, is materially identical with
8 and simultaneous with the effect of the wide MFNs.

9 That is quite a remarkable proposition, because what
10 you are saying is the fact that the clauses are in some
11 contracts and not in others, makes zero difference,
12 effectively. In other words, you are as affected as
13 a narrow MFN HIP as you are as a wide MFN HIP. It is
14 only when the spillover effects are that significant
15 that she has not been able to control for those matters.

16 But that is obviously not a plausible situation
17 here.

18 So given that the only situation where the tests
19 might not be detecting a spillover are a totally
20 implausible situation, in those circumstances, she has
21 carried out a full suite or an extensive suite of
22 empirical tests to test for spillovers and explained why
23 it is there is not a spillover problem and therefore the
24 econometrics stack up and make sense.

25 But there is actually just something else I want to

1 pick up in relation to spillovers. If we may, could we
2 go to bundle A, tab 1, page 756 {A/1/756}.

3 This, just so you understand, is annex R to the
4 decision and annex R to the decision is the CMA's more
5 detailed reasoning, such as it is, as to why
6 econometrics are not possible here, meaningfully.

7 R.34 is the point about persistency, which I have
8 talked about. R.35:

9 "Second, the observed changes in the behaviour of
10 the providers not bound by CTM's wide MFNs as well as in
11 the behaviour of PCWs, including CTM, since CTM stopped
12 enforcing its wide MFNs suggest that a
13 difference-in-differences methodology is flawed in this
14 case."

15 This is the spillover issue. They are saying that
16 there are impacts on the control group and you can
17 assume that because of the evidence they have got.

18 If you look at (a):

19 "The fact that providers not subject to CTM's wide
20 MFNs have started changing strategy and engaged more in
21 differential pricing since CTM stopped enforcing its
22 wide MFNs (see Section 9.C.II) indicates that the
23 treatment has affected not only the treated group but
24 also the control group in this case."

25 What it is essentially saying is, if you go back to

1 section 9.C.II, you see that there is a change in the
2 trend of pricing in relation to non-wide MFN HIPs and
3 that is suggesting that there is some sort of evidence
4 of some sort of spillover effect.

5 So it is worth just going back to that. It is at
6 {A/1/367}:

7 "Behaviour of providers after the Relevant Period
8 supports the finding that CTM's wide MFNs reduced
9 competitive pressure on all providers."

10 So it is a much less stark proposition that is
11 actually being tested in C.II. Let us look at what is
12 actually done. If we go to the following page
13 {A/1/368}, what we see there is a table, at the top,
14 which says: look, during the relevant period, agreeing
15 promotional -- sorry, I will just read the top title:

16 "MFNs during the Relevant Period agreeing
17 promotional deals during and after ..."

18 Number agreeing, 20. Number agreed after, 29. So
19 it is a shift of nine.

20 Then if you go down the page to 9.134:

21 "When compared to the Relevant Period, five new
22 providers without wide MFNs agreed promotional deals in
23 the 19 months after ..."

24 Although it is a number of people, they say, agreed
25 promotional deals afterwards.

1 You can see that in the second row, in that table,
2 it moves from five providers to ten providers:

3 "This includes three providers (accounting for over
4 12% of sales made through PCWs in 2017) that told the
5 CMA they were not willing to engage in the deals on
6 offer in home insurance during the Relevant Period. The
7 fact that these providers have now engaged in
8 promotional deals is consistent with them having a
9 greater incentive to engage in such deals due to an
10 increase in competition between providers on PCWs."

11 This is the story of a spillover effect. If we
12 could go over the page {A/1/369}, at 9.135, the CMA
13 refers to three HIPs that it says are examples of this.

14 Now, the first HIP, number 22, they are the ones who
15 actually had the widest permissible narrow MFN in their
16 contract that we saw yesterday. Now, as I said,
17 yesterday, they actually said in response to the
18 question, "We have got a wide MFN." So they are a funny
19 candidate for saying: look, narrower MFN people have
20 started doing more promotional deals afterwards because
21 they saw themselves as actually subject to a wide MFN.

22 Now it is true they saw themselves subject to a wide
23 MFN, with various carve outs that we saw yesterday, but
24 actually it turns out that they were more interested
25 overall in operating a uniform pricing policy to ensure

1 that their direct customers were never disadvantaged.
2 That was the general way in which they priced and it is
3 an odd candidate in those circumstances for these
4 purposes.

5 But let us move to the second one, [redacted] I am
6 sorry.

7 It was a non-MFN, it agreed two promotional deals
8 after November 2017. It had done one before 2017, so
9 the change in number of promotional deals by esure was
10 a single promotional deal. So we say that is utterly --
11 marginally, it is not an indication of any sort of broad
12 trend that somehow there was a change in the dynamics of
13 competition in relation to narrow MFNs, the market
14 generally. The CMA is reading an awful lot into it,
15 particularly against the background of the evidence that
16 we have already adverted to, where lots of people were
17 saying: well, we just did not change our pricing policy
18 at all.

19 But what is interesting about this is that when you
20 actually go back through the documents -- and I am just
21 going to give you the references to them, we do not need
22 to call this one up {F/301/19}, which was their response
23 to the section 26 notice given in 2017, they said they
24 are really not very interested in home insurance.

25 Then in their later response in {F/548/3}, and this

1 is in answer to their question 2, they say:

2 "At the time of writing the response to the November
3 Notice [so that is 2017], [redacted] was heavily focused
4 toward Motor insurance. Since this time, [36] has made
5 sufficient progress with its household product
6 capabilities to be able to consider these opportunities.
7 As a result of this enhanced focus, these offers were
8 put in place."

9 Now, the reason I emphasise this is it is nothing to
10 do with a broad market trend, which is what needs to be
11 shown for a spillover. It is because this particular
12 insurer said: we were previously much more interested in
13 motor and we have become more interested in home. This
14 is in relation to a single promotional deal.

15 So the idea that esure is good evidence of some sort
16 of broad spillover trend is just unsustainable.

17 This takes us to the third of the HIPs that was
18 relied upon in that section of the decision 9.C.II, that
19 is Lloyds.

20 Now, again, that is listed as a non-wide MFN HIP,
21 understandably in the sense that it did not have a wide
22 MFN with ComparetheMarket. But it did have one with
23 Confused until halfway through the relevant period.

24 In other words, to take Lloyds as a good example of
25 a non-wide MFN entity, changing its strategy over time

1 because of the withdrawal of the wide MFNs, is just not
2 sound. Because it was subject to a wide MFN. It just
3 was not subject to a ComparetheMarket wide MFN. But it
4 actually gets much worse with Lloyds, because all the
5 CMA are talking about is the idea that after the end of
6 the wide MFNs, from CTM, they did one promotional deal.

7 But the great irony about it is the CMA did not go
8 and look at whether or not, or ask about whether or not
9 it thought that that promotional deal was a success.
10 Because, of course, if you think that you have done one
11 promotional deal and it does not work, you have got no
12 indication that suddenly you are going to do lots more
13 and the world is changing for you. What you have got is
14 another example of them testing these things and
15 thinking they do not work very well.

16 Now, the CMA does actually assert, and I just give
17 you the reference in footnote 818, that Lloyds's one
18 promotional deal was a success. If we could go to
19 document -- the document at, I think it is {F/537/1},
20 you will see there Lloyds's own analysis of that
21 promotional deal. The promotional deal was in relation
22 to one of its brands, if you look at the highlighted --
23 the bold word beginning with, just under "Performance",
24 that is the one where they put in place a promotional
25 deal. They did say: well, look, there are some

1 potential benefits here, you see the green "G".

2 But looking at their portfolio overall, as a HIP,
3 you see that the way in which this impacted their book
4 overall was highly negative. In those circumstances,
5 the end point, which is the bottom right hand of that
6 table, where you get the total benefit to the HIP, is
7 a big red rejection. In other words, the CMA are
8 relying on a HIP that had a wide MFN for some of the
9 period, treating it as a narrow MFN candidate and saying
10 that it exhibits a trend towards more promotional deals,
11 because it did one more and it was a success.

12 It did one more and it was not.

13 So we have got to take these things in context. In
14 other words, even the evidential underpinnings, such as
15 they are, going towards this theory of spillovers, do
16 not stack up in the decision.

17 You couldn't take from this material that actually
18 what was happening, was that Lloyds was going to do lots
19 more promotional deals.

20 So we say that that underlying material is unsound.
21 Again, it is relying on references to promotional deals,
22 which are talking about tiny numbers of deals, some of
23 which lasted for just barely weeks or maybe a month.
24 They are not long running, many of these things. The
25 suggestion was they moved from 20 to 29 over a 38-month

1 period. These are tiny numbers, as we will come on to
2 see in relation to ground 4.

3 So we say not only has Ms Ralston done the detailed
4 analysis that is required in relation to these issues
5 concerning the objections put forward; but, those
6 objections are not ones -- are based -- are dealing
7 with, I am sorry, suggestions by the CMA that are not
8 based on sound evidence in any event.

9 So I have touched on persistence, I have touched on
10 spillovers. I just want briefly to deal with the
11 heterogeneity issue. So if we could go back to annex R
12 to the decision {A/1/757}.

13 R.37:

14 "In addition to these main limitations the CMA
15 considers that, given the observed pricing behaviour of
16 providers during the Relevant Period (including the
17 episodes of non-compliance by some providers subject to
18 wide MFNs which triggered targeted enforcement actions
19 by CTM), quantifying the effects of CTM's wide MFNs via
20 econometric analysis is unlikely to provide a more
21 robust assessment of the effects of CTM's wide MFNs in
22 this case than relying on a review of providers' and
23 PCWs' responses and contemporaneous documentary
24 evidence."

25 Well, I have spent a good chunk of yesterday and

1 today looking at those responses and contemporaneous
2 documents to show that in amongst all of that, there are
3 key responses showing that the CMA's approach is wrong
4 or at the very least should be very heavily doubted.

5 But just bear in mind what is being said here, we
6 cannot rely on econometrics or economic analysis,
7 because people were not complying with the WMFNs. We
8 see this in R.38:

9 "In particular, the fact that providers subject to
10 CTM's wide MFNs did not always show a pricing behaviour
11 consistent with their contractual agreements during the
12 Relevant Period and punctually faced enforcement actions
13 by CTM ... suggests not only that CTM's wide MFNs had
14 the effects of restricting competition, but also that a
15 difference-in-difference econometric analysis cannot
16 adequately capture the effects of CTM's wide MFNs and
17 therefore may not be appropriate in this case. The
18 heterogeneity of pricing practices observed within the
19 treated group [so that is the wide MFN group] during the
20 Relevant Period undermines the clarity of the comparison
21 between the treated group and the control group and in
22 practice reduces the likelihood of any econometric
23 analysis identifying an effect in the data."

24 I mean, it is almost an embodiment of confirmation
25 bias in a paragraph in a regulatory decision. Because

1 the wide MFN HIPs do not behave how the CMA think they
2 should under the wide MFNs, you are going to undermine
3 the clarity with which you can show that there is an
4 effect of the wide MFNs.

5 What that is actually saying is, actually, we have
6 to recognise that the pricing information does not
7 suggest that they are actually complying with the wide
8 MFNs at all. Actually, we should have carried out the
9 analysis, because it is not a question of clarity of
10 finding an effect, it is identifying whether or not
11 there are changes. If, in fact, there is heterogeneity
12 of pricing by the wide MFN HIPs, during the relevant
13 period, what that is saying is the wide MFNs are not
14 having an impact and you are not likely to see an effect
15 before or after or controlling for it.

16 But the heterogeneity point is a thoroughly bad one.

17 Anyway, just very quickly, I have been dealing with
18 persistence, spillover and heterogeneity. As I have
19 mentioned, these issues are not ones that have been
20 highlighted in the DCT study. I should say,
21 Professor Baker has a further critique of Ms Ralston's
22 material, which is about this notion of precision.

23 Apart from the fact that this appears to be
24 a different critique from the ones raised in the
25 decision and, of course, we are dealing with the

1 decision on this appeal, not Professor Baker's different
2 analysis in relation to these matters, Ms Ralston deals
3 with all those issues to do with precision in relation
4 to her second -- in her second report and explains why
5 she -- the precision critiques are not sound. In the
6 circumstances, she is not trying to precisely quantify
7 effects. What she is trying to identify is whether
8 there is an informative statistically significant impact
9 that she can identify from the data she has, and she
10 says she cannot do that.

11 Just very briefly, on sections 7 and 8 of her
12 report, if we could just go back to those, because these
13 are the applications of her econometric analysis.
14 I have been dealing with why it is not impossible. If
15 we could go to {A/5/124}, we see there, this is her
16 section 7 analysis of the impact on retail prices.

17 If we could go over the page, just for your notes
18 {A/5/125}, she is asking herself whether or not there is
19 a statistically significant effect on the prices that
20 each HIP charged on CTM relative to the prices. The
21 same HIP listed on other PCWs. She concludes at 7.8:

22 "Overall, the results of my analysis indicate that
23 there is no evidence to suggest that CTM's wide MFNs had
24 an appreciable effect on competition and, in particular,
25 on HIPs' ability to price differentially between PCWs.

1 None of my econometric analyses find evidence that the
2 disapplication of CTM's wide MFNs had a statistically
3 significant effect in terms of: i) increasing the
4 proportion of risks ... Ii) decreasing the proportion
5 of risks priced equally ... or iii) decreasing the
6 absolute level of retail prices ..."

7 So that is -- I am just very briefly dealing with
8 the summary of her conclusion on that.

9 Then if we go to section 8, which is to do with the
10 commissions, that is at page 143 {A/5/143}. Section 8
11 is the one that is, in a way, closest to the DCT
12 analysis, where there was an analysis of commissions.

13 But you will see, if you go over the page there, at
14 8.6, {A/5/144}, I will not read it out. If you could
15 just read paragraph 8.6. (Pause).

16 There we have a situation where not only is
17 econometric analysis not impossible here, it is highly
18 relevant, should have been undertaken, could have been
19 undertaken. When it was put forward, the evidence could
20 not be dismissed and in fact the evidence shows that
21 there is not a good basis for a finding of an effect in
22 relation to pricing or commissions in relation to these
23 matters.

24 Can I then move to the issues to do specifically
25 with promotional deals and ground 4.

1 I am going to deal with this in three parts.

2 Obviously, the CMA has emphasised this promotional deal
3 aspect in its report and said it is the stymieing of
4 promotional deals, which was a significant driver,
5 indeed probably the principal reason why it says there
6 was a fall in price competition, impact on looking for
7 commissions and an impact on PCW growth.

8 I will deal with it in three parts. First of all,
9 I think it is very important to put this promotional
10 deal stuff in context, before we get to the econometrics
11 and economics showing why in fact there has not been
12 a material change in the use of promotional deals.

13 So I will deal with the context issues and scale
14 issues first.

15 I will then, second, touch on the FCA points here.
16 The reason for that is the FCA findings that have come
17 out indicate the FCA, using its competition powers, have
18 said that price discounts in relation to new business
19 only are not in the interests of consumers and are bad
20 for competition. Of course, promotional deals, as the
21 CMA term them in this context, in other words, exclusive
22 deals with a PCW to reduce a price of insurance are new
23 business only discounts and therefore they fall squarely
24 within what the FCA was analysing here and indeed
25 prohibiting.

1 Then the third is the -- I will take you to,
2 briefly, to introduce the econometric analysis that
3 says, actually, there is no systematic trend in relation
4 to promotional deals, even when you are dealing with
5 these tiny numbers that we are dealing with.

6 I think it is probably worth just picking up where
7 the CMA deal with these matters. They are essentially
8 dealing with these issues on promotional deals and sort
9 of summarised in four tables. So if we could go to
10 {A/1/328}, this is the first table, 9.1.

11 What this shows is that during the relevant period,
12 which is January 2016 to November 2017, there were more
13 promotional deals entered into by providers that did not
14 have wide MFNs than there was in relation to providers
15 with MFNs. I mean, the number of promotional deals
16 entered into by providers without MFNs across this
17 19-month period is a total of 24.

18 But the CMA says, yes, but that is more than there
19 were by wide MFN entities.

20 Then if we go to table 9.2; A/1 at page 331
21 {A/1/331}:

22 "Table 9.2: The number of promotional deals agreed
23 by providers subject to wide MFNs and the number of
24 providers subject to wide MFNs agreeing promotional
25 deals during and after the relevant Period for

1 comparable periods."

2 So this is a during and after comparison. During,
3 we had seen that there were five. Then in the 19
4 months, not from November, but from December 2017
5 to June 2019, there were nine. There was an increase in
6 total of four.

7 It says that the number of providers moved from 3 to
8 7 and then there are some percentage figures there.

9 I mean, percentage figure, the number of providers,
10 the 7, it says over 20% of sales made through PCWs in
11 2017.

12 Just to be clear, that is not on the promotional
13 deals. These promotional deals, as I said, can be very
14 short. What they are talking about is the total
15 quantity of sales that those HIPs undertake overall.

16 It is that percentage of sales. It is not that 20%
17 of the sales through PCWs were subject to a promotional
18 deal during this period at all.

19 Just to illustrate, if each of those 7 ran
20 a promotional deal for a month during this period, then
21 that would essentially be 1/19th of their total sales
22 that was being subject to a promotional deal. So even
23 if, in total, they represent 20% of sales through PCWs,
24 in fact, the amount being, subject to any discount, is
25 much, much lower than that.

1 Table 9.3, which is on 346 {A/1/346}, number of
2 promotional -- I am sorry, I will wait. Thank you.

3 The number of promotional deals agreed by PCWs
4 during and after the relevant period for comparable
5 periods. This is all of the PCWs, how many deals did
6 they do? During the period, they did 26 and after the
7 period, they did 38. So it was a shift of a total of
8 12. Then the final table I want to go to is 9.4, which
9 is on 367 {A/1/367}.

10 Sorry, no, it is not. It is the right reference, it
11 is just that the table title is at the bottom of 367:

12 "... The number of promotional deals agreed by
13 providers who were not subject to wide MFNs during the
14 Relevant Period and the number of providers who were not
15 subject to wide MFNs during the Relevant Period agreeing
16 promotional deals during and after ..."

17 So this is the table I had already taken you to when
18 I was referring to the spillover effects. Here, what
19 you see is a shift from 20 during the relevant period to
20 29, so a total of 9. The number of providers, 5 through
21 to 10, 3 of whom I have already talked to you about.

22 Again, you get this -- I must say, I find it quite
23 a misleading statistic about over 40% of sales through
24 PCWs, because that is not what the promotional deals
25 actually do at all. That is to do with nature of the

1 beast.

2 Now, the first thing to note about all of these
3 tables is that you are carrying out a very simplistic
4 headcount analysis in relation to all of them. Very
5 simplistic indeed, because of course there can be all
6 sorts of other effects going on in a market, which are
7 nothing to do with a wide MFN, which might change the
8 way in which people behave.

9 These numbers are not meaningful and the emphasis
10 that is being placed on them is just vastly inflated and
11 they are also taken without any sense of context. That
12 is what I want to turn to now very briefly.

13 Ms Ralston's endeavours to give these figures some
14 sort of context, even before she starts the critique of
15 whether or not the headcount amounts to an indication of
16 any trend. So could we go to bundle A, tab 5, 160
17 {A/5/160}.

18 Let us just remember what we are talking about here.
19 The CMA are saying: look, what these tables show is
20 there was an increase in the number of promotional deals
21 done after the relevant period, which suggests that the
22 wide MFNs were stymieing price competition in relation
23 to promotional deals and therefore that was an
24 appreciable effect.

25 My first point is: look at the numbers, the

1 headcount numbers, they are tiny.

2 But then look at the context. Ms Ralston simply
3 looks at how much money the PCWs are investing in
4 different dimensions of activity as compared with
5 promotional deals. Because what we are asking ourselves
6 is: how important are these changes? How important are
7 these promotional deals? We have already seen evidence
8 that says lots of insurers are quite concerned that
9 promotional deals actually cannibalise and they are not
10 that attractive. What you see in table 9.1 is
11 investment in promotional deals as a proportion of
12 commissions revenue PCWs.

13 So what she is doing is thinking: well, how much
14 investment are you putting in compared to how much you
15 are getting in relation to commissions? If this was
16 a relevant significant dynamic for you, competitively,
17 you might think you would invest an awful lot in
18 relation to these promotional deals, because it would be
19 worth your while, because overall that would bulk up
20 your commissions. So you would see a higher and higher
21 percentage going into it.

22 You can see the figures. 2016, 2017 and 2018 for
23 each of the four PCWs.

24 It is a tiny, tiny amount that is being invested as
25 percentage of commissions.

1 Then if you go to 9.2, on the next page {A/5/161},
2 you will see:

3 "Materiality of promotional deal activity to PCW and
4 new business sales ..."

5 There you will see the total investment in
6 promotional deals by PCWs and HIPs, the estimated value
7 of PCW sales, and value of the promotional deals. It is
8 worth just pointing out line -- rows A and B, just how
9 small the total amounts are, we are talking about, and
10 this is in 2018.

11 Tiny amounts. I gave you figures earlier in the
12 submissions about the level of marketing investment.
13 Just in relation to online, running into hundreds of
14 millions of pounds, by the PCWs. Put that in contrast
15 with the total investment in promotional deals by PCWs.
16 What is the dynamic of competition here, in 2018? It is
17 not promotional deals. You will see the tiny figures
18 that promotional deals amount to in terms of the overall
19 proportion of sales.

20 If we could go over the page again {A/5/162},
21 Ms Ralston, to some extent, indulges the headcount
22 approach undertaken by the CMA, in figure 9.1, because
23 what she does is she looks at just the total number of
24 HIPs and looks at how many are engaged in a promotional
25 deal each month.

1 Again, you can see that even in relation to just
2 doing a headcount, not looking at the value of the
3 promotional deals, not looking at the duration or
4 anything, it is a very, very small proportion.

5 Then there is another table that I do want to go to,
6 which is in Ms Ralston's second report, so that is
7 {A/9/102}. What you see there is promotional deals by
8 providers, subject to wide MFNs, during and after the
9 relevant period.

10 What she has done there is actually look at the
11 number of promotional months and promotional days that
12 were undertaken as a percentage of the potential number
13 of days, during which a promotion should be taken. So
14 you are taking all of the PCWs and saying how many days
15 were you actually running a promotion on? How many days
16 could you have been running it on, and it is a tiny,
17 tiny percentage once again.

18 I should say Professor Baker criticises these tables
19 and Ms Ralston has responded in her second report in
20 relation to it, but he offers no alternative way of
21 looking at the issue, except he does say, you should add
22 up the total market shares of the promoting insurers,
23 which, as I have already indicated, is just not
24 realistic in relation to the consideration of
25 significance of promotional deals.

1 So it is a very, very brief tour around a number of
2 the key attempts to give some kind of context to this
3 headcount analysis; promotional deals were a tiny part
4 of the investment by PCWs and HIPs in relation to this
5 industry. That was not a significant dynamic of
6 competition.

7 That is understandable, because of the concerns that
8 we have already seen from insurers about cannibalisation
9 and so on.

10 I think it is also right, just to emphasise in
11 passing in this context, that as I adverted to earlier
12 on in opening, there are a whole range of dynamics of
13 competition that Ms Ralston has highlighted, not only in
14 relation to the price competition where promotional
15 deals are only one way in which price competition can
16 operate, but it is only one dimension of competition
17 between PCWs.

18 I am just going to focus on PCWs for the moment,
19 because we are assuming the CMA's market definition, but
20 we know that they invest very heavily in marketing and
21 rewards. That is by far their most significant costs,
22 even just in relation to online marketing, we saw the
23 vast sums that are being invested. They compete on ease
24 of use, coverage of risks, other sorts of promotions,
25 like free add-ons, free legal cover, free emergency home

1 cover, they compete on the ease of use going through the
2 journey on the website and so on.

3 We have seen all of that. That also needs to be
4 taken into account when one is contextualising these
5 issues.

6 Then there is the further point that Ms Ralston
7 raised, that promotional deals are not always, even on
8 the CMA's approach, going to be beneficial to consumers.

9 If I may, I will just pick this up in her report
10 {A/5/171}.

11 Under the heading 9B.4, you see, she says:

12 "Promotional deals were not always beneficial to
13 consumers."

14 If we could just go over the page {A/5/172}. 9.62:

15 "... I find that --

16 I do not know whether I can read this out:

17 "... of the [X] promotional deals analysed by the
18 CMA:

19 -- the price rose on the target PCW for [a number of
20 the promotional deals].

21 -- for a further [Y], the relative price improvement
22 was less than agreed ..."

23 So actually, even when you are taking the
24 promotional deals at face value, some of them do not
25 actually change retail prices. Some of them change them

1 less than the notional headline:

2 "For [Z] of the remaining ... promotional deals
3 where the prices did decline on the target PCW, prices
4 increased on the other PCWs."

5 In other words, what was going on was the insurers
6 were overall making sure that they got a similar sort of
7 overall average pricing and a similar sort of market
8 share. They did not lose profitability, because they
9 pushed prices up elsewhere.

10 Now, that matters. You can see the examples are
11 given in 9.64 of the evidence supporting that
12 proposition in particular. But the reason that is
13 important is if you are talking overall about an impact
14 on retail prices, you are not going to necessarily --
15 you are not recognising this, you are not recognising
16 the detriment to consumers in relation to these deals in
17 your analysis.

18 But it goes much further than that now, because we
19 do have the FCA material. Now, the CMA have accused us
20 of being opportunistic in referring to the FCA material.
21 As you can see, that is just completely unfair. CTM has
22 been saying the promotional deals are not necessarily
23 beneficial to consumers and the only reason that the CMA
24 talks about this being opportunism is because the FCA
25 report that concluded these issues came out determining

1 the position in relation to promotional deal issues,
2 after we had lodged the notice of application and we
3 hadn't talked about the previous elements of the
4 enquiry. But these were not determinative of what was
5 happening here.

6 We have throughout talked about the context that the
7 CMA is missing here, which is that in the insurance
8 industry, a practice has been adopted to effectively
9 exploit the stickiness of consumers; that is to give
10 them higher new business discounts and then assume they
11 will renew over time, will not seek to look for better
12 deals and therefore you can push the renewal prices ever
13 upwards.

14 It is what has been referred to in the press as the
15 loyalty penalty and that is the real mischief in
16 relation to insurance, not just home insurance or other
17 sorts of insurance over the last few years, in terms of
18 impact on retail pricing, and that is what the FCA was
19 looking at and concerned about. It was concerned about
20 this practice of price walking.

21 Of course, what it is concerned about is the extent
22 to which people do -- HIPs do discount just for new
23 business. Of course, it is only new business you are
24 talking about with PCWs, they are not involved in the
25 renewals business.

1 You are coming back to a PCW, you are by definition
2 not engaging in new business -- you are not engaging in
3 renewals business. So sorry.

4 To be fair, the CMA accept that. They accepted that
5 in correspondence when we questioned them about the FCA
6 issues.

7 Just briefly on the FCA. If we could go to
8 {B/26/3}, please. This is the FCA's statement 21/5 that
9 deals with the market study they carried out into the
10 insurance market more generally. It flows on from
11 a broader market study that had been carried out and
12 this was actually referred to as a policy statement.
13 I will not read through it now, but you can see at the
14 bottom of that page, the wider context of this policy
15 statement. I will invite you to read that in due
16 course, not right now.

17 If we could then go to page 14 {B/26/14}, you will
18 see the pricing remedy that is referred to, which is the
19 ban on price walking, which is what I was just referring
20 to, the practice of escalating the premiums that are
21 charged to people through renewals. The critique is
22 laid out there of price walking and responses to the
23 proposed price remedy.

24 Then if we could go on to page 18 {B/26/18}. There
25 you will see the heading just above 3.14 of "Discounts

1 and Incentives", so the concern is how discounts and
2 incentives can be used essentially to facilitate the
3 price walking, which overall is bad for consumers in the
4 CMA's view.

5 We just need to go over the page, then, I think it
6 is to 19 {B/26/19}. Yes. You will see here at 3.19:

7 "Some respondents also referred to the role of price
8 comparison websites ... and other intermediaries and the
9 extent to which they could offer incentives. As PCWs
10 typically only distribute new business policies,
11 respondents said the approach to incentives should not
12 disadvantage other types of firms compared to PCWs."

13 It says:

14 "Our response

15 Following the feedback received, we have considered
16 whether the ENBP ..."

17 So this is the effective new business price, the
18 ENBP, because the way that the pricing remedy works is
19 you have to offer the effective new business price to
20 all of your customers.

21 That is how you eliminate price walking. ENBP has
22 to be offered on year 1, year 2, year 3, if you stick
23 with someone. That is how they build it. This is how
24 the remedy works:

25 "... should take account of other types of

1 incentives. The use of incentives can be a part of
2 healthy competition [no-one demurs about that].
3 However, incentives that are only available to new
4 business customers can distort competition and lead to
5 a difference in the effective price for new and renewal
6 customers. New business incentives can also prevent
7 consumers from accurately assessing the expected
8 long-term cost of the product."

9 This is another aspect of the problem with these
10 incentives, these promotional deals, and so on. They
11 actually distort consumers' ability to detect what is
12 a good purchase for them. This is not speculation, they
13 actually carried out a behavioural economic study.
14 I will come back to that in moment. You have got two
15 problems with promotional deals, they can facilitate
16 overall detriment to consumers and they can confuse
17 consumers, so they buy bad products or worse products
18 than they would otherwise purchase. So these are two
19 dimensions where promotional deals are problematic:

20 "In determining our approach, we have considered:

21 -- the extent to which the incentive can mimic price
22 walking.

23 -- the extent to which the incentive may cause
24 customer confusion ...

25 -- the impact on effective competition."

1 So this is all done under the rubric of the FCA
2 concerned about competition and they are specifically
3 thinking: is it an adverse effect on effective
4 competition to allow new business promotional discounts
5 to continue? They conclude it is an impediment to
6 effective competition to do so.

7 Now, there is something obviously bizarre about the
8 CMA, in our case, saying promotional deals are a good
9 thing and they should be facilitated on their theory of
10 wide MFNs, because they generate effective competition
11 and having less of them means less effective
12 competition, an adverse effect on competition. The FCA
13 are saying: no, no, we are thinking about effective
14 competition and you are not getting it by allowing these
15 things and they have effectively banned new business
16 only discounting.

17 Now, it is quite right, as the CMA have emphasised,
18 that in relation to discounting, discounting is not
19 prohibited, but it has to be a discount on the effective
20 new business price. So it has to be the new business
21 and the renewals through whatever channel you purchase.
22 That is the way it works.

23 That is precisely not what these promotional deals,
24 the PDs' exclusive deals, that the CMA are focused on in
25 our decision are concerned with. They do not ever

1 consider that there is going to also be a discount
2 further down the line in relation to renewals:

3 "We also conducted an online experiment to examine
4 how consumers perceive different types of discounts and
5 the effects of discounts on consumers' ability to choose
6 the best value product. We have published the results
7 of this experiment in a research paper alongside this
8 Policy Statement."

9 That is what I was referring to:

10 "In this research, we considered a range of
11 different types of incentives that firms may offer. The
12 incentives ranged from those that are clearly cash ..."

13 That would be essentially promotional deals,
14 exclusive deals to reduce -- or cash equivalent. So
15 ironically, the FCA is concerned about cash back as
16 well. It does not like cash back arrangements. Those,
17 of course, were permitted under the wide MFN, but it is
18 actually going further:

19 "... (eg, a cash or percentage discount, a 'first
20 month free' offer, and a free add-on) to those which are
21 clearly non-cash (a toy, a chance to win a holiday, and
22 carbon offsetting).

23 We found that consumers found it more difficult to
24 determine their expected long-term price when presented
25 with cash or cash-equivalent incentives. For that

1 reason, we have amended the rules to make it clear that
2 both cash and cash-equivalent incentives that are
3 offered to new customers must be reflected in the ENBP."

4 Now, the reason we say that this is stopping
5 promotional deals is because if you have to bake
6 a promotional deal discount into the ENBP, it is no
7 longer a new business only discount. It is one that
8 enures to all stages. Since what the CMA has focused on
9 its decision is exclusively new business only discounts,
10 it has not at all analysed the situation in relation to
11 what the FCA is contemplating.

12 Now, I will not go to, given time, the study itself
13 that is referred to there, although it is extremely
14 interesting. Just for your notes, it is in {B/1 --
15 I think, is that right? I am so sorry, that is not
16 correct. It is {B/28/1}, I apologise, thank you. That
17 makes interesting reading in relation to the problems
18 created by the promotional deal-type issues.

19 Thank you to the EPE for pulling up the front cover.

20 So what does the CMA's skeleton say about this?

21 If we could go to their skeleton, I do not know
22 whether you have it loose or... it is page 19.

23 {B/44/19}, please. I am sorry, page 20 {B/44/20}.

24 Thank you.

25 This is (d):

1 "Does the FCA Study undermine the CMA's analysis of
2 PDs? In its Reply, BGL advanced a new argument that the
3 CMA failed to consider the possibility that PDs might
4 have adverse effects on competition and consumers ..."

5 As I have shown from Ms Ralston's material, it is
6 not a new argument. There is new evidence supporting it
7 in the form of the CMA, which goes way further, we
8 accept, than Ms Ralston's analysis. We entirely accept
9 that. We could not possibly have done that sort of
10 analysis, but it is clearly relevant.

11 They say:

12 "This argument is unconvincing. PDs were a key
13 manifestation of price competition during the Relevant
14 Period."

15 So what they are saying is new business only
16 discounts, selective discounts, were a key element of
17 price competition during the relevant period, yet here
18 we have this FCA saying that is not effective
19 competition.

20 So if you are saying that there is a reduction in
21 promotional deals, it is very difficult to understand on
22 what basis you are saying there is an adverse effect on
23 competition, given what the FCA is saying here.

24 They say:

25 "An adverse effect on PDs therefore establishes --

1 without more -- an impact on price competition."

2 There is not prevention, restriction or distortion
3 of price competition, it is not adverse:

4 "Moreover, the specific practice with which the FCA
5 were concerned was not PDs themselves, but 'price
6 walking'..."

7 We agree with that, but it is the findings in
8 relation to their enquiry on price walking that we are
9 emphasising:

10 "The FCA recognised in terms that PDs themselves can
11 be 'a part of healthy competition'..."

12 Now, with respect, that is not true. I read you the
13 section. It said incentives can be part of healthy
14 competition, but the conclusion of the FCA --
15 Ms Demetriou looks troubled, I do not like it when
16 Ms Demetriou looks troubled. I can go back to the
17 passage if that helps.

18 It was under 3.19 and it said, "Incentives are part
19 of healthy competition." It is at {B/26/19}. Under our
20 response:

21 "Following the feedback received, we have considered
22 whether ENBN should take account of other types of
23 incentives. The use of incentives can be a part of
24 healthy competition."

25 That is what the FCA says. No issue with the idea

1 that incentives can be, but if we go back now to the
2 skeleton argument, so {B/44/20}, it is simply not
3 correct and it is in fact a misquote to say that the FCA
4 recognised in terms that the PDs themselves can be part
5 of healthy competition.

6 Indeed, it would be somewhat perverse of the FCA to
7 have reached that conclusion when it says that PDs, as
8 dealt with by the CMA, in other words, new business only
9 discounts, were to be prohibited effectively, because
10 you had to have an effective new business price that
11 applied not only to the new business, but all the
12 business up across the lifetime of the policy.

13 That is wrong:

14 "Further, the FCA did not conclude that insurers
15 should not engage in PDs at all; instead, it has sought
16 to ensure that equivalent discounts are available to
17 both new and renewing customers."

18 Well, there is a semantic issue here, because PDs,
19 as discussed by the CMA in its report, are about new
20 business only discounts and the FCA is saying, "We do
21 not like that." It is completely true to say that if
22 you were to reduce a policy, but then carry that
23 reduction through the lifetime of the policy, the FCA is
24 fine with it. So we partly agree and partly disagree in
25 relation to that:

1 "BGL's argument is an opportunistic attempt to
2 obscure the key point that PDs were an important means
3 by which PCWs and HIPs competed in the Relevant Period,
4 which was demonstrably restricted by its network of
5 WMFNs."

6 I am not going to go back to why the latter part of
7 that sentence is wrong, but what you have in the
8 behavioural study in the findings of the FCA is the FCA
9 saying, "No, we think these things are frankly
10 dangerous, because actually they distort the way
11 consumers make choices."

12 The point we make is a simple one. That is
13 something that is relevant to the assessment of whether
14 or not there is an adverse effect on competition. So
15 even if they were able to say: look, there is
16 a reduction, a material reduction, in the number of PDs
17 that were undertaken, you have to ask yourself, how
18 valuable those PDs were in terms of generating effective
19 competition in circumstances where the FCA is saying
20 that kind of new business practice is not generating
21 effective competition. In fact, it is confusing
22 consumers. That is all we are saying about the FCA.

23 So then, finally, in relation to ground 4, can I go
24 back to the econometric analysis that Ms Ralston carries
25 out. Because I have dealt with context, I have dealt

1 with both in terms of the analytical material that
2 Ms Ralston has put forward, to try and contextualise the
3 scale of promotional deals. I have dealt with the fact
4 that she emphasises that there are all sorts of
5 competitive dynamics between just PCWs alone and PDs are
6 a very small part of that.

7 Then I have also dealt with the FCA and her
8 observations that actually PDs are not as necessarily
9 beneficial to pricing and so on, as is being assumed,
10 because they can operate in a range of ways, in
11 practice, but also have what might amount to, in this
12 context, perverse effects, as being identified by the
13 FCA. But it is important to emphasise the econometric
14 analysis she carries out for that.

15 Can I go back to {A/5/180}.

16 You see there that she carries out analysis of
17 promotional deals using an econometric analysis, not
18 merely a headcount analysis. What she is doing, in
19 part, is looking at the extent to which controlling for
20 various trends, you can identify whether or not there
21 was a trend suggesting an increase in promotional deals.

22 At 9.93, she sets out her conclusion and I would
23 just ask you to read it. (Pause).

24 THE CHAIRMAN: Yes.

25 MR BEARD: What you will see there is her indication that

1 actually when you do not just do a headcount, you
2 actually apply some kind of controls to the
3 arrangements, that in those circumstances, you end up
4 with a situation where not only is the approach hugely
5 time dependent, the analysis hugely time dependent, so
6 if you take the only time you are getting a positive
7 outcome is when you look at the situation of 38 months,
8 which is a somewhat strange and arbitrary period of 19
9 months each way.

10 She explained why 19 months is not a sensible
11 parameter to use, but she explains how, in fact, if you
12 use other time periods that were more reasonable, you
13 end up with a situation where you have no indication of
14 a trend at all.

15 Now, the very fact that this analysis is so time
16 sensitive ends up undermining the idea that you have got
17 some distinct sense of a trend here. There is obviously
18 some to and fro between Ms Ralston and Professor Baker
19 about this. I just provide the reference where what
20 happens is Ms Ralston takes Professor Baker's approach,
21 applies it using econometrics, but correcting for
22 certain errors he carries out, that he includes, and
23 reruns the analysis he put forward.

24 Just so you have got the reference, it is in bundle
25 A, tab 9 at 105 {A/9/105}.

1 What you will see there is, again, you end up with
2 significant time sensitivity in that you do get
3 a positive outcome, if you use a 23-month pre and
4 19-month post period, which is what the CMA have done in
5 Professor Baker's methodology. In other words, pre and
6 post withdrawal of wide MFNs.

7 If you just do 12 months either side, you do not.
8 If you do nine months either side, or six months either
9 side, but you end up with a positive headcount, if you
10 do three months either side. In other words, it is
11 a situation where, when you properly control for these
12 matters, you are not seeing compelling evidence of
13 a trend at all when you carry out the analysis properly.

14 So the point I am making here is not only is it not
15 contextualised, not contextualised in the overall scheme
16 of consideration of dynamics of competition, but
17 actually when you do anything more than the headcount
18 analysis, you end up with an analysis that says: no, we
19 have not got clear evidence of any trends here at all.

20 That is not shocking and surprising, given the tiny
21 numbers we are talking about, because also the
22 evidential background, where we have seen from insurers
23 that they have real concerns that promotional deals, are
24 not beneficial to them. Therefore, the idea that
25 whether with or without a wide MFN, they are really

1 interested in these things, would seem, as a starting
2 proposition, to be highly doubtful.

3 So, in those circumstances, she reaches her
4 conclusions that actually her regression analyses, run
5 in relation to promotional deals, show that no evidence
6 of an increasing trend even in relation to those tiny
7 numbers.

8 Therefore, we say that this notional key plank of
9 the CMA's analysis in relation to promotional deals is
10 fundamentally flawed in a number of ways. It lacks
11 proportion, it lacks coherence in relation to other
12 regulatory considerations, it lacks coherence in
13 relation to the overall scheme of competition and it is
14 flawed in relation to the economic analysis overall.

15 There is one other matter that I do want to just
16 touch on before I deal with grounds 7 and 8, very
17 briefly, and that is going back to bundle A/5, page 154
18 {A/5/154}. If we could go on to 155 {A/5/155}, I am
19 just going to deal with this very briefly.

20 Just worth having this in mind, because you have got
21 to bear in mind the overall story that the CMA is
22 telling, is that there was some distortion on the way in
23 which PCWs grew, expanded and so on.

24 On this chart provided by Ms Ralston, what you see
25 is very significant growth in relation to CTM, in the

1 years 2012 to 2014. Then essentially flattening off
2 progressively through 2015 through to 2017/2018. Then
3 picking up again slightly in 2019. But overall, the
4 success and growth of ComparetheMarket is driven in the
5 early years and it is a broad curve that we see with
6 a little uptick in 2019.

7 In relation to MSM, we see them relatively steady,
8 but dipping slightly in 2016, coming up between 2016 and
9 2017. That -- a slight inflection point in 2018 and
10 then a general trajectory. But overall, if you drew
11 a line from 2012 through to 2020, barring the slight dip
12 between 2014 and 2018, you effectively get a pretty
13 consistent trajectory for MSM.

14 If you look then at GoCompare, you see it peaking,
15 actually growing successfully through 2014 into 2016,
16 dipping and a trend downwards from 2016 to 2019, and
17 then an uptick from 2019 to 2020.

18 Confused, generally pootling along a straight line
19 until 2018 when they pick up.

20 What you cannot say in relation to any of that is
21 that the dotted line suggests any meaningful change in
22 the dynamics of market share in relation to PCWs and
23 that of course is the third theory of harm. There is no
24 evidence for it. That chart does not indicate it and
25 there is no other material.

1 That is entirely consistent with what we have said
2 about detailed pricing, about commissions, about the
3 conduct of insurers and about the significance or
4 otherwise of promotional deals. You are not seeing
5 those impacted, notwithstanding the importance.

6 Not seeing the importance of those dynamics on the
7 growth and change of the PCWs, which, on the CMA's case,
8 was based on claims by, I think, MSM and Confused.

9 So that takes me through to the end of ground 4.
10 I am going to deal with grounds 7 and 8 very briefly and
11 then finish up, if I may. I am going to ask for the ten
12 minutes or so indulgence into the court adjournment, if
13 I may.

14 In order to deal with grounds 7 and 8 and shortcut
15 the process, could we turn to the notice of application,
16 which is in bundle A/2 {A/2/86} and pick it up at
17 page 86. I am grateful.

18 I am just going to use this as the framework for the
19 submissions, because it has the relevant quotations in
20 it. Just as a matter of the legal test, the legal test,
21 I can go back to the authorities and in particular Napp.

22 But the relevant legal test is whether
23 ComparetheMarket must have been aware or could not have
24 been unaware or ought to have known that its MFNs would
25 result in a restriction or distortion of competition.

1 Of course, what that actually should be is must have
2 been aware, could not have been aware or at least ought
3 to have known that they would have resulted in
4 appreciable adverse effects on competition.

5 That, of course, is important in circumstances where
6 trying to ascertain whether or not these clauses, that
7 did not even form part of the commercial handbook for
8 negotiation by CTM, actually had any effect, is not
9 a straightforward exercise at all.

10 So we say that it is important to bear in mind that
11 legal test and the difficulty of that test of awareness
12 or ought to have known in the context of an effects
13 case.

14 We have looked, as we say, in paragraph 318, over
15 the page, for cases where in effects analysis, this
16 question of intention or negligence has been assessed
17 and we do not find any authorities useful to be guiding
18 us in that regard.

19 There are a couple of other particular points I want
20 to pick up, just in relation to grounds 7 and 8.

21 If we go over the page, to page 88 {A/2/88}, it is
22 important to bear in mind the currency of the DCT study.
23 Because, as I say, I have somewhat compressed on
24 historical matters, but we had the PMI market study,
25 then we had the DCT market study during 2016 and 2017.

1 Now, we say that the nature and terms of the DCT
2 market study means it is just wrong and indeed unfair to
3 purport to make any finding of intentional negligence on
4 the part of CTM.

5 The DCT study, which coincided with the relevant
6 period, as I have already explained, covering 2016 and
7 2017, was an enquiry into whether or not these sorts of
8 clauses created any problems. Indeed, as we have set
9 out at paragraph 324:

10 "... the CMA accepts ... that neither the PMI
11 Investigation nor the DCT Study 'establish that
12 a network of wide MFNs like CTM's is necessarily
13 unlawful'."

14 Because that was essentially what was being enquired
15 into. Is there a problem with these sorts of clauses
16 and a range of other matters, I should say, in relation
17 to DCT that was being considered here?

18 What we know is that the CMA were saying: we are
19 keeping an open mind about all of these matters when it
20 opened the DCT study. Of course, CTM then engaged very
21 fully, explaining how its wide MFNs worked or did not
22 work, why it had them and what the significance or
23 otherwise of these provisions were.

24 So it is not a case, going back right to the start,
25 where there was some sort of concealment or covert

1 attitude to any of this. CTM has always been completely
2 open about these matters and has argued throughout that
3 it does not see a problem with them. All they are
4 doing, as we have identified previously, is sending out
5 a signal that: we want to ensure that we have best
6 prices on our website.

7 Now, it is worth noting that there was an update in
8 relation to the DCT study and that was in March 2017.
9 Funnily enough, the CMA in its decision say that: in
10 fact, we cannot have been unaware of the concerns, at
11 least from March 2017, in other words, from the time of
12 that update paper, because they suggest that the update
13 paper must have alerted us at least to the fact that
14 there were real concerns here.

15 If you just go to paragraph 326, on page 89
16 {A/2/89}, you will see there the DCT study update paper
17 and just for your notes, we will not go to it, but for
18 your notes, that is {B/39/97}. It says it was
19 considering various clauses, including wide MFNs, which
20 might, might raise competition concerns.

21 It went on:

22 "We are interested in exploring these arguments in
23 favour of wide MFNs as well as arguments around the
24 potential harm for them in the next phase of our study."

25 BGL then responded to that study update paper:

1 "CTM welcomes the opportunity to respond and gauge
2 going forward on the four areas of focus to assess the
3 optimal way of ensuring that the demonstrable benefits
4 of comparison services reaches as many people as
5 possible whilst fostering conditions necessary for
6 further DCT investment in further innovation."

7 So they were saying we are going to look at these
8 issues and issues of potential harm in our next phase
9 and CTM says: Well, we welcome the opportunity to
10 discuss this with you. Why it is, at that point, we
11 should have known or been aware or ought to have known
12 or cannot have been unaware that there were adverse
13 effects is just very difficult to understand in these
14 circumstances. Indeed, in paragraph 37, we note that
15 even after that period, the CMA was saying to market
16 participants that it still maintained an open mind.

17 This is with, I think, it is AA:

18 "The CMA explained that its intention was to deliver
19 an authoritative, evidence based review of the sector
20 and it still had some way to go. The update paper only
21 contained initial views and the CMA was keen to hear
22 thoughts on those. The CMA reassured the HIP that it
23 was keeping an open mind on the issues in the update
24 paper and it had not reached a final view. There is
25 more history in relation to MFNs because of the previous

1 work on PMI but the CMA still had a lot to hear on the
2 issue."

3 The CMA was absolutely right to be keeping an open
4 mind, at that stage, no issue about it. But it is
5 indicative of the fact that for CTM, who was being
6 completely open about the position it was in, in
7 relation to these matters, and was arguing about whether
8 they were problematic and whether there was any impact,
9 it was not expected to be aware that in fact there were
10 adverse effects in these circumstances.

11 Indeed, it is just worth noting, and here I will go
12 to one further document, that what is held against
13 CTM -- and this comes out again in the CMA skeleton --
14 was that our internal documents and our internal
15 approach was that wide MFNs were critical to our
16 strategy and they were absolutely vital.

17 Well, you have already seen various bits of evidence
18 which suggest that there were from time to time
19 discussions with insurers about pricing issues, some of
20 which came to absolutely nothing. There is not some
21 sort of pattern of consistent enforcement, nor is there
22 a pattern of consistent active compliance with them or
23 concern about the operation of wide MFNs from the
24 insurers.

25 If we could just go to document {F/203/2}. This is

1 actually quoted in 336, in our notice of application:

2 "Exec[utive] Summary" in relation to a price:

3 "A fundamental pillar of the CTM proposition is
4 giving our customers access to the best prices.

5 "MFNs have been a tool to support this - but not the
6 only tool.

7 "We have options ready for life beyond car MFNs and
8 are trialling these.

9 "We want to be the distributor of choice for our
10 insurance/product partners, but this does not just mean
11 discounting ..."

12 This is following on from the PMI, MFNs have been
13 a tool to support this, but not the only tool. In other
14 words, after the end of wide MFNs and PMI, it was still
15 absolutely the goal of CTM to continue offering the best
16 prices. That was the driver.

17 If we could go back to the notice of appeal,
18 {A/2/92}. You see a series of quotes there, at the top
19 of the page:

20 "Offering the lowest possible price, is a core part
21 of the CTM proposition, competitive pricing is core to
22 our proposition. Offering the lowest possible price to
23 customers is a core part."

24 Then the fundamental pillar quote.

25 It was always about giving customers best prices.

1 It was not about the wide MFNs being critical. We were
2 using other tools. The reason why people know the
3 catchphrases about Aleksandr Orlov and things being
4 "simples" with ComparetheMarket, is because we have
5 invested vast amounts of money promoting the brand and
6 making insurance interesting.

7 That is not to do with the wide MFN, that is about
8 our approach overall and our approach to negotiation
9 with insurers. It is certainly tough, they may not love
10 us in the way in which we set prices, but that is
11 absolutely what you want in a competitive market.

12 If we go on to the next paragraph, it sums up the
13 position in terms of what was said in the SO:

14 "There is nothing inherently inappropriate about a
15 firm taking action to strengthen its competitive
16 position. This is what competitors do."

17 I interpolate there is nothing wrong with them
18 seeking best prices:

19 "... and the reliance placed upon quotes by the CMA
20 against BGL is highly selective."

21 The CMA keep doing this. In its skeleton, it does
22 it again. It quotes from the following, that:

23 "CTM sought to ensure it offered the best possible
24 price to consumers ..."

25 Then they emphasise:

1 "... and hence strengthen its competitive position
2 vis-à-vis rivals."

3 Paragraph 12 of their skeleton. This is supposed to
4 be a "gotcha" against CTM. It is nothing of the sort.

5 If you read the quote properly:

6 "The primary objective of CTM's MFNs was to use it
7 as one tool to seek to ensure it offered the best
8 possible price to consumers and hence to strengthen its
9 competitive position."

10 There is nothing wrong with strengthening your
11 competitive position by offering best prices. MFNs were
12 merely one tool. In fact, as we see from the evidence
13 from the data and from the material, from the HIPs, in
14 fact, what they were not doing was actually causing any
15 adverse effect on competition whatsoever.

16 So, in those circumstances, we have a situation
17 where the evidence being relied on by the CMA does not
18 support the overall position that they suggest is made
19 out in their extraordinarily lengthy decision, whether
20 it is in relation to the factual material, the market
21 definition approach, the recognition of reality, the use
22 of economics, or indeed, the appraisal of promotional
23 deals within that econometric analysis.

24 The CMA's lengthy decision does not provide a good
25 basis for a finding of adverse effects in relation to

1 these wide MFNs and nor does it provide any good basis
2 for a penalty at all in these circumstances.

3 Unless I can assist the Tribunal further, I am
4 grateful for the indulgence, those are the opening
5 submissions on behalf of ComparetheMarket.

6 THE CHAIRMAN: Mr Beard, thank you very much. We are very
7 grateful. Ms Demetriou we will start at 2 o'clock with
8 your submissions.

9 MS DEMETRIOU: Sir, if you would prefer to start, have an
10 hour's break, I do not anticipate I am going to be in
11 time difficulty in terms of finishing my submissions by
12 the end of tomorrow. So if the Tribunal would prefer to
13 have a full hour, we are not going to have any time
14 problems.

15 THE CHAIRMAN: That is very helpful for you to indicate.
16 I think we will nevertheless start at 2 o'clock. I have
17 got a couple of not quite housekeeping, but points which
18 I will raise at the end of the day regarding the
19 cross-examination of witnesses. So we will use the
20 quarter of an hour for that, if necessary.

21 MS DEMETRIOU: I am grateful.

22 THE CHAIRMAN: Thank you very much. Much appreciated. We
23 will remove ourselves to the retiring room and see you
24 at 2 o'clock. Thank you.

25 (1.14 pm)

1 (The short adjournment)

2 (2.03 pm)

3 THE CHAIRMAN: Good afternoon. Do start, Ms Demetriou.

4 Opening submissions by MS DEMETRIOU

5 MS DEMETRIOU: May it please the Tribunal, I am proposing to
6 organise my submissions as follows: I am going to start
7 off with an overview of the dispute between the parties
8 as the CMA sees it. Secondly, I am going to turn to
9 some issues of law and principle that arise between the
10 parties and I am going to take the Tribunal to some
11 authorities, not too many, but just a few. The reason
12 for that is that there are some issues of principle that
13 divide the parties and actually they are quite
14 fundamental to how the evidence in this case is assessed
15 by the Tribunal.

16 So I would like to start the main substantive parts
17 of my submissions dealing with those points and
18 identifying them.

19 Then thirdly, I want to turn to the evidence
20 underpinning the CMA's finding of an infringement by
21 effect.

22 I know that the Tribunal has read the decision
23 several times, but I do want to, if I may, emphasise
24 some key sections of the decision, and also take
25 the Tribunal to some of the underlying documents that

1 the decision refers to.

2 THE CHAIRMAN: Ms Demetriou, speaking purely for myself,
3 although we have all read the decision several times,
4 I think given its length, it certainly bears as much
5 reference as you choose to give it. So you can expect
6 no pushback from us, if you want to make very extensive
7 reference to the decision. We are more than happy for
8 you to do that.

9 MS DEMETRIOU: I am very, very grateful, sir. Just to
10 foreshadow, what I am not going to be dealing with in
11 opening, I am not going to deal with penalty at all in
12 opening, because I think that we would prefer to make
13 our submissions on that in closing, once the case has
14 evolved.

15 I am also going to say very little about the
16 economic evidence. We will have plenty to say about
17 that in closing, but it is going to be tested through
18 cross-examination and so I am not going to go through
19 chunks of Professor Baker's report or Dr Walker's report
20 to explain what our case is, because that is going to be
21 explored through the examination of the experts.

22 So I would like to start then with the overview.
23 The starting point in this case, is that the theory of
24 harm resulting from ComparetheMarket's wide MFNs, the
25 theory of harm which was investigated by the CMA and

1 which the CMA found in its decision, is both intuitive,
2 it is an intuitive theory of harm and it is
3 well-established in the economic literature.

4 The wide MFNs prevented the insurers, which were
5 bound by them, from offering lower prices on rival price
6 comparison websites than on ComparetheMarket and the CMA
7 found that this had a number of effects which softened
8 price competition.

9 I would just like to remind the Tribunal, in
10 summary, at the outset of my submissions, what those
11 effects were, what the theories of harm were, the
12 effects which softened price competition.

13 The wide MFNs meant that ComparetheMarket's rival
14 price comparison websites had less ability and less
15 incentive to compete with ComparetheMarket by offering
16 lower commission fees to the HIPs, in return for the
17 HIPs offering them lower retail prices.

18 That is because any lower retail price that the
19 rival PCW could procure through offering lower
20 commission fees, any lower price that it could procure
21 would have to be replicated on ComparetheMarket's
22 website, thus removing any competitive disadvantage.
23 This reduced the ability of other price comparison
24 websites to compete on price with ComparetheMarket.

25 So to think of it this way, why would a rival price

1 comparison website go to one of the HIPs and say: well,
2 we are going to reduce the commission that we are asking
3 of you, we are going to reduce the commission, so we are
4 going to reduce our profits in return for you reducing
5 the retail price? Why would it do that? It would only
6 do that if it could gain a price advantage and thus
7 attract more consumers. But it would not be able to
8 gain a price advantage, it would not be able to do it,
9 because the wide MFNs would require that price advantage
10 to be replicated on the ComparetheMarket website.

11 So it is very simple and intuitive and
12 straightforward to understand theory of harm.

13 Now, the other side -- and, of course, what that
14 means is that the ability of price comparison website
15 rivals to ComparetheMarket, to compete and to try and
16 reduce the market power enjoyed by ComparetheMarket, is
17 reduced because they are deprived of that key
18 possibility of competing on price to steal away
19 customers from ComparetheMarket.

20 The other side of that coin, of the same coin --

21 Professor Ulph?

22 THE CHAIRMAN: You are muted, Professor.

23 PROF ULPH: I would have thought it would be an advantage in
24 enabling them to compete against other PCWs.

25 MS DEMETRIOU: I am sorry, Professor, could you start again,

1 because I think I missed the first part of what you
2 said.

3 PROF ULPH: If a website was going to offer a lower
4 commission, and hence, lower fees through to the HIP,
5 that would allow the HIP to compete more effectively on
6 that website against other PCWs. Although
7 ComparetheMarket would have to lower its price in order
8 to compete, other websites would not have to have the
9 same obligations. So there is still an element of
10 competition between one HIP on one website against all
11 the other PCWs. You are only ruling out an element of
12 competition against ComparetheMarket.

13 So it is your case that ComparetheMarket was a
14 sufficiently large competitor. That was the crucial one
15 you had to maintain.

16 MS DEMETRIOU: Well, Professor, you will see and we will
17 come to this in the detail of the decision that, of
18 course, ComparetheMarket is by far the largest of the
19 four main PCWs. So in terms of effective competition,
20 what the rival PCWs would want to do is -- they were the
21 prime target of competition, ComparetheMarket, because
22 they enjoyed a position of market power. So they
23 occupied a large market share, when it came to the other
24 PCWs, so they had a 50% market share.

25 So the fact that one of the other smaller PCWs was

1 not -- did not have wide MFNs, I think does not prevent
2 this theory of harm arising, because the key point being
3 that a rival PCW would not be able to steal
4 a competitive march on all of the others. "All of the
5 others" meaning including ComparetheMarket, which is its
6 largest -- which was the largest rival for any of them.

7 So it may be that they could steal a march in
8 relation to some of the others, but that really is not
9 enough. In any event, it does not prevent there being
10 a softening of competition.

11 So the CMA's case here, the CMA's case generally, if
12 I can put it this way, is not that the wide MFNs meant
13 that price competition was completely impossible, that
14 is not what the CMA established or has to establish. It
15 is that price competition was softened, was reduced
16 compared to what it would have been in the
17 counterfactual.

18 Professor, the other side -- I think the point I was
19 getting to, I was going to come on to next, is also
20 relevant to the question that you have asked, which is
21 that the other side of the coin, the other side of the
22 coin that I have just been discussing, is that the wide
23 MFNs, they -- for the covered insurer's part, what they
24 meant is that the insurers had a reduced ability and
25 incentive to respond to any offers made to them by CTM's

1 rivals in respect of lower commission fees in return for
2 lower prices.

3 That is because they would have to replicate the
4 lower retail price on ComparetheMarket, without
5 receiving any benefit in the form of lower commission
6 fees. The CMA found, and we will come to see this in
7 the evidence that, as a consequence, several insurers
8 refused to enter into promotional deals with
9 ComparetheMarket's rivals.

10 So, Professor, just going back to your question,
11 that is an important part of the answer to your
12 question, we would respectfully submit, because one is
13 looking at it not only from the perspective of the PCW,
14 but also the ability and incentives of the HIPs to
15 respond to that kind of competitive initiative.

16 So if, for example, MoneySupermarket approached one
17 of the HIPs and said: well, we would like to price your
18 product lower on our price comparison website and in
19 order to persuade you to do this, we are going to ask
20 a lower commission fee of you; then, first of all, the
21 first point I was making is that the incentive for the
22 rival PCW to do that is reduced, because obviously the
23 reduction in retail price would be matched on
24 ComparetheMarket.

25 But also, and just going to your point, Professor,

1 that still allows them some competition to achieve a bit
2 of a march in relation to the other price comparison
3 websites; well, the problem is that it was more
4 difficult to achieve those arrangements at all, because
5 from the HIPs's perspective, it suddenly looks like
6 a very expensive business, because what they are doing
7 is they are required to reduce the retail prices, not
8 only on the rival PCW's site, but also on
9 ComparetheMarket's site. What are they getting in
10 return? Only a reduction in commission fees from the
11 rival PCW.

12 So, sir, you have a question.

13 THE CHAIRMAN: Just less a question, more a slight concern
14 about how you began your answer to Professor Ulph's
15 question. Obviously, we accept, and I do not think
16 Mr Beard would gainsay this, that market power is
17 relevant to assessing the economic effects of what you
18 are complaining of. I do not think anyone is going to
19 push back with that proposition.

20 But your answer began rather like an articulation of
21 an Article 102 complaint. I just highlighted the bit
22 where you began to say:

23 "... ComparetheMarket is by far the largest of the
24 four main PCWs. So in terms of effective competition,
25 what the rival PCWs would want to do is -- they were the

1 prime target of competition, ComparetheMarket, because
2 they enjoyed a position of market power. So they
3 occupied a large market share, when it came to the other
4 PCWs, so they had a 50% market share."

5 Now, I do not know whether there is a need to find
6 effectively dominance here and whether if that is
7 a requirement of your theory of harm, it is conceded or
8 not, but I just wanted to package a sense of unease
9 about those words.

10 MS DEMETRIOU: Sir, you are quite right and let me explain
11 exactly what I mean. No, we are not -- clearly not
12 running an Article 102 case.

13 If I could sort of refine or rather more accurately
14 express my answer, there are two elements to the answer
15 to Professor Ulph's question. So the first element is
16 that, of course, it may in theory have been possible --
17 so the theory of harm being that the rival PCW's
18 incentive and ability to compete on price is reduced,
19 because their ability and incentive to agree with a HIP
20 that it will offer lower retail prices in return for
21 reduced commission fees, those incentives are reduced in
22 circumstances where they are not going to be able to
23 steal a march against ComparetheMarket, because
24 ComparetheMarket will automatically, by virtue of the
25 wide MFNs, benefit from the same reduction in price.

1 So part of the answer is that there is a reduced
2 incentive to do that, because it is not going to be as
3 effective as it otherwise would have been without the
4 wide MFNs. That is really the first part of my answer.

5 The second part of my answer is that they would be
6 less likely to be able to achieve such an arrangement
7 with the HIPs, because the HIPs would essentially need
8 to fund the same reduction of price on CTM's website,
9 but without gaining for its part the benefit and the
10 reduction in commission fees.

11 So I hope that that explains a little bit more
12 accurately what our answer is to the question, without
13 straying into Article 102 territory.

14 But thank you for raising that with me, sir, so that
15 I have had the opportunity to clarify.

16 THE CHAIRMAN: Thank you.

17 MS DEMETRIOU: Now, another aspect of this theory of harm is
18 that, of course, the wide MFNs reduced the incentive on
19 ComparetheMarket to compete on price, because why would
20 it offer lower commission fees to an insurer in return
21 for a lower retail price when it was guaranteed the
22 lowest available retail price anyway?

23 There was no incentive for it to go to a HIP,
24 covered by a wide MFN, to say: well, we are willing to
25 charge you a lower commission fee in return for these

1 lower retail prices, no incentive to do that, because it
2 did not have to. It would benefit automatically from
3 the lowest retail price in the market, because of the
4 existence of the wide MFN.

5 We say, on the contrary, the wide MFNs gave
6 ComparetheMarket the ability and incentive to raise its
7 commission fees compared to the counterfactual, safe in
8 the knowledge that this could not be translated into
9 higher retail prices, retail prices higher than those on
10 its rival PCWs.

11 So it is a point that Mr Beard -- it goes to a point
12 Mr Beard kept emphasising. He kept saying: well, my
13 client has always wanted to achieve price parity and it
14 wanted to do that after the wide MFNs were removed, and
15 it wanted to do that before, and there is nothing wrong
16 with wanting to achieve price parity in the markets or
17 at least not to be above anybody else's -- any rival's
18 retail price.

19 The problem with that submission is that it is fine,
20 on its face, as far as it goes, but really the question
21 in this case and the question for the Tribunal is: well,
22 how did ComparetheMarket seek to achieve price parity?
23 The problem with the wide MFNs is that they allowed it
24 to achieve price parity without doing any work or
25 without conferring any benefits on the home insurance

1 providers.

2 So once those wide MFNs were removed, to put the
3 point another way, in order to achieve price parity with
4 its rivals, ComparetheMarket has had to compete on
5 price. So if its rivals are offering lower retail
6 prices, then ComparetheMarket would have to go to the
7 relevant home insurance provider and say: well, we can
8 see that this price, your price, is lower on GoCompare,
9 we would like that price too. So what we will do is we
10 will offer to charge you, we will reduce our commission
11 fees a bit.

12 So in order to achieve its goal of price parity, it
13 now has to act competitively, whereas what the wide MFNs
14 were doing was to enable it to achieve price parity
15 without doing that, simply because of the operation of
16 the contractual clause.

17 THE CHAIRMAN: Ms Demetriou, can I sort of repackage the
18 point you have just made, because I saw Mr Beard shaking
19 his head with some violence to some of your points and
20 that is probably a good thing from your point of view.

21 But let us put it this way: you are articulating the
22 harms that wide most-favoured-nation clauses cause, and
23 what Mr Beard was placing some emphasis on was the
24 benefits, not just to ComparetheMarket but to the market
25 of having them, and the benefit you can articulate is

1 that you get a guarantee as a consumer that if you go to
2 ComparetheMarket, you will get the lowest price.

3 Now, speaking for myself, I can see the points
4 there, but it comes, as it were, with disadvantages
5 which you have been articulating.

6 My question and my repackaging is this: in
7 Article 101 cases, one has got, as it were, an asymmetry
8 between the anti-competitive effects that are
9 infringements and pro-competitive effects arising out of
10 the infringements, which have to be specially justified
11 in 101.3. As we have discussed in the past, this is not
12 a 101.3 case.

13 So is it fair to say that even if Mr Beard is right
14 about the benefits of the operation of the wide
15 most-favoured-nation clauses in terms of what the
16 consumer gets when they access the website, that is
17 simply not something we need concern ourselves with,
18 because if you are right, on your side of the equation,
19 on the adverse effects, then it is game over, because we
20 are not in 101.3 territory?

21 MS DEMETRIOU: Sir, that is exactly right. That is exactly
22 what we say.

23 Sir, moreover, we say that it is a really critical
24 point in this appeal, that ComparetheMarket does not
25 contend that there are any pro-competitive effects that

1 the Tribunal needs to weigh in the balance, it does not
2 contend that. It has not run a case on Article 101(3)
3 and it does not say that there are pro-competitive
4 effects, which need to be weighed in the balance and
5 which deprive the CMA of the ability of finding an
6 adverse effect on competition. Its expert has not been
7 instructed, its experts have not been instructed to
8 examine whether or not there are any pro-competitive
9 effects.

10 So Mr Beard may claim that there are positive
11 effects, but we say that that should be disregarded
12 completely because, sir, for this reason. First of all,
13 we say that even on its own terms, it is an empty claim.
14 So what is being said is a consumer can get the
15 lowest -- can get a lower price or as low a price on
16 ComparetheMarket as it can on rival price comparison
17 websites.

18 But, sir, so what? Because the point for the
19 consumer is not whether or not ComparetheMarket is at
20 a lower price or at no higher price than any of its
21 rivals, but what is -- can it get, as a result of these
22 wide MFN clauses, is it getting a lower price than it
23 would in the counterfactual of no clause being in
24 existence? It is that that the CMA has found against
25 ComparetheMarket on.

1 So the CMA has found that in terms of comparing the
2 position on price competition with the wide MFNs in
3 existence, as compared to the counterfactual, no, this
4 is bad for prices, it is bad for price competition, that
5 is the finding in the decision.

6 I will come to the detail of the decision.

7 So the fact that Mr Beard claims: well, it is good,
8 because ComparetheMarket could guarantee that it was
9 lowest in the market, it just goes nowhere in terms of
10 positive effects. It might be -- it is positive for
11 ComparetheMarket, but for no-one else.

12 THE CHAIRMAN: Yes, I suppose the point I am making is that
13 even if you are wrong in that last submission and there
14 are positive elements, not to ComparetheMarket but to
15 the consumer in the market -- and I do not want to get
16 into a debate about this, but assume that is the case.

17 MS DEMETRIOU: Yes.

18 THE CHAIRMAN: For infringement purposes, it does not get
19 Mr Beard anywhere, because the 101.3 benefit has not
20 been articulated and is not before us now.

21 But can I just pick you up on the complete
22 irrelevance that you mentioned.

23 I think I -- and I am sort of raising this in reply,
24 Mr Beard can push back if he wants to on this, but
25 surely the positive benefits are what ComparetheMarket

1 perceive the positive benefits to be. That must be
2 relevant to penalty, mustn't it?

3 If ComparetheMarket's thinking is these clauses are
4 actually good, not for us, but for the service we are
5 offering to the consumer, then does that not feature in
6 the thinking on penalty, not infringement?

7 MS DEMETRIOU: Sir, on penalty, we are going to come and
8 deal with this in closing.

9 THE CHAIRMAN: Later. I was just picking up -- Mr Beard,
10 you have got your hand raised.

11 MR BEARD: I just wanted to slightly cut things short.

12 MS DEMETRIOU: I can't hear you.

13 THE CHAIRMAN: You need to be closer to the microphone.

14 MR BEARD: Is that better?

15 THE CHAIRMAN: Much better, thank you.

16 MR BEARD: I am so sorry. Just to be really clear, we are
17 not saying you take into account positive benefits in
18 relation to 101, Chapter I, because we are only dealing
19 with the infringement, though I think there is not
20 a debate between us there.

21 The point I was making was: if you go after best
22 prices using a whole range of techniques, you have to
23 ask yourself whether in the counterfactual, the wide MFN
24 is making any difference, because you are going after
25 that anyway.

1 So we agree with the CMA that the question you are
2 asking yourself is what happened in the counterfactual?

3 The point I was making was our whole strategy was:
4 go after best prices. It was not use a wide MFN to do
5 so.

6 In relation to the penalty point, yes, you are
7 absolutely right, it goes to intention and negligence,
8 but we can pick that up later.

9 I hope that assists, because actually on this, I do
10 not think there is a vast gulf between us. What I was
11 shaking my head about was the idea that this was
12 irrelevant to the analysis, going after best prices,
13 because it plainly is not, it is relevant to the
14 counterfactual.

15 THE CHAIRMAN: That is very helpful. Thank you very much,
16 Mr Beard.

17 Ms Demetriou, apologies for the interruption.

18 MS DEMETRIOU: No, not at all. It was a helpful
19 intervention. We say that it follows, sir, just to
20 finish off on the point you have just raised, that the
21 question for the Tribunal really is a binary question:
22 did the wide MFNs on the balance of probabilities have
23 an appreciable adverse effect on competition? Or did
24 they have no effect at all? So there is not some third
25 question, which is weighing up -- any weighing up of

1 pro-competitive effects. So it is a binary question for
2 the Tribunal.

3 Going back to the theories of harm, which I have
4 explained and, of course, I think one facet of them that
5 I omitted, but which is an important facet and is in the
6 decision -- and we will come to that -- is that because
7 the 32 HIPs covered by the wide MFNs competed less
8 strongly on price, as a result of them, this softened
9 price competition generally in the market between all
10 insurers competing on PCWs.

11 Really it does not take very much imagination to
12 work out why that is so, in circumstances where
13 everybody agrees that price is an important parameter of
14 competition in this market, then where you have got
15 a sizeable chunk of the market where competition has
16 been softened, then we say that it is, as a matter of
17 basic economic theory in a competitive market, that will
18 then have an impact on other market participants in the
19 same way as where you have a cartel arrangement that
20 does not involve all suppliers in the market, but only
21 a subsection of them, then that can lead to umbrella
22 effects in terms of raised prices for non-cartel
23 participants in the market.

24 So that is part of the theory of harm and, as I have
25 said, these are the mechanisms by which the CMA found

1 that the wide MFNs adversely affected competition. We
2 say that they are intuitively easy to understand. But,
3 of course, the CMA has not relied on intuition, because
4 this is an effects case, it has found an infringement of
5 competition by effect.

6 So what the CMA did in its investigation was to
7 examine whether, on the balance of probabilities, these
8 wide MFNs did in fact have the adverse effects on
9 competition, that the economic theory predicts they will
10 have.

11 In conducting its investigation, the CMA examined
12 a large number of contemporaneous documents, including
13 documents of ComparetheMarket, documents of its rival
14 price comparison websites, documents of many of the
15 insurers and it made, as you have seen, numerous
16 requests for information and carefully considered the
17 responses.

18 The CMA's conclusion, having conducted this
19 investigation, was that ComparetheMarket's wide MFNs did
20 in fact operate to soften price competition appreciably
21 in the ways that I have summarised.

22 The documents, as you have seen and as you will see,
23 include many documents produced at the time, so
24 contemporaneous documents, internal documents of both
25 the PCWs and the HIPs, and communications between them.

1 Those documents demonstrate -- some of those documents
2 demonstrate that the wide MFNs had an actual effect on
3 pricing strategy.

4 So people, at the time, were saying, in
5 contemporaneous documents, that the wide MFNs were
6 stopping them competing on price in ways that they would
7 otherwise have liked to have done. We will see that,
8 I want to take the Tribunal to those documents. In
9 other words, there is contemporaneous evidence showing
10 that the wide MFNs inhibited attempts to compete on
11 price.

12 Now, what is ComparetheMarket's response broadly in
13 this appeal? Its response is to seek to persuade
14 the Tribunal to ignore the contemporaneous evidence
15 showing that there was an actual effect on pricing
16 strategy, on a number of different bases. So it puts
17 forward a number of different bases to persuade
18 the Tribunal that it should ignore the elephant in the
19 room. Essentially, its case amounts to it is death by
20 a thousand cuts.

21 So what it says, it says, first of all, the Tribunal
22 must ignore some of the wide MFNs, because the CMA did
23 not adduce evidence from some home insurance providers,
24 that is one point it makes.

25 Secondly, it says that the Tribunal must ignore

1 other wide MFNs where the evidence is mixed, in other
2 words, where there is some evidence that sometimes the
3 HIP complied and other evidence showing that sometimes
4 it did not comply.

5 In relation to that point -- I am going to come to
6 each of these points, in relation to that point, we say,
7 well, why on earth, if there is mixed evidence, so if
8 there is evidence that sometimes there was compliance,
9 sometimes it had an effect, because the wide MFNs
10 stopped there being a promotional deal, but on other
11 occasions or during other parts of the relevant period,
12 the evidence is less compelling or even goes the other
13 way, why should that be ignored? Because it is still
14 evidence of an effect.

15 Now, the CMA is not saying here that there is
16 consistent evidence of effect throughout the whole of
17 the relevant period on the part of all of the home
18 insurance providers that were covered, but it does not
19 need to show that. It needs to show that there was, in
20 fact, an appreciable effect.

21 Now, thirdly, CTM says that the Tribunal must ignore
22 other wide MFNs, because the CMA has not called any
23 representative from a HIP to give evidence about them.
24 Though, of course, you will have seen that the CMA has
25 called evidence from a representative of a rival price

1 comparison website and we will hear in due course from
2 Ms Glasgow.

3 It was notable -- and I am going to deal with the
4 point when I come to the legal submissions about the
5 relevance of witness evidence, but it was notable, in
6 our respectful submission, that Mr Beard's canter
7 through the evidence did not focus at all on evidence
8 from rival price comparison websites and there is good
9 evidence in respect of the effect on CTM's rivals, but
10 he did not address that really to the Tribunal at all.

11 Now, the fourth point that ComparetheMarket make,
12 they say that the market should be defined differently
13 so as to include the HIPs's direct channels and they say
14 this reduces the importance of any adverse effect.

15 Then the fifth point they make is that the CMA
16 should have conducted an econometric analysis to show
17 the extent of the impact on prices, to show in numbers
18 that there was an effect.

19 We are, of course, in this appeal, going to address
20 each of those points. Some of them are points of
21 principle, which I will address in opening, today and
22 tomorrow. Some of them turn on the evidence and we will
23 address them through cross-examination and then in our
24 closing submissions.

25 But the point I wish to make for now is that in

1 making the various points that they do, ComparetheMarket
2 is seeking to persuade the Tribunal, in our submission,
3 to turn its eyes away from the factual reality of the
4 matter, which is that these clauses have had an effect.
5 Not only did they affect pricing, as I will show you,
6 not only did they affect pricing strategy, which is
7 really obviously the key point, but the contemporaneous
8 evidence clearly demonstrates that ComparetheMarket
9 itself placed great weight on these clauses.

10 Now, why? Why did it think they are important?
11 Because what they are saying now is that they were not
12 important at all. Well, at the time, they thought they
13 were important. Why? Precisely because these clauses
14 protected it from price competition and enabled it to
15 maintain price parity, to maintain its position of
16 market power, without actually competing on price.

17 I am going to show the Tribunal the analysis in the
18 decision in relation to that and take you to some of the
19 underlying contemporaneous documents which show it.

20 Now, the Tribunal will have seen that GoCompare and
21 Confused also used to have wide MFNs in their contracts
22 with insurance providers. The Tribunal knows that
23 between 2012 and 2014, the CMA investigated the use of
24 wide MFNs in the motor insurance market and published
25 its PMI report, in September 2014, finding that they had

1 anti-competitive effects. This led to the PMI order in
2 2015, which prohibited the use of wide MFNs in the
3 private motor insurance sector.

4 Now, what happened when that investigation was
5 taking place -- so obviously, these very similar clauses
6 in a parallel insurance market, were the subject of
7 intense regulatory scrutiny by the CMA at that point in
8 time. GoCompare and Confused removed their wide MFNs,
9 all types of insurance, including both of course motor
10 insurance, which they had to do, and home insurance, and
11 they did that either during or shortly after the CMA
12 investigation into motor insurance wide MFNs.

13 But in contrast to GoCompare and Confused,
14 ComparetheMarket retained and continued to enforce its
15 wide MFNs, precisely because they thought they were
16 important. So they resisted the regulatory pressure,
17 they resisted, as we will come to see, pressure from the
18 home insurance providers covered by them to remove the
19 clauses. Some of them were saying: well, look, the CMA
20 is investigating this, can you now please get rid of
21 them. They stood firm and they said: no, we are going
22 to keep these clauses in our contracts.

23 Now, why? Why did it do that if they really truly
24 believed that they had no effect, no effect in helping
25 to maintain its position, protect its position in the

1 market without it having to compete on price? We say
2 that it is implausible that it would have done that if
3 it had truly believed that the wide MFNs had no effect.

4 The contemporaneous evidence also demonstrates, as
5 I will show the Tribunal, that they systematically
6 monitored and enforced the wide MFNs. Again, that is
7 something which Mr Beard seeks to brush aside. Again,
8 he says, "Well, of course, my client was interested in
9 lowest prices." But again, we say, yes, but the key
10 question for the Tribunal, the key question really here
11 is: how did ComparetheMarket seek to achieve those
12 lowest prices? That is the vice of the wide MFNs, the
13 reason why they placed so much weight on them, was
14 because they could achieve lowest prices without
15 actually competing with their rivals on price. They
16 were a contractual mechanism for achieving lowest
17 prices.

18 Again, we say it is implausible that
19 ComparetheMarket would have engaged in all of this
20 systematic monitoring and enforcement and in
21 confrontations with the HIPs, if it had believed that
22 its wide MFNs were simply a tool, a tool. No, they knew
23 that they were important and they knew that they were
24 important and the reason why they thought they were
25 important was a reason, which is at root, an

1 anti-competitive reason.

2 Ultimately, one has to ask, and we invite
3 the Tribunal to ask, what is ComparetheMarket saying
4 about the contemporaneous document? The contemporaneous
5 documentary evidence, which demonstrates or which shows
6 that it believed, at the time, that the wide MFNs were
7 effective in protecting it from price competition.

8 So what does it say about that? Not just that it
9 believed, but that it put its money where its mouth was,
10 so to speak, and steadfastly monitored the wide MFNs,
11 spending money and resources doing so.

12 So what does it say about that? It has chosen --
13 and this is, we say, a very surprising element in this
14 case, it has chosen not to bring forward any factual
15 witness from the business to support its appeal, so
16 there is not a single person from ComparetheMarket
17 before the Tribunal seeking to explain
18 ComparetheMarket's attitude to the wide MFNs.

19 Nobody is here from the business seeking to suggest
20 that the CMA was wrong to have found that
21 ComparetheMarket believed that its wide MFNs protected
22 it from price competition. Nobody from the business
23 explaining why CTM spent time and money monitoring the
24 wide MFNs. Nobody from the business explaining why,
25 when the HIPs, some of them vociferously said, "Please

1 can you get rid of them", they said, "No, we are not
2 getting rid of them, we are maintaining them", despite
3 the investigation into motor insurance.

4 Of course, as we have said, nobody from the business
5 seeking to establish that, in fact, the wide MFNs were
6 actually beneficial for consumers. Nobody doing that at
7 all.

8 Now, the Tribunal will hear from the experts and, as
9 I have said, I am not going to say much about their
10 evidence in my opening submissions, but the Tribunal
11 will have seen that there are really three key
12 difficulties. We say these are three key difficulties,
13 I want to highlight now for present purposes, three key
14 difficulties for ComparetheMarket as regards its
15 economic evidence.

16 First of all, and this is a point we make in
17 relation to the econometric analyses conducted by
18 Ms Ralston, and this is a point relating to precision
19 that, again, Mr Beard rather brushed aside and did not
20 focus on, but it is an important point and that is that
21 none of those analyses conducted by Ms Ralston proved
22 that the wide MFNs had no adverse effect.

23 All they do is establish that such an outcome cannot
24 be ruled out. That is all they do. But they also
25 establish, they also establish that an adverse effect on

1 competition cannot be ruled out either. So, in
2 circumstances where the CMA has carefully assembled
3 a raft of evidence showing, on the basis of the
4 contemporaneous material, that the wide MFNs did have an
5 adverse effect on pricing strategy and on pricing
6 competition, we say that the econometric analyses of
7 Ms Ralston do not go as far as they need to, in order to
8 establish that the CMA's conclusions, that the evidence
9 analysed by the CMA and the conclusions that the CMA
10 drew from that evidence, should be set aside.

11 So that is the first point I want to highlight and
12 it relates to precision and, really, evidentially, where
13 does this econometric analyses, where do they go?

14 THE CHAIRMAN: Ms Demetriou, can I just understand exactly
15 what you are saying there, because we all know that
16 econometric analyses do not operate on the binary
17 51 per cent balance of probabilities approach that
18 lawyers are schooled in.

19 I think if I were to use a confidence interval in
20 the way that a lawyer might want to use it, and treat it
21 as a balance of probabilities question, I probably would
22 be taken out and shot by Professor Ulph before I got
23 very far.

24 Isn't it the case, then, that pretty much every
25 econometric analysis is going to not rule out

1 a particular outcome, one way or the other, but the
2 question is what is the confidence with which one is
3 predicting that a certain outcome will be the case on
4 the basis of the large amount of data that one is
5 analysing?

6 In a sense, I am agreeing with you, that neither
7 case is ruled in or ruled out by the analysis, but
8 I think my point is: so what? I think --

9 MS DEMETRIOU: Sir, I am sorry for interrupting.

10 THE CHAIRMAN: Not at all. What we are getting is a tool
11 articulated or intermediated through the evidence,
12 which, according to Mr Beard, is something that ought to
13 be taken into account as a building block in working out
14 whether the abuse that you alleged took place. Of
15 course, Mr Beard goes a little bit further. He says
16 that this building block was of such importance that it
17 is an error on the part of the CMA not to have deployed
18 it in this case.

19 So I do not think it is a conclusory point, it is
20 simply a building block point.

21 MS DEMETRIOU: Sir, yes. So I accept what you have said
22 generally about econometric analyses and confidence
23 intervals, and not proving one thing or the other.

24 Of course, the second point I was going to go on to
25 make is that in the circumstances of this case, we say

1 there are reasons why any econometric analyses is going
2 to be insufficiently precise to yield an answer, which
3 is going to be helpful.

4 So, sir, where we are at, and I am now dealing with
5 things at a level of principle rather than getting into
6 the weeds, because we are going to get into the weeds
7 later on the econometrics, but dealing with things
8 that --

9 THE CHAIRMAN: Just if you answer the question. I see
10 Professor Ulph's hand.

11 MS DEMETRIOU: Sorry.

12 THE CHAIRMAN: No, I -- you are on mute, Professor.

13 PROF ULPH: I just want to come in on the same points and
14 maybe make a point that Justice Smith has made in
15 a slightly different way. The whole point about
16 econometric analysis is you are doing hypothesis
17 testing. You are testing a hypothesis of an effect in
18 zero. So ask yourself the question: can we say
19 definitively that there is an effect or can we say we
20 cannot reject the hypothesis that there is no effect?
21 That is all you are really doing here, you are saying:
22 we cannot reject a hypothesis that there is no effect.

23 If you want to set it up to test a different
24 hypothesis of the effect, and say 10% or 20%, you have
25 to do your analysis in a different way. This is purely

1 an exercise in hypothesis testing and you have a very
2 clear hypothesis that you are trying to accept or reject
3 by doing your tests.

4 MS DEMETRIOU: Professor, I am very grateful and
5 I respectfully agree with what you have just said, and
6 I think I would probably be insane if I tried to
7 disagree with what you have just said. But I do agree
8 with what you have just said.

9 Really just to bring it back to the point of
10 principle that I am making for present purposes, for
11 overview purposes, really, looking in broad terms about
12 what are the decisions the Tribunal now has to make in
13 this appeal, we say, on the one hand -- and this really
14 is the crux of the matter. On the one hand, we have
15 evidence which led the CMA to conclude that there was an
16 actual effect on price competition.

17 I am going to show you that evidence. It is largely
18 qualitative evidence, but we say that there is no
19 problem with the CMA reaching a conclusion on the basis
20 of qualitative evidence. There is no case law that says
21 you cannot use qualitative evidence. So we say, on the
22 one hand, there is a conclusion reached by the CMA of
23 adverse, likely adverse effect -- by "likely", I do not
24 mean potential, I mean on the balance of probabilities
25 that there were adverse effects and it has been reached

1 on the basis of qualitative evidence.

2 On the other hand, what you have -- and I am dealing
3 just with the econometrics at the moment -- is an
4 analysis or analyses, which conclude that you cannot
5 reject the hypothesis that there was no effect.

6 So what you have is, on the one hand, positive
7 evidence relied on by the CMA and, on the other hand,
8 a statistical analysis, which is set up in the way that
9 Professor Ulph described and which concludes that you
10 cannot reject the hypothesis that there was no effect.

11 But what we say is that that cannot -- and this is
12 the broad point -- be a reason for rejecting the
13 qualitative evidence relied on by the CMA, because
14 although it does not reject the hypothesis that there is
15 no effect, it also does not find, it does not establish
16 that there was no adverse effect.

17 So really what the Tribunal is faced with on this
18 part of the case is a battle between the qualitative
19 evidence and the quantitative evidence. The point I am
20 making, for present purposes, is because of the way that
21 the quantitative evidence has been set up, it simply
22 cannot go far enough by virtue of its own parameters.

23 So that is the first point I make.

24 The second point I make is that there are important
25 reasons in this case, why regression analysis does not

1 lead to precise results and why it should not be
2 preferred over the qualitative evidence.

3 Again, I am going to return to those points in more
4 detail, once the Tribunal has actually heard the
5 evidence, but I just want to highlight for now, two
6 points.

7 The first is the point relating to spillover
8 effects. Again, this comes back to a point I was making
9 a few moments ago, which is that it is common ground
10 that this is a market where price is an important
11 parameter of competition and that the implications for
12 that are that the wide MFNs are likely to have had an
13 effect, not only on the insurers bound by them, but also
14 on those who are not.

15 Or to put it another way, assume that the CMA is
16 correct, that there was an appreciable effect on
17 insurers bound by the wide MFNs, then because of the way
18 the market operates, then it is very likely that those
19 effects would have spilled over to affect those HIPs who
20 were not bound by the wide MFNs.

21 Again, in the same way that a cartel can have
22 umbrella effects in respect of non-cartelists competing
23 in the same market, here too a softening of competition
24 between insurers bound by the wide MFNs would have had
25 spillover effects in relation to those who were not.

1 Yet, as is common ground, Ms Ralston's analysis
2 assumes her difference in differences approach assumes
3 that there were no spillover effects. So that is the
4 assumption. So her control group are non-covered HIPs
5 and she says -- she accepts that her analysis assumes
6 there were no spillover effects and we say that this
7 assumption is implausible and it is wrong. The effect
8 of it is that Ms Ralston's analyses are biased against
9 finding adverse effects on competition. So that is
10 a point which will have to be explored.

11 Further, we say that the data, the consumer
12 intelligence data, which Ms Ralston used to conduct her
13 analyses, is subject to important shortcomings, which
14 will have affected precision.

15 Again, that is something which is going to be
16 explored in the course of the evidence, and I am just
17 stating it now, so that the Tribunal understands some of
18 the key points that will be canvassed.

19 The third point, though, I want to highlight now
20 about ComparetheMarket's economic evidence, is we say
21 that it is divorced from the real world facts. We see
22 that, for example, in its expert's approach to market
23 definition. So Mr Beard explained yesterday that a key
24 part of ComparetheMarket's challenge to the CMA's case
25 on market definition relates to the narrow MFNs. You

1 will recall that yesterday, he made submissions about
2 that.

3 Essentially, ComparetheMarket's case is that the
4 narrow MFNs have to be ignored for the purpose of market
5 definition and the CMA -- of course, CMA's case is that
6 this simply does not reflect how in fact the market
7 operates.

8 So the CMA found as a fact that narrow MFNs are
9 pervasive and so they must therefore be taken into
10 account in determining how the market operates and how
11 the competitive constraints work. We say not to take
12 them into account lacks any factual reality. We say
13 that it is somewhat ironic that Mr Beard, in opening
14 yesterday, spent so much time on the Google ad pages.

15 Sir, you will recall, he went to those pages and
16 sought to characterise the CMA's position in conducting
17 a SSNIP test as being unduly theoretical. He said, "Why
18 do that? Why get into the hypothetical monopolist when
19 there is evidence here in the Google ad pages of HIPs
20 competing with PCWs?"

21 But, of course, the reason why the CMA use the
22 conceptual framework of the hypothetical monopolist test
23 was that it is necessary, not just to determine whether
24 HIPs compete with price comparison websites, but to
25 examine the extent of that competitive constraint and

1 you do not get that by looking up Google ads.

2 That is precisely what the hypothetical monopolist
3 framework seeks to do. We say it is significant that
4 Dr Niels agrees with the CMA that it was appropriate to
5 apply the hypothetical monopolist test, though of course
6 he disagrees with how that test was applied in practice.

7 So it is not right to simply look at Google ads and
8 say, well, this tells you everything you need to know
9 about competitive constraints. No, there was a much
10 more principled framework that was addressed by the CMA
11 and rather it is ComparetheMarket that is not operating
12 in the real world, when they say that as part of that
13 framework, the CMA had to somehow ignore the fact that
14 wide -- that narrow MFNs are pervasive and operate in
15 the market.

16 Now, it is important, of course, to say that these
17 deficiencies in ComparetheMarket's economic evidence are
18 not points that the CMA has dreamt up belatedly to
19 defend this appeal. They are points that the CMA made
20 throughout the investigation when ComparetheMarket
21 argued that the CMA should prefer its econometric
22 analyses. The CMA considered that submission carefully
23 and determined that that course would not lead to
24 a robust analysis in the circumstances of the present
25 case.

1 So, ultimately, then, as I have said, the question
2 for the Tribunal is whether the analysis of the
3 contemporaneous evidence by the CMA should be rejected
4 on the basis of the ex-post econometric analyses, which
5 is set up in the way that Professor Ulph described, and
6 which does not actually exclude the conclusion reached
7 by the CMA, and the CMA respectfully contends that the
8 answer to that question is "no".

9 So, sir, members of the Tribunal, that is what
10 I wanted to say by way of overview of what we say how
11 broadly the issues in dispute between the parties in
12 this appeal really arise. I was going to go on then to
13 look at some key issues of principle and to look at some
14 authorities.

15 I do not know whether this is a convenient time,
16 because I have got to the end of one section, to take
17 the break for the transcribers or whether you would
18 prefer me to press on and take a bit later.

19 THE CHAIRMAN: No, not at all. We are in your hands and
20 that seems like an excellent time. We will resume at
21 ten past 3 and we will try and exit to the retiring room
22 in the usual fashion. Thank you very much.

23 (3.00 pm)

24 (A short break)

25 (3.10 pm)

1 THE CHAIRMAN: Ms Demetriou, if you just wait for the
2 LiveNote to go, we will tell you when we are ready.

3 Ms Demetriou, over to you.

4 MS DEMETRIOU: Thank you. So I am going to move on now to
5 discuss some issues of principle, legal issues between
6 the parties, and they are relevant to the lens, as it
7 were, that the Tribunal -- we say through which
8 the Tribunal should approach the evidence.

9 They are important points, I am only going to focus
10 on the important points, because this case is relatively
11 unusual, in our submission, in the sense that there are
12 two types of evidence we have adduced, the CMA has
13 relied on, qualitative evidence, as I have said. That
14 is being challenged as insufficient and quantitative
15 evidence is being put forward in response.

16 The Tribunal, of course, is going to have to see
17 what it makes of these two buckets of evidence, which
18 are different ways of approaching the same problem.

19 So I think that, in our submission, some guidance
20 can be derived from the case law in terms of the
21 approach, the proper approach, and in particular what
22 needs to be established by competition authority in an
23 effects case.

24 The first point, I can dismiss, I think, quite
25 shortly, because I do not think there is anything really

1 between the parties having heard Mr Beard. But I think
2 it is important just to knock it on the head, as it
3 were, because it does appear in the various written
4 submissions and on the pleadings.

5 It relates to the question of actual or potential
6 effects, because, of course, Article 101 and the
7 Chapter I prohibition refers to actual and potential
8 effects. The point that was made by -- or rather the
9 case law explains that effects can be actual or
10 potential. The point made by ComparetheMarket in its
11 pleadings is that where an agreement has in fact been
12 implemented, then a competition authority really needs
13 to look at the evidence to establish whether there has
14 in fact been an effect on competition. It cannot ignore
15 the actual evidence and say: well, we think that there
16 are potential effects.

17 Mr Beard took you to the General Court's judgment in
18 Krka and also to the Google Streetmap judgment. The
19 Google Streetmap judgment of the Tribunal, rather
20 I think it is of the High Court, the President of the
21 Tribunal sitting in the High Court, makes the point that
22 where there has been implementation of a particular
23 anti-competitive practice or practice alleged to be
24 anti-competitive, then it would be odd if evidence of
25 its actual effects were not adduced and such evidence is

1 likely to be important in the case.

2 We say that this point of law does not need to
3 trouble the Tribunal, in this case, because the CMA has
4 determined that the wide MFNs had an actual effect on
5 competition. So that is the CMA's finding in the
6 decision.

7 It is not saying, we do not need to consider whether
8 they had an actual effect, because potentially, they
9 could have done. That is not the CMA's case.

10 So that is that point.

11 But this leads on to a second point, which is what
12 does the CMA need to do? What does the competition
13 authority need to do to show an actual effect on
14 competition, here on pricing competition?

15 Now, ComparetheMarket says, in this case, that it
16 needs to conduct a quantitative analysis to establish the
17 price increase paid by consumers. So it is saying, in
18 this case, the fact that the CMA did not do that -- you
19 heard Mr Beard say this repeatedly in his submissions,
20 the fact that the CMA did not do that means that it was
21 disabled from finding an adverse effect on pricing
22 competition.

23 Now, at one point yesterday, Mr Beard said that they
24 were not arguing that a price increase needs to be
25 quantified. So to be fair to them, he said, "We were

1 not saying it needs to be quantified." Instead, he said
2 that the price increase paid by consumers needs to be
3 established.

4 But we say that, essentially, their submission comes
5 down to the same thing. Because their case is that the
6 CMA had -- in this case, was obliged to engage in
7 a quantitative exercise to establish a hike in prices
8 paid by consumers and we say that is effectively the
9 same as quantifying the loss to consumers.

10 We say that that position is incorrect, because an
11 effect on competition can be established by determining
12 that there is an adverse effect on the structure, on the
13 market structure, on the structure of pricing
14 competition.

15 What the competition authority does not need to do
16 is go on to examine the actual prices paid by consumers
17 and we say that that is for two reasons. The first
18 reason is that, as a matter of principle, Article 101
19 and the Chapter I prohibition protect the structure of
20 the market and are not simply targeting consumer
21 welfare.

22 I am going to come back in a moment, once I have
23 told you the second reason, to look at a couple of cases
24 that Mr Beard took you to on that point.

25 But the second reason is that because, as a matter

1 of fact, on the balance of probabilities, which is of
2 course what the CMA has to demonstrate, an adverse
3 impact on the manner in which price competition is
4 conducted, and here the CMA has found that there was
5 a softening of price competition, will have an adverse
6 impact on the prices paid by consumers.

7 So the second thing follows from the first. On the
8 balance of probabilities, if you have shown an adverse
9 effect on price competition, a softening of price
10 competition, because PCWs are not competing as
11 effectively on price or as much on price as they would
12 have been, or HIPs are not competing as much as they
13 would have been on price, and so there is less retail
14 price competition; well, then that will translate to an
15 effect on the prices paid by consumers, but it does not
16 follow that the CMA has to analyse those prices or
17 quantify them in any way.

18 Now, looking -- just taking up the decision, the
19 summary in the decision, perhaps we could turn on the
20 EPE to {A/1/12}, A, tab 1, page 12.

21 This is the summary of the effects at
22 paragraph 1.12, at the bottom the page, the summary of
23 the facts that the CMA has found the network of wide
24 MFNs to have had.

25 If the Tribunal looks -- I am not going to read out

1 the summary, but if you look at the effects as
2 summarised here. On the subsequent page, what you can
3 see is that the effects were: a decreased ability to
4 engage in differential retail pricing; a decreased
5 ability in incentive for ComparetheMarket to compete on
6 price and softening of price competition, retail price
7 competition, between insurers. So, in other words, the
8 CMA has found that competition on those price
9 parameters, on retail prices, has been softened and it
10 follows that it has found that there is an adverse
11 impact on retail prices paid by consumers.

12 It does not need to go on and examine the actual
13 prices paid by consumers.

14 Now, I would like to say something more about my
15 first point, which is the point of principle relating to
16 the purpose, really, of Article 101 and the
17 Chapter I prohibition being targeted, not just at
18 looking at impact on consumers, but on the structure of
19 competition in the market.

20 Now, Mr Beard sought to draw a distinction in his
21 submissions on this point yesterday, between -- he
22 sought to say that Article 101 effects cases are
23 different to both Article 101 object cases and
24 Article 102 cases, in that he says in an Article 101
25 effects case, you do need to establish an impact on

1 consumer prices if your concern is price competition.

2 But we disagree with that and we disagree with
3 ComparetheMarket's interpretation of the case law. Can
4 I start with the Socrates case, please. Can we go to
5 bundle G, tab 121, page 54 {G/121/54}. Thank you.

6 Looking at paragraph 147, at the bottom of the page,
7 and what the Tribunal says there is -- and looking at
8 the -- perhaps we could just go up, I am so sorry, to
9 see the context of this. Can we go up slightly higher
10 in the page, please. Thank you.

11 So there is an argument being made that -- we might
12 need to go on the previous, sorry, page 53, {G/121/53}.

13 Yes, so you see that -- thank you, sorry, I am
14 squinting to try and see it on my screen.

15 We see the argument set out. So we see at 143, so
16 this is under the heading, "Two Distinct Products" and
17 the Microsoft, the argument put by Microsoft in that
18 case is set out. The Court of First Instance, you see
19 this at 143, held that -- this is all relating to market
20 definition.

21 Perhaps -- I am so sorry about this, but I think
22 I have not got the right reference. Can we go back?
23 I am going to make the point I was going to make without
24 going back into the context. If we can go back to the
25 next page, paragraph 147, to page 54 {G/121/54}. Yes.

1 This is under the heading, "Foreclosure" and the
2 point here that is being made is that the object of
3 competition law is to prevent harm to the structure of
4 the market. So to find an infringement, it is not
5 necessary to establish direct harm to customers or
6 consumers:

7 "As the ECJ stated in... GlaxoSmithKline ...
8 regarding what was then Article 81 ... but in terms that
9 were expressly of wider application."

10 I am just going to emphasise those words, because
11 what is being looked at here, you will see that -- the
12 words I want to emphasise are "the object of competition
13 law", in general, so this is an important paragraph,
14 where the Tribunal is explaining what the object of
15 competition law is in general. There is no carve out
16 for Article 101 effects cases.

17 Then looking at GlaxoSmithKline, again the Tribunal
18 is saying that these terms were expressly of wider
19 application even though that case concerned Article 81
20 because, of course, the Socrates case concerned
21 Article 82 or the Chapter II prohibition.

22 What the ECJ said was that:

23 "... like other competition laws laid down in the
24 Treaty art.81 aims to protect not only the interests of
25 competitors or of consumers but also the structure of

1 the market and, in so doing, competition as such."

2 While we are on this authority, could you perhaps go
3 to paragraph 154, which is on, I think page 57
4 {G/121/57}, because just while we are here, this deals
5 with a point on appreciability, and so I do not come
6 back to it later, I just show the Tribunal this:

7 "In our judgment, the meaning of an appreciable
8 effect should be the same in the context of the
9 Chapter II prohibition as it has for the
10 Chapter I prohibition where the requirement to show on
11 appreciable effect is well-established ... (Reading to
12 the words)... does not mean substantial: it mines more
13 than De Minimis or insignificant."

14 That is what we say the test is. Again, I do not
15 think that there is any debate between the parties as to
16 what the test is. It means you do not have to show
17 a substantial effect, you do not have to show
18 a significant effect, it has to be more than de minimis
19 or insignificant.

20 Now, turning to the GSK case itself, which is at
21 bundle G, tab 60, page 28, is the relevant paragraph
22 {G/60/28}.

23 Paragraph 63 at the top of the page. This is the
24 context for the citation in Socrates that I just showed
25 the Tribunal. Again, what the court is saying here is

1 that there is nothing in that provision, that is
2 Article 81, to indicate that only those agreements which
3 deprive consumers of certain advantages may have an
4 anti-competitive object.

5 Mr Beard yesterday emphasised the word "object", but
6 the reason why they are talking about an
7 anti-competitive object here, is because this was an
8 object case, it was not an effects case. So that is the
9 only reason why the Tribunal was referring to
10 "anti-competitive object".

11 We then see that the court is expressing itself in
12 general terms and the next part of the paragraph says:

13 "Secondly, it must be borne in mind that the court
14 has held that like other competition rules Article 81
15 aims to protect..."

16 So again, Article 81, not just Article 81 insofar as
17 the infringement is an object infringement:

18 "... aims to protect not only the interests of
19 competitors or of consumers but the structure of the
20 market and competition as such."

21 So what Mr Beard said yesterday in argument, he said
22 that this cannot be read across to an effects case,
23 because he says in an effects case, it is effects you
24 are identifying. So if all you are showing is that
25 there is some modification of the structure of

1 competition in the market, then you cannot be showing
2 that there is an adverse effect on price.

3 We say that that is not correct, because by showing
4 that there is -- you can show that there is an adverse
5 impact on price competition; that is an effect on price
6 competition. You do not have to then analyse consumer
7 prices.

8 What you are doing is showing an adverse effect on
9 the structure of the market, on the way in which market
10 participants compete on price. We say that there is no
11 distinction in the case law between object and effect,
12 in terms of the aim of Article 101 and the
13 Chapter I prohibition being to protect or an aim being
14 to protect the structure of the market and competition
15 itself.

16 The real distinction between object and effects
17 cases is that in an object case, you can presume, based
18 on a consideration of the terms of the agreement in
19 their context, that the agreement would have an effect
20 on competition, including an effect on the structure of
21 the market or on competition itself. Whereas in an
22 effects case, you cannot make that assumption, but you
23 have to examine whether there was in fact an effect on
24 competition, including an effect on the structure of the
25 market as the case may be.

1 That is what the CMA has done in this case. So what
2 the CMA has done in this case is to examine whether, in
3 fact, there is an effect on price competition, but it
4 was not obliged to go on and examine the retail prices
5 that were actually paid by consumers.

6 The reason for that is two-fold: one is because it
7 is enough to show that competition, the structure of the
8 market and pricing competition, as a process, was
9 diminished. That is enough.

10 The second is because where you have shown that
11 pricing competition was diminished, that will translate
12 into an effect, a likely effect, on the actual retail
13 prices that are paid.

14 One, in a way, you can think about it with
15 a hypothetical example of, say, a price cartel. So let
16 us take a price fixing cartel, a very, very
17 straightforward price fixing cartel case.

18 Now, of course, those cases are usually addressed as
19 infringements by object, by competition authorities,
20 because it is very clear that price fixing cartels will
21 have an effect on price. That is well-established.
22 But, of course, it is open to a competition authority to
23 treat it as an effects case. There is no reason why it
24 should have to approach those cases as object cases.
25 The reason they do is that because, of course, it is

1 administratively much simpler to do it and less resource
2 intensive.

3 But there is no reason, as a matter of law, why
4 a price fixing cartel could not be found to be
5 restrictive of competition by effect. Then one asks
6 oneself: well, in such a case, let us imagine that there
7 is evidence showing all of the discussions on price and
8 showing agreement that actually prices will be, I do not
9 know, £10 per kilo rather than £8 per kilo and all of
10 that is documented and the cartel is bang to rights.

11 Well, it would be enough to establish an effects
12 case for the competition authority to say: we have
13 established that there has been an adverse effect on
14 price competition, because the parties have agreed not
15 to compete on price. You would not have to go on and
16 look downstream at the actual prices paid by consumers,
17 still less quantify what the prices were. It could find
18 an infringement by effect without doing that, by looking
19 at all of the evidence to establish whether or not price
20 competition was adversely affected.

21 Now, so that is what I want to say about what needs
22 to be established and we say there is a difference
23 between the parties on this.

24 The third point of principle that I wish to raise
25 relates to the proper approach to a bundle of agreements

1 and this was a point that Mr Beard addressed you on. We
2 say that it is important to unpick this a little bit as
3 we say ComparetheMarket's approach has been a little bit
4 inconsistent on this point.

5 Now, I do not want to take pleadings points and
6 points on inconsistency, so let us look at where
7 ComparetheMarket have ended up in their skeleton
8 argument. If we could turn to their skeleton argument
9 at bundle B, tab 1, page 10 {B/1/10}, paragraph 43.

10 So the CMA's contention that a network of similar
11 agreements must be considered as a whole and it is not
12 necessary or appropriate to examine the effects of each
13 individual agreement separately, does not assist. BGL
14 is not suggesting an individualised effects analysis,
15 rather it argues that the combined analysis should
16 proceed from the evidence of effective rather than
17 theoretical coverage.

18 So that is what it says. It is not suggesting that
19 the CMA needed to analyse, on an individual basis, the
20 effect of each decision. But it is saying, at the same
21 time, that the combined analysis should proceed from the
22 evidence of effective rather than theoretical coverage.
23 I am not quite sure what they mean by that.

24 However, we say that they are right to accept that
25 the case law does not require an individualised

1 analysis. In fact, I think during the course of his
2 submissions yesterday, Mr Beard said: well, he thinks --
3 they accept that a competition authority can start from
4 a proposition, from the premise that if there are
5 binding agreements in force, those agreements are being
6 complied with. But he said if somebody presents
7 evidence to the contrary, that evidence has to be
8 considered.

9 Now, I just want to look at what the case law says
10 about all this. Could I, first of all, please go to the
11 Delimitis case, in bundle B, tab 13, page 8. {B/13/8}.

12 If we look at paragraph 13, what that tells you is
13 that this is an effects case, so it is looking at beer
14 tie agreements and the commission -- sorry -- and it is
15 an effects case rather than an object case. Then if you
16 look at paragraph 14, the court is referring to previous
17 case law, where it held that:

18 "The effects of such an agreement had to be assessed
19 in the context in which they occur and where they might
20 combine with others to have a cumulative effect on
21 competition. It also follows from the judgment that the
22 cumulative effect of several similar agreements
23 constitutes one factor amongst others in ascertaining
24 whether a trade between Member States is capable of
25 being affected."

1 So you look at the agreement in its context, and in
2 assessing whether or not the agreement had an effect and
3 whether an effect was appreciable, you can look at the
4 cumulative effect on competition of other similar
5 agreements.

6 So just pausing. That is what the CMA, of course,
7 has done in this case, because there are multiple
8 agreements with wide -- between ComparetheMarket and
9 home insurance providers, containing wide MFNs. The CMA
10 has considered the cumulative effect of those agreements
11 and found that cumulatively, they have an appreciable
12 effect on competition. So that is the approach that the
13 CMA has taken.

14 Then if you look at paragraph 15:

15 "Consequently in the present case, it is necessary
16 to analyse the effects of a beer supply agreement taken
17 together with other contracts of the same type on the
18 opportunities of national competitors or those from
19 other Member States to gain access to the market for
20 beer consumption or to increase their market share and
21 accordingly the effects on the range of products offered
22 to consumers."

23 So you look at one agreement taken together with
24 others of the same type.

25 Then moving ahead to the next page, paragraph 19

1 {B/13/9}:

2 "In order to assess whether the existence of several
3 beer supply agreements impedes access to the market as
4 so defined [so the intervening paragraphs have been
5 dealing with market definition] it is further necessary
6 to examine the nature and extent of those agreements in
7 their totality comprising all similar contracts tying
8 a large number of points of sale to several national
9 producers. The effect of those networks of contracts on
10 access to the market depend specifically on the number
11 of outlets thus tied to national producers in relation
12 to the number of public houses which are not so tied,
13 the duration of the commitments, the quantities of beer
14 and on the proportion between those quantities and the
15 quantities sold by free distributors."

16 Then you see at 20 and 21 that the existence of
17 a bundle of agreements is not sufficient by itself, so
18 you have got to look at access opportunities. Can the
19 new entrant penetrate the market given the bundle of
20 agreements? You see a reference in 20 and in 21 to
21 examining whether it is possible to penetrate the bundle
22 of contracts.

23 Really, the key point is that there is no suggestion
24 here that a claimant or a competition authority has to
25 examine every agreement in the bundle of agreements to

1 determine whether or not there is, in fact, compliance
2 throughout the relevant period.

3 So there is no suggestion that -- the court is not
4 saying here: well, before you look at the bundle of
5 similar contracts, you have got to conduct a factual
6 investigation to find out the extent to which those
7 contracts are being complied with.

8 What if one pub that is party to the contract
9 breaches its agreement for a couple of months and then,
10 you know, you do not have to go away and examine all of
11 those things. What you do is you look at the terms of
12 the agreement -- and remember, this is an effects case,
13 not an object case, and you look at the bundle of
14 similar agreements and you assess the cumulative effect.

15 This approach has been followed in other cases,
16 including in the ice cream cases that Mr Beard referred
17 to.

18 Let us go back, if we can, to Langnese-Iglo at
19 {G/23/6}. If we go to page 6, just to see the context.

20 So you see at paragraph 5, the operative part of the
21 commission decision set out and you can see that there
22 were agreements between Langnese-Iglo and its retailers.
23 The decision was addressed to Langnese-Iglo.

24 If you turn, please, to page 34 {G/23/34}, you see
25 here there is an analysis of -- looking at paragraph --

1 I cannot see the numbering very well, if it could be
2 slightly increased, the size. I do not know if that is
3 possible. Nevermind.

4 So it is paragraph 97. Here we go, thank you very
5 much:

6 "... the agreements appreciably limit the scope for
7 German competitors and competitors from other Member
8 States to establish themselves on the relevant market or
9 consolidate their market shares, without there being any
10 need to examine the cumulative effect of the parallel
11 networks ..."

12 So that is a slightly separate point, so the
13 commission has looked at this particular network and
14 then said, "We do not need to go on to look at parallel
15 networks."

16 98, these points I am taking you to, because they
17 deal with appreciability, just while we are on the case,
18 you see at 98:

19 "It must be borne in mind that that notice is
20 intended only to define those agreements which, in the
21 Commission's view, do not have an appreciable effect on
22 competition or trade between Member States. The Court
23 considers that it cannot however be inferred with
24 certainty that a network of exclusive purchasing
25 agreements is automatically liable to prevent, restrict

1 or distort competition appreciably merely because the
2 ceilings laid down in it are exceeded."

3 Then you see, it is entirely -- then you have
4 a point on trade.

5 Then you see, if we go forward to page 42 {G/23/42},
6 we see the fourth plea at the top of the page. So the
7 fourth plea is the commission's alleged obligation to
8 consider individual agreements separately, so that some
9 of them escape the prohibition laid down by
10 Article 85(1).

11 So here, the court is grappling with the point
12 directly, is it right that the commission needs to
13 examine each of these agreements, which are identical in
14 the network, to exclude some of them from the
15 application of Article 85(1)?

16 You see at paragraph 129, over the page {G/23/43},
17 so on page 43, the court saying, again repeating the
18 consistent case law:

19 "It is settled law that a network of exclusive
20 purchasing agreements set up by a single supplier can
21 escape the prohibition laid down in Article 85(1) if it
22 does not significantly contribute with the totality of
23 similar agreements found on the market including those
24 of other suppliers to denying access to the market."

25 Then you see:

1 "In the court's view, it follows that where there is
2 a network of similar agreements concluded by the same
3 producer the assessment of the effects of that network
4 on competition applies to all the individual agreements
5 making up the network. Furthermore, the Commission is
6 required in assessing the applicability to examine the
7 actual details of the case and cannot rely on
8 hypothetical situations."

9 Then, in that respect, the court considers that as
10 the commission has observed, it might be arbitrary to
11 divide the contested agreements into different
12 hypothetical categories.

13 Then you see at paragraph 131, over the page, the
14 conclusion {G/23/44}, that:

15 "A bundle of similar agreements must be considered
16 as a whole and therefore the Commission was right not to
17 examine the agreements separately. It follows that this
18 part of the plea must be rejected."

19 Now, I want to go on to show you the Neste case,
20 which also deals with this issue and explains it
21 a little bit further. But before I do that, can I just
22 show you the commission decision in Langnese. That is
23 at {G/19/1}, starting at page 1.

24 The reason I want to show you this, perhaps we can
25 go to page 8 {G/19/8}. Before I show you the relevant

1 parts, the reason I want to show you this, is not on
2 this point about bundle of agreements, but it does -- we
3 have seen the court on the point of bundle of
4 agreements, but it does also show the commission's
5 approach.

6 But really I want to use it to address, while we are
7 here, a further point made by Mr Beard, because Mr Beard
8 and his client have argued now, repeatedly, they have
9 said this is not an object case and so it is very
10 important for the CMA to establish effects.

11 Now, we agree with that. So obviously, no dispute.

12 But what they then do, what ComparetheMarket then do
13 in seeking to emphasise this distinction, which we agree
14 is a distinction that is relevant and is a distinction
15 that falls to be made, what they then do is they then
16 refer to various elements of the CMA's reasoning and
17 strands of the CMA's case. They say: well, the CMA
18 cannot rely on that, because it is not an object case.

19 So, for example, one of the things that they
20 repeatedly say is that the CMA cannot rely on the
21 economic literature or the expected effects, as a matter
22 of economic theory, or they cannot make inferences,
23 because these are all object things and they are not to
24 do with an effects case. Really, the simple point we
25 make is that all of these points are relevant evidence

1 to an effects case.

2 So it is relevant for the CMA to look at what the
3 agreement says on its face and whether or not the
4 agreement was enforced and what the parties thought
5 about the agreement at the time. Those are not points
6 which are just relevant to object infringements. They
7 are also highly relevant to effects cases.

8 If we look at what the commission did here, perhaps
9 if we go to paragraph 70 through to 74 {G/19/9}, I think
10 that must be on the next page, we see here under the
11 heading, "The Restrictions of Competition", and if
12 the Tribunal could -- I think I have the wrong decision
13 here actually. This is the wrong decision.

14 THE CHAIRMAN: Mr Beard.

15 MR BEARD: Sorry.

16 THE CHAIRMAN: You are on mute, Mr Beard.

17 MR BEARD: I think Ms Demetriou wants 19.1 in this bundle.

18 I think it is the next tab on, that she actually wants
19 to be referring to.

20 MS DEMETRIOU: I am very grateful. I am glad I did not
21 start making submissions about this authority before.

22 Thanks to Mr Beard.

23 MR BEARD: Ice cream and railways are entirely
24 interchangeable.

25 MS DEMETRIOU: We have reached that point in the afternoon

1 where nobody may have noticed.

2 Anyway, so 19.1 and page 8. {G/19.1/8}.

3 What we see here is the analysis of the restriction
4 of competition. Again, this is an effects case, not an
5 object case. What we see at 71 is a summary of what the
6 obligation was in the agreement. So we have
7 a description of what the obligation was and we see at
8 72, the commission's understanding of the economic
9 impact of that type of restriction.

10 Then going on to the next page {G/19.1/9}, we also
11 see at 73, another implication, economic implication of
12 the term of the agreement. Then at 74, the combined
13 effects are complementary. So again, this is operating,
14 at this stage, very much as the analysis is reasonably
15 theoretical.

16 Then you see appreciability being discussed from
17 paragraph 76 onwards. So you see, at 76, the commission
18 saying that the supply agreements fulfil the conditions
19 of 85(1), only if they affect competition to an
20 appreciable extent. Then you have an explanation of why
21 appreciability is met in this case.

22 So you see, at 77, the contract goods covered by the
23 exclusive purchasing obligation are ice cream products
24 of the LI range and what the product categories are that
25 are affected.

1 Then you see, at 81, the market being defined.

2 Then moving over the page {G/19.1/10}, if we can go
3 to page 10, so we have all of this -- all of this
4 relates to market definition.

5 Then we see, if we move on to the next page
6 {G/19.1/11}, you can then see a section, just above
7 recital 95, about Langnese-Iglo's position on the
8 relevant market. So again, what market power did they
9 have?

10 Then if you move down, please, to paragraph 100,
11 this is to show you the structure of the analysis on
12 page 12 {G/19.1/12}. So page 100 -- at paragraph 100,
13 recital 100, is talking about market coverage.

14 Then you see, at 102 -- so 101, sorry, how many
15 outlets have been tied up by these agreements. Then, at
16 102, quite a concise conclusion:

17 "What has to be examined here are a concise analysis
18 is the network of similar agreements concluded by the
19 undertaking under consideration. If this network has no
20 appreciable effect by itself then the effects of similar
21 networks concluded by other undertakings will have to be
22 examined too."

23 So there was no consideration here that the bundle
24 of agreements, different supply agreements, are taken as
25 a bundle. Their impact on the market in terms of, first

1 of all, the markets defined and then how many retail
2 outlets they tie up, is assumed. So the bundle is taken
3 as a whole and there is no consideration here of
4 individual compliance. So there is no suggestion that
5 what the commission needs to do is examine each of the
6 relevant agreements between Langnese-Iglo and each of
7 its retailers, to examine whether, in fact, there was
8 compliance throughout the relevant period. Then to
9 salami slice off the bundle of agreements into something
10 smaller based on evidence in relation to each retailer.
11 That is simply not how these cases proceed.

12 What we see then moving on to the Neste case, which
13 is at G, tab 32 {G/32/7}. Perhaps if we could go to
14 page 7.

15 PROF ULPH: Sorry, before you go there, could I raise
16 a question?

17 MS DEMETRIOU: Of course.

18 THE CHAIRMAN: Yes.

19 PROF ULPH: I just want to make sure I understand the nature
20 of this network argument. The way I think about it is
21 that if there is a network of agreements in place, we
22 think about it in the current context and we think that
23 the effect on competition is: well, that is going to
24 produce some kind of uniform pricing effect, it may well
25 be the case that any one given HIP, the agreement it has

1 with CTM, it just waves its hands and says: I am going
2 to ignore that agreement. I am going to price how
3 I want.

4 So the network argument, as I understand it, is that
5 if all the other HIPs are complying with their
6 agreements under a pricing uniformly, then this
7 particular HIP might price uniformly, because that is
8 the best competitive response to the fact that everybody
9 else is pricing uniformly, even though its own
10 individual agreement is not determining its behaviour.

11 Is that the essential case that you are arguing? Is
12 that what you mean by the network effect?

13 MS DEMETRIOU: Yes, exactly. Yes, I am very grateful for
14 that intervention, Professor Ulph. So we agree with
15 that and we think -- I am making two points on the
16 network. I am making a legal point, which is the one
17 I am on at the moment, but there are two complementary
18 points.

19 The legal point is that the cases do not require
20 a competition authority. So where a competition
21 authority has found that there is a network of similar
22 agreements, that cumulatively have an effect on
23 competition, it is not required to examine every single
24 one of those agreements to work out whether or not there
25 was compliance for the whole period. So that is not how

1 the law has proceeded.

2 The second point I am making is that there is a good
3 reason for that and the reason follows -- is consistent
4 with respect with the point that you have just put to
5 me, which is that even if a particular counterparty, in
6 this case, a HIP, says: well, we did not actually think
7 that this agreement made any difference to us, you
8 cannot conclude from that that it had -- that the
9 network effect was reduced. You just simply cannot do
10 that, it is not evidentially robust to do that.

11 I am going to come back to that point when we are
12 looking at the decision.

13 So there is a legal point and also a point of -- an
14 evidential point, as it were.

15 PROF ULPH: But can I just pick you up on that evidential
16 point because the logic of your argument, as I spelt it
17 out, was that there had to be evidence of the network of
18 agreements affecting all the other HIPs does not in fact
19 influence their pricing behaviour and if you do not
20 establish that that network of agreements influenced at
21 least a substantial part of their pricing behaviour, you
22 have not quite nailed the argument. I think the
23 competitive response, even if the particular HIP is
24 basically completely ignoring his wide MFN, you cannot
25 really claim that the effect of all these other

1 agreements is affecting his behaviour in a particular
2 way.

3 MS DEMETRIOU: Can I -- sorry.

4 PROF ULPH: So there is a crucial step in the argument
5 connecting the bundle of wide agreements affecting
6 everybody else to their behaviour. That is the logic of
7 my argument.

8 MS DEMETRIOU: I think I understand now. Can I try and
9 answer it in this way? Can I try and put it in this
10 way? Sir, I am going to show the Tribunal, when I deal
11 with the evidence, direct evidence in relation to some
12 HIPs who wished to engage in differential pricing and
13 did not engage in differential pricing because of the
14 wide MFNs. So let us take an example of such a HIP,
15 call it "HIP A" and then let us say -- so HIP A, the
16 evidence establishes, wanted to engage in differential
17 pricing, but was precluded, did not, because of the wide
18 MFNs. So we know that it had an impact on its pricing
19 strategy.

20 Then let us say that there is "HIP B" and let us say
21 that HIP B told the CMA: Well, we would not have done
22 anything differently, this wide MFN had absolutely no
23 impact on our pricing behaviour, we would not have done
24 anything differently, we did not want to price
25 differentially in any event... You heard Mr Beard

1 yesterday seek to emphasise evidence from HIP saying:
2 We did not want to price differentially, that was not
3 part of our strategy. So HIP B says: We did not want
4 to price differentially so the wide MFN made absolutely
5 no difference to us.

6 Now, in ComparetheMarket's view of the world, you
7 excise that HIP's wide MFN from the network and you do
8 not consider it, that is what they are seeking to do in
9 attacking the evidence that the CMA relied on. However,
10 HIP B is basing its statement on the conditions of
11 competition that it has met in reality and the
12 conditions of competition that it has met in reality are
13 a world where there is a network of wide MFNs, which
14 make it difficult to price differentially; that is the
15 very theory of harm that the CMA has established.

16 So in that world, in that real world, HIP B did not
17 need to deviate from its strategy of no differential
18 pricing, so if HIP B is one of those HIPs that wanted to
19 price in the same way on all the price comparison
20 websites because, as Mr Beard said, pricing
21 differentially could result in cannibalisation of
22 profit, some HIPs did not like that, then in CTM's world
23 they say: Well, the wide MFN did not affect HIP B,
24 therefore you ignore HIP B for the purposes of this
25 analysis.

1 But the key thing is that the counterfactual world
2 is the world in which there were no wide MFNs at all, so
3 the network does not exist. Now in that world HIP A
4 would have engaged in differential pricing; we know that
5 from the documents directly. So it would have
6 for example done promotional deals and in that case
7 HIP B would have faced stronger price competition. So
8 in the counterfactual world of no network of MFNs then
9 HIP A and other HIPs in the position of HIP A would have
10 engaged in differential pricing and so HIP B would have
11 faced stronger pricing competition and may have needed
12 to react and so it may well have needed to re-evaluate
13 its stance on no differential pricing.

14 So -- Professor Ulph, this is quite a long answer to
15 your question, but I hope it is helpful -- what we are
16 saying is that you cannot simply say: Well, HIP B says
17 the wide MFN made no difference to it because it did not
18 want to engage in differential pricing... because that
19 is the real world in which it was operating, which is
20 the network of wide MFNs. But in the counterfactual
21 world where those do not exist and there is more price
22 competition, then it would likely have had to have
23 reacted.

24 What we do see in the evidence, and again I am going
25 to come to this, is that several HIPs after the wide

1 MFNs were removed who had said they were not interested
2 in pricing differentially in fact then did after removal
3 the wide MFNs. Sir, you have a question now.

4 THE CHAIRMAN: Yes, I am sorry. They are like buses, they
5 come along in a series. I just want to ensure that
6 there are not any sort of straw figures being set up
7 because I think my understanding of the debate between
8 the two is that we end up somewhere in the middle.

9 I mean if Mr Beard was running the argument that you
10 look in a granular way at each HIP and say you have not
11 established your case on effect in relation to this HIP,
12 therefore we put a line through it and just disregard it
13 and we can go through them on a sort of one by one basis
14 and knock them out and the network that you can argue
15 from is what is left; I do not think I would be
16 particularly sympathetic to that sort of argument. But,
17 equally, if the CMA came with the investigation into one
18 HIP and said: We looked at this one HIP, they told us
19 this, we can extrapolate from this one example the
20 network and how it works in the market... I think you
21 would be getting a similarly cool response from us.

22 So is it not a question of looking at the thing in
23 the round and seeing what the network is in light of all
24 the evidence? I must say my understanding -- and I am
25 sure you will correct me if I am wrong -- my

1 understanding of Mr Beard's point was looking at the
2 HIPs in the round one has a number of constraints or
3 criticisms if one is being ComparetheMarket, criticisms
4 of the CMA's approach which render the ability to infer
5 a network effect less possible.

6 So the points he makes are there is a certain
7 ambiguity in contract clause terms, there are
8 differences in wording which render certain courses
9 possible and not possible, there are some wide clauses
10 not present in certain agreements, so there is a sort of
11 coverage point or meaning of terms point. You then have
12 the number of HIPs that were approached by the CMA and
13 he made the point that you did not interview a number of
14 people. Now, no-one is saying that that puts you out of
15 court as regards those people. But the fact that one
16 does not know what they say is, I think, something which
17 Mr Beard is saying we have got to take into account in
18 trying to discern what the effect is and, similarly,
19 when one has got what he would characterise as an
20 equivocal response from the HIPs that you did speak to.

21 No-one is saying that the equivocal response because
22 it is equivocal means that you are wrong and there is no
23 effect. It simply is a factor that one has to throw
24 into the mix when one is trying to discern what the
25 effects are and just to complete what is proving to be

1 a very long question, just to complete the thought:
2 matters are made even more complicated when one has to
3 look at potential as well as actual effects because of
4 course the fact that a clause exists and is capable of
5 enforcement is something which needs to be borne in mind
6 also in determining what is happening in the market
7 because you may think: Well, I have got this clause in
8 my contract, actually I am pretty confident that I am
9 not being monitored so I could probably get away with
10 doing what I like on pricing...

11 But if it is in your mind you may well be thinking:
12 my behaviour needs to be conditioned in a certain way.

13 So it seems to me a very nuanced question and what
14 I am slightly concerned about is that you are setting up
15 a case that Mr Beard is making and, if that is right,
16 then I think we need to get it clarified because frankly
17 if Mr Beard is making this case, as I say, he is going
18 to have a hard time at least of persuading me that you
19 approach the network in that granular way.

20 MS DEMETRIOU: I am very grateful. It is a very helpful
21 intervention. Thank you. In terms of the approach that
22 you have laid out, sir, which is that you take
23 everything into account in determining the network
24 effect, we really do not disagree with that. So we are
25 not saying -- and I agree with you that we would be in

1 difficulty if I were coming to the Tribunal saying we
2 have examined one agreement only and you can infer
3 a network effect from the one agreement because we do
4 say that inference plays its part. But there is a limit
5 to how much work it can do, so I agree with the point
6 that you put to me.

7 I also agree that in terms of approach it would be
8 wrong if ComparetheMarket were seeking to say: Well,
9 you do not have evidence in relation to X, Y and Z HIP,
10 therefore you have got to, as it were, at the outset,
11 exclude them from the analysis. Now if they are not
12 saying that, I am happy. I do think they are saying
13 that. So let me take for example the HIPs which the CMA
14 did not contact. Now in relation to those HIPs on the
15 approach just put to me by you, sir, the Tribunal would
16 look at matters in the round and would say: Okay, the
17 CMA did not contact these HIPs but these are nonetheless
18 contractually binding clauses, there is no reason that
19 has been put forward to suggest that these HIPs did not
20 comply and therefore it is permissible to take those
21 into account in considering the network effect. Now,
22 the Tribunal may decide that because there is no direct
23 evidence they take them into account a bit less or place
24 a little less weight on them; that is a matter for
25 the Tribunal.

1 But what you cannot do -- and I think this is
2 ComparetheMarket's case -- is just say you just cannot
3 consider those HIPs at all, you cannot consider them,
4 you delete them from the analysis at the very outset and
5 I do think that ComparetheMarket are seeking to approach
6 the matter in that way. They are seeking -- they have
7 got various categories of -- and I was going to get on
8 to this tomorrow in more detail on the evidence but just
9 because we are on the point now to explain what we
10 perceive to be their case, that they have categorised
11 the HIPs in various categories, so the ones that we have
12 just discussed that the CMA did not contact one such
13 category. They then say that there is another category
14 where there was no observable change in pricing
15 behaviour and they say, well, you just eliminate those
16 from consideration too.

17 What I say in relation to that is no, no, you do not
18 because -- and this is really the point that I was
19 making in response to Professor Ulph and it is one point
20 of response we have, but there is an important
21 difference between or rather to put it this way if a HIP
22 told the CMA: Well, we priced consistently in any
23 event, we did not want to engage in differential
24 pricing, so actually the wide MFN did not affect us
25 because we did not want to do promotional deals, our

1 business strategy was to price the same on all of the
2 PCWs... CTM's response to that is to say, therefore, the
3 wide MFN had no observable impact on this HIP.
4 Therefore you exclude them from the analysis because
5 there was no causative effect is how they put it.

6 We say, no, you cannot do that because the statement
7 that is being relied on in terms of we did not want to
8 price differentially in any event is a statement made in
9 a context of the real world in which there was a network
10 of wide MFNs and what the CMA had to do is consider
11 whether or not this HIP may have acted differently with
12 more competitive pressure in a counterfactual world of
13 no network.

14 THE CHAIRMAN: Well, Ms Demetriou, I think I will put the
15 question to you in a second. But my sense is that this
16 is simply a difference in terms of how one articulates
17 the argument. I was always told by my pupil master that
18 I had a Germanic way of thinking about things -- and
19 I do not think that was a compliment -- but what I like
20 to do is line up the factors and then weigh them.

21 The way I took Mr Beard's submissions was he was
22 articulating various points of different qualities and
23 different natures, one of which was, for instance, the
24 people you did not interview and was saying: Look, you
25 have got to look at all these in the round when you are

1 seeking to discern the effects. I did not understand
2 him to be saying that you simply take out of account
3 those particular HIPs that were not interviewed even
4 though they had in their contracts a wide
5 most-favoured-nation clause.

6 But I think for my own benefit, as much as anything
7 else, it is probably important that we understand
8 exactly what Mr Beard is saying because it may be you
9 are not setting up a straw figure at all, you are
10 setting up a point that we will have to decide.

11 MS DEMETRIOU: Sir, before going to Mr Beard, can we just
12 turn up the notice of appeal just to explain where I am
13 coming from?

14 THE CHAIRMAN: Of course.

15 MS DEMETRIOU: If we look at bundle A, tab 2, page 37,
16 {A/2/37}.

17 THE CHAIRMAN: Yes.

18 MS DEMETRIOU: Paragraph 129. Do you see for example at
19 129.1 it accepts that four insurers adopted strategies
20 which put them periodically in non-compliance; so
21 periodically in non-compliance:

22 "As will be seen, these insurers... entirely
23 disregarded the WMFN for a substantial part of the
24 Relevant Period ... These should be excluded from the
25 effective coverage."

1 Then you see at 129.2:

2 "[CMA] accepts at Annex L to the Decision that
3 during the Relevant Period the WMFN had no 'observable
4 impact' in relation to a further six insurers ... and
5 again [these] should be excluded from effective
6 coverage."

7 Essentially that is the approach. I mean, if they
8 now are not taking that approach then I am very happy to
9 hear it, but that is the approach they have taken. So
10 they reach a binary conclusion in relation to these
11 categories, they seek to categorise the HIPs on this
12 type of basis and we saw that a further category is HIPs
13 that were not contacted by the CMA and they say those
14 fall to be excluded, too.

15 So that is why I referred to this as death by
16 a thousand cuts. What they do is they seek to whittle
17 down the network to almost nothing on these different
18 bases. They are not saying, as I see it here, you look
19 at it all in the round and there is some contrary
20 evidence and so even if there was a softening of
21 competition it maybe was not that great. What they are
22 saying is: No, no, you adopt, you, Tribunal, adopt
23 a binary view and so if there is no observable impact
24 then that is it, you exclude them. If actually for part
25 of the relevant period, a substantial part of the

1 relevant period, we think the evidence shows they
2 disregarded again you exclude them totally. No account
3 at all. So that did seem to us to be the case they were
4 putting on appeal

5 THE CHAIRMAN: Okay, Mr Beard.

6 MR BEARD: Thank you. So let us just take it in stages.

7 What we are talking about here is the argument that
8 has been put forward, which is when you have got
9 a network of formal contracts you can simply treat the
10 effective coverage as being the span of those contracts
11 and we say that is not right. Then we ask ourselves:
12 how do you do the calculation of what a coverage number
13 is in relation to this? There you have to look at the
14 underlying evidence.

15 So we do say: Look, if you have got evidence that
16 people were not complying with these contracts then we
17 do not understand how you can include them within the
18 effective coverage, which is something you heavily rely
19 upon. So to that extent we are accepting the
20 proposition that you do need to think about the
21 situation in relation to the effectiveness of the
22 coverage in relation to the individual contracts because
23 we do look at the particular evidence and we say none of
24 the authorities suggest you should ignore the underlying
25 evidence.

1 But we do need to take a step back here because as
2 we have made very clear our overall case is that in the
3 counterfactual world you would not have ended up with
4 anything different and there I think we are in the
5 territory that, sir, you are talking about, which is:
6 Look, we take all of this evidence and we look at
7 whether or not these particular groups of HIPs were
8 being affected in relation to differential base pricing
9 or in relation to promotional deals and that is
10 something that you have to consider when you are asking
11 yourself would things have been different in the
12 counterfactual.

13 One of the things Ms Demetriou is ignoring of course
14 is the evidence we deal with is not just the evidence of
15 what was going on during the period, but what they were
16 doing afterwards when they say: It made no difference
17 to us, we were not doing anything else. Those are the
18 factors we say, in the end, are going to be critical to
19 the counterfactual analysis. So when we work through
20 the categories what we are doing is saying: Look, you
21 cannot just simply include these people just as full
22 100% coverage candidates within a network.

23 You have actually got to think about what the
24 network is actually doing in relation to those
25 individuals when you have got evidence in relation to

1 them. In relation to the residual category it might
2 have been different, if all the evidence in relation to
3 all the people you had investigated, was very clear and
4 very emphatic then perhaps you can draw inferences in
5 relation to those last 15. But when you have got that
6 body of evidence that is showing that you have got real
7 doubts about the effectiveness of the network in
8 relation to the other people where you have got
9 evidence, you cannot then just treat the 15 as
10 effectively bound by this network for the purposes of
11 the effective coverage analysis.

12 So there is an extent to which because we are
13 battling this formalism that Ms Demetriou is relying
14 upon, we do say you do have to look at the individuals,
15 but when it comes to the counterfactual, sir, you are
16 absolutely right. We are saying: Look, at the
17 realities of this, look at what was actually going on
18 and of course we do do that through the prism of the CMA
19 having the burden of proof in relation to that
20 counterfactual and we are saying you just cannot hide
21 behind the formality of the structure of this so-called
22 network. You do actually have to look at the evidence
23 in the round and the various matters, sir, that you were
24 referring to are precisely the matters we say are
25 relevant to that counterfactual analysis.

1 Does that help? I do not think it is saying straw
2 men because we do say that it is important in relation
3 to the formalism that Ms Demetriou is adopting in
4 relation to networks. To put it another way, we are
5 saying these agreements, they are not all similar
6 because of the way they operate. That might be the way
7 of looking at it.

8 THE CHAIRMAN: I think, let me before Ms Demetriou pushes
9 back, let me have a go at articulating what I think you
10 are both saying. The gripe that you have got, if I can
11 be as crude as that, Mr Beard, is that you do not like
12 the 32 insurers point, because what you see that as
13 doing is that it is setting up a kind of monolithic
14 point, which you say the CMA are hiding behind. They
15 say, 32 insurers, this is obviously very, very
16 significant.

17 So that is the reason you have taken us to the parse
18 of the evidence relating to the 32 insurers in play and
19 I understand that.

20 But accepting, for the sake of argument, that that
21 is right, that one has got to take a more nuanced
22 approach, it seems to me that one cannot go to the other
23 extreme and say simply because number 32 was not
24 interviewed by the CMA they do not fall within the 32 is
25 going too far the other way. What one has to do is one

1 has to look at the market as a whole, look at all of the
2 evidence, weigh its quality and work out what is going
3 on, and in light of the totality of what is going on
4 reach a view as to whether there was or was not a
5 monolithic network of 32. So we reach a conclusion
6 depending upon what everyone is saying is going on and
7 if they do not say anything at all, then one has got to
8 decide whether there is room for an inference that they
9 were behaving like number 1 who has stated its position
10 very clearly, hypothetically speaking, or not.

11 MR BEARD: I am not sure we are disagreeing on any of that.

12 I think the issue comes when we are saying you have
13 got to prove these things and, therefore, if you have
14 not taken evidence in relation to a particular HIP
15 for example and you have got ambivalent evidence in
16 relation to a large number of the other HIPs, then the
17 ability of you to draw an inference in relation to that
18 person is massively diminished because the benefit of
19 any doubt has to fall to us. So we are not saying if
20 you had evidence, clear evidence in relation to 31 HIPs,
21 that they were all cap doffing, compliant entities who
22 made clear that they were acting primarily because of
23 the wide MFN, then being able to draw an inference in
24 relation to the 32nd we can see that there might be real
25 power behind that. But that is not the world that we

1 are dealing with and, in those circumstances, we are
2 concerned about it and, yes, you are absolutely right,
3 sir, the monolith of 32 is a crumbling monument because
4 as soon as you look at the evidence in relation to these
5 matters you do not have the structure to hold it up.

6 THE CHAIRMAN: No, fair enough. I mean just to give
7 a couple of examples of where I see weight coming into
8 it and it ceasing to be binary. You referred to
9 a couple of instances where the wording of the wide
10 most-favoured-nation clause was unclear. Now, it seems
11 to me that is a point which cuts both ways because it
12 may be that if one construes it as a lawyer there was no
13 constraint because the wording was narrow rather than
14 wide. But in the perception of the person subject to
15 that clause they perceived that there was a constraint
16 in which case it seems to me one has, albeit perhaps
17 unintended, an anti-competitive effect in that case and
18 that seems to me to be a question that we would want to
19 take into account when considering how the person
20 subject to these clauses perceived them and informed
21 their conduct. So that is a pretty grey area, which, it
22 seems to me, we have to bear in mind.

23 To take another example on the other side of the
24 divide Ms Demetriou is going to be taking us to other
25 price comparators or aggregators and their view of wide

1 most-favoured-nation clauses. Again, that seems to me
2 interesting and important evidence but one has got to
3 bear in mind when weighing that evidence that these are
4 rivals to ComparetheMarket who may very well have their
5 own axe to grind in an entirely irrelevant way to what
6 we have to decide. Again, I cannot say how that is
7 going to impact but it is something that when
8 considering the evidence we need to be aware of.

9 So I think what I am saying and all I am saying is
10 that I, myself, do not see this as a binary question at
11 all. I see it as a question of articulating the factors
12 that we have, what we know and then appropriately using
13 inference to try and reach a conclusion from the bedrock
14 of fact that we have found. Now putting it that way,
15 how far do we have disagreement?

16 MR BEARD: Well, I am not sure we necessarily do. I think
17 there are two aspects of disagreement. Let me work
18 slightly backwards. In relation to the PCW evidence
19 obviously the rivalry issues are important. They will
20 inevitably colour the evidence and we gave citations as
21 to how we have dealt with that evidence in our response
22 in the letter of facts.

23 In relation to the overall approach and it not being
24 binary, I think in relation to the assessment of the
25 counterfactual, which is the key question here, that

1 must be right. But in doing that you do have to think
2 about the individual instances of evidence because there
3 is a real danger with Ms Demetriou's approach which
4 says: Ah, well, HIP A says it is not going to do
5 anything different but that is in a world where
6 essentially -- sorry. HIP B is not going to do anything
7 different because of the way that HIP A is constrained.
8 If HIP A had not have been constrained HIP B might have
9 done something differently.

10 Now, the danger is that if you have got a situation
11 where actually many of the HIPs are saying: Well, we
12 did not care and actually that was not important for us,
13 there is a danger that you are sort of pulling yourself
14 up on your own bootstraps in relation to that theory and
15 it is a theory, not fact. But I agree that is something
16 that needs to be teased out in the evidence and I agree
17 that that is something that is not binary. So in
18 relation to the counterfactual we make all our points
19 about them not proving the effect in relation to each of
20 the individual entities or there being doubt that needed
21 to be tested, but it is right that you consider that in
22 the round.

23 Obviously if the CMA is not making its proof out in
24 relation to individuals that will undermine the
25 cumulative. The situation is just slightly different in

1 relation to the monolith point and it is because of the
2 way that the CMA has sought to rely on Delimitis, and
3 Langnese and Scholler Neste and so on and we will come
4 back to that. But we say none of that case law is
5 saying you just adopt a monolithic approach to this
6 analysis. You have to shift over to the counterfactual.

7 In attacking that we said: Look, you cannot do it
8 that way because you have got these individuals that you
9 cannot count as effective coverage. So to that extent
10 we were attacking on an individualised basis as well.

11 THE CHAIRMAN: Thank you. Ms Demetriou.

12 MS DEMETRIOU: Sir, we do not disagree at all with the way
13 that you put it which is that there should not be
14 a binary approach at all, so you should not be a priori
15 rather at the outset just eliminating categories of HIP
16 for whatever reason, that that is not the correct
17 approach and that it is a matter of weighing all of the
18 evidence in the round and reaching a conclusion.

19 I also, just to be clear, agree with the point that
20 Mr Beard put at the end about my HIP A and HIP B
21 example. So if we could not establish any HIPs within
22 the HIP A category, then it would not work, but we do
23 say that we have established HIPs within the HIP A
24 category and if we have not, then it is game over. But
25 we have and that is what I am going to come to tomorrow.

1 But we do say it is not a binary approach and we say
2 that the relevance of cases like Delimitis, and
3 Langnese-Iglo and so on are that they do demonstrate
4 what inferences can be drawn and are drawn have been
5 drawn by the European Commission when it comes to
6 assessing appreciable adverse effects of networks of
7 agreements because what is clear from those cases is
8 that there is not an analysis, a granular analysis of:
9 Well, was there compliance? Did somebody say that they
10 did not comply? Was there full compliance by each of
11 the counterparties through the whole period?

12 So of course we are not saying that that evidence is
13 irrelevant. We have never said that. Nor are we coming
14 here with just the example of one HIP and saying that
15 a network effect must be inferred. But we do say that
16 there is something to be drawn from this case law.

17 The last case on this line of cases I wanted to take
18 you to was Neste. I do not know whether you want me to
19 do that now or whether you want me to resume in the
20 morning. I am in your hands.

21 THE CHAIRMAN: Well, we have got a few things that I think
22 we would like to get communicated to you this evening,
23 but I do not want you to feel that you have left a point
24 hanging. If you are happy to --

25 MS DEMETRIOU: No, I am happy to do that.

1 THE CHAIRMAN: Very good. In that case we will resume
2 tomorrow at 10.30, but we will go through, well, they
3 are not quite housekeeping points, but let me run
4 through the points. They are all really evidential
5 points and the first one follows pretty closely from
6 what we have just been discussing.

7 You are going to be taking us through the material
8 regarding how HIPs and price comparators saw these
9 clauses, but we wondered whether it would be possible to
10 produce, say, a folder on Opus, the documents which you
11 rely upon to support your case regarding the effects on
12 the market and I say that simply because I, for one,
13 would like to read the documents as they are and I know
14 they are referred to in the decision but what I would
15 not want is for it to be said that we had missed
16 something that we ought to take into account.

17 I know you are going to take us through the most
18 significant ones, but I think you ought to have the
19 assurance that we are going to read everything that the
20 CMA want us to read and what I am going to suggest is
21 that the CMA take the lead in framing, as it were, the
22 adverse documents that they rely upon and that can then
23 be supplemented -- but not subtracted from --
24 by ComparetheMarket so that they can insert
25 any documents that they think we ought to read in the

1 same light. So Mr Beard will be inserting the
2 equivocations, you will be inserting the absolutes.

3 I wonder if that could be done in two forms, if the
4 universe of documents could be done chronologically and
5 also by entity, by HIP or by price comparator so that we
6 can identify what the evidence is in relation to each
7 particular entity as well as in the round because
8 I think both exercises are going to be necessary.

9 Now I do not want to give anyone a massive job, but -
10 I anticipate because this is actually the basis for the
11 CMA's case - you have probably got a list of these
12 documents somewhere or, if you have not, you can compile
13 one relatively easily, but if that is not the case, do
14 let me know, because I do not want to have the parties
15 starting from scratch on a massive job.

16 MS DEMETRIOU: Can I just briefly take instructions on the
17 point?

18 THE CHAIRMAN: Well, Ms Demetriou, I will leave it with you
19 and if you tell me tomorrow morning it cannot be done,
20 then I will take that.

21 MS DEMETRIOU: Sir, I am sure it can be done. The question
22 is when can it be done by. I am not going to be in
23 a position to do it tomorrow.

24 THE CHAIRMAN: No, I do not think there is any particular
25 rush, Ms Demetriou.

1 MS DEMETRIOU: No.

2 THE CHAIRMAN: I mean, we are going to be reserving this
3 decision.

4 MS DEMETRIOU: Yes.

5 THE CHAIRMAN: So if you need a fortnight to do it, then
6 from our point of view that is absolutely fine. It is
7 just I would not want it to be said, by either side,
8 that we have not read and had the opportunity to
9 incorporate into our judgment, documents that, quite
10 understandably, you have not been able to take us to
11 orally, which will be referenced in the decision. But
12 the decision is an 800-plus pages, and we do not want to
13 miss points that you are making but are making in the
14 course of what is a large amount of material.

15 MS DEMETRIOU: I understand, thank you. I am sure that it
16 will be possible to do that, but I will take
17 instructions as to timing and so on.

18 THE CHAIRMAN: That is very helpful. It may be that instead
19 of the CMA doing the first cut and ComparetheMarket
20 adding to it, you can adopt a different co-operative
21 approach and simply pull it together, the teams behind
22 you operating together. I mean, I really do not mind
23 how it is done but I think it would be a valuable
24 exercise if it could be done.

25 MS DEMETRIOU: Could I just check, are you referring to just

1 the contemporaneous documents or also for example
2 responses to transcripts --

3 THE CHAIRMAN: No, no, I am referring to everything.

4 MS DEMETRIOU: Everything.

5 THE CHAIRMAN: I certainly think that things like the
6 [Redacted] witness statement, things like that, we
7 obviously would be reading because it is material that
8 you rely upon. So, no, time is not a relevant limiter
9 on the material. It may be relevant as to weight
10 because, speaking for myself, being a fan of the ocean
11 frost, I would place, I think, more weight on
12 a contemporaneous document saying: these clauses are
13 pernicious and look how it is constraining our business,
14 rather than someone saying that five years after the
15 event. But that is a matter of weight. So if you want
16 us to look at it, put it in there and we will look at
17 it. Mr Beard, the same obviously of course goes for
18 you, that is the point.

19 Okay, that was the first thing. The second thing
20 was the question of the questions that I flagged that we
21 would be wanting to make of the experts and our thinking
22 has evolved a little bit in light of your helpful
23 points. It seems to me that first of all such materials
24 as we have produced to aide our questioning we will try
25 to get to the parties in the course of tomorrow so that

1 you can pass them on to Dr Niels and Dr Walker so that
2 they can look at it.

3 Secondly, we will, although -- well, let me take
4 a step back.

5 The reason Professor Ulph and I are keen to ask some
6 questions is because I think we feel a little bit
7 analytically at sea, and it may be completely our fault,
8 but analytically a little bit at sea in how we apply
9 sort of standard competition 101 to two-sided markets
10 and what we want to do is provoke something of a debate
11 so that we can get our bearings because I think we both
12 feel that we are not quite having the tools that we
13 think we need to answer the questions. So that is where
14 we are coming from and although I think, speaking for
15 myself, and not for Professor Ulph, my questions are
16 more sensibly directed to Dr Walker because in a sense
17 they arise out of the way the decision has been
18 structured, I am going to put them first to Dr Niels so
19 that you have, and Dr Walker has more importantly,
20 a very clear idea of where I am coming from. I think
21 Professor Ulph has actually questions which are more
22 appropriately put to Dr Niels in any event and so that
23 is what he will do and that is what we are planning to
24 do.

25 We have thought very hard about when we should ask

1 these questions and normally we would ask them at the
2 end of your respective cross-examinations and give you
3 then both a chance to ask further questions because one
4 expects and, frankly, one normally gets the relevant
5 questions being put by counsel and the only reason we
6 are minded to ask the questions after
7 examination-in-chief early on is because I think we are
8 very keen to have corrected our sense of lack of
9 direction and I stress it is our problem, not yours.
10 But we kind of want to get those questions off our
11 chests early so that if we are in need of education and
12 correction, that is done sooner rather than later.

13 But I do not want to impose that on the parties
14 without giving you a chance to think about whether that
15 fits with you. There is obviously going to be a risk of
16 duplication because I am sure we are all thinking about
17 roughly the same things but because these are I think
18 questions that... Well, we do not know, I think, what
19 the answers are going to be; I think that is why we are
20 so interested and concerned about them. We think they
21 ought to be asked earlier on, but we are in your hands
22 as to whether that is a course that you are comfortable
23 with. Again, you do not need to respond to that now.
24 Perhaps you can think about it overnight and give us
25 a push back in the course of tomorrow.

1 MS DEMETRIOU: Sir, thank you for that indication. We are
2 really grateful that you are going to be able to send us
3 the questions at some point tomorrow, that will help.

4 Would it be acceptable to have a look at the
5 questions first before making any submissions as to
6 order because I think the nature of the questions might
7 affect our view on that, or at least my view on that.
8 So if possible, if possible and subject -- of course we
9 are in your hands but if possible it would be good to
10 see the questions first and then I can make more
11 meaningful order --

12 THE CHAIRMAN: That is an entirely fair point and I will
13 think about that overnight, but I cannot see beyond it
14 showing my homework and giving you a chance to mark it,
15 I cannot see any harm as to producing what I intend to
16 ask for the parties and indeed the witnesses to
17 consider. That is, I think, not a particular problem
18 from my point of view.

19 MS DEMETRIOU: I had thought that that is what you were
20 suggesting. Sir, I do not mean to push the Tribunal
21 into doing that --

22 THE CHAIRMAN: No, no. I have got certain diagrams which
23 I am going to send.

24 MS DEMETRIOU: Yes.

25 THE CHAIRMAN: But I was not planning on sending over the

1 questions, but now that you have made the point,
2 I cannot see the harm because frankly this is not the
3 sort of pulling a rabbit out of a hat cross-examination.
4 This is a genuine sense of enquiry and I think the
5 longer people have to think about it the better.

6 I think as long as you appreciate that it is framed
7 as a set of questions, designed to elicit responses
8 rather than any kind of draft judgment or preliminary
9 set of thinking. It is literally intended because there
10 are certain questions that I do not know the answer to.

11 MS DEMETRIOU: Of course.

12 THE CHAIRMAN: So I will do that. Mr Beard, do you have
13 anything to say?

14 MR BEARD: I am happy to proceed on the basis. If

15 Ms Demetriou wants to see the questions before she makes
16 a call, I am not going to at this stage give any sense
17 of whether or not I would agree or not with that call.

18 I can see some sense in, if the Tribunal has
19 questions, those being dealt with effectively as
20 examination-in-chief because I anticipate
21 examination-in-chief in relation to all of these experts
22 is going to be minimal if any in order that you have got
23 a sort of base line exposition against which is
24 cross-examination is then conducted because otherwise
25 you end up with a slightly weird position where

1 Ms Demetriou cross-examines and then we have a debate,
2 somewhat later on, as to whether or not she has or has
3 not covered off the questions that the Tribunal had in
4 mind. The same may well be true for me with Dr Walker
5 and that does not seem to me to be an optimal solution.

6 But if Ms Demetriou wants time to think about it,
7 though I have not spoken to Ms Ralston or Dr Niels, I do
8 not suppose they are going to mind. So as long as they
9 know before they enter the witness box I think that
10 would be useful and mostly, as long as we have got that
11 material, and they can see it, they can be thinking
12 about it, whoever is going to be asking the questions in
13 whichever order.

14 THE CHAIRMAN: Exactly. Well, I think that is what we will
15 do then, so thank you both for that. Now that was
16 really as far as Dr Niels and Dr Walker were concerned.

17 The last area that we have got is the econometric
18 evidence and it seems to me that the econometric
19 evidence is doing rather more in this case than it
20 ordinarily does in, say, a case like BritNed and let me
21 try and unpack that because I think it is going to
22 affect how you cross-examine the witnesses in this area
23 and chiefly how Ms Ralston is cross-examined.

24 Just starting with the question of no econometric
25 analysis by the CMA, which is a point that is a

1 criticism I think that is advanced by ComparetheMarket,
2 it seems to us that the CMA has a discretion as to how
3 it makes its findings, how it conducts its investigation
4 and the materials it chooses to assemble in order to
5 make a decision and it seems to us -- but if you want to
6 push back in reply, please do -- it seems to us that the
7 Tribunal should be slow to second guess the manner in
8 which the CMA has chosen to put together its decision.

9 That said, were the CMA to ignore or not follow
10 a material line of inquiry then that, as it seems to us,
11 is something that perhaps does need to be explained. It
12 is like, but I do not want to overstrain the analogy, it
13 is like not calling a witness that could have been
14 called and drawing inferences against the party who
15 could have called that witness in accordance with the
16 principles articulated by Brooke LJ in *Wisniewski v*
17 *Central Manchester Health Authority* and you will all
18 know the propositions that were advanced in that case
19 about when it is permissible to draw inferences from
20 witnesses of fact not called. So it may be that there
21 is an analogy to be applied there.

22 But whether one can draw such an inference depends
23 on that which is not adduced and it seems to us that one
24 aspect of at least Ms Ralston's report is that
25 econometric analysis is an important source of evidence

1 and that is something which she puts front and centre
2 and it is something that, Mr Beard, you put in your
3 submissions that it is odd that there is no such
4 evidence on the part of the CMA and I anticipate that
5 that is one area where Ms Demetriou will be
6 cross-examining Ms Ralston and it is something which is
7 not normally an issue. Normally what you have got is
8 both parties advancing econometric evidence and the
9 question is who is right and who is wrong, rather than
10 the exercise being not done on one side and done on the
11 other.

12 So that, it seems to me, is an important area for
13 the experts in this case, just what value does
14 econometric analysis bring to the party because if it is
15 hugely valuable then the omission by the CMA is
16 significant and an inference might be justified. If, on
17 the other hand, it does not add anything, for whatever
18 reason, then of course the suggestion that we draw an
19 inference becomes much slighter. So that is the first
20 slightly unusual aspect.

21 We then have the point that ComparetheMarket are
22 saying: Well, there is this gap. We say it is a bad
23 gap, it is one that requires explanation and to fill it
24 here is Ms Ralston. We have actually done what we say
25 the CMA should have done and, what is more, when the

1 analysis is done it supports us, not the CMA.

2 Now I am absolutely sure, Ms Demetriou, you will be
3 cross-examining on that. If the evidence of Ms Ralston
4 that there were no effects of a material sort due to
5 these clauses is right -- and I have put it in a very
6 broad way, but you know what I mean -- if she is right
7 about no effects then in a sense the case of
8 ComparetheMarket on the first point, the inferences we
9 ought to draw from the absence of the evidence is made
10 in spades because what Mr Beard will be saying then is:
11 Well, look, not only have you not done the analysis, we
12 have done it and it supports us, ergo you really should
13 have done it because the decision would have been very
14 different. So that is the second area which is more
15 traditional I think in terms of cross-examining the
16 experts.

17 Now this brings me on to the third area, which is,
18 it may be, Ms Demetriou, that you manage to show that
19 Ms Ralston's analysis is simply wrong and that on her
20 analysis she cannot show that there was no effect in the
21 way contended by ComparetheMarket, in which case the
22 evidence obviously cannot be used in the way Mr Beard
23 wants to say it supports the no effect argument.

24 But -- and this is the third area of relevant
25 evidence I think that the economists can give -- the

1 mere fact that you will have successfully shown on this
2 hypothesis that Ms Ralston's work is wrong does not mean
3 that I cannot draw an inference about the failure to
4 conduct econometric analysis by the CMA, and the reason
5 one cannot necessarily do that is that it is possible
6 that a different economist, not Ms Ralston, could do
7 a better job. So it seems to me that the third area of
8 cross-examination on both sides is going to be can one
9 do, on the facts of this case, an econometric analysis
10 at all? It does seem to me that that is a different
11 question to whether the analysis in fact carried out by
12 Ms Ralston is right or wrong.

13 The reason I want to articulate these three distinct
14 areas is because I think at least two of them are
15 atypical and I would not want the parties and
16 particularly the advocates not to understand what we are
17 expecting, as it were, the economists to bring in their
18 evidence. I think it is pretty clear from Ms Ralston's
19 evidence and the responses to it that these are matters
20 on the radar, but I thought it might be helpful to
21 articulate those three, to my mind, rather distinct
22 areas.

23 MR BEARD: Yes, I am most grateful and I am sure
24 Ms Demetriou is, too, for the Tribunal giving that sort
25 of guidance.

1 I think just very briefly, on the first point, I am
2 not sure one needs to go so far as to be looking at
3 issues of analogy with failing to call witnesses.

4 I think if one goes back to Green LJ's comments in
5 Flynn Pharma and his reference to paragraph 94 in the
6 KME judgment, I do not think I took you to it,
7 I referred you to it, but one of the things that comes
8 out very clearly from the European Court case law is
9 that one of the things that you have to test is not only
10 whether the evidence relied on is factual, accurate,
11 reliable and consistent but also whether the evidence
12 contains all the information which must be taken into
13 account in order to assess a complex situation. I think
14 one therefore does not necessarily need to be drawing on
15 analogies with witnesses in order to get to that point.
16 Obviously it is a matter for legal argument. I am sure
17 Ms Demetriou will have lots to say about it, but I think
18 it is worth just bearing that in mind.

19 I also think that it is likely, although again it is
20 a matter for Ms Demetriou, that the issues to do with
21 the first and second issues may well overlap in the
22 sense that the questions about the nature of econometric
23 analysis and the benefits of it.

24 I do not think the CMA, with respect to the CMA, is
25 somehow going to say that econometric analysis is never

1 relevant. I think its case, as Ms Demetriou fairly put
2 it earlier, was that in this case it was not appropriate
3 and therefore we are more likely to end up with
4 a crossover in relation to issues of principle and the
5 particulars of this case, which might mean that issues 1
6 and 2 tend to fold together a little bit.

7 I entirely see the point in relation to 3 which is
8 the general point on the impossibility of the
9 econometric evidence here and it is a point we have
10 emphasised as being wrong and inevitably Ms Demetriou
11 will need to deal with that with Ms Ralston in due
12 course and no doubt I will consider those issues with
13 Professor Baker in due course.

14 But I am grateful. I do not have anything else to
15 add in relation it that, unless I can assist the
16 Tribunal further in relation to those matters.

17 THE CHAIRMAN: No, Mr Beard, that is very helpful.

18 Just to be clear, I do not think anyone in this
19 room, this virtual room, is suggesting that econometric
20 analysis in general is not valuable. I think it is
21 something which is very fact-dependent and if I can take
22 an example that Ms Ralston at least will be very
23 familiar with; the BritNed decision, where she conducted
24 an economic analysis, and did it very well, but lacked
25 the consistent number of data points in order to make

1 a confident projection of mark up --

2 MR BEARD: I am sorry, sir, I do just want to interrupt.

3 You may have your Ralstons and your Jenkins

4 confused --

5 THE CHAIRMAN: Have I now?

6 MR BEARD: -- in relation to that.

7 THE CHAIRMAN: I am sorry about that.

8 MR BEARD: No. I am sure Ms Ralston takes it as no

9 discredit that she has been confused with

10 Dr Helen Jenkins.

11 THE CHAIRMAN: My apologies.

12 MR BEARD: But I think it is Oxera and Helen's; there are

13 more than one.

14 THE CHAIRMAN: There are more than one. I am very grateful

15 for the correction. Well, in that case the point was

16 mistaken as to target but sound as to point.

17 MR BEARD: Well, quite understood. I just thought I should

18 intervene before you went further.

19 THE CHAIRMAN: I am very grateful. You spared my blushes,

20 but the point there was that the data was simply not

21 there in order to conduct the regression that everyone

22 wanted to conduct.

23 MR BEARD: Yes.

24 THE CHAIRMAN: That sort of point, it seems to me, is the

25 kind of point that Ms Demetriou is making here, that --

1 and we will see what points she does make -- but that is
2 what I mean by the value or otherwise of econometric
3 analysis.

4 MR BEARD: I quite understand and obviously we can deal with
5 the comparison with the limited data in BritNed and the
6 position here in --

7 THE CHAIRMAN: Well, that was just an example.

8 MR BEARD: Absolutely. Point taken. I am sorry, I will
9 leave it.

10 THE CHAIRMAN: I am grateful. Ms Demetriou, sorry.

11 MS DEMETRIOU: No, I do not have anything to add, but we are
12 all grateful on our side for you giving so much thought
13 to this in advance and identifying those areas and they
14 are areas which are very much on our radar.

15 I think that we obviously agree that the CMA, with
16 your starting point or your provisional starting point,
17 which is that the CMA has a discretion as to what
18 evidence it looks at in order to establish a case by
19 effects. We do not think that the correct approach is
20 that -- and I do not think that you were saying this,
21 but in case there is any doubt, we do not think that it
22 is correct to say that unless an econometric analysis is
23 impossible that is what has got to be done. So that is
24 not the CMA's position.

25 THE CHAIRMAN: No.

1 MS DEMETRIOU: I can see that Mr Beard is shaking his head
2 as well.

3 MR BEARD: That is not the position. That is understood.

4 THE CHAIRMAN: No. I mean, I think that is common ground.

5 MS DEMETRIOU: That is common ground. But of course we do
6 recognise and we do say, and the CMA said throughout the
7 investigation, that the reason it did not think it was
8 appropriate to conduct an econometric analysis in this
9 case was because of concerns about the robustness of
10 such analysis and so that is a matter that we will be
11 exploring.

12 THE CHAIRMAN: Thank you and I do apologise if we have been
13 teaching our respective grandmothers to suck eggs but it
14 did seem to me important that our expectations were at
15 least articulated so that you could again tell us if we
16 were going substantially off piste because I think that
17 is, in a case of this complexity, quite important.

18 Is there anything that you want to raise with us
19 before we close for the day and I am extending that
20 invitation to Professor Ulph and Ms Lucas as well?

21 No. Deafening silence.

22 Thank you all very much. I do apologise,
23 particularly to the transcriber, that we have gone on
24 half an hour longer than we should have done. Thank you
25 very much for your tolerance and we will resume at

1 10.30 am tomorrow.

2 MR BEARD: Thank you.

3 (4.53 pm)

4 (The hearing was adjourned until 10.30 am

5 Wednesday, 3 November 2021)

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