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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)

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1 (10.30 am)

2 THE CHAIRMAN: Good morning, Ms Demetriou, Mr Beard, just to
3 check that you can both see and hear us. You can, that
4 is wonderful. I will not invite you to begin yet,
5 Ms Demetriou, because I think the livestream is still
6 catching up. But I will give my usual wording about no
7 recording transmission or photography. I think you know
8 what I mean, I will not say anything more.

9 CLERK OF THE COURT: We are live.

10 THE CHAIRMAN: We are good to go. Ms Demetriou, over to
11 you.

12 Opening submissions by MS DEMETRIOU (continued)

13 MS DEMETRIOU: Good morning. I left off yesterday, I was
14 still dealing with some issues on the law and issues of
15 principle. I was going to take you to one further
16 authority on approach to bundles of agreements and that
17 is the Neste case.

18 Perhaps if the Tribunal could pick that up in bundle
19 {G/32/1}. It begins at page 1, but I would like to go
20 straight to page 7 {G/32/7}.

21 You can see from paragraph 19 of the judgment, the
22 question that was referred to the court, which is
23 whether the prohibition in what is now article 101:

24 "... applicable to an exclusive purchasing agreement
25 concluded by a supplier of goods, which could be

1 terminated by the retailer at any time on one year's
2 notice, if all the exclusive purchasing agreements
3 concluded by that supplier have had a significant
4 influence on the partitioning of the market, either on
5 their own or together with the network of exclusive
6 purchasing agreements concluded by all suppliers but the
7 agreements of similar duration to the exclusive
8 purchasing agreement in question represent only a very
9 small proportion of all the exclusive purchasing
10 agreements of the same supplier, the majority of which
11 are fixed-term agreements which have been concluded for
12 a period of several years?"

13 So what you have in this case is a network of
14 exclusive purchasing agreements, which has been said to
15 be contrary to article 101, because of foreclosure. But
16 some of those agreements are agreements of several
17 years' duration, and some of them are terminable on one
18 year's notice.

19 So the question that is being posed is: should you
20 be dividing up the network of agreements depending on
21 whether they are terminable on one year's notice or
22 whether they are longer-term agreements?

23 Then if we could go to paragraph 32, please,
24 {G/32/11}, thank you very much.

25 Paragraph 32, you can see that what is being said is

1 that:

2 "... the fundamental factor for the supplier is less
3 the exclusivity clause itself than the duration of the
4 supply obligation assumed by the retailer ..."

5 That duration is the decisive factor in the market
6 ceiling effect. So it is a relevant point.

7 Then moving on to paragraph 36, please, {G/32/12}.
8 You see there what is being said is that where:

9 "... the contracts which may be terminated upon one
10 year's notice at any time represent only a very small
11 proportion of [a network], they must be regarded as
12 making no significant contribution to the cumulative
13 effect ..."

14 At 37:

15 "The fact of subdividing, exceptionally [and I am
16 emphasising exceptionally], a supplier's network is not
17 arbitrary nor does it undermine the principle of legal
18 certainty. Subdividing the network in that way results
19 from a factual assessment of the position held by the
20 operator concerned on the relevant market, the aim of
21 the assessment being, on the basis of an objective
22 criterion of particular relevance in that it takes into
23 account the market's distinctive features, to limit the
24 number of cases in which a supplier's contracts are
25 declared void to those which, together, contribute

1 significantly ..."

2 Then if we go to paragraph 38, on the next page
3 {G/32/13}, we can see there that the commission had
4 argued that the bundle of agreements should not be
5 subdivided on the basis that some of them are terminable
6 on a year's notice. What the court is doing is saying
7 that contrary to the submissions made by the commission,
8 that approach does not conflict with the Delimitis
9 judgment.

10 It says:

11 "Although that judgment, in the context of the case
12 then under consideration, set out in paragraphs 25 and
13 26 the criteria for assessing the extent to which a
14 supplier's 'Contracts', without being more specific,
15 contribute to the cumulative sealing-off effect, it did
16 not exclude a selective assessment according to the
17 various categories of contracts that a particular
18 supplier might have entered into."

19 If we could also just turn up the Advocate General's
20 opinion at {G/30/13}, we see this point being picked up
21 by the Advocate General, so {G/30/13} and it is
22 paragraph 29 of the Advocate General's opinion.

23 What you see there is the Advocate General saying
24 that:

25 "The case-law therefore requires national courts to

1 consider all the 'similar' agreements operated by a
2 particular supplier. Normally the various agreements
3 comprised in a network of exclusive purchasing
4 agreements operated by a particular supplier would be
5 'similar', if not almost identical. However, in my
6 opinion it does not follow that particular agreements
7 containing specific clauses having clearly different
8 economic effects should for the purpose of applying the
9 Delimitis test, necessarily be regarded as 'similar'."

10 So the Advocate General reaches the same conclusion
11 as the court, that because on their face the terms of
12 these agreements have a material distinction in the
13 sense that some of them are terminable on a year's
14 notice, and that has a different economic effect to the
15 much longer-term agreements, then exceptionally those
16 agreements can be hived off from the network.

17 Now, we say that that is different to what is being
18 said in the present case. What is being said in the
19 present case is not that the wide MFNs have got some
20 material distinction in their terms, so that there is
21 different categories in terms of their legal effects,
22 but instead a variety of granular factual points are
23 being made as to compliance at various points during the
24 relevant period.

25 So we are not saying -- going back to the debate

1 yesterday, we are not saying that if evidence is put
2 forward to the CMA that in respect of a particular
3 agreement on the facts, it is clearly established that
4 there was no compliance. We are not saying that the CMA
5 does not have to consider that evidence. Of course, we
6 are not saying that. If there is relevant evidence put
7 before the CMA, it needs to take account of it.

8 But what we are saying is that this case law makes
9 clear that the starting point for the authorities is to
10 treat agreements as a bundle and the reason why is
11 because -- you can see the reason why that might be so
12 is that agreements, on their face, are legally binding
13 and are capable of having a network effect.

14 What you do not see from that case law -- in fact,
15 you see the opposite, what you do not see is
16 a requirement on the part of the competition authority
17 or, as the case may be, a claimant who is seeking to
18 establish an infringement of competition, to investigate
19 each and every one of the agreements to ensure that
20 there was compliance throughout the period. You just do
21 not see that at all. So it may be that the Tribunal can
22 think of it in terms of a presumption, that may be
23 a helpful way of seeing it.

24 But, in any event, we say that where this becomes
25 material, so where this approach becomes material, is in

1 relation to the submission made by Mr Beard, which he
2 rowed back from yesterday, following discussion with
3 the Tribunal, rowed back from the submission that what
4 you do is at the outset simply excise a group of
5 contracts because, for example, they have not been
6 contacted by the CMA. We debated that yesterday, so
7 I am not going to go back over it, but I did want to
8 show you this authority.

9 The next point that I would like to make in relation
10 to points of principle, again it is a very short point
11 and it emerges -- I am not going to take you to any
12 authorities. If necessary, we can elaborate more in
13 closing, but it is really a point I make in response to
14 the discussion at the end of yesterday about how the
15 econometric evidence fits into the picture.

16 Really, it is a short point of principle, which is
17 this: that the CMA has a discretion as to how it goes
18 about proving an infringement by effect. So it has
19 a discretion as to what evidence it relies on and the
20 question, of course, for the Tribunal is: is that
21 evidence sufficient to establish an effect? That is why
22 we are all here.

23 Now, if the Tribunal finds that the evidence relied
24 on by the CMA to establish an effect is sufficient to
25 demonstrate an appreciable effect, adverse effect on

1 competition, then we say that the CMA had no need to go
2 any further. It has established its case on effect.

3 So, of course, now ComparetheMarket say that the CMA
4 should have conducted an econometric analysis.

5 So what is the proper approach to that submission?
6 We say it is not akin to, in public law, you have
7 debates about whether or not a public authority has
8 taken account of a relevant consideration, so it is not
9 akin to that. It is not a factor or a train of enquiry
10 that the CMA was either required to pursue or at least
11 give good reason for not pursuing, because it is all
12 about the evidence that the CMA has built its case on.

13 So if the Tribunal finds that the evidence that the
14 CMA relied on is adequate to show an appreciable effect,
15 we say that is it. There is not some further step where
16 the CMA has to show that it was impossible to carry out
17 an econometric analysis. That simply isn't the law or
18 the right approach. Of course, as in this case,
19 ComparetheMarket did submit econometric analyses to the
20 CMA during the course of the investigation and, of
21 course, the CMA has to take account of those and respond
22 to them.

23 So that is a different question, and it did do so in
24 this case, it responded to them, it explained why it was
25 not persuaded that it should prefer those analyses to

1 its own assessment. So I just say that in terms of
2 highlighting how we say the Tribunal should approach
3 this question.

4 Sir, that is all I want to say about that for now.
5 It is quite a short point.

6 I am sorry, Professor Ulph.

7 THE CHAIRMAN: You are muted, Professor.

8 PROF ULPH: I just want to go back to your argument. Your
9 argument is about what evidence the CMA should have
10 provided, because it seemed to be conditional on our
11 acceptance of the power of the evidence, of the
12 non-econometric evidence. Although at the time the CMA
13 was deciding what evidence to use, it did not know what
14 our judgment would be on that.

15 I agree with you that if we were persuaded by this
16 body of evidence that their case was made, then
17 sometimes that is game over.

18 But you did not know whether or not we would be
19 persuaded or the CMA did not know whether or not we
20 would be persuaded at the time it was deciding what
21 evidence to produce.

22 So it seems to me that there is still at least some
23 obligation to explain to the Tribunal, why it chose not
24 to provide econometric evidence. The mere fact that we
25 might find the other evidence compelling, I do not think

1 gets round the problem that there is a question as to
2 why you did not do it, or the CMA did not do it.

3 MS DEMETRIOU: So, sir, with respect, we do not accept that.
4 So we do not accept that there is some sort of legal
5 obligation to consider whether or not to use econometric
6 evidence in an investigation.

7 Now, of course, in private damages claims,
8 econometric evidence is run of the mill. But in terms
9 of the CMA's approach, we say that the correct analysis
10 is this: that the CMA has a discretion what evidence it
11 uses to prove its case.

12 Now, either that evidence -- I am agreeing so far
13 with you Professor Ulph, either that evidence is
14 adequate or not. So the first step for the Tribunal is
15 to consider whether that evidence was adequate, whether
16 it is sufficient to prove an appreciable effect on
17 competition. If it was not, then game over for the CMA,
18 so we have lost. But if it was, we say that there is
19 not then some other legal obligation on the CMA to
20 explain why it did not go further.

21 So if it is evidence, if the Tribunal thinks its
22 evidence was sufficient, there is not some super-added
23 obligation to explain why it did not go further and also
24 conduct an econometric analysis.

25 So, in this case, of course, as I am

1 distinguishing -- I am distinguishing a different point,
2 which is that, in this case, ComparetheMarket did
3 conduct econometric analyses during the course of the
4 investigation and those were considered by the CMA. So
5 it had to respond to them. So I am not saying that it
6 could shut its eyes to the submissions that were being
7 made. Of course, it could not. It had to consider
8 those.

9 But the question is, the question for the Tribunal
10 is: is the evidence on which the CMA built its case
11 adequate or not? That is really the question.

12 Now, it may be that the Tribunal takes the view that
13 in light of the econometric evidence, that actually what
14 that does is shake the foundations of the qualitative
15 evidence relied on by the CMA. So that is a different
16 question.

17 So the Tribunal is not, of course, required to shut
18 its mind to the econometric evidence produced on the
19 appeal. So the Tribunal can look at that and say: well,
20 we have seen the qualitative evidence of the CMA, but
21 that is actually thrown into doubt by this econometric
22 evidence.

23 That is a route that is open to the Tribunal and
24 that is CTM's case on this appeal. But all I am saying,
25 I am making a more modest point, which is that if the

1 Tribunal is satisfied that the qualitative evidence,
2 despite econometrics, is sufficient, there is not some
3 additional legal obligation on the CMA to explain why it
4 did not carry it out in addition to the evidence it did
5 rely on.

6 THE CHAIRMAN: Ms Demetriou, I do see what you are saying,
7 but I think it is quite a binary position you are taking
8 and I think the evaluation of evidence is just a little
9 bit more nuanced than that. Let us park econometrics
10 for the moment, because we have had a big debate there
11 about whether it is relevant at all. You have explained
12 the CMA's position on that and we will hear the experts
13 on that in due course.

14 But let us just consider the evidence not garnered
15 that could have been garnered by a regulator looking
16 into a question that is before it.

17 Now, let us say, it is interviewing a number of
18 market participants in order to work out what their
19 perception of a particular clause is. So you have got
20 100 market participants and the regulator might say:
21 look, we just cannot do all 100. We are a public body,
22 we have limited resources, we are just not going to be
23 able to engage with all 100. So we are going to pick
24 a number, we are going to sample it.

25 Now, it seems to me that one would be hard-pressed,

1 as an addressee of that decision, ultimately reached, to
2 say that a sampling process was a bad approach. It is
3 obviously justifiable. But I do think it would be
4 incumbent upon the regulator to say: this is the basis
5 for our sampling, this is why we have picked the 25
6 people out of 100 that we approached. If, for instance,
7 you had omitted number 70 and yet number 70 is a massive
8 and significant player, then I think you would be
9 entitled to say: I am terribly sorry, but I see the 25
10 you have picked, but you have not gone to someone that
11 absolutely ought to be in your 25 and, I'm afraid, I am
12 going to draw an inference regarding the fragility of
13 the evidence of your 25, because you have not spoken to
14 someone that you should have spoken to.

15 Now, that is an extreme example, and I make clear
16 I am not regarding it as this case at all, but it does
17 seem to me that there is, in that case, a relationship
18 between the evidence that you adduce and the evidence
19 that you do not adduce.

20 You cannot simply say: these are the 25, read them
21 and weep, that is it. Because number 70, my
22 hypothetical number 70, ought to have been part of the
23 sample and might have either strengthened or weakened
24 the case and because you have not engaged with number
25 70, our hypothetical 70, it damages the purity or force,

1 however you want to put it, of the 25 sample that you
2 have put in.

3 I think that is what Professor Ulph is getting at,
4 he will correct me if I am wrong, but I do not think you
5 can say: just look at the 25 and shut up.

6 MS DEMETRIOU: No, sir, I agree with what you have said. So
7 I agree that, on that hypothesis, if the CMA decided not
8 to call evidence from a certain group of market
9 participants, then that is something which the Tribunal
10 can take account of. Of course, the CMA has in this
11 case, as an analogy, has decided not to contact
12 particular insurers and has explained, as you have said,
13 sir, in the decision, the basis on which it has made
14 that decision and that is something for the Tribunal to
15 weigh in the round.

16 I think I was making a slightly different point.
17 Well, it is a related point, but in relation to the
18 econometrics, the point really that I was addressing was
19 one that emerged from discussion yesterday, which was
20 that somehow the CMA has to show that it was impossible
21 to conduct an econometric analysis, that there is some
22 hard-edged approach to the type of evidence it has to
23 garner in this case.

24 So we are not -- we think that that is wrong, that
25 that principle, if that submission is being made, that

1 that is wrong, because there is no hard-edged approach
2 to the type of evidence that the CMA needs to build its
3 case on. So that is why --

4 THE CHAIRMAN: No, I see what you are saying and I can see
5 why you are saying it, given the way I parsed the
6 questions that were in my assessment arising out of the
7 econometric expert evidence. But I think I better try
8 and be clearer about what I was saying, because the
9 point I was making was that it is not enough for you to
10 show that CTM's expert has failed in her task to show no
11 effect. You do have to do that, but it is not enough,
12 because it is possible that a differently instructed or
13 different economist could do that job.

14 Now, I am not being very complementary to CTM's
15 expert here, because I am basically postulating a bad
16 job by that expert, but I think you do need to say that
17 the reason you did not adduce econometric evidence
18 yourself is not because ComparetheMarket's expert could
19 not do it, it is because no expert with reasonable
20 resources or with reasonable certainty, or for whatever
21 reason, could do the job that meant it was a useful
22 exercise for you to do.

23 So I am not putting it as the level of
24 impossibility. What I am saying is you have got to, in
25 just the same way as the sampling exercise has to be

1 justified as something that meets the SSNIP test, you
2 have got to justify the reasons why you did not go down
3 the route of econometric analysis.

4 That may be because it is not going to produce
5 useful results. It may be because it cannot be done,
6 because the sample is the wrong size. It may be that it
7 is simply too expensive given the other evidence that
8 you have got. All sorts of reasons for it, but those
9 reasons do have to be unpacked.

10 MS DEMETRIOU: Sir, I think that we are then on the same
11 page. So we do, of course, say -- and it may be that
12 I misunderstood, I am sure I misunderstood
13 Professor Ulph's initial point that he was putting to
14 me -- but I think we are on the same page in the sense
15 that the CMA has explained, in this case, why it did not
16 conduct econometric evidence. So it has explained that
17 and, of course, that is something that will be explored.

18 THE CHAIRMAN: Of course.

19 MS DEMETRIOU: As you have just said, sir, another important
20 factor in relation to this into whether or not -- into
21 a decision not to conduct econometric evidence is the
22 other evidence. So in circumstances where the CMA took
23 the view following its investigation that the other
24 evidence was adequate, well, that is a good reason in
25 itself not to conduct econometric evidence. That is one

1 of the reasons that the Tribunal can take account of
2 when assessing all of this and we say that is why the
3 primary question for the Tribunal is whether that other
4 evidence is sufficient.

5 Now, of course, when analysing whether the other
6 evidence is sufficient, you will of course take into
7 account the econometric evidence advanced by
8 ComparetheMarket. But highly relevant to the question
9 of was it reasonable, was it reasonable for the CMA not
10 to conduct an econometric analysis, is the evidence it
11 did look at.

12 That is all I am really saying. So I was really
13 addressing the more hard-edged way, if I can put it that
14 way, that the debate sort of evolved yesterday, which is
15 that the CMA has to show somehow that it is an
16 impossibility to conduct an econometric analysis in
17 order for the decision to stand. We would not accept
18 that.

19 THE CHAIRMAN: No. I see we have two hands up. Professor,
20 you first, and then Mr Beard.

21 PROF ULPH: I think we are in danger of taking what you
22 thought was a small point and making it into a very big
23 point. But can I just try restating my argument to you
24 and I may have misunderstood your argument you were
25 making.

1 I do not disagree with you that the CMA was not
2 required in law to do an econometric analysis, I accept
3 that point. Nor do I disagree with you that if we take
4 all the evidence you presented and we find that
5 compelling, and we reach a judgment on the basis of that
6 evidence, that leads to a particular conclusion.

7 What I was saying was that I do not think that
8 second point is a reason why the CMA legitimately choose
9 not to do econometrics. It seemed to me that you were
10 saying, and I may have misunderstood you, that if we
11 were to find the CMA's evidence compelling, that would
12 be a reason for not doing the econometrics.

13 That cannot be the case, because you would not know
14 at the time you are producing your evidence, whether or
15 not we would find this evidence compelling. Obviously,
16 you would hope that we would find it compelling, but you
17 would not know that.

18 So is that really a reason for not doing
19 econometrics? That was my question to you.

20 MS DEMETRIOU: Thank you. So I think what you are asking,
21 if I can just make sure that I have understood it, is
22 that it would not be safe for the CMA in taking its
23 decision or it is arguably not safe for the CMA in
24 taking its decision not to do an econometric analysis,
25 because the Tribunal may end up disagreeing with the CMA

1 as to the qualitative evidence that was before it. So
2 the Tribunal may end up disagreeing that it was
3 unnecessary to conduct an econometric analysis.

4 Have I understood that correctly, Professor Ulph?

5 PROF ULPH: I am saying that we might not find the
6 qualitative analysis compelling.

7 MS DEMETRIOU: Yes.

8 PROF ULPH: That does not necessarily tell you what
9 additional evidence should have been done. I am leaving
10 it open that there are many other forms of evidence one
11 can provide and maybe different types of qualitative
12 analysis would have been more compelling. I am not
13 saying it has to be econometrics. I am just saying you
14 cannot use the fact that we would find the evidence
15 provided compelling as a reason for not doing the
16 econometrics, because at the time you were making the
17 decision, you would not know what our view would be of
18 the evidence. It is a rather simple --

19 MS DEMETRIOU: Yes, I understand. I understand. So, no, of
20 course -- at the time, of course, the CMA would not
21 know. I mean, the CMA reaches its own view as to what
22 evidence is sufficient at the time, but, of course, it
23 cannot prejudge what the Tribunal may think. So it
24 cannot say: well, it is absolutely certain that
25 the Tribunal is going to find this analysis compelling,

1 therefore, that is a good reason not to conduct an
2 econometric analysis. I agree with you, Professor.

3 On the other hand, the Tribunal -- the CMA does have
4 to take a view at the time, which it did do, as to
5 whether the evidence it has got in front of it is
6 sufficient or whether it needs to go on and do more.

7 So, in this case, it took the view it was
8 sufficient. Of course, it is for the Tribunal now to
9 examine whether it was correct to take that view, that
10 is the purpose of this appeal, but I do agree with what
11 you have put, now that I have understood it properly.

12 Thank you.

13 PROF ULPH: Thank you.

14 THE CHAIRMAN: Thank you, Professor. Mr Beard.

15 MR BEARD: I have got my hand up for a very, very mundane
16 reason, which is page 16 of the transcript, sir, you
17 were referring to the CMA's expert and I think
18 throughout you actually wanted to use a different
19 acronym. I think you wanted to be referring to
20 "ComparetheMarket" or "CTM's expert".

21 THE CHAIRMAN: I was absolutely wanting to do that.

22 MR BEARD: I think everyone understood that, but I thought
23 for the purpose of the transcript, and just in passing,
24 I think that it is important not to lose sight of part
25 of the submission we are making in relation to

1 considering evidence in the round, that econometric
2 evidence can influence the way that you look at
3 qualitative evidence. It is a sort of reflective
4 equilibrium. I do not want that to be lost. I think
5 that is part of what Professor Ulph is potentially
6 talking about.

7 But I will leave that for now and I will not intrude
8 on the flow of submissions, since I had a very, very
9 mundane intervention.

10 THE CHAIRMAN: But, thank you, nonetheless.

11 MS DEMETRIOU: Thank you. Just also, so that we do not lose
12 sight of a point that, in this debate, which we have now
13 explored a little more, just so that we do not lose
14 sight of a point, of course, that we do make, which is
15 that that the CMA, of course, in this case, did
16 consider -- so it is not that it did not -- we are not
17 facing a case where the CMA did not consider at all
18 whether to conduct an econometric analysis. Of course,
19 it did consider it very carefully, because
20 ComparetheMarket was asking it to, was saying: you
21 should be conducting an econometric analysis.

22 It is a point that it made during the investigation
23 and the CMA did, of course, consider whether to do that
24 at the time and decided that it would not be robust,
25 which is why it did not do it. That, of course, will be

1 explored in the evidence.

2 I am now going to move on to my fifth and final
3 point on the law and points of principle, and this
4 really relates to concerns, the weight to be placed on
5 different types of evidence. So it is a different point
6 to the one I have just been making and you will have
7 heard that a recurrent theme of Mr Beard's submission is
8 that little weight should be placed on various parts of
9 the qualitative evidence considered and relied on by the
10 CMA, because the CMA has not called witnesses from the
11 HIPs. Of course, it has called a witness from a rival
12 price comparison website.

13 I just want to take the Tribunal briefly to three
14 authorities. Then I am going to make some short
15 submissions.

16 The first authority is a case called Gestmin and
17 that is at {G/116.1}. This is a now well-known
18 exposition by Lord Justice Leggatt, as he then was,
19 about the limitations of witness evidence. Really, the
20 point I want to make, the point I want to extract from
21 it is that where one has contemporaneous documents,
22 contemporaneous documents, those are the best evidence
23 of what happened at the time.

24 If we could turn to page 7, please {G/116.1/7}, so
25 the passage starts at paragraph 15, so evidence based on

1 recollection. What the judge does there, from
2 paragraphs 15 to 18, through to 18, is explain, set out,
3 explain how memory is fallible and therefore that there
4 are vulnerabilities in ex-post oral evidence.

5 Then you see at paragraph 19, over the page
6 {G/116.1/8}, an additional point being made, which is
7 that witnesses may well have a stake in the result of
8 the litigation.

9 Then you see at 20, interference with memory
10 introduced in civil litigation.

11 Then you see paragraph 22, if we could look at that,
12 that is really the key paragraph that I want to draw
13 your attention to:

14 "In the light of these considerations, the best
15 approach for a judge to adopt in the trial of a
16 commercial case is, in my view, to place little if any
17 reliance at all on witnesses' recollections of what was
18 said in meetings and conversations, and to base factual
19 findings on inferences drawn from the documentary
20 evidence and known or probable facts. This does not mean
21 that oral testimony serves no useful purpose - though
22 its utility is often disproportionate to its length. But
23 its value lies largely, as I see it, in the opportunity
24 which cross-examination affords to subject the
25 documentary record to critical scrutiny and to gauge the

1 personality, motivations ..."

2 If we can go over the page, please {G/116.1/9}:

3 "... working practices of a witness, rather than in
4 testimony of what the witness recalls of particular
5 conversations and events. Above all, it is important to
6 avoid the fallacy of supposing that, because a witness
7 has confidence in his or her recollection and is honest,
8 evidence based on that recollection provides any
9 reliable guide to the truth."

10 So essentially -- and this is a point which is taken
11 up in practical terms in the new practice direction that
12 the business and property courts have adopted, and which
13 now governs evidence, factual evidence in those courts,
14 in the practice direction, which is not in the
15 authorities bundle, but we can add -- I am sure that at
16 least some members of the Tribunal will be familiar with
17 it -- states that it is not appropriate for a witness to
18 be used as a vehicle for giving a narrative to the
19 contemporaneous documentary record.

20 So, really, the short point I make on this, is that
21 where the CMA has relied on contemporaneous documents
22 and, by that, I mean "contemporaneous" in the true sense
23 of the word, not meetings after the events with the CMA
24 or responses to section 26 notices or witness
25 statements, but actually the contemporaneous

1 communications or internal documents of the company's at
2 the time, and where those documents, on their face,
3 allow a particular factual finding to be made or an
4 inference to be drawn, those documents should be taken
5 at face value and there is no need then to call
6 a witness to provide any kind of gloss or explanation
7 for them.

8 So that is really the first point that I wish to
9 make. The reason I make it is because at times, in his
10 submissions, Mr Beard -- and we will come to this when
11 I come to show you the evidence in the submissions -- at
12 times, in his submissions, Mr Beard said: well, really
13 what the CMA should have done is called X witness to
14 give evidence in relation to this, so we could test it
15 in cross-examination.

16 Really, my short point, is where the CMA is relying
17 on contemporaneous documents, and is not trying to say
18 that those documents should be interpreted in
19 a different way, but is rather trying to say they should
20 be taken at face value, there is no need, there was no
21 need for the CMA to do that.

22 Rather, if CTM want to be saying: these
23 contemporaneous documents should be disregarded or --
24 Mr Beard, again, is shaking his head, he has the
25 opposite of a poker face, but I will try not to let this

1 put me off my stride, it is probably encouraging.

2 So if CTM want to say that there is a document that
3 should not be taken at face value or should be
4 disregarded, of course, it was open for CTM to go and
5 seek a witness to say: well, that document at the time
6 says this, but actually it should be taken in
7 a different way or disregarded, because of this or that.
8 So they could have done that.

9 But my point is it is not for the CMA, when it is
10 relying on contemporaneous material, to have to call
11 witnesses to back up that contemporaneous material when
12 it is relying on what they say on their face. So that
13 is the first point.

14 THE CHAIRMAN: How does that fit with paragraph 22 of
15 Gestmin?

16 MS DEMETRIOU: Can we go back, please, to paragraph 22.

17 THE CHAIRMAN: Back a page {G/116.1/8}.

18 MS DEMETRIOU: Sir, your point on paragraph 22.

19 THE CHAIRMAN: Well, he is saying -- I mean, this is what
20 I say is The Ocean Frost case.

21 MS DEMETRIOU: Yes.

22 THE CHAIRMAN: Where Lord Goff said years ago: look, the
23 documents are king, because people just cannot remember
24 what is going on and that -- I mean, one needs no
25 persuasion of that as a commercial litigator.

1 MS DEMETRIOU: Yes.

2 THE CHAIRMAN: The importance of documents is when you get
3 that rare case where you do not have any documents and
4 suddenly you realise that they are incredibly helpful.
5 But the point Mr Justice Leggatt, as he then was, is
6 making in 22 is you have got to see the documents in
7 context and there may be a whole raft of questions about
8 what actually this document means in context.

9 So, I mean, the great danger of looking at documents
10 is that, yes, of course, they say what they say, but
11 just as with everything, you need to see the context in
12 which they were made.

13 That is why I think the judge is referring to the
14 importance of cross-examination in paragraph 22.

15 MS DEMETRIOU: Sir, in response to that, then, I can see --
16 so I think one needs to distinguish different types of
17 case, so if there is documentary evidence from
18 a particular insurer, which, on its face, calls for
19 explanation or is inconsistent with other
20 contemporaneous documents at the same time, then
21 a contextualisation from a witness as to their
22 recollection of the documents may be helpful.

23 But where, as I will show you is the case here,
24 there are documents, contemporaneous documents from
25 particular insurers, which are clear on their face, then

1 calling a witness to say -- and where there is no
2 conflict on the face of those documents about what they
3 mean, so they are clear on their face, they say,
4 for example: here we are being offered a promotional
5 deal and we are rejecting it, because of the wide MFN.
6 So that says what it says on its face. There is then no
7 need to call a witness to explain that, because it is
8 clear on its face.

9 Now, what I am saying is that if ComparetheMarket
10 wishes to say: well, reliance should not have been
11 placed on that, because there is some contextual
12 feature, which means that it does not actually mean what
13 it says on its face, then, of course, it is open to them
14 to call a witness. But the CMA, it is not incumbent on
15 the CMA to contextualise by way of witness evidence,
16 documentary -- the documentary contemporaneous documents
17 at the time where those are clear on their face.

18 It may be that if there is a dispute on evidence as
19 to what happened at a particular meeting and
20 a documentary record is incomplete, then, of course,
21 what is being said in paragraph 22 is that
22 contextualisation can be useful and there can be -- as
23 can the opportunity to cross-examine.

24 But the point is a more limited one in paragraph 22,
25 in my respectful submission. What that does not say is

1 that where you have documents, which are clear on their
2 face, it is nonetheless incumbent on the party relying
3 on them to call a witness to explain them. Indeed that
4 would go contrary to the practice direction and the
5 recent approach of the courts.

6 So, sir, that is really what we say about
7 paragraph 22 and really it is a straightforward point
8 about the importance of the contemporaneous written
9 record.

10 Of course, if there are conflicts, on the face of
11 the documents, that is a different question. But what
12 the CMA was entitled to do, is accept, at face value,
13 those documents, when they are clear in their effect.
14 That is something I am going to come back to when I am
15 going to look at some of the underlying documents.

16 THE CHAIRMAN: I mean, I anticipate that there is going to
17 be some pretty significant pushback from
18 ComparetheMarket on this point and it may be that one
19 needs to go back to first principles about how evidence
20 works. I mean, if one dials back to the bad old days,
21 when you had an awful lot of formality about evidence,
22 instead of it all just being about weight, what you
23 would be doing, you would be putting in a Civil
24 Evidence Act notice saying, "We are relying on these
25 documents for the truth of which they say."

1 You would be saying, "We do not want to call the
2 witness to speak to those documents for the following
3 reasons", and whatever those reasons might be, who
4 knows?

5 But if that is the way one needs to analyse it, it
6 does seem to me that you are obliged at least to tender
7 the witnesses or to make it clear why you are not doing
8 so. But to say: we are going to go through the
9 documents that we have, using our position as regulator,
10 obtained from other people in the market, but if you,
11 the addressee of the decision, do not like what we have
12 produced, off you go and find someone to rebut it, I am
13 not sure that that is quite how it ought to work. You
14 have got to present your case warts and all and it is
15 for Mr Beard to have the opportunity to probe the
16 deficiencies.

17 MS DEMETRIOU: Sir, of course, he can have the opportunity
18 to probe the deficiencies. But taking, first of all,
19 your point about Civil Evidence Act notices, of course,
20 we are now a long way from that point. That is why the
21 recent practice direction deprecates the idea of calling
22 witnesses to explain or narrate contemporaneous
23 documents. Because, of course, there will be lots of
24 contemporaneous documents in a case where -- which do
25 not call for explanation, because -- this is the point

1 of the more recent approach in the practice direction.
2 They speak for themselves and actually calling a witness
3 to narrate them or to explain them to the court is
4 superfluous and unnecessary. That is why it has been
5 deprecated.

6 So we have moved a long way from the starting point
7 that we were years ago, where one was looking at Civil
8 Evidence Act notices, and so on, in relation to these
9 documents.

10 Now, of course, in this case, many of the documents
11 relied on by the CMA were ComparetheMarket's own
12 documents. So, in those circumstances, what we are
13 saying is that the CMA was entitled to look at those
14 documents, decide what they say on their face, or draw
15 inferences from them, and reach findings, which, of
16 course, it has done in its decision.

17 Now, the CMA cannot be then criticised for not
18 calling a witness from ComparetheMarket. That would
19 obviously be ridiculous. It is entitled to examine the
20 documents, reach conclusions from them, and if
21 ComparetheMarket want to say: well, this document does
22 not actually support the finding you have made, because
23 we had something else in mind, then it could have very
24 easily have called its own witness.

25 THE CHAIRMAN: No, I think you are pushing at a pretty open

1 door when it comes to ComparetheMarket's witnesses.

2 I think if you were to try and extract a statement from
3 one of Mr Beard's client's own witnesses, you would get
4 some pretty hefty pushback otherwise. I think you can
5 take it that there is a distinction between the
6 witnesses of the addressee of the decision and third
7 parties.

8 But third parties, I do think that there is an
9 element in which one needs to avoid the impression --
10 I stress, it is just the impression -- of
11 cherry-picking. In other words, if you are coming to
12 court with a case, you have got to say what it is and as
13 part of the price of bringing that case and asking the
14 court to believe it, you have got to deliver the
15 mechanism for testing it.

16 Now, I quite recognise that that mechanism is
17 a nuanced one, when you are talking about the
18 documentary record as opposed to something that can be
19 added, and you can take it, we will obviously take that
20 into account. We are not in the bad old days of calling
21 witnesses just for the sake of calling them.

22 But neither are we at the other extreme saying: here
23 are the documents, that is that.

24 MS DEMETRIOU: Sir, can I just respond in two ways to that?

25 THE CHAIRMAN: Please, please.

1 MS DEMETRIOU: So the first thing I want to say is really
2 a point of principle, that there is a distinction --
3 and, of course, I accept that this is all a question of
4 weight and nuance and so on, so there are no hardline
5 rules.

6 But I do want to draw a distinction between two
7 different types of situation. The first is where the
8 contemporaneous documents might be said to speak for
9 themselves. In those circumstances, then we say very
10 great weight should be given to the contemporaneous
11 documents, very great weight should be given to them.
12 The fact that the CMA has not called a witness to
13 narrate them, as it were, or to be tendered for
14 cross-examination, we say should not be something which
15 is conversely given any great weight by the Tribunal.

16 Now, a different situation would be where there is
17 on the face of a document, for example, a conflict or an
18 uncertainty. Now in those circumstances, one might see
19 that more weight might be placed by the Tribunal on
20 a failure to call a witness to explain a conflict where
21 the CMA has drawn a particular inference.

22 So, sir, that is the first point on principle.

23 The second point that I wish to make is that you say
24 that I am pushing at an open door in terms of witnesses
25 from BGL, from ComparetheMarket. Well, of course, the

1 fact is, in this case, Mr Beard yesterday made two
2 particular comments about witnesses. He said that -- he
3 remarked on the fact that we did not call a witness --
4 the witness from Aviva (Quote Me Happy). He has
5 actually given a witness statement in the investigation,
6 you will recall that.

7 THE CHAIRMAN: Yes.

8 MS DEMETRIOU: He also made a comment in passing that we did
9 not call someone from AXA. I am going to come back to
10 the evidence in these in relation to the decision.

11 But, sir, in fact, the CMA did approach these two
12 HIPs and they did approach the witness who gave
13 a witness statement during the course of the
14 investigation and we will, of course, disclose the
15 relevant communications and put this into the bundle.
16 But they did approach -- the CMA did approach them to
17 ask whether they would give evidence in this case.

18 Sir, the position is that as regards AXA, which is
19 one of the HIPs referred to by Mr Beard yesterday, they
20 said that they were unwilling to do so, because of their
21 continuing commercial relationship with ComparetheMarket
22 and they said that giving evidence would result, in
23 their view, to a breakdown in that relationship and
24 substantial financial losses.

25 As regards the gentleman who did give a witness

1 statement, he said that he was unwilling to give one,
2 because he was concerned it would affect his future
3 employment relationships. So a similar reason.

4 So I have obviously waived privilege in those
5 communications. We will put them into the bundle. But
6 I do want to explain to the Tribunal that those
7 witnesses referred to by Mr Beard were approached and
8 they refused to give evidence.

9 Now, sir, this --

10 MR BEARD: Excuse me, if I might intervene. This is
11 evidence being given from the bar. We have not seen any
12 of this material before. Ms Demetriou is now suggesting
13 she is going to waive privilege in relation to the
14 enquiries made by the CMA in relation to witnesses.

15 If she is waiving privilege in relation to that
16 topic, she needs to waive privilege generally. She
17 cannot pick and choose in relation to these matters.
18 This is not a course that can be adopted at this point.
19 We have had no opportunity to deal with any of these
20 matters. It is the first time that this has been put to
21 us. This is an inappropriate use of evidence at the
22 bar.

23 MS DEMETRIOU: I really do not understand why Mr Beard is
24 getting so worked up.

25 THE CHAIRMAN: No, no, I think we need to tread quite

1 carefully here. First of all, I understand why you are
2 making the point and I think we perhaps need to think
3 quite carefully about how evidence of market practice is
4 adduced in these cases. So I am interested, because it
5 does go to weight, in the steps that the CMA has taken
6 in terms of marshalling its case, the case for the
7 prosecution, as it were, though of course the CMA
8 decided the case as well.

9 That is important.

10 But, I think you need to think very carefully about
11 the extent to which you want to open up, at this stage,
12 how the CMA has conducted its investigations, because
13 I think -- and I am speaking entirely provisionally
14 here, I think that whilst you are entitled to make
15 general points about the difficulty of herding
16 witnesses, who really have no interest in assisting the
17 CMA, which is why the CMA has its compulsory powers, you
18 are perfectly entitled to say that, and I am quite sure
19 that no-one is going to be saying that the CMA is trying
20 to withhold evidence, that it could easily call, from
21 the court. I do not think anyone is going that far.

22 So you can make the general point, but if you are
23 going to be waiving privilege in a specific instance and
24 say: look, Mr Beard made a bad point yesterday, because
25 actually we really tried to get hold of Mr X and Mr X

1 just told us to take a running jump and was really going
2 to be an unwilling witness. Well, I think if you are
3 going to do that, then you are going to have to lift the
4 lid on everything.

5 I anticipate that that is something that,
6 practically speaking, is not going to be possible and
7 might well be undesirable for all kinds of other reasons
8 as well, because the CMA, I think, is entitled to
9 a degree of discretion, by which I mean non-probing by
10 the Tribunal or the other side in how it carries on its
11 affairs.

12 So I think I am going to tell you not to proceed
13 with those submissions, at this stage. But think how
14 you want to and if you want to deploy specific points in
15 response to the matters that Mr Beard made. But if you
16 choose to go down that route, we will have a case
17 management problem in terms of how it is fed into these
18 proceedings and I think you will have a lifting of the
19 lid problem, because I think if you are going to be
20 answering specific points, there will be a huge amount
21 of questions about, for instance, your approach to
22 econometric analysis before the meerkat said you need to
23 have it.

24 So this is a difficult question.

25 MS DEMETRIOU: Sir, may I respond, please?

1 THE CHAIRMAN: Yes. Mr Beard, do not worry, we see your
2 hand up as well.

3 MR BEARD: Understood, I am sorry.

4 MS DEMETRIOU: So, sir, just taking it step by step. The
5 points that Mr Beard made in opening, which were, you
6 will recall, directed in particular to particular
7 witnesses, including the witness who did give evidence
8 in the investigation. These were points which he
9 emphasised, which were not put to the CMA, so they do
10 not appear, as far as I can see, in their pleadings.
11 They are points which have been emphasised for the first
12 time at trial.

13 Now, we are -- and the submission that is being made
14 by ComparetheMarket is that, because the CMA has failed
15 to call Mr X, for example, as a witness, then little
16 weight should be placed. That was the clear submission
17 that was being made. Little weight should be placed on
18 the findings made by the CMA in relation to that
19 particular HIP.

20 Now, I am going to come back to deal with the
21 substance of that, because we say that there is a lot of
22 good contemporaneous evidence in relation to that HIP.
23 But taking the point of principle and taking Mr Beard's
24 submission, he is saying: you did not call Mr X, who
25 gave a witness statement, therefore the Tribunal should

1 give little or no weight to the findings made in
2 relation to that insurer. A new point which they had
3 not made before.

4 Now, the CMA is entitled to defend itself in
5 relation to that point. We will come to the Tesco
6 decision in a minute, because there the Tribunal says
7 that the reason why the CMA has not called a particular
8 witness may be -- is something which obviously can be
9 taken into account. That must be right, because if the
10 CMA has tried to call a witness and they are
11 unavailable, that is something that should be taken into
12 account. We will have a look at that in a minute.

13 So the CMA is entitled to defend itself.

14 Now, I do not accept -- obviously, if we are going
15 to be explaining why we did not call Mr X, then I am
16 waiving privilege to that extent. So we have thought
17 about this, it is not something that I am doing on the
18 hoof. We thought about Mr Beard's submission yesterday
19 and we, the CMA, will waive privilege in relation to the
20 communications with Mr X.

21 Now, sir, I do not agree, with respect, that this
22 entails waiving privilege over other aspects of the
23 investigation or preparation for this trial, because
24 that is not how the case law operates, we say. One is
25 waiving privilege in respect of a particular point. We

1 are not cherrypicking the point. I am responding to
2 a provision. I am not cherry-picking. The approach to
3 econometrics is nothing to do with this issue and if the
4 CMA were not entitled to respond to the submission made
5 by Mr Beard, that no weight should be placed on the
6 evidence from this HIP, because of failure to call
7 a witness. If we were not entitled to respond, I would
8 be defending this appeal with my hands tied behind my
9 back.

10 THE CHAIRMAN: Right, just pausing there. I am not, at the
11 moment, going to accept your waiver of privilege and the
12 reason I am not going to do it is because I want the CMA
13 to be very clear in their understanding of the
14 implications of what they may be doing.

15 I am not, at this moment, saying that if you make
16 this waiver and produce this material, the lid is going
17 to be lifted on everything. What I am saying is, I see
18 it as an outcome that is on the cards.

19 So you may want to think about exactly how we
20 proceed in terms of allowing both sides, and I want to
21 stress it is both sides that are engaged in this, to
22 defend themselves.

23 But speaking for myself now, I frankly do not see
24 how you can say: we have got an answer to Mr Beard's
25 "you did not call this witness" point, because, look, we

1 have tried to bring this witness in. It seems to me,
2 you have got to do that, then, for every witness that
3 you could have called.

4 Now, I am not deciding this, but I am trying to
5 tease out the implications of your waiver.

6 But Mr Beard is saying: look, you have put into
7 place all of this documentary evidence, you are saying
8 to the Tribunal and indeed to ComparetheMarket, "Read
9 this documentary evidence and weep, it makes our case."
10 Mr Beard has made the general point, buttressed by
11 specific examples, that the documentary evidence needs
12 to be seen in context and part of that context is what
13 the witnesses say.

14 So frankly, it is not, I think, going to be an
15 answer to the examples that Mr Beard articulated to deal
16 with those examples. So it seems to me that your waiver
17 will have to be across all of the persons who could
18 speak to these documents and we would need to know just
19 what the CMA did and did not do, in order to get live
20 witnesses into court.

21 Now, that is one area. I am not deciding it, but
22 I am giving you a heads-up as to what might happen.

23 Equally, the point has been made that you should
24 have, just before ComparetheMarket raised the point, you
25 should have gone to town on the econometric evidence.

1 It is a point that Professor Ulph was making earlier.
2 Again, are we to expect that we will have an answer as
3 to why that road was not travelled?

4 MS DEMETRIOU: Sir --

5 THE CHAIRMAN: It is a point different in kind, but I would
6 suggest similar in quality to what was Mr Beard's point
7 regarding the witnesses. Now, I do not want you to
8 respond to this now, because I am not going to make
9 either side commit on this. So, as I say, I am not
10 accepting your waiver at this point, because I do not
11 want the toothpaste to erupt from the tube in
12 circumstances where it cannot be squeezed back. I want
13 you to think about it. I know you have thought about it
14 already, but you will not have thought about it with the
15 warning that I am giving you now.

16 I am not saying that it is going to be carried
17 through, because I am speaking in response to something
18 that has erupted more or less out of nowhere, but I do
19 think you need to factor in the potential implications.
20 We can have an argument about limited waiver and you can
21 show me the case law to show that my approach is, albeit
22 provisional, wrong. That is absolutely fine, but
23 I think we probably do need to have that argument and
24 now is not the time.

25 So both sides need to think about this.

1 I think it is also a point that is related to the
2 question that we raised yesterday about the universe of
3 documents which the CMA is relying upon. You recall the
4 first of the three points I raised at the end of
5 yesterday was: could we have a group of documents?

6 Now, thinking about it overnight, the point I made
7 yesterday, was really we did not want to miss points
8 that either side were making in order to ensure that we
9 take everyone's good points and everyone's bad points
10 into account when we write the judgment. But I am
11 wondering if there is not a more fundamental point,
12 which is tied more closely to the evidence on which the
13 CMA actually relies.

14 I am delving back into my own ancient history here,
15 when I was a baby junior in the Lloyds litigation, we
16 had an interesting situation that we were the claimants
17 but with no witnesses. We were alleging, without any
18 live witnesses at all, just with experts, that the
19 underwriting of certain syndicates had been negligently
20 conducted.

21 The judge on Day 1 of the trial said, "Well, what is
22 your case?" We said, "It is in the documents. There
23 are 50 lever-arch files of documents, that is our case."
24 Nick Phillips erupted in a sort of quiet way and said,
25 "Well, you are not going to get away with that. You are

1 going to have to set out, with specificity, each and
2 every document you rely upon and why you rely upon it
3 and I will give you five days to do it." That is what
4 we did.

5 We produced a schedule which identified each and
6 every document which we relied in support of our case,
7 so that the other side knew. I am not going that far,
8 but I do think that one of the virtues of identifying
9 the documents that you are relying upon, is that it does
10 give everyone clarity as to the case that they have to
11 meet on the facts. I am quite sure that every document
12 will have been referenced and probably referenced many
13 times in the decision.

14 But the more I see of the way the submissions are
15 going in this case, the more I think that we need to
16 have an evidential baseline, which constitutes the CMA's
17 case and the documents which go to rebutting it.

18 Now, I think that is part and parcel of the debate
19 we are having now, about what additional material in the
20 shape of witness evidence ought to be adduced, should
21 have been adduced, in light of that documentary
22 material. But one cannot determine that without an idea
23 of what exactly the documents are that you are relying
24 on.

25 MS DEMETRIOU: Sir, in relation to that --

1 MR BEARD: Just before Ms Demetriou comes back, because
2 I understand she wants to respond, I am sure. But
3 I just want to be clear. It is not only the substance
4 issues on this supposed waiver of privilege that give
5 rise to significant concerns. There is a timing issue
6 and a fairness issue, what, I think, sir, you were
7 adverting to, by referring to case management matters.

8 Because, just to be clear, throughout this process,
9 going back to the interactions that ComparetheMarket had
10 with the CMA, prior to the SO, after the SO, in relation
11 to the letter of facts and the second letter of facts,
12 it was throughout saying: the documentary material you
13 have got from these insurers and also from the PCWs does
14 not make out your case. You will see that from all the
15 documents.

16 What I have added is reference to authority in
17 relation to these matters.

18 Now, that does not change the nature of the case
19 that we have been putting forward at all in relation to
20 this. We have been saying: you have not got a good
21 basis for treating these documents as clear. In those
22 circumstances, when I go back and refer to authorities
23 that go back a decade talking about what the obligations
24 of the OFT and CMA are, in relation to -- ambiguities in
25 relation to documentary material and section 26, that is

1 not in any way a new case.

2 There is nothing ambiguous about the position we
3 have been adopting. We have been saying: your material
4 is not sound. What we have explained in the authorities
5 is simply what that analysis means in terms of previous
6 case law about how you overcome those difficulties and
7 how the burden of proof works.

8 If the CMA is going to say, we have not previously
9 raised the burden of proof, I will provide all the
10 references in relation to that, I do not see that that
11 is the position.

12 So it is a case management issue as well, that if
13 there were to be waivers of privilege, whether the
14 cherry-picked versions or a broader version, and we say
15 it would have to be broader, there is a practical
16 problem here of how we then go away and deal with these
17 matters. Because it is not for Ms Demetriou to give
18 evidence about these things.

19 THE CHAIRMAN: No. Ms Demetriou, you will be allowed to
20 come back on this, but I just want to respond in part to
21 what Mr Beard has said, so that you can deal fully with
22 the point that I think is being made.

23 The cover pricing cases say what they say. I think
24 it is important to understand though that the documents
25 in that case were of a very peculiarly specific sort.

1 So the case that I dealt with, there was a particular
2 point about a ringed round figure, where someone, not
3 the person who had authored the document, but someone
4 was saying the significance of this ringing round
5 entails particularly naughty behaviour and the fact was
6 the document was ambiguous.

7 MR BEARD: Yes.

8 THE CHAIRMAN: You could see the point about the ringing
9 round. What you needed was someone to speak to the
10 document and to have questions put, so that you could
11 work out what it meant. What we said in that case was:
12 we see your point, but we can see 16 other points as to
13 how this particular document could be construed and you
14 are just not going to get home on it.

15 Now, I think that these documents, the ones that the
16 CMA are relying on here, are somewhat different in
17 quality. One does not have that sort of debate about
18 what was meant, but one does have questions which go to
19 weight, which I am not going to come close to addressing
20 now, because we have to decide this in due course after
21 we hear all the evidence, where Mr Beard is making the
22 point that he needs something more than the mere
23 document.

24 He may be right about that, he may be wrong about
25 that. We will look at the documents in the round. We

1 are certainly not going to refuse to admit them. We
2 will look at them and we will assess them for what they
3 are worth.

4 But I do think that Mr Beard is entitled to make the
5 point that who knows what might have been said if the
6 author of the document was called.

7 Now, we do not know. So we do get back to the case
8 I articulated yesterday, which is in Wisniewski v
9 Central Manchester Health Authority, about what
10 inferences one can draw, regarding the evidence not
11 called, when it might have been called.

12 That is, at the end of the day, where we end up.

13 MS DEMETRIOU: Sir, yes, sorry --

14 THE CHAIRMAN: Now, the question is: what do we do about
15 this at the moment? I have already given an indication
16 that we are not going to be going down the route that
17 the CMA is anything other than a public body, that is
18 entitled to the full benefit of our assumption that they
19 are acting in the public good and trying to do these
20 things in the public interest, and that an investigation
21 and decision like this is conducted carefully and
22 responsibly. That is something which we are prepared to
23 accept.

24 But I do not think that can close out the particular
25 points on weight that Mr Beard is making. He is not

1 making a criticism beyond saying: you have chosen not to
2 call a particular witness -- he may have perfectly good
3 reasons for not calling it. That is, in a sense,
4 relevant, but it does not diminish Mr Beard's point. We
5 are not going to be keen, at this stage, to go down
6 a minute evaluation of the assessment of who you could
7 and who you could not have called.

8 So we are not going to be saying you are culpable in
9 not calling these people, but I think we are going to be
10 saying, if and to the extent that we formulate an issue
11 or question, where we would have liked to have known the
12 answer, it is going to affect the weight that we can
13 attach to the written document.

14 MS DEMETRIOU: Sir, yes.

15 THE CHAIRMAN: That is very much a provisional sense and it
16 may be that I am going to have to articulate how we are
17 going to approach the evidence, before we actually hand
18 down a final judgment. I will think about whether that
19 is necessary, so that both sides know where we are
20 coming from.

21 I have not spoken either to Professor Ulph or
22 Ms Lucas about this, so it is me riding solo on this,
23 but that is how I see it at the moment.

24 MS DEMETRIOU: Sir, I do not demur from any of that. So, of
25 course, the Tribunal will have to look at the

1 documentary evidence and will have to decide what weight
2 to place on it. Of course, you are completely right and
3 I accept that if the Tribunal takes the view on
4 a particular document or in relation to a particular
5 category of evidence, that it calls for explanation,
6 then in those circumstances, the Tribunal would be
7 entitled to place weight on the fact that there is no
8 witness being cross-examined in relation to those
9 documents. So I do not demur from that at all.

10 I just make two points. The first is, I think,
11 completely consistent with what you have just said, sir,
12 which is that it all depends on the context. So if
13 there are documents which speak clearly for themselves,
14 in those circumstances, the Tribunal is likely to place
15 less weight on the fact that there is not a witness
16 speaking to them than in circumstances where a document
17 is ambiguous or calls for explanation.

18 So that is really a point as to a degree of weight
19 and we say it is all factual, it is all fact specific
20 and that must be right.

21 The second point to make is that, of course, there
22 are lots of documents, in this case, from BGL, from
23 ComparetheMarket, which the CMA say can be taken to mean
24 factual conclusions have been drawn by the CMA from what
25 those documents say. We do make the point that in

1 circumstances where ComparetheMarket wished to say that
2 the documents meant something else, they could have
3 adduced their own witness.

4 Now, of course, in lots of regulatory appeals, the
5 appellant does adduce factual evidence from the business
6 to rebut factual findings made by the CMA.

7 So those are really the two points that I make in
8 response.

9 In relation to privilege, I have heard everything
10 that you have said and we will take that away with us
11 and I will come back and give you our response in
12 relation to the points I was making in relation to the
13 two witnesses.

14 THE CHAIRMAN: I think that will be helpful. I mean, what
15 is informing my warning shot to you is, first of all,
16 I am not sure, at this stage, how useful that material
17 is actually going to be.

18 Secondly, if it is useful, then that I think rather
19 indicates that there is going to be an expansion of the
20 work that needs to be done in terms of waiver.

21 Then, thirdly, if that is right, there is what are
22 called the case management, but it is actually pretty
23 fundamental case management questions of how one deals
24 with such matters in the context of a hearing, where we
25 are now on Day 3.

1 MS DEMETRIOU: Sir, I take all of that on board and we will
2 take it away with us and I will come back with
3 a response having heard what you have said.

4 Could I just, before leaving these points, show
5 you -- because I think they are consistent,
6 unsurprisingly, with the observations you have been
7 making, but can I just show you Tesco and also Flynn in
8 the Tribunal, just because they are relevant to the
9 debate that we have just been having.

10 THE CHAIRMAN: Yes, of course.

11 MS DEMETRIOU: So Tescos at {G/116/49}. Again, I am just
12 showing you these, sir, and members of the Tribunal, for
13 completeness, given the debate we have just been having.

14 You see at paragraph 115, Tesco has been extremely
15 critical of the OFT's approach to witness evidence:

16 "In argument, Counsel for Tesco laid considerable
17 emphasis on the OFT's failure to interview witnesses
18 during its investigation or indeed to call witnesses for
19 this appeal. This failure, it was said, could not be
20 justified and substantially undermined the OFT's case.
21 The Tribunal should, argued Tesco, (a) decline to draw
22 inferences in favour of the OFT's case and (b) should
23 draw adverse inferences from the OFT's failure to call
24 certain witnesses."

25 Then we see, if we look at paragraph 116:

1 "The importance of the issues raised by Tesco calls
2 for a return to first principles and the restatement of
3 some familiar but, fundamental, propositions. First,
4 the evidence on which the OFT wishes to rely in support
5 of an alleged infringement of the 1998 Act is a matter
6 for it during the administrative stage. Of course, the
7 OFT must act fairly. The OFT must also put to the
8 parties the evidence on which it relies to establish the
9 infringement alleged. There is no rule of law, however,
10 that, in order to establish a Chapter I infringement,
11 the OFT has to rely on written or oral witness
12 evidence~..." {G/116/50}.

13 There is then a discussion, which has moved on in
14 the sense that the Tribunal is looking at the OFT's then
15 powers of investigation, which have --

16 MR BEARD: Sorry, it is written and oral evidence, just for
17 the transcript, not witness and oral evidence.

18 MS DEMETRIOU: Sorry. My copy is so small on the screen and
19 my eyesight is obviously getting worse with age. I am
20 very grateful.

21 MR BEARD: I am sorry, Ms Demetriou, I did not mean to
22 suggest that you had intentionally misread it. I hope
23 you understand, it is just correcting it for the
24 transcript as we go along.

25 MS DEMETRIOU: No, I am grateful for the intervention, thank

1 you very much.

2 THE CHAIRMAN: That is helpful. Can I make one point on
3 transcripts. First of all, I know that they are cleaned
4 up at the end of the day anyway. But it is obviously
5 very helpful for the more egregious errors to be pointed
6 out, just so that we have a belts and braces approach.

7 But just to make clear my approach on transcripts.
8 When they are used and quoted by us, in the course of
9 the judgment, we take a somewhat stern editorial
10 approach to the transcripts on the basis that we will
11 revise them to fit what we think was said, rather than
12 what is transcribed. Usually that is a matter of
13 complete clarity.

14 If there were to come a point where we were
15 genuinely in doubt as to what was said, and it mattered,
16 then we would, of course, come back to the parties. But
17 you can certainly take it that we regard the transcript
18 as an extremely helpful tool, beautifully put together
19 by the hard working transcribers, but the last word on
20 what was said will be ours rather than theirs.

21 Just so that I could put to bed any worries about
22 mistranscription. But, Mr Beard, please do carry on
23 correcting mine and Ms Demetriou's errors, because it is
24 very helpful.

25 MS DEMETRIOU: Thank you. Can I just check if Mr Beard's

1 hand is --

2 MR BEARD: I didn't mean to have my hand up. No, no,
3 absolutely not.

4 MS DEMETRIOU: Okay. Thank you. So I was saying that
5 paragraphs 117 onwards are dealing with the then powers
6 of investigation, which have since been beefed up. So
7 those points are not directly pertinent.

8 But if we can move on to page 51, to paragraph 120
9 {G/116/51}:

10 "We do not think that the OFT could be fairly
11 criticised if it had asked an individual to attend an
12 interview, the individual in question had refused to
13 co-operate and the OFT had decided to rely on other
14 evidence available to it in order to prove its case. We
15 would expect any responsible public body at least to ask
16 itself whether there are witnesses who might be able to
17 provide evidence of a material fact or shed light on an
18 alleged infringement."

19 This goes to what they should be doing during the
20 investigation:

21 "By declining to contact relevant individuals to
22 ascertain whether they would be willing to co-operate,
23 there is a risk that a public body forgoes potentially
24 promising lines of inquiry."

25 I show you that, sir, because it is completely

1 consistent with what you put to me earlier, which is if
2 the CMA decides in an investigation not to contact
3 a particular category of individual, then it needs to
4 explain why it has not done that. We say here, where it
5 did not contact some of the HIPs, it has indeed
6 explained that in the decision.

7 Then we see at 121 to 122:

8 "The fourth point, closely linked to the third, is
9 that the OFT's failure to call witnesses runs a risk
10 that, on an appeal, the Tribunal may ultimately conclude
11 that the OFT has failed to prove the alleged
12 infringement."

13 Again, that is consistent with the point that you
14 put to me, sir, which is why I am showing it to you,
15 that it is relevant and it is something that may be
16 relevant and it is something which may go to weight:

17 "If the OFT chooses to base its case on what turns
18 out to be incomplete, inconclusive or inconsistent
19 documentary evidence, then that evidence may not be
20 sufficiently strong to satisfy the Tribunal on the
21 balance of probabilities, that an infringement has
22 occurred ... We note that, even where the OFT does
23 choose to rely on witness evidence, that is of course no
24 guarantee of success before this Tribunal."

25 So, of course, that is correct and we accept that;

1 that the question for the Tribunal is: has the evidence
2 that the CMA has relied on, is that sufficient in all
3 the circumstances? If the Tribunal considers that the
4 evidence is not sufficient, and that it should have been
5 supplemented by calling oral evidence, or additional
6 oral evidence, I should say, then that is something of
7 course it can take into account, which is the point you
8 put to me, sir, which is why I am showing you this.

9 Then we see:

10 "Tesco invited us to modify our approach to, and
11 assessment of, the available evidence simply because the
12 OFT had chosen not to rely on witness evidence. That is
13 a proposition that seems to us to go too far. It is not
14 the task of this Tribunal to speculate as to why the OFT
15 did not interview particular witnesses, still less do we
16 consider it appropriate to refrain from drawing
17 inferences that seem appropriate to us on the basis of
18 the evidence presented."

19 So I do draw attention to those words. So if
20 the Tribunal thinks the CMA is correct to have drawn
21 inferences, factual inferences from the documents, then
22 it is going too far to say we should not draw those
23 inferences, because witnesses were not called:

24 "Ultimately, the Tribunal must consider the merits
25 of the decision in the light of all the direct and

1 circumstantial evidence placed before it."

2 So again, we respectfully endorse that. You will
3 see from page 55 {G/116/55}, paragraph 129, that in this
4 case -- perhaps we can go to that, page 55. You see
5 that:

6 "Counsel for Tesco submitted that the Tribunal
7 should draw adverse inferences from the OFT's decision
8 not to call witnesses (which Tesco termed a 'failure')
9 if there was no good reason for the decision. Tesco's
10 case was that the OFT should have called witnesses to
11 give evidence on key issues of disputed fact; by not
12 doing so it deprived Tesco of the chance to test parts
13 of the OFT's case in cross-examination."

14 So a similar submission. You see on the facts of
15 this case, of that case, and again, everything is
16 case-specific, I acknowledge that, we see paragraph 136
17 {G/116/5}.

18 THE CHAIRMAN: 130, just pausing there, is setting out the
19 case that I have mentioned three times already, but it
20 is good to see it there.

21 MS DEMETRIOU: Sir, thank you {G/116/5}:

22 "Applying the principles [in that case] in
23 Wisniewski ... the Tribunal is satisfied ..."

24 So that is the upshot of applying those principles
25 in this case:

1 "... the Tribunal is satisfied that a credible
2 explanation has been given for witnesses' absence,
3 namely the OFT's position is that its case stands or
4 falls on the documents. The explanation may not be
5 wholly satisfactory because it might mean that the
6 Tribunal cannot resolve certain issues of fact. Indeed,
7 Tesco argued that a number of the documents relied upon
8 by the OFT were far from clear and noted that
9 explanations had not been available because of the OFT's
10 decision not to gather evidence from the authors and/or
11 recipients of the documents. We shall address that
12 argument in the factual context in which it arises. As
13 noted above, in light of the OFT's decision not to seek
14 witness evidence, any doubt in the mind of the Tribunal
15 as to the content or meaning of documents relied on by
16 the OFT must operate to the advantage of Tesco, as the
17 undertaking alleged to have infringed the Chapter I
18 prohibition. We do also bear in mind, however, the
19 OFT's observation that evidence in cases of this sort
20 may often be fragmentary in nature." {G/116/58}.

21 So again, sir, all of this is consistent -- and that
22 is why I am showing it to you, consistent with the
23 points that you have been putting, including the
24 Wisniewski case. What the Tribunal did here was decline
25 to draw adverse inferences, looked at all the documents

1 on their merits. You saw the point at paragraph 122.
2 If the Tribunal agrees with the inference drawn by the
3 regulator, by the CMA, in respect of a particular
4 document, you do not then go on to say: well, we are not
5 going to make the -- we are not going to accept the
6 inference that the CMA made simply because no witness
7 has been drawn.

8 So that is the case that was rejected by
9 the Tribunal and we agree.

10 Sir, just before we leave this issue, can I just go
11 back to the Flynn judgment in the Tribunal, because this
12 relates to section 26 responses.

13 THE CHAIRMAN: Yes.

14 MS DEMETRIOU: Mr Beard took you to some of this, but I want
15 to show it to you again {G/128/32}, and paragraphs
16 84-85. You see Mr Hoskin's submission for the CMA
17 there, it is a question of weight and you can see --
18 I am not going to read it, you have seen that already,
19 but essentially, that submission was accepted at
20 paragraph 85.

21 Then we see -- so that is an important point, we say
22 that is the right approach to section 26 [break in
23 audio], a matter for you to decide what weight they
24 have, look at them on their own merits, look at the
25 surrounding evidence to see to what extent they have

1 been corroborated.

2 Then you see, at 85, that submission is accepted.

3 Then, at 86, whether adverse inferences should be drawn:

4 "Finally, we note that Pfizer and Flynn each
5 submitted that the Tribunal was entitled to draw adverse
6 inferences from the CMA's failure to call witnesses, in
7 particular from pharmacies and the [department of
8 health]. Each cited the judgment of the Supreme Court
9 in Prest~..."

10 Then if we go on to paragraph 87, on the next page,
11 page 33 {G/128/33}:

12 "We do not think that this is an appropriate case in
13 which to draw such an adverse inference.

14 Notwithstanding the observations we have already made in
15 relation to the DH, the evidence on which the CMA wishes
16 to rely, whether at the administrative stage or on
17 appeal, is a matter for it. It is not for us to
18 speculate as to why the CMA did not call factual
19 witnesses. A failure to call witnesses or otherwise to
20 base its case on what may transpire to be incomplete
21 evidence could expose the CMA to the risk that it will
22 fail to convince the Tribunal that it has proven the
23 alleged infringements. In this case the CMA has chosen
24 to rely on Section 26 Responses, including those from
25 the DH and other documentary evidence in support of its

1 case and we will determine the appropriate weight to be
2 afforded to the specific evidence."

3 So again, we say that is consistent with the debate
4 that we have been having. So I just wanted to show you
5 that for completeness, because we do say that is the
6 right approach.

7 In this case, the CMA has rested its case on the
8 documentary evidence and on the oral evidence it is
9 calling from Ms Glasgow, and has adduced its own
10 economic evidence to support and to explain why it has
11 not conducted econometric evidence in this case. You
12 will hear all of that evidence. That is the basis on
13 which the CMA is defending the decision and opposing
14 this appeal.

15 The Tribunal will look at the documentary evidence.
16 I am going to show you portions of it very shortly and
17 will reach its view as to weight. The point that we
18 make is that if you agree with the inferences drawn by
19 the CMA from the evidence, then there is not -- you do
20 not then disregard those inferences or say that they
21 cannot be made, simply because oral evidence has not
22 been called. Those points are made firmly in these
23 cases and we say they are important points.

24 So, sir, that has taken a bit longer than I had
25 anticipated. I hope it has been of some assistance.

1 I wonder if this is a good time for a break.

2 THE CHAIRMAN: No, thank you. For my part, I think it has
3 been very helpful to have the battle lines articulated.

4 I have got three things before we rise. First of
5 all, I know that you are going to be producing the
6 schedule of documents, as it were, that you rely upon.
7 The documentary record, as it were. I am going to
8 formalise that into a direction. The reason I am going
9 to do that is because I think it is important that
10 everyone knows what the CMA's case is and what we are
11 evaluating and what Mr Beard is responding to.

12 So I am not particularly fussed about a time, but
13 you will have to produce what the CMA says is its
14 documentary case. A list of documents in chronological
15 order and by reference to person and I want that
16 schedule to be backed up by a folder of the documents
17 themselves. Those documents shall not be redacted for
18 confidentiality. We will keep it under wraps as
19 something only for the Tribunal for the moment, but I do
20 not want any highlighting or anything like that to
21 identify confidentiality.

22 What I do want highlighted are the passages in those
23 documents that the CMA relies upon, so that we can zone
24 in on exactly what the CMA says its case is.

25 I am making that a direction, because I want there

1 to be no later debate about what is and what is not the
2 CMA's case. It seems to me that is important for the
3 protection of everyone in this hearing.

4 MS DEMETRIOU: Sir, may I just make one observation about
5 your directions?

6 THE CHAIRMAN: Yes, of course.

7 MS DEMETRIOU: Yesterday, the way that you put it was that
8 we should provide the documents both chronologically and
9 by HIP.

10 THE CHAIRMAN: Yes.

11 MS DEMETRIOU: I am a little concerned that if what you are
12 asking for goes beyond a reorganisation of the
13 documents, because the documents are all in the
14 bundle -- but I do understand the utility of what you
15 have asked for in terms of a reorganisation of those
16 documents and highlighting the parts in particular that
17 the CMA would wish the Tribunal to read.

18 But if what you are asking for goes beyond that,
19 I am a little bit concerned in the sense that we are, of
20 course, defending the decision and not some other
21 factual basis for the decision.

22 So I do not want it to be said that -- because, of
23 course, it is very important that we do not change the
24 factual basis for the finding of infringement during the
25 course of the appeal. I am very conscious of the fact

1 that the case law states that the CMA is defending its
2 decision and, of course, can respond to points made by
3 the appellant, but should not be changing the
4 fundamental basis for its case.

5 Of course, we do say that the basis for the finding
6 of infringement is all in the decision.

7 THE CHAIRMAN: I am not doubting that at all. To be clear,
8 and this will come to be articulated in my second
9 direction, which I will be coming to in a moment, I am
10 obviously not expecting you to go outside the parameters
11 of the decision and if you were to do so, then I think
12 you would get pretty significant pushback from Mr Beard.
13 So I am sure you will not be doing that.

14 So, yes, there is no reinventing of the decision.

15 All I want clear is a baseline, so that if, at some
16 later point, we look at a document and say: hello, that
17 looks interesting, we will check and if it is in your
18 schedule or in your folder of documents, we will deal
19 with it. If it is not, we will not be and we will not
20 be criticised for it, because we will have the cover of
21 this direction.

22 It is very much giving Mr Beard a target to tilt at
23 and it is giving us the confidence that we know what we
24 need to look at for the CMA's defence of the decision
25 that it has reached.

1 MS DEMETRIOU: I understand, sir. I had mistakenly thought
2 that what you were asking for was a narrative of the
3 documents, but I can see that you are not.

4 THE CHAIRMAN: Absolutely not. The narrative, you may want
5 to produce that for your closings and, of course, you
6 can do that. No, I want a schedule which just lists the
7 documents, so we know what they are, and then the
8 documents themselves, so that we can look at them. But
9 I do not want any analysis or supplementation beyond the
10 physical documentary evidence and what it is.

11 MS DEMETRIOU: Could I just ask: would it be most helpful,
12 so, for example, where there is a response to
13 a section 26 request and only part of it is -- part that
14 the CMA is relying on, would you like the whole document
15 or would it be easier just to have the relevant page?

16 THE CHAIRMAN: I suspect it would be easier to have the
17 relevant page, provided the context can be seen. That
18 is why the list of documents is so important, so that
19 when you put in just a page, we know what it is we are
20 looking at. I know you will exercise your judgment. If
21 it is a three-page document and you think we ought to
22 see all three pages, even though pages 1 and 3 do not
23 really add very much, well, put it in. If it is
24 a 400-page document and you are referring to page 52,
25 you obviously do not put it in and there will be a whole

1 range of things in between.

2 Mr Beard, I had envisaged it to be a joint document.
3 I do not think it should be now. This direction is made
4 to the CMA. You will, of course, have liberty, it is
5 not a direction, but liberty to put in your own bundle,
6 which provides, as it were, the context for the
7 materials on which the CMA relies.

8 Again, it is going to be confined to the universe of
9 documents that are in the record now. We are talking
10 about a tidying up process, not a reinvention of the
11 wheel process. But you are obviously entitled to say:
12 well, frankly, the CMA should have put in the following
13 extra pages, because they are relevant to understanding
14 that which the CMA is saying.

15 Let me be clear, I will not want a narrative as to
16 why we should be placing little weight on what the CMA
17 says. That will come in your closing submissions and
18 not in the response to this schedule. So I am just
19 interested in the documents, that is it.

20 Next direction. Whilst I think the CMA is entitled
21 to waive privilege, if it wishes to, I think in reality
22 the application that you are making is an application to
23 adduce new evidence and I think that is how we should
24 see it.

25 I am not inviting the application, I think I have

1 probably done the reverse, but if the CMA wishes to make
2 it, then I think it should be a formal application to
3 admit evidence and a corollary of that is a waiver of
4 privilege, if the documents are privileged. But I think
5 it is important that everyone understand what the CMA is
6 doing by this application if it is made.

7 So I think it is appropriately characterised as an
8 application to adduce new evidence. That is what I am
9 going to call it and I think it will need to be made
10 with a degree of formality, because I think Mr Beard
11 will have something to say about the application.

12 Whether he is resisting it or whether he is saying
13 it can only be granted on certain conditions, who knows?
14 But I think we need to see the colour of the CMA's money
15 in terms of what it wants to do.

16 So those are two directions that I am making.

17 The third point is simply timing. We have had
18 a very productive morning, but I anticipate you have
19 been taken somewhat out of your planned route through
20 the submissions you wanted to make. Do you need us to
21 sit longer to enable you to have a little bit more time?

22 MS DEMETRIOU: Sir, that is very kind. Can I take stock at
23 lunchtime and see how much progress I have made then?

24 THE CHAIRMAN: Of course, absolutely. I think we can
25 probably find you some more time today. I do not think

1 we want to push you into tomorrow, because that disrupts
2 the timetable for tomorrow. But you absolutely need to
3 have the time you need, to make the points you want to
4 make. It is no criticism of anybody, but the Tribunal
5 has been a little bit more interventionist this morning
6 than it was during Mr Beard's submissions and that is
7 one of those things. There we are.

8 We will rise for ten minutes, because it is -- I am
9 sorry, Mr Beard.

10 MR BEARD: Back on mundanities. Just in relation to the
11 directions.

12 THE CHAIRMAN: Yes.

13 MR BEARD: I think it might be useful, I am not trying to
14 put undue pressure on the CMA, but we do need to have
15 a sense of when this schedule is going to be provided,
16 because we need it sufficiently in advance of closing.

17 I am not going to make a point about the fact that
18 it would have been better before we get into
19 cross-examination, because I think that ship has sailed.
20 But I think if we are going to have this, we not only
21 need the CMA's approach, but we need it in sufficient
22 time that we are not spending our time during our
23 closing preparation trying to factor in new documents.

24 So that is just something that I think needs to be
25 factored into how you structure the direction perhaps.

1 THE CHAIRMAN: I understand. I have quite deliberately not
2 given a date.

3 MR BEARD: Okay.

4 THE CHAIRMAN: But I know Ms Demetriou will take away what
5 I have directed and add it to the consideration that her
6 team will be making about what can be done by when.

7 I am not going to press you now, Ms Demetriou, but,
8 of course, Mr Beard makes an entirely fair and proper
9 point, but I anticipate that is something you are
10 already carefully considering.

11 MS DEMETRIOU: Sir, yes. But can I just be absolutely clear
12 to offer Mr Beard some reassurance, we are not going to
13 be producing any new documents at all. These are all
14 documents that are referred to in the decision, so there
15 is no question of taking Mr Beard by surprise or having
16 had to have produced this in advance. It is really
17 a reorganisation of the documents already in the bundle
18 and referred to in the decision.

19 MR BEARD: I completely understand, and therefore, I am not
20 trying to make any fuss about it. The point is, if you
21 are going to be specifying what you are relying on more
22 clearly, that is relevant for the way that we will
23 structure our closing and I want to be able to take that
24 into account when we are preparing closing. It would be
25 unfortunate if this came at a point where we cannot

1 really factor it into closing and we are spending time
2 dealing with materials you are not going to be
3 specifying. It really is as simple as that. That is
4 the only reason I raise the timing point.

5 MS DEMETRIOU: That is fine. Can I ask a supplementary
6 question? Just in order that we implement the direction
7 in a way that is as helpful as possible to the Tribunal,
8 because you will have seen that in the decision, the CMA
9 analyses all of the relevant evidence and where,
10 for example, there is evidence which is inconsistent, it
11 takes that into account and explains its view of it.

12 Now, do you want us to include those documents as
13 well? I anticipate that Mr Beard would want to add
14 them.

15 THE CHAIRMAN: Well, I think that it behoves the CMA to, as
16 it has done in the decision, take the burden with the
17 benefit. In other words, it is largely pointless for
18 you to put in something which is out of context, so
19 I think you should include the context.

20 Again, we are talking about only documents that are
21 in the record as it stands now. If you want to bring in
22 something else, then by all means make an application,
23 but I think you should attempt to make Mr Beard's job as
24 limited as possible in that you will want to show,
25 because it goes to weight, the evidence in a complete

1 way.

2 Really, what I am trying to do is I am providing
3 Mr Beard with a safety valve to which he is entitled to
4 say: well, this is a point which you do not regard as
5 significant, but we do, you need to see this as well.

6 MS DEMETRIOU: Very well, sir, I understand. The reality of
7 this is that these documents are all in the F bundle on
8 the system, and so the documents that are relevant and
9 taken into account, so it will be essentially
10 a reorganisation of that material, both chronologically
11 and by HIP.

12 THE CHAIRMAN: One moment, let me just get the -- well, I
13 mean, I suppose the question is simply this: if you are
14 telling us that we need to read tabs 1 through 712, and
15 that is the case, well, we will do it. But I think your
16 case is a little bit more focused than that and it is
17 that distillation, if it is such, that we are looking
18 at.

19 But you will obviously have to take your own course.
20 We have done a lot of reading, but we have not, I think,
21 strayed very far into bundle F and obviously you are
22 going to be taking us to some points.

23 But the basis for my direction is that I want set
24 very clearly in a direction, a baseline, so that we can
25 say, this is the CMA's documentary case. There are

1 other parts to its case as well, but when it comes to
2 the documents, this is the CMA's case. So that you
3 cannot say, we did not take it into account, and
4 Mr Beard cannot say: I do not know what the case was.

5 Now, Mr Beard may be streets ahead of me and knows
6 exactly what in bundle F matters and does not, but I do
7 not know what matters and does not and I think we need
8 to.

9 MS DEMETRIOU: Sir, very well. I think the fact is that all
10 of the documents in bundle F are relevant and are
11 referenced in the decision. They are relevant, because
12 the CMA places weight on them or they are contextual
13 documents which Mr Beard would want to rely on. Now,
14 not every part of every document is relevant, which is
15 why I made the point about shortening the documents.

16 THE CHAIRMAN: Yes.

17 MS DEMETRIOU: But as far as we are concerned, I would not
18 feel comfortable. They are all documents which have
19 been referred to in the decision and relied on.
20 Obviously, some are more compelling than others, but
21 I would not want to be in a position where we are
22 saying, well, we are not relying on these 50, because
23 they are all relied on in the decision. That is why
24 they have been produced in the F bundle.

25 Now, what we can do to make the Tribunal's work,

1 I hope, a little easier is reorder the documents and
2 strip out those bits of them, which are just not
3 relevant, so you have a shorter bundle. We can do that
4 chronologically and we can also do it by HIP. But I am
5 not anticipating leaving out in their entirety, any of
6 these documents, because they were referred to by the
7 CMA in their decision and they are all relevant in one
8 respect or another.

9 MR BEARD: Can I make a brief suggestion? If that is the
10 plan on the part of the CMA, might it actually be easier
11 if they do the reorganisation and simply highlight
12 rather than actually trying to take pages out of
13 electronic bundles?

14 THE CHAIRMAN: Maybe the answer is that we simply go through
15 and highlight in a particular colour, the F documents
16 that you rely upon, and find some way of electronically
17 ordering them chronologically and by person, so that we
18 can simply jump from highlighted point to highlighted
19 point.

20 What I am anxious to create in this situation is an
21 electronic version of a post-it note, so that you can
22 flag up the bits that we need to look at. Because at
23 the moment, I mean, I have no idea what the volume of
24 these documents are, but we are talking about 712 tabs.
25 Now, even if each tab is a single document, that is two

1 lever-arch files. Since I anticipate some are more than
2 one-page long, we are talking probably five, six
3 lever-arch files, if we can move to the old money. We
4 are, I think, all of us, entitled to know exactly what
5 we are tilting at.

6 MS DEMETRIOU: Sir, may I take advantage, please, of the
7 short break we are going to have for the transcribers?
8 Just to take instructions from the CMA as to what they
9 think would be the most useful approach for
10 the Tribunal. Would that be acceptable?

11 THE CHAIRMAN: That would certainly be acceptable. To be
12 clear, this is something which the CMA, I think, has the
13 right to a significant discretion in how it wants to put
14 its case. This is your case. All I am trying to do is
15 ensure that we can give, as a Tribunal, due weight to
16 it. I think with all the best will in the world, simply
17 having bundle F sitting there like this runs the risk
18 that we are going to miss points that the CMA sees as of
19 significance. That is really all we are getting at. So
20 it is the best way of achieving that.

21 MS DEMETRIOU: I am very grateful and so long as it is
22 understood that we have some flexibility in how we
23 present it, but having heard of course everything you
24 have said, then we will take that away with us and do it
25 as expeditiously as we can.

1 THE CHAIRMAN: Absolutely. Yes, to underline, you have the
2 helm in this, so we are willing to give you a great deal
3 of flexibility. At the end of the day, we will tell you
4 if it is useful or not, but I think you know now what it
5 is that we are looking to you to produce.

6 But at the end of the day, this is your
7 justification of your decision and therefore the
8 justification must be framed as you would wish to make
9 it.

10 Let me be clear, if you say, we can only understand
11 the facts of this case by reading every one of these
12 documents, we will read every one of these documents.
13 That is understood. But I just do not think that is
14 quite what you are requiring us to do.

15 MS DEMETRIOU: No, I understand, sir, thank you very much.

16 MR BEARD: Before we rise, apparently that bundle runs to
17 36,000 pages, so there may be a degree of be careful
18 what you wish for.

19 THE CHAIRMAN: 36,000 pages, how many lever-arch files is
20 that? Can we divide that by 300?

21 MR BEARD: Divided by 3 -- 36,000, is 12, is it not?

22 THE CHAIRMAN: Is it only 12?

23 MR BEARD: Not 120? No, it is 120. I am sorry, I am an
24 order of magnitude out.

25 THE CHAIRMAN: You are an order of magnitude out.

1 It is 120 lever-arch files. I do not think we
2 really want to read 120 lever-arch files.

3 MR BEARD: I am sure that is something all members of the
4 Tribunal and no doubt counsel agree, so that may be
5 a good point at which to rise.

6 THE CHAIRMAN: Ms Demetriou, as ever, I am very grateful to
7 you. It is 12.20, we will resume at 12.30.

8 (12.20 pm)

9 (A short break)

10 (12.31 pm)

11 THE CHAIRMAN: We are live. Over to you.

12 MS DEMETRIOU: Thank you very much. For the remainder of my
13 oral opening submissions, I want to take the Tribunal to
14 the decision, please, to highlight particular points in
15 the decision and take you to some of the underlying
16 documents in the F bundle.

17 Could we start with {A/1/10}, paragraph 1.2. I know
18 the Tribunal knows this, but I want to show you some
19 basic points and basic parameters in terms of the
20 decision. So paragraph 1.2 {A/1/10} sets out the
21 relevant period, so the relevant period relates
22 to December 2015 to December 2017, 1 December in each
23 case.

24 We see, if we could turn to page 49, please
25 {A/1/49}, paragraph 2.63, that three of the big four

1 price comparison websites, so GoCompare, Confused, as
2 well as ComparetheMarket, historically had wide MFNs in
3 their agreements at least for private motor insurance
4 and home insurance sectors. We see from that paragraph
5 when they started using them. So you have that there.

6 Then at paragraph 2.65, on page 50 {A/1/50}, you
7 see, as I said, at the outset yesterday of my opening
8 submissions, that Confused and GoCompare removed their
9 wide MFNs, in December 2012 and March 2015 respectively,
10 once the writing was on the wall as regards motor
11 insurance. But ComparetheMarket did not do this, of
12 course, until this investigation had commenced and it
13 then removed them on 1 December 2017.

14 You can see from paragraph 2.66 that therefore wide
15 MFNs had been a feature of the market for almost
16 a decade before the relevant period.

17 Then moving forward, please, or rather moving back
18 to page 35 {A/1/35}, paragraphs 2.22 to 2.23, I am not
19 going to read these out, but they explain how PCWs
20 operate. I am sure, by this stage, the Tribunal has
21 seen and read these paragraphs. But really the key
22 point being that the insurer sets the price and sells
23 the policy, which is marketed on the price comparison
24 website, but the insurer sets the price and makes the
25 sale and the insurers pay the PCW a commission fee in

1 return.

2 Then we see at 2.24, over the page, page 36
3 {A/1/36}, the big four PCWs in the UK operating in home
4 insurance. You have seen them referred to in the
5 decision.

6 Moving on, this is all background contextual
7 matters, moving on to page 39 {A/1/39} of the bundle,
8 paragraph 2.34 explains the importance of the price
9 comparison website channel. So you can see the figures
10 there that for new business, in 2016, PCWs were the most
11 important channel used by providers for new business and
12 accounted for approximately 54% of new business.

13 You then have the next most important channels
14 explained. You see -- I just want to pause here
15 actually because, of course, this is an important
16 contextual fact, the importance of the channel, that is
17 taken into account by the CMA in looking at
18 appreciability of effect. Before I go on in this
19 section, it might be a good idea just to show
20 the Tribunal now, so you have got the points in mind as
21 we go through the decision, what the factors were that
22 were taken into account by the CMA on appreciability.

23 You will find those much later in the decision, if
24 we could turn up page 372 of the decision and the
25 summary is at paragraph 9.144 {A/1/372}. You can see

1 there the summary of why the CMA found that the effects
2 of the wide MFNs in restricting competition were
3 appreciable and did not only have an insignificant
4 effect on the market for the following reasons.

5 I just want to show and remind the Tribunal of those
6 points, so that you have got them in mind as we go
7 through the decision.

8 The first is the market position of CTM. Now, of
9 course, there is going to be a point about market
10 definition on this, and I am not going to be addressing
11 that further in my oral opening, because we are going to
12 have evidence on that.

13 Secondly, at B, on page 373 {A/1/373}, the market
14 position of CTM's rival PCWs. So their market position
15 was less than 50%, CTM's market position was more than
16 50%, we have seen that from A.

17 Then at (c) the market position of the providers and
18 the CMA has found that the providers did not
19 collectively or individually exert countervailing buyer
20 power to limit the market power of CTM in the relevant
21 period.

22 So, again, that is going to be something that is
23 going to be examined under market definition, but this
24 is a factor relied on by the CMA. Fourthly, market
25 coverage, fifthly, the nature of the clauses on page 374

1 {A/1/374} and in particular the fact that they impacted
2 directly on an important dimension of competition
3 between PCWs and between providers competing on PCWs;
4 namely price. So, in other words, it is accepted, it is
5 common ground that price is an important parameter of
6 competition in this market and the clauses directly
7 impact upon price, so they are not looking at some
8 tangential competitive parameter.

9 Then the role and importance of the wide MFNs in
10 CTM's own competitive strategy. Again, we will look at
11 some of the documents on this. Then at (g) widespread
12 compliance and again we will look at this but I just
13 want to show you at this stage the factors relied on by
14 the CMA.

15 {A/1/375}. Then over the page at (h) nature of the
16 competitive effect. The CMA has found that the effects
17 were market wide because they had spillover effects,
18 they reduced competition even between providers that
19 were not covered by them. Then (i) barriers to entry
20 and expansion.

21 Sir, I am not elaborating on those for the moment,
22 but I just want the Tribunal to have them in mind as we
23 go through the material in the decision.

24 If we could go back, please, to where I was, so
25 page 39 of the decision -- sorry, page 40 of the

1 decision, {A/1/40}. You can see there that the figures
2 that I took you to, in terms of the importance of the
3 PCW channel, are indicated in this figure. At 2.3, you
4 have got the figure there, which shows the importance of
5 the channel.

6 Then at 2.37, you can see that the CMA find that the
7 growth in importance of the big four PCWs and the sale
8 of home insurance can be observed both in terms of
9 volume of policies sold by year and revenue generated
10 and essentially it is getting more important.

11 So you can see that it is increasing and you see, at
12 the bottom of the page, the revenue generated has
13 materially increased by more than 90 per cent from
14 approximately, and there is a confidential figure, in
15 2012, to over -- and you see the other confidential
16 figure, in 2018 {A/1/41}.

17 So there is a very large increase and then you see
18 the increase in CTM's revenue from the home insurance
19 sector over those years.

20 Then at 2.38, on page 41, this concerns the market
21 position of ComparetheMarket. So the table at 2.3 shows
22 the share of the big four PCWs of home insurance sales
23 to consumers expressed in volume percentages it made
24 using the PCW channel during that same period of 2012 to
25 2018 and you see that CTM achieved the highest share of

1 volume of home insurance channels in every year from
2 2012 to 2018 and you see the figures there, which are
3 confidential figures. Then you see at (b) that CTM is
4 the only PCW to have consistently grown its business and
5 share of volume, with its sales growing, and you have
6 the percentage growth there.

7 Then if we could please turn on to page 45, {A/1/45}
8 and paragraph 2.49, that gives some contextual
9 information about commission fees, so negotiation of
10 commission fees is an important aspect of the
11 relationship and they are typically structured on a cost
12 per acquisition basis, meaning that for every quote
13 successfully converted to a sale the provider pays
14 a flat fee, different levels may be agreed depending on
15 volumes.

16 Then we see, if we can go on to page 48, {A/1/48} at
17 the bottom of the page, under the heading "The terms of
18 the wide MFNs" and you see there the CMA found that in
19 almost all of the 32 agreements the wide MFN was in
20 materially the same terms, so had materially the same
21 effect, and was expressed as a contractual obligation on
22 providers. An example is given over the page at 2.59.
23 Now, you have seen the annex that Mr Beard took you to
24 and you will recall that in his opening Mr Beard sought
25 to make a point about the wording of the clauses and

1 I just want to deal briefly with that.

2 He sought to suggest that they are narrower than
3 might at first seem to be the case and he made a point
4 that they do not stop PCWs offering other forms of
5 incentive, including gifts to consumers, and the CMA's
6 case is that what they do do is they restrict the
7 quotation of lower prices on other PCWs and that that is
8 a significant restriction because price is so important
9 and I am going to come on to show you the sections of
10 the decision.

11 THE CHAIRMAN: But just so that we understand each other, it
12 is just price, so the cinema tickets on Wednesday or the
13 cuddly toys, or whatever else it is that is offered as
14 an inducement, that falls outside the effective ambit of
15 the clause?

16 MS DEMETRIOU: That is correct, sir. Toys and cinema
17 tickets fall outside the effective ambit of the clause
18 and the CMA's case is that price is an important -- the
19 restriction on price is still significant because
20 for example, as I will come to show you later on in the
21 decision, a price discount will move a provider up the
22 rankings on a PCW whereas giving a gift does not and so
23 it is an important point.

24 Now, Mr Beard also made the point that there are --
25 sorry, Professor Ulph.

1 PROF ULPH: Yes, I just wanted to make a point about price.

2 So if I buy a product I have to hand over X amount
3 of money, but in return for that I get a token that
4 I can spend in a restaurant that was worth Y amount of
5 money, and I would have gone to that restaurant anyway,
6 so it is a valuable token to me, as an economist I would
7 think of the net price as being X minus Y.

8 So the fact that there is a restriction on X but
9 other PCWs are allowed to offer inducements like Y, as
10 an economist I would think about that as being
11 a variation in price because it is what you
12 ultimately -- what matters to an individual's budget as
13 a consequence to making that purchase.

14 MS DEMETRIOU: Professor, yes I understand that and I am not
15 suggesting that other non-cash incentives are
16 irrelevant, so we are not saying -- it is not the CMA's
17 case that these wide MFNs restricted all types of
18 competition. But we do say that one cannot simply look
19 at it as the overall price. I do understand the point
20 you are making as an economist, but, as we will come on
21 to see in the decision, the price, so the price of the
22 premium leaving aside any gifts are what matters in
23 terms of the ranking on the page and that is a really
24 important factor for competition between the HIPs.

25 So giving a meerkat or a toy meerkat or a cinema

1 ticket would not affect the rankings on the page and so
2 that is one reason why you cannot look at it purely in
3 those economic terms. I do understand the point that
4 you are making, but that is our response to it. But we
5 are certainly not saying that all competition was
6 removed, so there was still the opportunity to compete
7 in relation to these non-cash incentives.

8 PROF ULPH: That is very helpful, thank you.

9 MS DEMETRIOU: Thank you, Professor. Mr Beard also made the
10 point that differences in question sets meant that
11 a wide MFN could potentially be circumvented. He made
12 that point in opening, too, and that is something that
13 the CMA took into account and can I just show you where?
14 Obviously we will deal in more detail with these points
15 in closing but I want to highlight them for you now in
16 opening.

17 If you turn to page 338 of the decision, please,
18 {A/1/338}. You will see at the bottom of that page
19 footnote 1239. So you see there:

20 "As CTM's wide MFNs related to providers not quoting
21 lower prices on rival PCWs for the same risk profile
22 CTM's rivals may still have been able to gain a
23 competitive price advantage if, for example, differences
24 in Question sets meant that for the same consumer the
25 risk information CTM's rivals provided to providers

1 differed to the risk information provided by CTM. As set
2 out in Annex P, the CMA has found limited evidence that
3 in Practice providers sought to circumvent the wide MFN
4 clause ..."

5 Can I just take you briefly to the relevant part of
6 annex P so that you have got in mind where that is. So
7 page 668 of the decision {A/1/668} and you will see
8 there at paragraph 32, at the bottom of page 668,
9 Mr Beard's submission that he made to the Tribunal was
10 a submission made by BGL during the investigation about
11 circumvention because of different question sets and
12 what you see is how the CMA deals with that. Can I just
13 take you to page 670 and paragraphs 37-38. You see that
14 the CMA found BGL in support of its submission:

15 "... provided several examples of home insurance
16 providers [this is at paragraph 37] referring to
17 technical reasons ... as an explanation for price
18 discrepancies ... However, the examples provided by BGL
19 do not show that the home insurance providers in
20 question were referring to technical issues in order to
21 deliberately circumvent their wide MFN obligations, as
22 opposed to such issues being the genuine reason either
23 in whole or in part, for the pricing discrepancies
24 identified by CTM. Where CTM was not satisfied with the
25 explanation received from the Provider, CTM would

1 persist in requiring explanations and remedial action to
2 be taken and would escalate its enforcement actions.
3 Therefore, the CMA considers that it would have been
4 difficult in practice for a provider to consistently use
5 technical excuses to conceal from CTM persistent
6 deliberate breaches of CTM's wide MFN outside of CTM's
7 compliance tolerance thresholds ..." {A/1/670}

8 Then you see at P.38:

9 "This is supported by the fact that the CMA has only
10 identified one example of a provider apparently
11 deliberately trying to circumvent its wide MFN
12 obligations ..."

13 So, again, I just want to show you at this stage
14 that the CMA grappled with that point in the
15 investigation and responded to it and that is its
16 response.

17 THE CHAIRMAN: Ms Demetriou, just to put some colour on
18 this, and I understand in the abstract exactly what you
19 are saying. But obviously each price comparator has got
20 the questions that it asks the proposed insured in order
21 to generate the quote and I infer that those questions
22 are broadly speaking the same.

23 If you are talking about circumventing wide MFN
24 clauses, how exactly does the HIP do that because they
25 presumably do not have control over the questions that

1 the price comparator is asking, so how would
2 I manipulate it just as a sort of concrete example so
3 I can picture how this works?

4 MS DEMETRIOU: I think it is a point that Mr Beard was
5 making and he was saying that there are differences in
6 the questions that PCWs ask in respect of particular --

7 THE CHAIRMAN: Right.

8 MS DEMETRIOU: -- insurers. So PCW A may ask different
9 questions in relation to HIP B's insurance product as
10 compared to PCW B and that those differences can be
11 exploited by the HIPs to avoid complying or to avoid the
12 implications of the rule.

13 THE CHAIRMAN: Right, okay. So it is at the level of the
14 price comparison website differences --

15 MS DEMETRIOU: Yes.

16 THE CHAIRMAN: -- that the manipulation occurs. So if,
17 for example, one had a price comparison website that
18 just went entirely off piste and asked 20 questions
19 where ten would do, you would obviously expect the
20 ratings engine in the HIP to produce a significantly
21 different outcome because the information would be that
22 much more granular. But what you are saying is because
23 the general thrust of the questions -- because one does
24 not want to ask the consumer too much because they get
25 bored with filling in lots of questions -- because the

1 general thrust of the questions asked by the price
2 comparison websites are essentially the same, in order
3 to allow the slightly different questions to affect your
4 quote by HIP you are actually taking a technical point
5 rather than one of substance in terms of the quotes that
6 you are producing?

7 MS DEMETRIOU: Sir, yes. Can I just show you -- it may be
8 that the best way of answering your question is just to
9 look at page 670. Can I show you that because that does
10 provide an example {A/1/670}.

11 So you see there that is Legal & General, so this is
12 the example that was identified by the CMA, do you see
13 that?

14 THE CHAIRMAN: Yes.

15 MS DEMETRIOU: They say they found one example of this going
16 on. So prior to the relevant period Legal & General
17 designed a promotional deal. This is prior to the
18 relevant period, but it is an example of how it works in
19 practice.

20 THE CHAIRMAN: Sure.

21 MS DEMETRIOU: "... designed a promotional deal with
22 Confused that sought to take advantages of differences
23 in the question sets used by Confused and
24 [ComparetheMarket] as a 'work-around'."

25 Sir, do you see that?

1 THE CHAIRMAN: I do.

2 MS DEMETRIOU: So then because of the differences in
3 questions then essentially the argument will be that you
4 are not comparing like with like and so you are not
5 bound by the clause. Really what the CMA has found is
6 that in practice this is not something which happened so
7 they have examined the point. It is not that they have
8 ignored this point; they have taken it into account,
9 they have examined it and they have only found one
10 example.

11 THE CHAIRMAN: No, I understand. I think all I was trying
12 to see was actually the ability to evade involves taking
13 advantage of the difference in the questions posed by
14 the price comparison websites --

15 MS DEMETRIOU: Yes.

16 THE CHAIRMAN: -- and leveraging that difference which, I am
17 sure for most cases is a difference without any meaning,
18 leveraging that difference to evade the clause.

19 MS DEMETRIOU: Yes.

20 THE CHAIRMAN: But if, for instance, you had a price
21 comparison website that just went down a different way
22 of rating, you would actually automatically enable the
23 HIPs behind it to sidestep the wide most-favoured-nation
24 clause because they would be given different
25 information.

1 MS DEMETRIOU: Yes, but that is not a point that is being
2 made.

3 THE CHAIRMAN: No, no, Ms Demetriou, do not worry. I am not
4 trying to make Mr Beard's case here, I am just trying to
5 understand how this point works.

6 MS DEMETRIOU: Yes, and of course also of relevance to this,
7 you will have seen and we will come to CTM's internal
8 tolerance levels. So when it was monitoring prices on
9 the other price comparison websites it applied a certain
10 tolerance level before it intervened and that tolerance
11 level reflected the fact that questions could be
12 different or the product sold might be slightly
13 different, it might be. So those tolerances reflected
14 that fact, so they would not intervene unless the
15 tolerance levels were exceeded and so it is also
16 relevant to this point, sir.

17 Sir, just moving on. Can I just show you at this
18 juncture -- I am moving on to a slightly different
19 point, but can I show you, by way of background,
20 page 436 of the decision in annex C and I am sure you
21 have seen this, {A/1/436}, but it is the list of
22 insurers that ComparetheMarket listed on its platform.
23 This is at 436 and it is divided into those insurers
24 with which it had wide MFNs, so that is the first table,
25 C.I., and there are 32 of those if you count them. We

1 have heard that figure several times now.

2 At C.II. there are the remaining 13 with which it
3 did not have wide MFNs, although narrow MFNs were in
4 place {A/1/437}. Then can I just show you so that you
5 know where it is again on page 444 in annex E,
6 {A/1/444}. You can see this broken down, you can see
7 the shares of home insurance providers shares of supply
8 on the big four PCWs and it is broken down by each
9 insurer and by year, so that is 2017 and over the page
10 you have 2016 {A/1/445}.

11 Then what you see there in the second column, or the
12 second main column, it indicates whether or not that
13 insurer had a wide MFN, so you can see that the top, by
14 sales, insurer Legal & General did then number 6 did,
15 number 9 did, number 10 did. So you can see there them
16 reflected in that table.

17 I want to take you on now to section 7 of the
18 decision and when I skip out parts of the decision it is
19 partly because of time and partly because some of this
20 is going to be addressed in the evidence, and I do not
21 want to tread on the toes of those giving evidence. But
22 also it is a question of time. What I am doing in
23 opening is highlighting some key parts to understand the
24 infringement found by the CMA.

25 THE CHAIRMAN: Quite.

1 MS DEMETRIOU: You know, and we can see from page 161-162,
2 so 161, nature of competition, and {A/1/161} we know and
3 it is common ground that price is a key parameter of
4 competition between PCWs and also between the home
5 insurance providers operating or selling through PCWs.
6 We have a summary of the findings in this section of the
7 decision at 7.3-7.6, {A/1/162}, and essentially at 7.3
8 you see that retail prices are an important dimension of
9 competition both between the PCWs and between providers.

10 {A/1/161}, 7.4, the importance of price competition
11 between PCWs is reflected in the strategies of the big
12 four PCWs. I am going to come to these points in more
13 detail but by way of overview to see what the
14 conclusions are. 7.5 the strategies of two of CTM's
15 rivals amongst the Big Four included incentivising
16 providers to offer the lowest price on their platform by
17 adopting differential pricing strategies.

18 Then at 7.6, for providers competing on PCWs the
19 importance of price competition is reflected in their
20 monitoring behaviour and pricing strategies.

21 Then we see at 7.7 that promotional deals were an
22 important strategy for two of the Big Four PCWs during
23 the relevant period.

24 Just to take those findings, so this is what the CMA
25 does in the remainder of section 7 of the decision, is

1 take those findings one by one and explain why it has
2 reached those conclusions and just to take you through
3 some of the steps.

4 On page {A/1/164}, you see at 7.12, that
5 obviously -- this is addressing the question of
6 multi-homing or multi-sourcing, so multi-homing relates
7 to consumers, multi-sourcing relates to providers. What
8 the CMA is saying is that if you have a high proportion
9 of multi-homing consumers or multi-sourcing providers,
10 that generally means that a PCW faces greater direct
11 competition from other PCWs. That makes sense. I do
12 not think that there is any dispute about that.

13 With regard to consumers, we see this at 7.14, a
14 majority of consumers single-homed, that there is
15 a material proportion which multi-homed.

16 So we can see at 7.14(b), the figures are
17 confidential, but you see that they vary according to
18 the PCW in question. But in each case, there is
19 a material number, although not the majority, who
20 multi-homed, so who visit more than one PCW.

21 Then at 7.16, on page {A/1/165}, you see that in
22 terms of the multi-sourcing of home insurance providers,
23 the evidence is overwhelming. The vast majority
24 multi-source and we can see that in the table at 7.1 on
25 page 165.

1 THE CHAIRMAN: Yes, I see.

2 MS DEMETRIOU: Sir, I have just noticed the time. Is this
3 a convenient time to pause?

4 THE CHAIRMAN: If it is for you, Ms Demetriou, yes, indeed.
5 Should we resume at a quarter to 2, would that
6 assist?

7 MS DEMETRIOU: I think it would, if everybody is happy to do
8 that, and if it is not too much on the Tribunal or the
9 transcribers.

10 THE CHAIRMAN: I hear deafening silence, so I will take
11 silence as consent, which I should not do, but I will.
12 We will start again at a quarter 2.

13 MS DEMETRIOU: Okay.

14 THE CHAIRMAN: Thank you very much.

15 (1.02 pm)

16 (The short adjournment)

17 (1.45 pm)

18 THE CHAIRMAN: Ms Demetriou, we will just go live in
19 a second, I hope. Ms Demetriou, over to you.

20 MS DEMETRIOU: Thank you, sir. I was taking the Tribunal
21 through the building blocks of the decision and if we
22 could please turn up {A/1/169}, paragraph 7.25.

23 This is the point I was making a little earlier in
24 response to Professor Ulph's question about rankings and
25 you will see that home insurance products are listed in

1 retail price order by default on the Big Four PCWs, with
2 the lowest price product being listed first as the top
3 ranked result.

4 You see then the evidence obtained by the CMA in the
5 DCT's market study, from three of the Big Four, shows
6 that the vast majority of sales of home insurance made
7 through their platforms were made through providers
8 ranked in the top five results. You have there the
9 figures.

10 So that shows the importance of the rankings and the
11 link between retail prices and rankings.

12 Now, if you could please turn to page -- actually,
13 the same page, page 107. 7.27 and 7.28 explain that
14 price is important for consumers when choosing
15 a specific insurance provider on a PCW. So the CMA
16 finds the two linked factors, retail prices and the
17 ranked results, are particularly important matters for
18 consumers.

19 You see over the page at 7.28 {A/1/171}, the
20 evidence, which is then explained in detail, the summary
21 of the evidence that the CMA has taken into account in
22 reaching that conclusion. So the CMA has assessed the
23 sensitivity of consumer demand to changes in home
24 insurance providers' retail prices on PCWs, taken into
25 account consumers' views from consumer research and

1 assessed evidence from PCWs and providers.

2 So those are the three strands of evidence that have
3 been taken into account.

4 Then you have an analysis, and there is not time now
5 in opening, but you have an analysis of those strands of
6 evidence in the following paragraphs of the decision.

7 If you could now -- I am just going to point to
8 a few key paragraphs, if I may, so if you could turn to
9 page 174 {A/1/174}, you see here the heading at 7.C,
10 "How PCWs compete for consumers". Again, you see that
11 an important parameter is price competition and again
12 that is not disputed by ComparetheMarket and it was not
13 disputed in the investigation. We see that recorded at
14 7.53, which I do not ask you to turn up now.

15 THE CHAIRMAN: What you are saying, Ms Demetriou, is whilst
16 the ranking is a matter for each particular price
17 comparator, what the consumers are looking for is best
18 value for money and so delivering what the consumer
19 wants, the price comparison website gives you the
20 comparison on price.

21 MS DEMETRIOU: The two things are interlinked, sir, just to
22 make sure that I am not misunderstanding your question.
23 So the consumer is price sensitive, that is what it is
24 looking for, it is looking for the cheapest product
25 because it is an important parameter of competition. So

1 consumers value price, lower prices, and we see that
2 from the assessment carried out by the CMA.

3 But also lower prices translate into the rankings on
4 the page. So when you do a search on a price comparison
5 website, you end up with rankings and they are in order
6 of price, starting from the lowest price. So they are
7 the first ones you see on the page.

8 THE CHAIRMAN: Yes, and as you say, the two are linked. But
9 suppose, hypothetically, the proposed insurer market
10 became very interested in the extent to which claims are
11 paid within 21 days and not disputed by insurers, and
12 that became a really important decision-making item as
13 well as, let us say, price, there is nothing to stop
14 price comparison websites comparing on other criteria.

15 MS DEMETRIOU: Not at all.

16 THE CHAIRMAN: It is just that they have discerned that
17 price is the driver, so that is what they deliver by way
18 of comparison.

19 MS DEMETRIOU: Yes, of course. We do say that other
20 parameters of competition, so differences in what is
21 being offered -- the example you gave, sir, is a good
22 one -- that those are also parameters of competition
23 which operate in this market. So we are not saying they
24 are insignificant or negligible, but we are saying that
25 price is very important and that is what the CMA has

1 found and --

2 THE CHAIRMAN: No. I see Professor Ulph has his electronic
3 hand raised. You are on mute.

4 PROF ULPH: I unmuted before I spoke. Just to make a couple
5 of points here. One is related to Marcus' point about
6 other parameters of competition and that might affect
7 not so much what product you buy, but which channel you
8 go for. So, for example, if a consumer has read
9 a damning report about some -- or a very good report,
10 about some home insurer, that they processed all the
11 claims very quickly, that might affect the consumer's
12 decision as to whether to go to a PCW or to go to the
13 home insurer's site, because they have already been
14 persuaded that that home insurer is giving them the kind
15 of product that they want.

16 The other point about price comparisons, isn't it
17 the case that the price comparisons that a PCW will
18 return is just between those HIPs that choose to list on
19 that site? So it does not guarantee necessarily you are
20 getting the lowest price, amongst all possible HIPs. It
21 only gives you the lowest price on the HIPs that are on
22 that PCW and if savvy consumers recognise that there
23 might be different HIPs listing on different websites,
24 or different PCWs, that might be the reason why they are
25 multi-homing.

1 They may say: I have got a very low price here, but
2 this other website might have a different sort of HIPs
3 listed on it and they may give an even lower price. Is
4 that correct?

5 MS DEMETRIOU: So yes, that is all correct. We recognise
6 that -- in relation to your first point, we recognise
7 there is some constraint from HIPs direct channels, but
8 that is what is analysed in the market definition
9 evidence. I am not going to trespass on that. The
10 question is: how much of a constraint is it?

11 In relation to the second question: yes, you are
12 quite right that not all HIPs appear on these price
13 comparison websites. So some do not use price
14 comparison websites at all, although we have seen that
15 most of them multi-source on at least three and in most
16 cases, four, you are right, that there is not -- it is
17 not 100% on all of them. So there are some differences.

18 One of the points obviously that we make or that the
19 CMA makes in this case, is that competition between PCWs
20 is very important and that is what was being inhibited
21 by the wide MFNs.

22 So we do say that there is a proportion of customers
23 that multi-homed and that ideally what you would like to
24 see is HIPs competing with each other on these price
25 comparison websites, so HIP A offering lower prices on

1 price comparison website B, so as to offer a competitive
2 price and avail the consumer of the benefits of price
3 competition.

4 But we do agree with the points that you have made.

5 PROF ULPH: Thank you.

6 MS DEMETRIOU: Thank you for your intervention.

7 THE CHAIRMAN: Ms Demetriou, I think you may have
8 inadvertently muted yourself.

9 MS DEMETRIOU: I have, thank you so much. It was very kind
10 of you to pick me up straightaway and not let me go on
11 for five or ten minutes.

12 Now, if we could turn, please, to page 177
13 {A/1/177}, we see at 7.47, the CMA finding that retail
14 prices quoted by home insurance providers are an
15 important dimension of competition between the Big Four
16 PCWs. So in order to attract consumers to their
17 platform, which is obviously what they want to be doing,
18 and expand, each of them needs to implement competitive
19 strategies aimed at securing the lowest price or at
20 least the equal lowest price compared to their rival
21 PCWs. Such strategies include incentivising providers
22 to quote lower prices on their channel than they quote
23 on the other -- on their competitor's channel.

24 We see at 7.49 {A/1/178}, the point made about the
25 link with the rankings. So particularly important for

1 PCWs to ensure that products ranked in the top five
2 positions are competitively priced.

3 Then at 7.50, we see the evidence underpinning this
4 finding explained. Again, I am not going to read it
5 out. I am locating these key building blocks now. I do
6 not have time in opening to read all of these
7 paragraphs. I know you have read them already, but I do
8 want to highlight the key building blocks of the
9 decision.

10 Now, what we see, if you could turn, please, to
11 page 181 {A/1/181}, we see that the CMA's
12 investigation -- you see the heading above
13 paragraph 7.55, on page 181, the CMA's investigation
14 found that all of the Big Four PCWs implemented
15 strategies focused on securing competitive prices from
16 the insurers in order to compete with their rival price
17 comparison websites.

18 Then I have made the point already that Mr Beard
19 says repeatedly, he says: well, of course, CTM was
20 trying to achieve price parity, which PCW would not be
21 trying to achieve price parity? We agree with that.

22 The question is: how do you achieve price parity?
23 Is it by competing on price or is it by resting on these
24 clauses? That is really the key question in this case,
25 one of the key questions.

1 Then if you look at 7.56, at the bottom of the page,
2 this paragraph summarises the key strategies used by the
3 PCWs. In summary, they are competing on commission fees
4 in return for a reduction in retail price. That is (a)
5 at page 182. (b) is temporary deals affecting the
6 structure and level of commission fees. Over the page,
7 on 183 {A/1/183}, is (c) promotional deals and it says
8 there:

9 "MoneySupermarket and Confused were the main users
10 of promotional deals [at that time] ..."

11 Then what happens in terms of the structure of the
12 decision is that -- if you turn to page 185 {A/1/185},
13 is that the CMA then considered each of the big four
14 price comparison websites pricing strategies in turn.
15 There is a wealth of evidence, in our respectful
16 submission, in respect of each PCW.

17 If we look, first of all, at MoneySupermarket, we
18 see there at 7.61, that it was the second largest PCW
19 during the relevant period. At 7.62, a key aspect of
20 its strategy was to ensure that consumers should be able
21 to find a cheaper alternative to both their renewal
22 quote and quotes found on other PCWs.

23 So that is a key part of its strategy and
24 consistently with that, it implemented something which
25 it referred to as its "best price strategy". You can

1 see that on page 186, at paragraph 7.64 {A/1/186}.

2 This involved, and we see this from 7.66, so its
3 best price strategy, which was to deliver more sales and
4 win market share.

5 This involved, you see, at 7.66 {A/1/188}:

6 "For the second element of the strategy, ie.
7 strengthening its reliance on promotional deals ...
8 decided to target particular providers and/or particular
9 consumer segments ... in order to reduce retail prices
10 quoted on its platform compared to its rivals and
11 therefore drive more sales on its platform."

12 You see then in the paragraphs that follow, an
13 explanation of how it went about deciding on these
14 promotional deals.

15 Then if you look at 7.71, on page 188, this relates
16 to Legal & General. So we see there that
17 MoneySupermarket's strategy was also observed by Legal &
18 General, which told the CMA that:

19 "... earlier deals with aggregators were largely
20 informal and it was often [it] that would propose offers
21 and ideas to PCWs. More recently, MSM
22 [MoneySupermarket] have been very keen to do offers with
23 it'."

24 Then, at 7.75, on page 189 {A/1/189}, we see that
25 MoneySupermarket provided evidence to the CMA:

1 "... that CTM's wide MFN impacted on its ability to
2 implement its Best Price Strategy in the Relevant
3 Period."

4 Of course, this is something on which we are calling
5 evidence from Natasha Glasgow, who is referred to in
6 that paragraph.

7 THE CHAIRMAN: Yes.

8 MS DEMETRIOU: Then at 7.81 on page 191, {A/1/191}, you see
9 the conclusion in respect of MoneySupermarket:

10 "... the CMA finds that in the Relevant Period
11 MoneySupermarket pursued a strategy focused on
12 incentivising providers to implement differential
13 pricing strategies in order to secure the lowest price
14 from providers when compared to their rival PCWs ...
15 considered this strategy to be successful during the
16 Relevant Period and has continued to seek ... lower
17 prices ... after the Relevant Period as a core part of
18 its Best Price Strategy."

19 Then we have evidence from Confused, you see
20 immediately following that. If you look at 7.85 on
21 page 192 {A/1/192}:

22 "Confused also told the CMA that achieving 'price
23 competitiveness' by incentivising differential pricing
24 by providers through the use of promotional deals is a
25 major focus for it in both motor and home insurance."

1 Then over the page, please, on page 193 {A/1/193},
2 you see at 7.88, that:

3 "The evidence obtained from Confused shows that,
4 during the Relevant period, Confused's pricing strategy
5 did not prioritise the negotiation of commission fees
6 (outside the context of promotional deals) as a way to
7 gain a competitive edge over its rivals, choosing
8 instead to focus on promotional deals ..."

9 So it was seeking cheaper prices to attract more
10 consumers, but it did it through promotional deals
11 rather than negotiating on general commission fees.

12 Then you see at 7.89 that its:

13 "... willingness to agree promotional deals in home
14 insurance has continued after the Relevant Period."

15 Then you see the conclusion at 7.92, on page 194
16 {A/1/194}.

17 Then you have GoCompare, at 7.94, on page 194, it
18 too was focused on price competitiveness, but rather
19 than using -- it did it in a different way. So:

20 "Rather than using temporary promotional deals,
21 however, it focused on incentivising providers to quote
22 their best prices on GoCompare primarily through the
23 structure and level of its negotiated commission fees,
24 including through a tiered commission structure ..."

25 Then at 7.98, {A/1/196}, you see that actually:

1 "Since the Relevant Period, GoCompare has run
2 promotional deals in home insurance for the first time,
3 specifically, three promotional deals with three
4 different providers as of June 2019."

5 Just for the Tribunal's note, two of those new
6 promotional deals are with providers who used to be
7 covered by wide MFN, and who, since the removal of the
8 wide MFNs, approached GoCompare and asked to do
9 a promotional deal. We see that from 7.99.

10 Then we have ComparetheMarket itself, so looking at
11 page 197 {A/1/197}. Paragraph 7.102:

12 "... [ComparetheMarket] did not agree any
13 promotional deals in home insurance [during the relevant
14 period] ..."

15 The CMA finds that a reason for that:

16 "BGL told the CMA that this was because it had
17 limited confidence that insurance providers would pass
18 on the commission fee reduction through lower retail
19 prices and this was one of the reasons identified in
20 some internal contemporaneous document."

21 So the CMA accepts that that was a reason, but it
22 finds an additional reason. We see that at 7.102, in
23 the middle of the paragraph, was that:

24 "... CTM's preference was to secure lower prices by
25 maintaining and enforcing its wide MFNs ..."

1 Can I just take the Tribunal, at this stage, to one
2 of the documents in the F bundle. This is at F,
3 tab 124, page 2 {F/124/2}. This is a document that
4 relates to motor insurance, and it is an internal
5 ComparetheMarket document, and it relates to a discount
6 trial that it ran in relation to motor insurance.

7 What you see there is them saying that:

8 "-- Other PCWs have increasingly been discounting
9 [commissions] to gain lower prices for customers.

10 -- CTM has chosen not to do this in the past, on the
11 basis that we expected that it would (i) reduce
12 profitability; (ii) we have previously relied more on
13 WMFNs; and (iii) we don't want to start a ...
14 discounting war."

15 Then they have run this trial. What you see in the
16 remainder of the slides, which, because of time, I am
17 not going to turn up all of them, is that this trial was
18 rather more successful than ComparetheMarket had been
19 expecting. This is a trial in motor insurance once
20 they'd had to abandon their wide MFNs.

21 If we just go to page 8 of that clip of slides
22 {F/124/8}:

23 "Trial summary

24 We can ... our way to ..."

25 So in the context where wide MFNs are no longer

1 being relied on, what CTM is finding here is, yes, we
2 can run -- we can offer discounts and we can, through
3 discounts, buy our way to pricing parity. In other
4 words, through competition and not through reliance on
5 the clauses.

6 If we can go back to the decision at {A/1/198}, what
7 we see at 7.103, is the submission that BGL stated that
8 it is sceptical of the benefits of promotional deals and
9 explains why it is sceptical, including, as we have
10 seen, that -- and we see this at --

11 MR BEARD: Sorry, could I just pause? I am sorry,
12 Ms Demetriou.

13 You are, in fact, on occasion reading out material
14 that is marked up as "confidential".

15 MS DEMETRIOU: I had seen "buy" and "price parity", but
16 I had not appreciated that those words -- they were
17 highlighted, but they did not seem to me to be at all
18 confidential, because you have used the words "pricing
19 parity" throughout your submissions. So I assume that
20 was an error.

21 MR BEARD: Sorry, no. We are going on the mark-up that you
22 are relying on.

23 MS DEMETRIOU: Right, okay.

24 MR BEARD: You cannot in those circumstances selectively
25 choose those positions. We have indicated previously

1 that we are willing to lift confidentiality. I am
2 alerting you to the fact that you are referring to
3 material openly that is confidential.

4 MS DEMETRIOU: I am sure Mr Beard -- Mr Beard also made
5 errors during his submissions and I did not interrupt
6 each time.

7 THE CHAIRMAN: Let us not get too heated about this, but
8 I think we all make mistakes. I think I have made one
9 myself, but I think until we have sorted out the
10 question of confidentiality, they are mistakes and we do
11 need to avoid them. So it is in that spirit, I think,
12 that Mr Beard is making the point and I think he is
13 right to do so.

14 MS DEMETRIOU: No, I accept that. I am not intentionally
15 going to read out anything.

16 THE CHAIRMAN: No, no, I understand. But the fact that they
17 may not be confidential is, I think, at this stage, an
18 irrelevant point. These are highlighted yellow and we
19 must not do it. I know it was inadvertent, but he is
20 right to raise it.

21 MS DEMETRIOU: Sir, that is fine. Let us move on.

22 Now, where was I? Yes, so 7.106 {A/1/199}, on
23 page 199, we see that CTM's view was that it -- so it
24 viewed reaching price parity as being critical. We see
25 that from 7.106, but CTM's view was that this should not

1 be achieved by sacrificing growth in commission fees.
2 Of course, that would be its view, which price
3 comparison website would not want to sacrifice -- would
4 want to sacrifice growth in commission fees?

5 "Further, the CMA notes that BGL has not submitted
6 contemporaneous or other analysis supporting its
7 assessment of the relative risks of volume-based
8 discounts and promotional deals in terms of pass through
9 to lower retail prices."

10 So although it is said that one reason -- this was
11 why it avoided promotional deals, it did not actually
12 provide evidence to support that.

13 Then we see, if we move on to 7.109 {A/1/201}, the
14 CMA finding there that -- and it goes on to look at this
15 in more detail in the next section of the decision, that
16 wide MFNs were integral to ComparetheMarket's
17 competitive strategy during the relevant period.

18 As I say, I am going to come on to look at this in
19 more detail.

20 Then what we see is that since the relevant period,
21 it has entered into two promotional deals. We see them
22 say at 7.112, on page 202 {A/1/202}, that it does not
23 consider this to be significant or something that arose
24 as a result of its disapplication of the wide MFNs.

25 But the CMA, at 7.113, finds that:

1 "... it is highly relevant that, having preferred to
2 rely on wide MFNs in the Relevant Period to achieve its
3 pricing strategy and also having expressed the view in
4 this Investigation that promotional deals are not
5 attractive to PCWs, CTM has started to discuss and agree
6 promotional deals since stopping enforcement of its wide
7 MFNs."

8 That is something the CMA does place reliance on.

9 Then at 7.114 {A/1/203}:

10 "In addition, while CTM has stated that it
11 considered that the 'trial' deals in home insurance were
12 either unsuccessful or inconclusive, it has subsequently
13 entered into further promotional deals, including
14 another with the provider with which BGL considered its
15 'trial' deal to be unsuccessful ..."

16 So again, that is something on which the CMA has
17 placed some weight. We see the conclusion in that
18 regard at 7.115.

19 Then moving on in the decision, in terms of the
20 building blocks, we see at 204, section 7D, {A/1/204},
21 we are now turning -- the CMA is now turning to home
22 insurance providers and how they competed on retail
23 prices on PCWs.

24 We see at 7.119, on page 205 {A/1/205}, the CMA's
25 conclusion that retail prices -- so the structure is the

1 same, it reaches its conclusion, it foreshadows its
2 conclusion, in 7.119, that:

3 "... retail prices are a particularly important
4 dimension of competition between providers competing on
5 PCWs. It is clear that the pricing strategies employed
6 by one provider depend on the pricing strategies of
7 other providers."

8 Then you have a summary, at 7.120, of the basis on
9 which the CMA made that finding and you see at (a)
10 evidence on the price sensitivity of consumers, at (b)
11 the views of home insurance providers and (c) the
12 pricing strategies of home insurance providers.

13 Again, these are then addressed in turn in the
14 following paragraphs of the decision.

15 If we look at page 208, at 7.125, at the bottom of
16 that page {A/1/208}:

17 "The CMA's analysis ... shows that providers
18 accounting for the majority of sales through PCWs
19 (approximately 65% in 2017) used differential pricing
20 during the Relevant Period whether on base retail prices
21 and/or through the use of promotional deals. It also
22 shows that more providers have done so after the
23 Relevant Period. This was in spite of the existence of
24 a number of factors {including the existence of the wide
25 MFNs] ..."

1 So what is being found by the CMA is that there is
2 an appetite for differential pricing, not surprisingly,
3 given the price sensitivity of consumers and how
4 important price is as a parameter of competition.

5 Then you see a section, on page 209, {A/1/209},
6 addressing the base pricing strategies.

7 Then at 7.130 to 7.131, {A/1/210}, you see that
8 commission fees are a relevant factor in setting the
9 retail prices.

10 Then moving on in the decision to page 214
11 {A/1/214}, you see, at 7.141, the CMA finds that:

12 "... seven home insurance providers ... (accounting
13 for ... [29%] of PCW sales in 2017) engaged in
14 differential base retail pricing in the Relevant
15 Period."

16 Most of these were subject to CTM's wide MFNs, but
17 they either operated their differential base retail
18 pricing strategies in a way that was compliant or they
19 faced enforcement action.

20 There is then a description of the differential
21 pricing strategies. I am going to come back to this in
22 the next section of the decision.

23 If we look at 7.143, for example, which relates to
24 Legal & General, which, as we know, is the largest HIP
25 judged by sales through PCWs. We see there at 7.142

1 that they adopted a differential base pricing, retail
2 pricing strategy, from early 2015.

3 This is 7.143:

4 "... whilst it was alert to and abided by the terms
5 of [the] wide MFN, this generally did not conflict with
6 its differential pricing strategy ... However, on at
7 least on one occasion, in early 2017, when [it did
8 conflict], this led [Legal & General] to consider
9 putting a proposed price increase on CTM on hold in
10 order to 'adhere to the clause ..."

11 Let me just show you that document. So we see that
12 at bundle F/350, page 1 {F/350/1}.

13 PROF ULPH: Ms Demetriou, could we go back?

14 MS DEMETRIOU: Yes, of course.

15 PROF ULPH: Could we go back to 7.141? {A/1/214}.

16 MS DEMETRIOU: Yes, Professor.

17 PROF ULPH: Okay, my question is just -- you have lost it
18 now.

19 MS DEMETRIOU: I think it is page 214.

20 PROF ULPH: 214. You were going through these paragraphs
21 quite quickly. So you found that seven home insurance
22 providers engaged in differential retail pricing in the
23 relevant period. So how does that square with your
24 argument that the wide MFNs were closing down
25 competition or restricting competition?

1 MS DEMETRIOU: Well, because what is being said by
2 ComparetheMarket is that there was no appetite for
3 differential retail pricing. So they say there was no
4 appetite for this and so nobody would have done it
5 anyway. So what we are saying is that in relation --
6 that even with the wide MFNs, there was an appetite for
7 differential base pricing. What we are going to come on
8 to see is that the wide MFNs inhibited that.

9 THE CHAIRMAN: When you say "appetite" -- I am sorry,
10 Professor -- are you just referring to promotional
11 offers or are you referring to something more strategic?

12 MS DEMETRIOU: No, here this is looking at differential base
13 retail pricing, so where a PCW and a HIP agree that in
14 return, for example, for lower commission fees, the HIP
15 will pay -- will sell on that PCW at a lower price, at
16 a lower retail price.

17 PROF ULPH: But my point is a slightly different one.
18 I think this goes beyond just having appetite for
19 differential retail pricing.

20 Because if it is just having an appetite, but you
21 could not realise that appetite, because of the wide
22 most-favoured-nation clauses, then you would not
23 actually see any differential retail pricing. But you
24 are saying: well, actually, we did see differential
25 retail pricing, so how -- I am just slightly puzzled --

1 MS DEMETRIOU: I understand.

2 PROF ULPH: -- how you square that with the argument that
3 wide MFNs were closing down the competition.

4 MS DEMETRIOU: I see. We are not saying, it has never been
5 part of the CMA's case that the wide MFNs totally
6 stopped differential pricing. We are saying that it
7 softened it. So it softened price competition. We are
8 not saying that in the presence of the wide MFNs, there
9 was absolutely no price competition on retail prices and
10 now there is. So there was to some degree, some degree
11 of price competition, and what happened was that it
12 softened it compared to the counterfactual.

13 What we are showing here -- sorry, Professor Ulph,
14 does that answer your question?

15 PROF ULPH: Well, it just throws up another puzzle, which is
16 how do you measure the degree of differential retail
17 pricing that would have taken place in the
18 counterfactual, if you are saying it is softening
19 relative to that level? Where is the evidence as to
20 what that level would have been?

21 MS DEMETRIOU: So, Professor, we are going to come to the
22 evidence, but the way that the CMA has approached this
23 on the evidence is two-fold. Just to foreshadow where
24 we are coming from.

25 So they are looking at the qualitative evidence of

1 what the actors in the market did and so they are
2 showing that on the documents, what happened was it did
3 affect their pricing behaviour and so that had a likely
4 effect on prices. Secondly, there is an analysis of the
5 promotional deals, which we will come to.

6 So that is the way the CMA has approached it on the
7 evidence. It has not measured or quantified the effect,
8 no. What it has done is relied on these two strands of
9 evidence.

10 PROF ULPH: Thank you.

11 MS DEMETRIOU: Then moving on to page -- sorry, I was going
12 to go to bundle F, tab 350, page 1 {F/350/1}. This
13 relates to Legal & General and it is the point being
14 made in the paragraph that I was on previously,
15 paragraph 7.143 of the decision. Please, we do not need
16 to go to it now.

17 But again, we see here:

18 "Hi all ..."

19 Sorry, I am reading out something which I think is
20 confidential. I am so sorry, if the Tribunal can read
21 that sentence.

22 THE CHAIRMAN: Yes, of course.

23 MS DEMETRIOU: "... a 1% increase for CTM is recommended."

24 That is in commission fee:

25 "In light of the conversation regarding the

1 'Most-favoured-nation' clause, a differential rating
2 approach to the Aggs based on their performance against
3 plan has been put on hold."

4 So we say that that is evidence of Legal & General
5 saying that they are recommending a 1% increase for CTM,
6 but a differential approach based on performance has
7 been put on hold because of the WMFN.

8 Then if we could go back to the decision at
9 {A/1/217}, page 217. Now, this concerns One Call. So
10 this is paragraph 7.148, concerns Once Call, and you can
11 see that they told the CMA that outside of any
12 promotional deals, its pricing will generally be the
13 same across PCWs. However, it agreed a different
14 commercial model with one of the competitor price
15 comparison websites, in 2015, resulting in cheaper
16 prices for a cross-section of consumers.

17 Again, if we could just pick up bundle F at page 11
18 {F/382/11} and in response to question 4:

19 "Please describe to what extent changes in the
20 Commissions paid by [this HIP] to PCWs have affected the
21 premiums set by [it] for Home Insurance on PCWs or on
22 other Channels, over the Relevant Period. Please
23 explain why changes in commissions were (or were not)
24 fully passed through ..."

25 Then you see:

1 "If a PCW reduced our commission, this reduction
2 would be passed on entirely to the consumer's premium
3 for that specific PCW. This would not impact the
4 premiums on other PCWs. Prior to the removal of MFN, we
5 wouldn't have been able to do this and the discount
6 would have been spread across all aggregators. This has
7 now allowed us to pass the full commission reduction
8 onto consumers that have bought on that specific channel
9 and advertising this on the relevant site for true
10 clarity."

11 So again, the response is explaining that now after
12 the wide MFNs, what it can do is reflect lower
13 commission fees in lower retail prices on that channel.

14 Then if we can go back to the decision, please, to
15 7.151 {A/1/217}, at page 218 {A/1/218}, here you see
16 that many providers adopted a strategy of generally
17 setting the same base retail prices, so they did not all
18 have differential retail prices during the relevant
19 period. You see there that there are a number of
20 factors which incentivised providers to set uniform
21 based retail prices. One of those factors is the wide
22 MFN.

23 Then if we can move on, please, to page 221
24 {A/1/221}. This concerns promotional deals, which again
25 was another key way in which price competition was

1 conducted.

2 We see at 7.159 that they were used by 21 providers
3 during the relevant period, accounting for approximately
4 80% of sales. The providers accounted for the sales,
5 not the promotional deals.

6 We see at 7.168 -- and again, this is just a piece
7 of evidence to take into account, on page 224 {A/1/224},
8 what MoneySupermarket says there. So I am not going to
9 read it out, because it is confidential, but
10 the Tribunal will see the point in terms of that factor
11 having an impact on numbers of requests that are made
12 for promotional deals.

13 Then if we could move on to page 225, please.
14 {A/1/225}. We then see there is evidence on providers'
15 approaches to promotional deals. That is set out in the
16 paragraphs following.

17 Again, I am locating it for the Tribunal. I have
18 shown the Tribunal the upshot. I know you have read
19 this, but I want to take you through necessarily at some
20 speed, the building blocks of the decision.

21 You see that the upshot, the conclusion at 7.178, on
22 page 228, {A/1228}:

23 "The CMA therefore finds that promotional deals were
24 an important means of competing through differential
25 pricing that providers were generally willing to Engage

1 with."

2 Then at page 230 {A/1/230}, paragraph 7.183:

3 "The CMA's analysis finds that promotional deals:

4 (a) Led to a decrease in providers' retail prices on
5 the relevant PCW and an improvement in the retail price
6 quoted by the provider on the relevant PCW relative to
7 rival PCWs.

8 (b) Led to a relative improvement in the provider's
9 ranking ..."

10 Again, you see that explained further. I am not
11 going to read it out, but just so you can locate it, in
12 187-188, on page 231-232, {A/1/231}, that describes the
13 reduction in price as a result of promotional deals,
14 both in absolute terms and relative to other PCWs.

15 Then you see at 7.196, the CMA's conclusion on
16 rankings, on page 234. {A/1/234}

17 So, of course, just standing back from this, the CMA
18 has found in this section, that price -- that during and
19 after the relevant period, price is an important
20 parameter of competition between PCWs and also between
21 insurers competing on PCWs, and that efforts to engage
22 in price differentiation focus on both base retail
23 prices, driven in part by commission fees, and on
24 promotional deals.

25 This, of course, is a very important piece of

1 context for the analysis of the wide MFNs, because those
2 clauses deliberately and specifically targeted price,
3 which is a key parameter of competition. As I explained
4 at the very outset of my submissions, yesterday
5 afternoon, there is a clear mechanism through which the
6 wide MFNs have an impact on price competition through
7 the theory of harm, that I described and summarised at
8 the outset.

9 Now, the next part of the decision I want to turn to
10 starts on page 238 {A/1/238}, and it relates to how
11 ComparetheMarket used its wide MFNs.

12 Again, I am just going to take the Tribunal to some
13 key parts, so that you can see the structure, and I can
14 highlight key facets of the evidential basis relied on
15 by the commission in reaching its conclusion.

16 If you could turn, please, first of all, to
17 paragraph 8.16, which is on page 245 {A/1/245}, you see
18 here that CTM was, of course, unsurprisingly aware that
19 competition authorities and other regulators were
20 considering the potential for wide MFNs to have
21 anti-competitive effects.

22 You see one of its employees, who is named there,
23 you can see his position referring to the OFT's
24 investigation, saying that:

25 "The MFNs in question are, to my knowledge [this is

1 the OFT's Amazon investigation] the same as the ones we
2 operate, albeit the situation is very different given
3 Amazons [sic] dominance."

4 Then it says:

5 "[X] and I were already clear that the MFNs [sic] we
6 operate would not be defensible should we have
7 a dominant market share, albeit of course our share is a
8 long way off dominant at 8% of sales. I still believe
9 we have a good opportunity to maintain the status quo
10 and the development below does not change anything,
11 albeit the timing is unfortunate ..."

12 Now, the 8 per cent, we are not sure and the CMA is
13 not sure, what that referred to and they were asked
14 about that, and they did not have any good answer to
15 what market the 8 per cent referred to. Of course, we
16 know that, in this market, their market share is very,
17 very much higher.

18 Then at 8.18, we see 8.18 {A/1/245} through to 8.21
19 {A/1/246}, we see the CTM recognising that these wide
20 MFNs were under scrutiny.

21 If we could, please, have a look at 8.21, so the
22 slide in the deck highlighted that:

23 "CTM had trialled discounting commission fees
24 previously and 'in all instances the outcome has been
25 negative for CTM'. At the time CTM therefore regarded

1 its wide MFNs, at least in private motor insurance, as
2 effective in reducing the need for it to invest in
3 offers to insurance providers to secure the lowest
4 prices ..."

5 If we turn, please, to bundle F, tab 199 at page 1
6 {F/199/1}. If we could turn -- we can see what this is.
7 We can see the date is 29 September 2014. If we go to
8 page 9 on this slide {F/199/9}. So what we see here is
9 a slide saying:

10 "Ensuring CTM consumers are not disadvantaged
11 through the display of offers on partner direct sites."

12 So that relates to the narrow MFNs:

13 "Exclusive Offers -- Work more closely with our
14 partners to secure exclusive offers/discounted pricing."

15 Then if we can go to page 10 {F/199/10}:

16 "Ensuring CTM are receiving the sales income driven
17 through our first class distribution."

18 If we go back to, please, the decision at
19 paragraph 8.25, on page 249 {A/1/249}, what we see here
20 is that by January -- really, the point -- sorry, if
21 I can just finish on the previous point that we see at
22 8.21. CTM, as Mr Beard said repeatedly, it is important
23 for it that it has a price parity. What it does not
24 want to do is achieve that through discounting
25 commission fees, because obviously that eats into its

1 profit. So what it is relying on, the CMA finds, are
2 these wide MFNs at least in part {A/1/247}.

3 MR BEARD: Sorry to interrupt, just to correct, I did not
4 keep saying "price parity", I said "best prices".
5 I referred to "price parity" in relation to other
6 topics. It was "best prices".

7 MS DEMETRIOU: Right, that does not make any difference to
8 my point. But I am happy to accept that clarification.

9 If we go to paragraph 8.25, on page 249 {A/1/249}:

10 "By January 2015, CTM had observed a noticeable
11 shift in the approach of 'a large number' of insurance
12 providers to negotiating commission fees and offering
13 discounted pricing, including through the use of
14 promotional deals."

15 You see reference there to a slide deck, which
16 states that:

17 "'Following the announcement in Sept14 that narrow
18 ..."

19 That is a typo, that must be a mistake, because it
20 must be wide MFNs are to be prohibited, because that
21 relates to the motor insurance:

22 "... we've seen a shift in approach from a large
23 number of partners:

24 -- Increased resistance to CPA [commission fee]
25 increases

1 -- Higher instances of lower pricing on other PCWs
2 and direct websites

3 -- An expectation that CPA [commission fee]
4 reductions will be offered for exclusives ...

5 -- Attempts to drive competition among PCWs

6 -- An awareness that PCWs must avoid 'equivalent
7 behaviours' to an MFN."

8 So this is a contemporaneous acknowledgment that
9 since the prohibition of the wide MFNs in the motor
10 insurance sphere, this is what CTM observed as being the
11 impact at the time.

12 Then could we turn to {F/353/1}, please. Yes,
13 Mr Beard's "best prices" here, he is right, that is
14 quite often the term that is used.

15 If we could look at page 8 {F/353/8}, we have seen
16 it is June 2015, these slides, so page 8:

17 "Trading environment

18 Partners have used the prohibition of wide MFNs [so
19 partners being the insurers] to try to drive down
20 [commissions] in return for best prices.

21 This has been a constant challenge, not helped by
22 the continuous drip feed of the CMA findings."

23 Then:

24 "Despite aggressive [commission] discounting from
25 our competitor, CTM's [commissions] remain the highest

1 in the market and continue to grow ...

2 MSM, Confused and Google have been aggressively
3 discounting in an attempt to steal market share.

4 This is continuing, but MSM have resorted to now
5 only offering discounts on specific customer segments."

6 If we could look also at page 16 here {F/353/16}:

7 "Summary

8 -- Insurance pricing is complex -- there are
9 multiple factors effecting prices ...

10 -- The market has evolved and made achieving best
11 prices more difficult, in particular the prohibition of
12 wide MFNs and an increase in [commission] discounting."

13 So this is their internal observation as to the
14 effect of the wide MFNs being prohibited in the context
15 of motor insurance.

16 If we could turn to bundle F, tab 224, page 1,
17 please {F/224/1}. So this is an executive finance
18 update of April 2016. If we could turn to page 30
19 {F/224/30}. This again considers the ban of wide MFNs
20 for motor insurance:

21 "-- The commercial landscape for PCWs and insurers
22 has changed over the last 24 months.

23 -- The prohibition of WMFNs has had the biggest
24 impact, restricting our ability to get best prices."

25 So again, a clear internal acknowledgment of what

1 they were using the wide MFNs for. But yes, this is
2 motor insurance, but it is important because it feeds
3 through into their desire to hang on to these wide MFNs
4 when it comes to home insurance.

5 Then if we could turn to bundle F, tab 124, page 1
6 {F/124/1}. August 2017, just to show you the date, if
7 we could look at page 2, please {F/124/2}. I have
8 already shown you this document, I am sorry, we do not
9 need to go to it again.

10 If we can turn back to the decision, so page
11 {A/1/257}, what we see is that despite the fact that CTM
12 was aware of the risks involved and aware of the
13 regulatory and competition scrutiny, it continued to
14 maintain and enforce its wide MFNs in home insurance and
15 indeed included them in new contracts, as late
16 as October 2017. As the decision comes on to describe,
17 it was escalating its enforcement action.

18 So the CMA says that plainly these wide MFNs were
19 material to BGL's strategy and when it comes to
20 assessing the submission they make now, which is: well,
21 these were of no effect at all, they did not have any
22 effect because they were ignored and they were not
23 complied with and they did not cover any particular
24 segment, any wide segment of the market. We say it is
25 very important to look at the contemporaneous evidence

1 and what BGL, what CTM, thought at the time. What they
2 thought at the time was that they were important.

3 If we look, on the same page, at 8.48, {A/1/258}, we
4 see that what they did is -- it is an important section
5 this of the decision, because it shows that insurers
6 wanted the clauses removed and asked -- several insurers
7 asked for the clauses to be removed and CTM rejected
8 their requests.

9 We say that this is direct evidence of an effect on
10 the ability of insurers to engage in price competition.

11 If we look at page 259 {A/1/259}, we see at
12 paragraph 8.50 that AXA requested the removal of its
13 wide MFN clause from its contract on at least four
14 occasions and this was resisted.

15 I am going to come back to some of the documents in
16 relation to AXA, but could I ask you to look here at
17 sub-paragraph (c), on page 260 {A/1/260}. We can see
18 that on the date, which is highlighted, that HIP, so
19 that is AXA, requested that CTM remove the wide MFN and
20 it was made at a time when AXA wanted to enter into
21 a promotional deal with that rival PCW, which would put
22 it in breach of its wide MFN obligation.

23 We see that it highlighted the pro-competitive
24 impact of the removal of wide MFNs in private motor
25 insurance and the request was escalated within CTM.

1 Can we look perhaps at bundle F, tab 329, starting
2 at page 5 {F/329/5}.

3 If that could be made bigger, please. If we could
4 go to the bottom of the page, because the e-mails work
5 backwards in terms of order. So you see there an e-mail
6 saying:

7 "... it would be good to arrive at a final positon
8 on this ...

9 To summarise my view of the current status: [AXA]
10 believes that there has been a clear increase in
11 competition in the market for private motor insurance
12 (PMI) since the ban of wide MFNs. We have noticed an
13 increase in promotional offers being presented across
14 PCWs, as insurers are now able to leverage promotional
15 deals with selected partners in order to drive
16 commercially advantageous arrangements. We'd also
17 expect to see insurers begin to vary their pricing by
18 channel. This allows insurers greater flexibility to
19 target specific customer groups and work dynamically
20 with PCWs - a clearly pro-competitive outcome to the
21 benefit of all PMI customers, and one the CMA clearly
22 sought to achieve.

23 Equally, as PCWs can no longer guarantee the
24 'cheapest' price on PMI we've experienced a change in
25 our relationships with some PCWs, who are now more

1 willing to work smarter to achieve 'best price' in a far
2 more mutually beneficial way, as opposed to being able
3 to simply rely upon contractual provisions to guarantee
4 this."

5 Then moving up, please -- sorry, moving up in the
6 document, so the top of the page, back to where we were.
7 Thank you. "No response", we see at the top of page 5:

8 "... no response from you on the below ... I've
9 tried to call you ..."

10 Can we go to page 4 now, please, {F/329/4} to the
11 bottom of the page.

12 Perhaps we can start from page -- we need from
13 page 3 {F/329/3}. Sorry, can we go back to page 1 and
14 work through the document. I am sorry, it is difficult
15 working off a screen, when I do not have the hardcopy
16 {F/329/1}. The upshot is, so we do not have to come
17 back to it, is at the top of this page. It says, you
18 can see that:

19 "I can confirm that we wish to retain the wide MFNs
20 for Van & Home insurance in our contract."

21 If we go down to page 2 {F/329/2}, we see a response
22 to the various points that have been put about increased
23 competitiveness and really a resistance to lifting the
24 wide MFNs.

25 You see the upshot at the beginning, at page 1, that

1 I have already taken you to.

2 Then if we could go back to the decision, to
3 page 261, at paragraph 8.51 {A/1/261}, we see that this
4 insurer, Aviva (Quote Me Happy), also requested removal
5 of its wide MFN in 2012, 2013, and again, in 2015.
6 Again, that was resisted.

7 We see a similar point made in relation to insurer
8 32 at 8.5.2. {A/1/261}.

9 If we could again look at the e-mail exchange, so go
10 to bundle F, tab 346, page 1 {F/346/1}. So this is in
11 relation to Legal & General. If that could be made
12 bigger, please:

13 "Having reviewed the commercial position ahead our
14 lunch tomorrow, our main priority is getting the wide
15 MFN clause removed, before we will consider an increase
16 in [commission].

17 This is because we know ..."

18 So CTM are obviously asking for an increase in
19 commission and this is what is being said by e-mail:

20 "This is because we know that by keeping the wide
21 MFN clause and taking an increase in price [in
22 commission that is], we will be worse off compared to
23 our competitors as we have to both keep prices aligned
24 and take a [commission] increase. We know that two of
25 our main competitors ... do not have wide MFN clauses in

1 their agreement, and as a result our position is being
2 harmed on the other aggregator sites as we are unable to
3 compete.

4 CTM are eroding value by ..."

5 So the point here is being directly made at the time
6 in 2015, which -- by this HIP, by Legal & General. It
7 is saying this MFN clause is damaging for us, because we
8 have to accept your increase in commission and what we
9 have to do is keep our prices aligned and we know that
10 some of our main -- we cannot do anything about retail,
11 we cannot reflect that increase in commission in
12 a higher retail price on your site, because of the wide
13 MFN. We have to keep the retail price aligned to the
14 prices on other price comparison websites. Two of our
15 competitors do not do this, do not have these wide MFN
16 clauses and so our position is being harmed vis-à-vis
17 them.

18 Then if we look at page 2 {F/346/2}, so {F/346/2}.

19 EPE OPERATOR: This is the EPE operator, there is no page 2
20 to this document.

21 MS DEMETRIOU: I am sorry, you are quite right. Can we go
22 to -- I am sorry, thank you for that.

23 MS LUCAS: Just before we move off this document, am I right
24 in thinking this is an internal document? I think, at
25 one point, I got the impression from what you were

1 saying that this was sent to CTM.

2 MS DEMETRIOU: Yes, I am sorry, I did not mean to give that
3 impression. I am sure I misspoke. It is an internal
4 document, which is internal to this particular HIP and
5 it is obviously considering the commercial position
6 vis-à-vis ComparetheMarket. So, I am sorry if
7 I misspoke.

8 MS LUCAS: Thank you.

9 MS DEMETRIOU: The document, for the EPE operator, that
10 I wanted to go to next is 347, page 1 {F/347/1}.

11 If that could again be made larger. It is really
12 the bottom of the page:

13 "... we believe we had agreed a 1% increase subject
14 to CTM finances team signing off ..."

15 Then you see what is said in -- can I just ask
16 the Tribunal to read the highlighted text yourselves,
17 please.

18 Then can we go on to page 2, please, to the operator
19 {F/347/2} and could that be enlarged, please?

20 Can you please scroll down a little bit. I am so
21 sorry, if the Tribunal just bears with me a moment to
22 find the part in the document. (Pause).

23 It is right at the top of the page, please, and
24 really it is the first part at the top:

25 "... this is the perfect storm scenario when they

1 know we are under market pressure and expect us to take
2 a significant increase, they won't back off from MFN so
3 expect us to either absorb this cost or to pass onto
4 customers across the whole market, instead of just to
5 them."

6 Again, what we are saying is that this is direct
7 contemporaneous evidence from this HIP, really
8 describing, in practice, the theory of harm that
9 I explained at the outset, which is that
10 ComparetheMarket are seeking to increase its commission
11 fee, but instead of accepting as a response the ability
12 of the HIP provider to increase the retail prices
13 commensurately on that site, indeed that HIP has to be
14 passed on to consumers across the whole market, because
15 of the wide MFNs. So that is in action a facet of the
16 theory of harm that I summarised at the beginning of my
17 submissions yesterday.

18 Now, if we could please go back to the decision, to
19 page 263, paragraph 8.54, {A/1/263}.

20 Again, I am not taking you to the document, in the
21 interests of time, but you see there in relation to the
22 same HIP, reference to an internal slide. So again,
23 another internal document, in June 2017, noting again
24 that they have pressed, as part of the commissions
25 negotiation, they have again pressed for removal of the

1 wide MFN. However, this is currently non-negotiable
2 with CTM.

3 Now, the factual evidence, as the CMA goes on to
4 show in the next part of the decision, goes on to
5 explain the factual evidence, is that consistently with
6 this, ComparetheMarket actively monitored its wide MFNs.

7 You can see from paragraphs 8.56 to 8.58,
8 a description of -- and, indeed to 8.60, a description
9 of how it went about doing that {A/1/263}. You see
10 there was a detailed document, at 8.57, prepared each
11 month setting out the level of price parity for each
12 insurance brand and these snapshots recorded the
13 internal and external actions taken or to be taken.

14 I will just show you an example, so you have one in
15 mind. It is at F/259 and I think it needs to be clicked
16 through to an Excel spreadsheet from that page.
17 {F/259/1}. If it is possible to call the Excel
18 spreadsheet up, thank you so much.

19 It has not appeared as yet. It does not matter.
20 I will move on and we can come back to that if there is
21 time.

22 Sir, if we could move forward in the decision,
23 please {A/1/274}:

24 "The CMA finds that there was widespread compliance
25 [by insurers] with [the] wide MFNs ..."

1 Just pausing there, we say that that is not
2 surprising, because the clauses were of course
3 contractually binding. We say that is a point
4 the Tribunal should take into account, as the CMA did,
5 when making findings as to the likelihood that these
6 clauses had an effect, on the one hand, or were simply
7 ignored, on the other hand.

8 If we look at paragraph 8.65, on page 267,
9 {A/1/267}, we see that point being made, that the
10 relevant providers took their contractual obligations
11 seriously. I am going to come back to some of the
12 individual examples, at 8.67, so we can skip over those
13 now and perhaps turn on to page 270 {A/1/270}, you see
14 the heading at the bottom of the page:

15 "CTM communicated to providers the importance it
16 placed on compliance with its wide MFNs."

17 It did so:

18 "The CMA found clearly and repeatedly ..."

19 This, to go back to a point made by the Chairman
20 yesterday, it is reasonable to infer and the CMA did
21 infer:

22 "... gave rise to a reasonable belief or
23 apprehension on the part of providers that they could
24 face enforcement action if they engaged in differential
25 pricing."

1 Then again, I am going to take you now to
2 paragraph 8.80, on page 273 {A/1/273}, so another point
3 made by the CMA. Again, this is then explored in
4 subsequent paragraphs. So a structured decision, you
5 have seen, is that a conclusion is foreshadowed. Then
6 it has explained the basis on which the CMA reached that
7 conclusion.

8 So 8.80:

9 "Home insurance providers also had a strong
10 incentive to comply with the wide MFNs because CTM was
11 an important source of new business."

12 We have seen its power in the market from the
13 figures that I showed you earlier.

14 Then if we can turn, please, to page 275 {A/1/275}:

15 "The CMA found in this section that most providers
16 adopted pricing strategies that were consistent with the
17 wide MFNs."

18 If you look at paragraph 8.86, towards the bottom of
19 the page, you see that:

20 "The CMA obtained information from 17 providers with
21 wide MFNs about their pricing strategies. These 17
22 providers accounted for over 35 per cent of sales made
23 through PCWs and over 90 per cent of sales made through
24 PCWs by providers with wide MFNs."

25 So you see the footnote, and this goes back to a

1 point that we were canvassing this morning, in terms of
2 evidence not sought:

3 "As described in annex B ..."

4 I am not going to take you to annex B now, but it is
5 further explained how the investigation was -- how the
6 evidence was gathered:

7 "The CMA's evidence sought to balance the need for
8 the CMA to operate efficiently and effectively with
9 avoiding unnecessary burdens on business. The CMA
10 prioritised its limited resources by focusing on
11 obtaining information from a representative sample of 27
12 home insurance providers, 17 with wide MFNs and 10 with
13 narrow MFNs in their agreements with CTM. These
14 insurers accounted for 80-90% of sales by volume made
15 through PCWs in 2017."

16 So that is the explanation. The CMA has for
17 proportionality reasons and to avoid undue burden on
18 businesses has focused its investigation on the number,
19 but they are a number that accounted for a very large
20 proportion of the relevant sales.

21 THE CHAIRMAN: Yes.

22 MS DEMETRIOU: What the CMA finds is that, you see this at
23 8.87, is 13 of the 17 providers with wide MFNs that were
24 contacted by the CMA, priced the same across PCWs or
25 consistently priced lower on CTM, such that their

1 pricing strategy was consistent with the wide MFNs and
2 those 13 providers accounted for nearly 30 per cent of
3 sales made through PCWs in 2017.

4 We see that the other four, so the other four out of
5 the 17, from the remainder of that paragraph, they
6 sometimes priced in non-compliance with their wide MFNs,
7 but then faced enforcement action.

8 Now, of course, what CTM -- sir, you have your hand
9 up.

10 THE CHAIRMAN: Ms Demetriou, yes. Just to provide us, at
11 a later stage, I take it the requests for information
12 made to markets participants are somewhere in the F
13 files. I think it would be helpful, do not do it now,
14 but just have a few example instances of the first touch
15 or second touch of the request made by the CMA to the
16 relevant market participants.

17 Do not take yourself out of it now, but while
18 I think of it, I would like to look at a couple of
19 those.

20 MS DEMETRIOU: Of course, sir. I will come back to those,
21 if I may.

22 I do have to emphasise that in opening now, I
23 necessarily cannot take you to everything that is of
24 relevance to the decision. What I am seeking to do,
25 I hope in a way that is helpful -- and I am conscious

1 I am doing it quickly because of time, but I am seeking
2 to highlight the planks or building blocks of the
3 decision, so the Tribunal has an overall picture of the
4 basis on which the CMA reached its decision.

5 I hope that that is -- obviously, in closing, we
6 will come back to this in more detail and in more
7 granular detail, but I hope that it is helpful in
8 framing the debate that is going to follow in terms of
9 the evidence and so on.

10 THE CHAIRMAN: Ms Demetriou, it is helpful. Obviously, you
11 will appreciate this, but it bears saying we understand
12 the very considerable burdens that both teams labour
13 under in terms of the considerable amount of material
14 and we will do, as we have done, pretty extensive
15 reading around the subject.

16 What we will also do is where there is material that
17 we feel we ought to have specifically drawn to our
18 attention, we will make that known to you, so that at
19 some point in the course of the process -- and it may be
20 after the hearing, but at some point, that material can
21 be identified to us and taken into account.

22 So we have well in mind the difficulties that you
23 are labouring under. It is extremely helpful, but we
24 know that you cannot possibly be comprehensive and you
25 are hitting the high points and we know that.

1 MS DEMETRIOU: I am very grateful, sir. I will move on and
2 I bear in mind your request and we will return to that
3 and show you the material.

4 I want to just make a responsive point to a point
5 that Mr Beard made in his opening submissions. So CTM
6 say that actually showing consistent -- showing the
7 adoption of pricing strategies that are consistent with
8 the wide MFNs, they say that is not enough, because it
9 does not show that the wide MFNs had any effect. He
10 said it does not show that there is a causative link.

11 We make broadly two responses to that point. We
12 say, first of all, it is good evidence in support of an
13 effect, in circumstances where the CMA has established
14 that there was significant appetite for differential
15 pricing. So where you have an appetite for differential
16 pricing, on the one hand, and we say that has been
17 established in section 7, and then you see evidence of
18 compliance with the wide MFNs, we say that is good
19 evidence, that despite the appetite for differential
20 pricing, there is nonetheless compliance with the wide
21 MFN. That is evidence that they are having an effect.

22 We say, secondly, of course, the CMA has not stopped
23 here in the decision. So it has not said: well, we have
24 shown that they have complied, their pricing has
25 complied with the wide MFNs. So that is it, we have

1 established an effects case.

2 Of course, it has not only relied on evidence of
3 compliance, it has relied on other evidence too, which
4 I am in the process of showing you and will show you,
5 but that is, we say, one relevant part of the evidential
6 matrix. It is not to be disregarded, it is part of it
7 and it is an important part of it.

8 We then see, just moving forward, I just glance at
9 8.91, on 277, {A/1/277}, which makes the same point
10 about the providers that were not contacted and explains
11 that they only accounted for 5 per cent of sales made
12 through PCWs. Again, the point that is made here is
13 that none of these providers -- so what the CMA did look
14 at is all of CTM's monitoring material in the relevant
15 period, so none of them were highlighted in this very
16 detailed monitoring material as requiring follow-up
17 action. So in those circumstances, it can be inferred
18 that they did price consistently and compliantly with
19 the wide MFNs. So there is evidence of that, because
20 they were not picked up.

21 Now, 8.92 to 8.93, on page 278 {A/1/278}, I am not
22 going to read out these points, but just for your note,
23 that the issue I made yesterday, that I illustrated
24 through HIP A and HIP B, if you recall that discussion,
25 so HIP A, who does change its pricing behaviour and HIP

1 B, who might not have wanted to engage in differential
2 pricing and says to the CMA: we did not want to do that
3 anyway.

4 I made the point that that response is in relation
5 to the competitive position it faced, which was a world
6 with the wide MFN network and that, if, as the CMA
7 found, the removal of the wide MFNs in the
8 counterfactual world with no wide MFNs would have
9 resulted in more pricing competition, HIP B may well
10 have had to engage in differential pricing.

11 That point is made at paragraphs 8.92 to 8.93 of the
12 decision. I am not reading it out, I am just locating
13 it for you. The point I want to go on to make now is
14 that there is important evidence in this case of
15 insurers in the HIP A category, so insurers which, where
16 the evidence demonstrates, that they specifically took
17 into account the wide MFNs when determining their
18 pricing and the wide MFNs had an impact on their
19 pricing.

20 If we could please turn to paragraph 8.96 at
21 page 279 {A/1/279}, we see a summary of that. So we see
22 that the CMA found that there were providers accounting
23 for a significant proportion of sales on PCWs, that
24 specifically took into account the wide MFNs in
25 determining their pricing strategy. In particular, this

1 included three of the largest providers with wide MFNs,
2 which together accounted for approximately 18% of sales
3 through PCWs and over 20% of sales made through CTM in
4 the relevant period.

5 We do say that this is an important plank of the
6 evidence for the CMA, because in response to a point put
7 to me yesterday by Professor Ulph, the network effect
8 that the CMA has found obviously depends on there being
9 some providers, who have complied with the wide MFNs and
10 whose behaviour has been affected by them.

11 If the CMA -- so the CMA considers, and this is just
12 to explain the overview of the CMA's case, that it has
13 established that. I am going to show you some of the
14 highlights of the evidence in respect of those large
15 providers that fall into the A category. It is from
16 that, that we say these network effects follow and that
17 other -- the behaviour of other providers was affected
18 in the market.

19 If you could look, please, at 8.97, {A/1/279}. This
20 is AXA. You see that AXA told the CMA that its wide MFN
21 was ingrained in its pricing principles and explained to
22 the CMA that if it wanted to reflect changes in
23 commission fees, then it would need the ability to vary
24 custom premiums on a like-for-like basis {A/1/280}.

25 Perhaps we could turn to bundle F, tab 291, at

1 page 5, {F/291/5}. Is there anything more on that page?
2 Otherwise, I have a wrong reference.

3 Sorry, it is quite right. Sorry, it is my own note
4 that I am not reading. So if we can look at
5 paragraph 2, so if we read the question, first of all:

6 "Please describe to what extent changes in the
7 commissions paid by this HIP to PCWs have affected the
8 premiums set by the HIP for home insurance on PCWs or
9 other channels over the relevant period."

10 And if we look at the response and I am looking at
11 the second paragraph:

12 "Operating under wide MFNs has meant that
13 variability in commission by PCW has not been accounted
14 for at the channel level but at the product portfolio
15 level. Principally if AXA wanted to reflect unique
16 changes in commission by passing them straight through
17 to leads generated by each PCW, then it would need the
18 ability to vary customer premiums on a like for like
19 basis. This is something which has been impossible
20 under wide MFNs. Variable commission and blended
21 customer premiums result in underlying differences in
22 profitability by a channel but again this has been
23 managed by portfolio and in aggregate. In the future
24 without wide MFNs insurers will be able to consider more
25 granular allocation of commission by PCWs insurers pass

1 on these cost increases by channel providing a lever for
2 insurers to negotiate commissions. With wide MFNs
3 commissions can be increased by PCWs knowing that the
4 prices offered to their consumers will not be adversely
5 impacted relative to other PCWs. Essentially this is
6 tantamount to removing competition between PCWs in
7 respect of price resulting in a scenario whereby PCWs
8 who charge lower commissions are subsidising those
9 charging higher commissions, commission has increased
10 steadily over the relevant period."

11 So this insurer is explaining, in terms, that it
12 considers that the theory of harm has eventuated, the
13 theory of harm resulting from the MFNs has eventuated.

14 If we look, please, at page 4 of this document
15 {F/291/4}. If you look, please, at the second main
16 paragraph and the last sentence:

17 "Where wide MFNs still apply, no promotional or
18 exclusive discounts can be offered."

19 If we look, please, at page 12 {F/291/12}, and the
20 response to question 10:

21 "Please explain the importance of exclusive deals to
22 AXA's home insurance business, and the frequency with
23 which exclusive deals have been proposed to or requested
24 by PCWs over the relevant period."

25 Then you see:

1 "The ultimate value to AXA of exclusive deals is not
2 understood due to the prevalence of wide MFNs and the
3 continued enforcement until recently by ComparetheMarket
4 in recently supporting a rival's promotion which
5 supported an offering of [and you can see the amount]
6 promotional discount to new home insurance customers AXA
7 was accused of breaching the wide MFN provision in our
8 agreement with ComparetheMarket. The breach was
9 primarily driven by a lack of internal clarity within
10 this HIP as all other PCWs had agreed not to enforce
11 wide MFNs. Therefore the ComparetheMarket position was
12 not widely understood in relation to home insurance.
13 The exclusive deal allowed both the HIP and the rival
14 PCW to collaborate in delivering a powerful promotion to
15 UK consumers and promote both..."

16 If we could go over the page, please, {F/291/12-13}:

17 "... Both brands. AXA had limited budget to support
18 product specific above the line advertising so this
19 provided an invaluable opportunity to promote the brand

20 --

21 THE CHAIRMAN: Ms Demetriou, just one moment, I see that

22 Mr Beard has been replaced by a black hole.

23 MS DEMETRIOU: That sounds dramatic.

24 THE CHAIRMAN: I do not know whether, Mr Beard, are you
25 there?

1 MR BEARD: I am here. I have not been sucked into a black
2 hole. We had noticed that the camera had stopped
3 registering me, that should not detain the Tribunal. We
4 will see whether it revives itself.

5 THE CHAIRMAN: Very good, as long as you are there in some
6 capacity, that is great.

7 MR BEARD: I can see you. You cannot see me.

8 THE CHAIRMAN: Excellent. Do proceed.

9 MS DEMETRIOU: Thank you very much. Perhaps if the
10 situation gets worse, Mr Beard -- he is back. There we
11 go. It is a different camera angle. I can see
12 Ms Berridge, too. There we go. That is very
13 reassuring.

14 THE CHAIRMAN: We are very relieved, yes.

15 MS DEMETRIOU: So if we could go back, please, to page 13
16 and this is explaining that it was an invaluable
17 opportunity:

18 "This is the first time that AXA had participated in
19 a truly co-branded ATL campaign with a PCW."

20 Then could I just ask you to read the words that are
21 highlighted. Then could we, please, look at the bottom
22 of the page, {F/291/13}, at question 11: Please explain
23 the HIP's views of the overall success of exclusive
24 deals.

25 Could I ask you just to read the response. (Pause).

1 THE CHAIRMAN: Yes.

2 MS DEMETRIOU: Then, please, could we go over the page, to
3 page 14 {F/291/14} and have a look at question 12:

4 "... any [other] occasions in which either AXA or
5 a PCW have proposed an exclusive deal, but an exclusive
6 deal was not agreed."

7 Then again, I think you have seen this document, but
8 can you just refresh your memory as to what is said
9 there. Some of the words are highlighted, so I think it
10 is easier if the Tribunal reads the response to itself.

11 THE CHAIRMAN: Yes, we will do that. Yes, thank you.

12 MS DEMETRIOU: Just pausing there, I am going to go to one
13 further page on this slide, but a point that Mr Beard
14 made when he took you to this document yesterday, was he
15 said: well, because the reason was not disclosed to the
16 price comparison website, there is no real evidence that
17 the reason these subsequent deals were rejected was
18 because of the wide MFN.

19 I want to come back to that when we look at the
20 contemporaneous evidence in a moment. But if we can go,
21 while we are on this document, to page 16 {F/291/16},
22 and question 16, I will just go to the answer:

23 "In the absence of wide MFNs on [motor insurance]
24 AXA has been able to leverage future Exclusive Deals for
25 immediately lower Commissions."

1 Then you see that it has been able to negotiate
2 a reduction in commission on motor insurance:

3 "... in consideration for [it] support[ing]
4 co-funded pricing offers ... Without this flexibility
5 ... such a strategy would be impossible."

6 Now, going back to the decision and if we can go to
7 page 280 {A/1/280}.

8 Sir, I am conscious that we need a break for the
9 transcribers. If everyone could bear with me for two or
10 three more minutes, then I will finish on this HIP and
11 that would be a convenient time. I have not forgotten
12 about the break.

13 THE CHAIRMAN: Very good.

14 MS DEMETRIOU: So looking at 8.98, we see that this -- and
15 8.99, that this HIP has explained {A/1/280} -- this is
16 a reference to these deals that were rejected in 2017.
17 Could we look, please, just at the internal e-mails from
18 this HIP, which are referred to in the footnotes.

19 So if we go to bundle F again. So {F/496/1}, the
20 bottom of page 1, I want, I think. If the bottom could
21 be magnified, that would be great, thank you.

22 So if we look at this, I just wanted to -- this is
23 an internal e-mail from AXA. I just wanted to make you
24 aware and please note the date:

25 "I just wanted to make you aware of a situation with

1 ComparetheMarket as this may end up in them escalating
2 things to you and I want to be sure that you agree with
3 the position we are taking."

4 Can we go over the page, to page 2, please,
5 {F/496/2}. Then it is outlined, so it says at the top:
6 The CMA investigation into private motor insurance
7 banned the wide MFNs:

8 "In the months that followed, PCWs made commitments
9 to remove wide MFNs across adjacent personal lines of
10 business, such as house insurance. The exception to
11 this was CTM who were still enforcing wide MFNs across
12 non-PMI products with little regard for the sentiment
13 offered by the rest of the market.

14 "In 2016... the CMA had also kicked off their review
15 into Digital Comparison Tools..."

16 "In May/June 2017 AXA was approached by
17 MoneySupermarket to participate in its summer campaign
18 where AXA needed to provide a material promotional offer
19 on its direct household insurance product of X per cent
20 in return for X worth of paid media to support the
21 co-branded campaign including TV. The working
22 assumption was that this offer could be supported as the
23 CTM position was not widely understood.

24 "As the ... team worked through the MSM offer it was
25 felt that given the heightened focus by the CMA on wide

1 MFNs and the fact that the market had all but agreed to
2 banning wide MFNs or private household insurance, that
3 we stood a good chance of negotiating the clause out of
4 our contracts.

5 "The negotiations became protracted due to the low
6 level of engagement at CTM resulting in crunch talks
7 with the senior stakeholders. At this stage media had
8 already been secured by MSM and CTM refused to
9 reconsider their position on wide MFNs. At this stage,
10 CTM demanded that in order to allow AXA to operate
11 outside of the contract that we could simply match the
12 MSM offer, but that we had to offer at least three
13 promotions in 2017 ... to which we agreed under a level
14 of duress two. 2 x 10% on household insurance and
15 1 x 5% on motor insurance.

16 "Where are we now:" and you can see that price
17 comparator 1 and CTM have received:

18 "... promotions equivalent to a 10% discount on
19 AXA's household insurance for 1 month. (CTM received
20 a targeted 15% discount of two-thirds of new business at
21 zero cost to CTM."

22 If we go to the next page. {F/496/3}:

23 "CTM expect AXA to honour the [two] remaining
24 discounts in December.

25 "The CMA have issued their findings on DCTs and ..."

1 Have commenced a competition law investigation.

2 Then it says, can you read, please, the words that are
3 highlighted, so I do not read that out. (Pause).

4 Then:

5 "Given the change in landscape, and our fundamental
6 belief that the removal of wide MFN's is in the best
7 interest of UK consumers and competition, we aim to
8 renege on our commitments to CTM in relation to the
9 other [two] remaining discounts. Such promotions are
10 not in our best interest commercially and were forced
11 upon by applying contractual terms which we have always
12 believed to be unfair and are now potentially in breach
13 of competition law.

14 "CTM will probably escalate this quickly given our
15 change in stance and may use the fact that the
16 investigation is ongoing as a reason why AXA should not
17 rely upon it. We can think of 'other' things which they
18 may want, but previously these were not accepted ...
19 Consequences of this could be:

20 "1) CTM resist sighting breach of contract which
21 technically we are..."

22 I think that should be citing:

23 "2 CTM resist and threaten to remove AXA from its
24 panels."

25 So again, it is looking at potential enforcement

1 action that could be taken for breach of the wide MFNs:

2 "3 CTM concede and accept AXA's position.

3 "4 CTM concede but request some other mechanism by
4 way of compensation.

5 "5 CTM concede but penalise AXA operationally.

6 "6 CTM concede by penalise AXA commercially -- CTM
7 have already made aggressive overtures relating to the
8 next round of commission negotiations which could be
9 exacerbated."

10 Then if you could just read, I think, the first of
11 the highlighted bits. (Pause).

12 Then if we go to the next page {F/496/4} --
13 actually, if we can go back to the top of page 1
14 {F/496/1}.

15 You see in the middle of the page:

16 "Thanks for escalating.

17 "I think they will threaten 2 below with some vigour
18 but I support your stance."

19 Then further down:

20 "I think under 1 below, that any normal person would
21 not do this as the wide MFN clause is highly likely to
22 be held legally unenforceable ... "

23 And then you see the words that are highlighted.

24 So essentially what you see here is a description of
25 the response, the reaction by ComparetheMarket, to the

1 May/June 2017 deal that was concluded by AXA with
2 MoneySupermarket.

3 You see that what CTM required was that the deal was
4 replicated and, in fact, further benefits were conferred
5 on CTM at no cost to them for, in effect, the
6 contractual clauses to be waived and for that deal,
7 in May 2017, to go ahead. What AXA is saying here is:
8 actually, we want to renege on the last onerous bit of
9 that deal, which is that these further reductions should
10 be given to ComparetheMarket down the line, but they are
11 very worried about the effect of the wide MFN and what
12 the consequences could be, including delisting them from
13 their website.

14 When you turn to the decision, and this is -- I am
15 about to stop for the break. But if you turn to the
16 decision, you see at paragraph 8.100, on page 281
17 {A/1/281}, the reference -- so in the previous
18 paragraph, we have seen that there were then two
19 subsequent deals, which were offered to AXA, which they
20 turned down in the immediate aftermath of this, of
21 the May/June 2017 deal. So, two further deals were
22 offered. If we go back to page 280, perhaps at the
23 bottom of the page, you see one of them {A/1/280} is the
24 one at (a), so you see the date and the PCW.

25 Then over the page, the other one is the one at (b)

1 {A/1/281}. Then at 8.100:"AXA confirmed that the reason
2 that it was unable to support -- the second of these and
3 it has made the first point in relation to the first of
4 them -- was because of the wide MFN.

5 So what we have is evidence in response, in the
6 section 26 response saying: well, that is the reason we
7 did not pursue these two other deals in August 2017,
8 because we had already been stung on the May -- and
9 enforced against on the May 2017 deal.

10 You see direct evidence of -- contemporaneous
11 evidence of AXA's reaction to the enforcement that was
12 taken against them in respect of the May 2017 deal.

13 So you ask yourself, well, is the response in the
14 section 26 notice, which says: well, the reason we did
15 not enter into these two other deals three months' later
16 was because of the wide MFNs, is that a plausible
17 response? Well, of course, it is a plausible response.
18 Of course, it is, because we have seen the enforcement
19 action that was taken in response to the May 2017 deal
20 and what internally AXA thought about it, which is that
21 it was terrible and anti-competitive and they were
22 facing potential delisting action.

23 So we say it is really incorrect for
24 ComparetheMarket to suggest there is no evidence on this
25 point. As we say, this HIP has stated in terms in

1 response to a 26 request for information and it came hot
2 on the heels of the enforcement action. Of course, that
3 is a reasonable inference for the CMA to make --
4 a reasonable factual conclusion for the CMA to make.

5 Sir, if that is -- I am sorry, I have gone on a bit
6 longer than I thought. If that is a convenient time to
7 stop.

8 THE CHAIRMAN: Not at all. Yes, thank you. Before we rise,
9 how are you doing for time? That is not in any way
10 a criticism of the speed you are going at, you are going
11 as quickly as you can.

12 MS DEMETRIOU: I think I have got a fair shot at finishing
13 by 4.30 if the Tribunal is prepared to sit until 4.30.

14 THE CHAIRMAN: Well, certainly, we will do that. I think we
15 can run until 4.45, if that helps. I think, after that,
16 we begin to get into the law of diminishing returns in
17 terms of attention and transcription and just general
18 tiredness.

19 MS DEMETRIOU: Of course.

20 THE CHAIRMAN: But if you want to have until 4.45, then do
21 take it.

22 MS DEMETRIOU: That is very kind and I will do my best to
23 finish by 4.30, but it is very good to know that I have
24 got an additional 15 minutes, if needed. Thank you.

25 THE CHAIRMAN: Very good. Thank you very much. We will

1 resume at 20 to 4. Thank you.

2 (3.31 pm)

3 (A short break)

4 (3.46 pm)

5 THE CHAIRMAN: Ms Demetriou, we will just wait until the
6 livestream is up and running.

7 Ms Demetriou, over to you.

8 MS DEMETRIOU: Thank you, sir. I have just shown
9 the Tribunal evidence in relation to AXA, showing that
10 there is contemporaneous evidence, in relation to
11 the May/June promotional deal, that were the subject of
12 enforcement action in relation to that deal, which was
13 to their disbenefit and to the disbenefit of competition
14 and that they then rejected two subsequent deals shortly
15 afterwards on the basis of the wide MFNs in light of
16 that experience.

17 I am now going to ask you to turn to page 281 of the
18 decision, so {A/1/281}, and we are going to look at HIP
19 number 41. You can see from 8.101 that this is the HIP
20 in respect of which the CMA took a witness statement
21 during the investigation and that was referred to by
22 Mr Beard yesterday. So you can see that explained at
23 8.101.

24 Mr Beard did not take you to any of the documents,
25 the contemporaneous documents, in relation to Aviva

1 (Quote Me Happy) and I just want to show you some of
2 those, because like HIP~19, Aviva (Quote Me Happy) also
3 rejected promotional deals, because of CTM's wide MFNs.

4 You can see from 8.102 on page 282 of the decision
5 {A/1/282}, that it rejected at least two promotional
6 deals in home insurance offered by MoneySupermarket and
7 Confused.

8 Could we just turn, please, to bundle F, tab 392 at
9 page 3 {F/392/3}.

10 At the bottom of the page, first of all:

11 "As discussed yesterday we are keen to keep up
12 momentum... We do have additional investment funds
13 for September and we would like to work closer with you
14 to drive sales.

15 "Our feelings are anyone implementing [it says
16 'narrow' MFN but the CMA has concluded, and they must be
17 right given the context, that this is meant to refer to
18 wide MFNs given the context] anyone implementing a
19 narrow MFN clause are on shaky ground. It would appear
20 anti-competitive to us especially if parties are using
21 it to stop lower premiums in the market and the update
22 from the CMA in a couple of weeks could be interesting."

23 Just going on to the next page, page 4, {F/392/4}:

24 "If you have concerns around the above we could look
25 to run a price cut offer without advertising the fact or

1 bringing attention to it. We would also be happy to add
2 7 day cancellation notice to the deal should you need to
3 react to any pressures quickly."

4 So that is MoneySupermarket communicating with
5 HIP~41, showing interest in a promotional deal,
6 recognising the constraint that is placed on it by the
7 wide MFN.

8 If we could go to page 2 of this document {F/392/2}.
9 Could you please, first of all, read the e-mail at the
10 bottom which is highlighted. (Pause).

11 So this is direct evidence of them rejecting a deal,
12 because of the wide MFN. May I just pause as well. So
13 the second paragraph in that e-mail, which refers to
14 a different type of offer, just to go back to a question
15 that Professor Ulph put to me earlier about incentives,
16 so this different kind of offer might be, for example,
17 a stuffed meerkat or some cinema tickets, so what Aviva
18 (Quote Me Happy) is saying is: how about that? No
19 doubt, because that is not banned by the wide MFN.

20 Then if we go up the same page:

21 "Unfortunately I am not getting any traction on an
22 ancillary investment. They want to use the funds to
23 invest in price [in price] in line with company
24 strategy."

25 Then if we look at page 1, please, {F/392/1}. Can

1 you please read the bottom, the response. (Pause).

2 Then:

3 "No worries... You need to get out of that
4 contract!"

5 Obviously meaning the wide MFN.

6 THE CHAIRMAN: Yes.

7 MS DEMETRIOU: So this is, again, direct contemporaneous
8 evidence of one of the larger insurers having to reject
9 a promotional deal that it is being offered, because of
10 the wide MFN and that being recognised explicitly is the
11 reason in correspondence between them and the price
12 comparison website in issue.

13 Going back to 8.102, on page 282 of the decision
14 {A/1/282}, this relates to another deal with one of the
15 other PCW rivals. This is sub-paragraph (b) and you see
16 the response from Aviva (Quote Me Happy) on
17 a promotional deal offer from that PCW stating:

18 "Rather embarrassingly I have forgotten that we have
19 a wide MFN clause in place which is stopping this ...
20 Looks like we cannot do it."

21 And then again you see what is said after that.

22 They try again:

23 "The short answer is no I'm afraid. We have a rule
24 ... that we cannot knowingly break legally enforceable
25 contract terms. Given these terms are still legal, we

1 are not in a position to contravene the terms."

2 Now, that is Aviva (Quote Me Happy). I want to now
3 look at Legal & General, which is addressed in
4 paragraphs 8.103 and the following paragraphs at the
5 bottom of page 282. {A/1/282}.

6 Now, yesterday, in his submissions, Mr Beard, at the
7 end of Day 1 and at the beginning of yesterday, Mr Beard
8 addressed this home insurance provider, so this is Legal
9 & General, he cited various documents, which he said
10 supported CTM's case that the wide MFNs had no material
11 impact. Those documents included this provider's
12 response to the statement of objections, for example,
13 you will recall that.

14 But again, he did not go to the contemporaneous
15 documents relating to this HIP. He did not go to any of
16 that. The CMA, on the other hand, did address that
17 decision and they did explain, at 8.103, why they did
18 front up to the points made by Mr Beard, so they
19 considered them and they explained why they preferred
20 the contemporaneous evidence. So they noted that what
21 was being said in submissions and in a meeting with the
22 CMA, for example, was inconsistent with that
23 contemporaneous material.

24 If we look, if we could perhaps go to {F/321/2} and
25 perhaps to page 2, first.

1 At the bottom of page 2, we see here:

2 "Please could I have your view on whether you see an
3 issue from a CTM contractual perspective of entering
4 into an exclusive price offer with MSM."

5 If we go to the top of page 1, {F/321/1}, and then
6 if that could be enlarged, please:

7 "I am not satisfied we can operate the MSM
8 proposition without breaching the CTM clause ... The
9 contractual defined terms in my [view] ensure that the
10 clause applies to all household contracts ...

11 "The only option might be that MSM gives its own
12 discount/cashback and this is operated by [the HIP] at
13 source. So the price reduction is driven by [the PCW]
14 and not by [the HIP]. I need to give them a bit more
15 thought."

16 Just to see the context, at the bottom of the page,
17 you see what is being said -- if we can just go to the
18 bottom of page 1, please. This is in the context of:

19 "We have been approached by MSM who would like to
20 run an above the line marketing campaign with them to
21 include a provider exclusive offer such as 10% off or
22 a voucher etc.

23 "As you know we have a wide MFN clause in our
24 agreement ... which reads as follows:.."

25 So again, this is direct evidence, in February 2017,

1 of the HIP being approached by a price comparison
2 website and it rejecting this offer on the basis that it
3 is bound by the wide MFN.

4 If we could go now to bundle F, tab 284, page 1
5 {F/284/1}. If we start at the bottom and you can see
6 who the e-mail is from, and it is to this HIP, so it is
7 from MoneySupermarket to this HIP:

8 "One the things we are going to catch up about was
9 the ATL conversation so my suggestion of the mid-May
10 mid-June slot. Would you be able to find out whether
11 you will be able to work to that timeline?"

12 If we can scroll up the page, please, we see the
13 response:

14 "At the moment I am still working on whether we
15 could do this contractually which is the major hurdle I
16 need to overcome and would be the showstopper for us if
17 we cannot."

18 Again, evidence of a promotional deal, an offer for
19 a promotional deal being rejected on the basis of the
20 wide MFN.

21 If we could go now to {F/324/1} and if we look,
22 first of all, at page 1, to see what it is. This is
23 dated June 2017 and it is an internal briefing pack
24 produced by this HIP for a meeting with
25 MoneySupermarket, ahead of a meeting with

1 MoneySupermarket. If we look at page 3 first {F/324/3},
2 "Account discussion topics" and you see item 3,
3 "Exclusive offers", and "CTM wide MFN".

4 So here you see this HIP is planning a meeting with
5 MoneySupermarket and high up on the agenda is its wide
6 MFN with CTM.

7 Then if we look at page 5 {F/324/5}, "Topics for
8 discussion", and then you see, "Exclusives -- MFN
9 blocker", that is what they are saying. They say:

10 "The [Legal & General] CTM agreement includes a wide
11 MFN clause. This clause states that [Legal & General]
12 cannot offer cheaper rates on any other Agg or Direct.
13 The other three Agg contracts only have narrow MFN
14 clauses, which mean that we cannot offer cheaper quotes
15 Direct or with MSM.

16 "The wide MFN in the CTM agreement prevents us from
17 being able to work with MoneySupermarket on exclusive
18 pricing offers such as the above line activity that MSM
19 are running with [another insurer, presumably not
20 covered, I think definitely not covered by the wide MFN]

21 "The CMA is currently completing a market study on
22 Digital Comparison Tools and has highlighted wide MFNs
23 as one of four types of practice that might raise
24 a competition concern.

25 "As the CMA's private motor insurance market study

1 banned wide MFNs in 2015 but did not state there would
2 be a read across to other products, it is reasonable to
3 expect that CMA will ban this clause in the current DCT
4 review."

5 "We suspect that CTM has partners that do not have
6 the wide MFN for home insurance particularly where they
7 have a joint motor/home agreement with CTM, and the wide
8 MFN removal has then removed this clause for all
9 products. As part of this year's CPA negotiation we
10 have again pressed for the removal of the wide MFN,
11 however, this is currently non negotiable with CTM,
12 until the current CMA review is completed."

13 "Ahead of the CMA decision, should we decide to
14 provide cheaper rates to non-CTM customers, we
15 ultimately risk CTM switching us off. We have spoken to
16 MSM about pencilling us in for the partner above the
17 line slot in October 2017, once the CMA decision has
18 been made, however they cannot hold this for us unless
19 we are 100% confident that we will do the offer even if
20 the CMA rules do not change and we could end up why
21 broach with CTM."

22 So again, this is evidence which really could not be
23 clearer that this HIP wants to do an offer with
24 MoneySupermarket, wants to do a deal with
25 MoneySupermarket, has spoken to MoneySupermarket about

1 pencilling them in for the deal, but cannot act on that
2 appetite to do the deal, because of the wide MFN.

3 Again, it is direct evidence at the time of pricing
4 competition, potential pricing competition being
5 suppressed.

6 Now, if we could please also look at F, tab 318 at
7 page 1 {F/318/1}. This is an internal paper
8 of November 2017 prepared for the pricing committee to
9 assess the impact of a proposed deal with
10 MoneySupermarket. If we could just enlarge that
11 a little bit, please.

12 Could you please read the first paragraph because it
13 is highlighted, so I do not want to read it (Pause).

14 THE CHAIRMAN: Yes.

15 MS DEMETRIOU: Perhaps if you could just read the entire
16 document rather than me reading it out and then I will
17 make the point I want to make.

18 THE CHAIRMAN: Yes, of course.

19 Yes, thank you.

20 MS DEMETRIOU: Thank you, sir. Again, they are saying they
21 have been approached for a deal from MoneySupermarket
22 and that they cannot act on that. They say the worst
23 case scenario is that CTM could terminate their
24 agreement. They cannot act on it specifically and
25 expressly, because of the wide MFN, and what they are

1 fearing in the worst case scenario is that CTM will
2 switch them off, not list them. You see why that is
3 problematic in terms of the percentage of their sales
4 that is referred to at the bottom the page.

5 Just pausing, these three insurers that I have taken
6 you to, as the CMA said a little earlier -- made up
7 earlier -- in the decision, made up more than 18
8 per cent, these three insurers are significant insurers
9 and together they made up more than 18 per cent of sales
10 through PCWs.

11 We say that plainly this is direct evidence, direct
12 contemporaneous evidence of the wide MFNs having an
13 actual effect on the price competition that these
14 insurers sought to engage in.

15 It really, we say, is impossible to say on the basis
16 of this material that there was no effect on price
17 competition, because these documents are showing the
18 insurers wishing to engage in price competition and
19 being prevented from doing so expressly because of the
20 wide MFNs.

21 Now, the next part of the decision concerns
22 enforcement of the wide MFNs and let me just show you,
23 please, the structure of that.

24 If we could turn to paragraph 8.115, on page 291, or
25 on page 290. {A/1/290}. You see figure -- in fact, it

1 was 291, I wanted {A/1/291}. Figure 8.3, you see an
2 extract from CTM internal document "Non-car WMFN
3 enforcement negotiations." What you see in this part of
4 the decision is a description of how enforcement took
5 place. So there was, first of all, a contact made to
6 the insurer, you see this from 8.117, to identify the
7 reason why pricing was outside the tolerance levels
8 identified in the monthly documents.

9 Then you see at 8.121, on page 293 {A/1/293}, that
10 where -- and you see this at 8.121:

11 "Where CTM's concern ... was not resolved, CTM took
12 a risk based approach to the prioritisation of pricing
13 differences that it wished to pursue further..."

14 Taking into account the significance of the volume
15 of customers and the extent of the price difference and
16 so on. Then it escalated its enforcement action with
17 six providers during the relevant period.

18 So this is escalated enforcement. We have already
19 had a description of the more -- the enforcement below
20 the escalation level where the phone was picked up and
21 discussions were had. That is in the previous
22 paragraphs.

23 Then what you see at 8.122 is that:

24 "The CMA has obtained evidence that CTM took action
25 against six providers during the Relevant Period, which

1 together accounted for nearly 15% of sales through PCWs
2 in 2017."

3 The names are included there.

4 I have already taken the Tribunal to some of the
5 documents, more particularly some of the documents
6 relating to AXA, to the AXA deal with MSM, which gave
7 rise to direct enforcement action. I have taken you to
8 those documents. I am not going to go back to that.

9 But can I take you, please, to page 296 of the
10 decision {A/1/296} and you see there paragraphs 8.130
11 through to 136, concern a different HIP. This is
12 Deeside (Aim 4) and this shows -- so Deeside (Aim 4),
13 you can see from 8.130, is relatively small, but CTM
14 still enforced.

15 If you turn to 8.134, on page 297 {A/1/297}, is that
16 the wide MFN was discussed by CTM with this HIP on
17 several occasions during the context of negotiations on
18 commission fees.

19 So it was used in that context too as a bargaining
20 tool. Then what we see, at 8.135, is that:

21 "During exchanges regarding the proposed increase in
22 relation to commission, CTM reiterated on several
23 occasions its WMFN obligation and its internal documents
24 then showed it was satisfied with the progress it had
25 achieved, we see this in 8.136, in ensuring that this

1 HIP was pricing consistently with the wide MFNs."

2 And we give an example there of a snapshot for June.

3 Then we see that the upshot is for the remainder of
4 the relevant period its pricing appears to have been
5 regarded by CTM as generally within the compliance
6 threshold.

7 So one point, I just pause to make here, is that
8 what I have shown to you, what I have been showing you
9 recently are direct pieces of evidence where you see
10 a HIP say: we want to enter into this promotional deal,
11 we are stopped from doing it, because of the wide MFNs.
12 That is direct evidence of effects of the wide MFN.

13 But, of course, the wide MFN can have effects and
14 the CMA found did have effects that are a little bit
15 more difficult to pin down in the sense that you do not
16 have evidence of a promotional deal being refused, as is
17 the case with the HIP that I have just been looking at.
18 But what you do is you have CTM waving the wide MFN
19 around in the context of negotiations in relation to
20 commission increases and then you see them falling back
21 into line.

22 A further example is at page 298 and this HIP is
23 Grove and Dean. {A/1/298}. You see a heading above
24 paragraph 8.138 and 8.139 you see that Grove and Dean
25 applied a temporary increase and you see the amount

1 there, which is confidential, on its quotes on CTM in
2 home insurance to reflect CTM's higher commission fees.
3 So what you would expect of course, absent the wide
4 MFNs, is that. If CTM increase its commission fees that
5 is reflected in higher charges just on its website and
6 that is what Grove and Dean did.

7 Then you see the consequence over the page at
8 page 299, {A/1/299}, described at paragraphs 8.140 to
9 8.141. You see that there is a meeting in March 2017
10 with CTM where CTM question this HIP on the
11 application -- on the wide MFN and it confirmed in
12 a follow up e-mail, CTM confirmed that it was enforcing
13 the wide MFN in home insurance and you see an internal
14 e-mail from the HIP saying they have given:

15 "... us a ticking off for applying different
16 pricing on bike, van and home across other aggregators.
17 Car is fine as this has been legally challenged and
18 quashed!' as well as noting that 'it is on their radar
19 now, so I would imagine this will be reviewed monthly
20 from now on."

21 Then you see at 8.141 that, as a direct result, they
22 confirmed that they removed the increase and thereafter
23 continue to provide price consistently across PCWs for
24 home insurance. So what they sought to do is increase
25 the retail price on CTM in response to an increase in

1 commission fees and that has been quashed, squashed
2 because of the wide MFN. If we just look at -- perhaps
3 there is not time to take you to the documents, but
4 those documents referred to are contemporaneous
5 documents which are then footnoted.

6 Now, at 8.142 you have another HIP, One Call.
7 I have already shown you I think the section 26 response
8 of this HIP and so I am not going to go back to it, but
9 I would ask the Tribunal to read these paragraphs I am
10 not going to read them out now, but I have taken you to
11 the section 26 response already and you can see that
12 enforcement action was taken against this HIP when it
13 entered into promotional deals with rival PCWs.

14 Now, if we go on to 8.148 on page 302, {A/1/302}
15 this concerns Qmetric (Policy Expert) and we see that
16 again CTM took enforcement action against Qmetric
17 (Policy Expert) and we see what sales they account for
18 and we see that at 8.149 that it monitored its pricing
19 and that when CTM identified that its pricing were lower
20 on a rival it raised the issue and was not satisfied
21 with the response and escalated its enforcement action.
22 If we go over the page, please, {A/1/303} we see, at
23 8.151, that the HIP explained that during a telephone
24 call CTM made a specific threat to delist it, due to its
25 poor levels of compliance, it told the CMA it took the

1 matter very seriously at this stage and genuinely
2 believed that it would be delisted.

3 Then you see at 8.152:

4 "As a result of the delisting threat this HIP cut
5 short a promotional deal and reduced its prices on CTM."

6 You see in the footnote that the response -- and
7 this is a document that Mr Beard took you to -- the
8 response to the section 26 notice said: well, we would
9 have terminated it early anyway, the promotional deal,
10 for other reasons. So again that is something that the
11 CMA took account of but it found, and was entitled to
12 find on the basis of the document, if you look at the
13 wording in the footnote told the CMA it believes it
14 would have terminated this deal shortly after that date.
15 The fact was that it did terminate it before as a result
16 of the wide MFN; so even if it would have terminated it
17 even earlier. You see at 8.153, {A/1/304}, that the
18 result of this enforcement action in relation to this
19 HIP was recorded in an internal CTM presentation and
20 again obviously that is contemporaneous material which
21 the CMA took account of.

22 Now 8.154 relates to Swinton. You see the heading
23 above 8.154 on page 304. Again, what you see is a
24 description of how CTM queried Swinton's prices on
25 several occasions and you see that at 8.156 it sent it

1 an e-mail in February 2017 querying the divergences,
2 8.157, it escalated the issue.

3 {A/1/306} 8.158, a further chaser. 8.160, the HIP
4 replied saying it was taking the issue seriously:

5 "We have been taking some time here to look into
6 this issue carefully explaining that a number of factors
7 may give rise to the difference in pricing and stating
8 we are concerned about the issues you have raised in
9 your earlier e-mail. Would like to discuss these."

10 So what actually then happened is that all of this
11 got caught up in events so the CTM withdrew its wide
12 MFNs of course on 1 December and so this did not go any
13 further. But what you see is clear evidence here of the
14 HIP being concerned about the enforcement action.

15 Now, again moving on in the decision to section 9.

16 What the CMA has done in section 9, which starts on
17 page 321, {A/1/321}, is it has taken account of all of
18 that evidence that I have shown you and further evidence
19 in section 9 in reaching its conclusions on appreciable
20 effect and it has also carried out in section 9 an
21 analysis of the promotional deals, which, as I have
22 shown the Tribunal, were an important means by which
23 competition on price took place during the relevant
24 period both between insurers and between PCWs.

25 If we look at the summary at page 326, {A/1/326},

1 paragraph 9.21 at the bottom of the page, we see the
2 conclusion being foreshadowed:

3 "During the relevant period providers that had
4 a wide MFN agreed substantially fewer promotional deals
5 than those that did not and since CTM stopped enforcing
6 its wide MFNs more promotional deals have been agreed by
7 providers previously subject to CTM's wide MFNs when
8 compared to the relevant period and more providers
9 previously subject to CTM's wide MFNs have agreed
10 promotional deals when compared to the relevant period."

11 So you then see how that -- if you then look, you
12 can see at paragraph 9.24 in table 9.1, {A/1/328}, on
13 page 328 that during the relevant period, the number of
14 deals agreed by providers subject to wide MFNs was much
15 lower than the number of deals reached by agreed by
16 providers without the wide MFNs. We say that that is
17 a significant point on which the CMA was entitled to
18 place weight.

19 If we look at table 9.2 on page 331, {A/1/331}, we
20 see that after removal of the wide MFNs -- so it is
21 looking at the 19-month period prior to removal and the
22 19-month period afterwards -- the number of promotional
23 deals agreed went from five to nine. Mr Beard says that
24 is just four more, but in the context, and we will
25 address this when we look at the evidence, but in the

1 context of the overall figures that is significant
2 because it has almost doubled. Then you see that the
3 number of providers that engaged in promotional deals
4 has jumped up from three to seven.

5 Then if we look as well at page 333 at
6 paragraph 9.35, {A/1/333}, we see that:

7 "... two providers previously subject to [the] wide
8 MFNs ... that used uniform base retail pricing during
9 the Relevant Period have invested in updating their
10 pricing models..."

11 Since the end of the relevant period. In fact
12 I skipped over, but I should not have done, on page 331
13 to 332, paragraphs 9.33 and 9.34, which again relate to
14 the activity that has gone on since the removal of the
15 wide MFNs {A/1/331}.

16 We also see, and this is a point that has come up in
17 discussion, if we turn to page 363, {A/1/363}, the
18 heading a third of the way down the page that the CMA
19 found that the softening of competition between
20 providers subject to the wide MFNs, those providers
21 making up 40% of the market, softened competition
22 between providers more generally and we see that
23 explained in those paragraphs and of course we can see
24 that reflected in the promotional deals concluded by
25 insurers without wide MFNs.

1 If we look at page 368 at the table at the top of
2 the page, {A/1/368}, we see there the overall numbers of
3 promotional deals that have been concluded afterwards
4 compared with before. So they have increased from 20 to
5 29 and the number of providers entering into them have
6 increased from five to ten. So we say that this
7 evidence is all consistent and what it shows is an
8 increase in activity both in the number of promotional
9 deals concluded after the removal of the wide MFNs and
10 also the number of providers that are willing to enter
11 into them and that evidence needs to be seen alongside
12 the qualitative evidence that I have shown you where the
13 providers and the PCWs are at the time and subsequently
14 explaining the effect of the wide MFNs on their pricing
15 strategy.

16 Now in those circumstances we see that it is not
17 surprising then that CTM's rival PCWs considered the
18 wide MFNs to be a barrier to expansion and if we look
19 for example at the Confused response to CMA information
20 request at {F/242/6}, and the response to question 6 and
21 it is asking about barriers to growing its business, and
22 you see there at the bottom of the page:

23 "We believe that Confused's growth in the home
24 insurance market has been restricted due to the wide
25 MFNs imposed by another PCW. HIPs have been unable to

1 return a cheaper price to Confused's customers due to
2 this contractual restriction."

3 Then we see a similar response from MoneySupermarket
4 at {F/282/3}. So you see at 6: three significant
5 barriers to entry within the home insurance sector and
6 you see the middle one is wide MFNs. Prevent or
7 restrict other PCWs from being able to invest in pricing
8 with a provider to enable cheaper products to be offered
9 to consumers.

10 In relation to promotional deals Mr Beard sought to
11 place weight on the FCA report and let me just tell you
12 briefly what our response is to that. He said that it
13 establishes that promotional deals are bad for
14 consumers. Now, it is not clear precisely what
15 consequences it seeks to draw from this. Mr Beard
16 seemed to be saying that in light of the FCA report
17 the Tribunal somehow has to disregard the findings made
18 in the decision about an adverse effect on promotional
19 deals but we say that that would be a remarkable
20 submission because of course promotional deals were an
21 important way in which price competition manifested
22 itself during the relevant period. So they were an
23 important means, and we have seen this in section 7, in
24 which HIPs and PCWs competed on price.

25 Now it may well be post-FCA remedy that promotional

1 deals will not be the key means of competition because
2 discounts will have to be extended to renewal customers,
3 so that will mean that HIPs and PCWs, because price is
4 such an important parameter of competition, will have to
5 find other ways in order to compete on price. But the
6 question for the CMA was: was there an adverse effect on
7 price competition? You cannot ignore the means by which
8 price competition manifested itself at the time in order
9 to determine that question. That is really what we say
10 about the FCA report. Sir?

11 THE CHAIRMAN: It may be that this is a point that we need
12 to explore in reply because I think Mr Beard's point was
13 quite closely tied to the market in which we are
14 examining anti-competitive effects because I think his
15 point was that it is invidious -- and this is what the
16 FCA found -- invidious to differentiate between new
17 customers and renewals.

18 Now of course your decision but not the FCA decision
19 is looking at a market and the effect in the market that
20 does not include renewals and so if you say: Look, we
21 are only looking at new business, people who go to price
22 comparison websites, then clearly your point has got
23 much more force than if one should be looking more
24 widely. So it seems to me this is the point that really
25 we need to consider when we have got a greater grip on

1 the debate about the width of the market and what we
2 should be looking at.

3 But let me put it this way; if you are right, and
4 I know we have got a lot of work to do in understanding
5 this, but if you are right that we are simply looking at
6 new business to price comparison websites, then it seems
7 to me your point is quite a strong one, but is not
8 really affected by what the FCA says because it is
9 looking at a different thing. If, on the other hand,
10 you are addressing the same sort of market situation as
11 the FCA was doing; namely the distinction between old
12 customers and new, then you may have more work to do on
13 the point.

14 I entirely take your point, but I think that
15 probably there is more work to be done on this but not
16 now. Mr Beard, I see you have got your hand up.

17 MR BEARD: I have. I just want to be clear about our
18 position in relation to it. Obviously, sir, you are
19 right insofar as the market is wider than the whole
20 issue about price walking and the impact on renewals is
21 relevant. But the issue still arises in relation to the
22 FCA conclusion even if you are looking at the CMA's own
23 market and I think that is an important point to
24 emphasise because what was being found by the FCA was
25 that if you have someone who approaches a website and

1 thinks, oh, there is a discount here on this product,
2 they end up potentially making bad choices in relation
3 to what the most suitable product is for them.

4 Now, what is being said by the FCA there is that
5 that is not an effective form of competition in relation
6 to consumers. Insofar as you are saying one type of
7 price competition is not good for consumers we say that
8 is a material consideration, at the very least, as to
9 how you treat these discounts because when the FCA is
10 saying: Actually, they just end up misleading people,
11 you cannot, as the CMA, treat that as a virtue even if
12 you have proved there is some notional impact, which of
13 course we do not accept.

14 So I think it is important that we recognise that
15 our case is not just predicated on a wider market
16 definition. It also applies when there is a narrower
17 market definition.

18 THE CHAIRMAN: Is that because the discounts are in some way
19 time limited or slanted to draw people in without --

20 MR BEARD: Yes.

21 THE CHAIRMAN: -- considering a proper, as it were,
22 permanent price reduction?

23 MR BEARD: Well, I think there are two things going on.

24 What the behavioural study actually says is that
25 when you have cash discounts, or equivalent to cash

1 discounts, what you end up with is people essentially
2 being grabbed by those and then making poor choices
3 about what the absolute best value is for their
4 particular product and, therefore, that is problematic
5 in and of itself. But the FCA is actually going further
6 because it is talk about all new business only it is
7 talking about when you offer a discount only for your
8 new business that sucks people in and then puts them on
9 the treadmill of the price walking which is itself
10 damaging.

11 So again what it is saying is that that element of
12 price competition, of driving down new business prices
13 by whatever means, is actually damaging overall to
14 effective competition, which is why it needs to be
15 stopped. So it is both the flash effect and the
16 new-business-only effect that they are targeting there
17 and we are saying: Look, what they are saying is that
18 is not effective price competition. So when you are you
19 talking about an adverse effect on price competition you
20 need to have that finding in mind because ironically
21 what you are saying in relation to promotional deals --
22 I know Ms Demetriou puts it in terms of dynamics of
23 price competition -- you are engendering price
24 competition that another regulator is saying is not
25 effective competition and not beneficial to consumers.

1 THE CHAIRMAN: Okay, thank you, Mr Beard.

2 Ms Demetriou, back to you.

3 MS DEMETRIOU: Sir, yes, thank you. In respect of your
4 point about the interaction with market definition
5 I think I respectfully agree that that is a point for
6 later on, once that has been explored, so the
7 interaction between this issue and the question of
8 whether renewals are in the same market. So I would
9 like to come back to that once we have heard the
10 evidence.

11 In respect of the point that Mr Beard was just
12 addressing you on, so assuming now that the CMA is
13 correct on market definition, we do say that what the
14 FCA found -- the FCA did not find that promotional
15 discounts were not effective price competition. They
16 found that they had deleterious effects in terms of
17 price walking for renewal customers, so that was the
18 concern.

19 Mr Beard is shaking his head. He can make his
20 points later. He has already chewed up a chunk of my
21 time, so I am just going to tell you the headline points
22 that we make. We say that the way that price
23 competition manifested itself, at the relevant time, was
24 significantly through promotional deals. So when one is
25 testing was price competition softened, you cannot take

1 promotional deals out of the equation because that was
2 the way, in fact, one of the two key ways in fact in
3 which price competition took place at that time.

4 So you cannot say, well, we are going to ignore that
5 because actually the FCA later found that for a certain
6 category of consumers those things can be bad and so
7 they have imposed a remedy because that was, in fact,
8 how price competition was affected. Now, the fact that
9 had the remedy been in place -- so really the fact that
10 the remedy has been enacted one can test it this way;
11 had the remedy been in place at the relevant time, then
12 the HIPs and the price comparison websites would have
13 found a different means, a different mechanism through
14 which to express their price competition. But in each
15 case you are still testing the same thing: was price
16 competition softened? That is why we say it cannot be
17 ignored, but it was a point we will come back to, but
18 I did want to explain what our position is on this
19 issue.

20 THE CHAIRMAN: No, I quite understand and I am very grateful
21 to you for doing so. I suppose the only point that
22 raises itself in my mind, and it is certainly not for
23 now but something that I will put on the record, is that
24 of course price competition in the sense of undercutting
25 can be bad as well as good. So if you have got your

1 typical margin squeeze then you have got a benefit in
2 the short term of the consumer getting good deals. But
3 in the long run, it is a bad thing because you are
4 eliminating competition. I am not saying that this is
5 by any stretch of the imagination this case, it is not.

6 But what you have got is you have got the age old
7 problem of the three infringers of competition law in
8 prison, one saying: I am in prison because I put my
9 prices too high; the other saying: I am in prison
10 because I put my prices too low; and the other one in
11 prison for not changing the prices at all. So these
12 things are slightly relative. I entirely take your
13 point, but how one factors into that point the notion
14 that a price competition might be bad is something which
15 I confess I have not got my mind around, but it did seem
16 to me at least worth raising.

17 MS DEMETRIOU: Sir, thank you. Can I just give you two
18 immediate reactions to that?

19 THE CHAIRMAN: Of course.

20 MS DEMETRIOU: We will come back to it in more detail, but
21 the two immediate reactions are of course generally when
22 one is looking at lower prices being bad one is looking
23 at dominant undertakings and abuses, exclusionary abuses
24 and we are not in that territory here. We are looking
25 at an Article 101 Chapter I case. The second point to

1 make is of course CTM are not claiming that there are
2 pro-competitive benefits of these wide MFNs, so they are
3 not claiming that. They are not saying consumers were
4 salvaged, were saved as a result of these clauses
5 because otherwise there would have been more promotional
6 deals which would have been bad for them. So it is not
7 a point they are making. I just leave those --

8 THE CHAIRMAN: That second point I completely accept and we
9 went into that yesterday, I think. But what I am saying
10 is not that there is an allegation of pro-competitive
11 effect, but that the anti-competitive effect that you
12 are alleging is more nuanced and is not
13 anti-competitive. I think that is for better or worse
14 the thrust of the FCA point.

15 So it is a sort of curate's egg point. You have got
16 your anti-competitive bit of the egg and then you have
17 got the deleterious problems of price competition as
18 part of the same point and that is, I think, the
19 difficulty I am raising. I am not pretending to have
20 a solution but I again think it is something that we
21 need to have at least on our radar.

22 MS DEMETRIOU: Sir, I quite agree because it is the point
23 that is being raised by CTM so they are saying, well,
24 this type of price competition was no good so somehow
25 you cannot count it. We will come back to it, but

1 I just wanted to explain in a nutshell what our response
2 to it is, which I think you have got.

3 THE CHAIRMAN: Absolutely.

4 MS DEMETRIOU: But I am not pretending that this -- I am not
5 trying to say that this is an issue that we now brush
6 under the carpet and will not return to. Obviously we
7 will need to debate it in the course of these
8 proceedings.

9 THE CHAIRMAN: I think, just to be clear, obviously the fact
10 that it is the FCA saying this entitles it to a certain
11 degree of weight, but I am not sure that it creates
12 anything more than it is a part of the evidential
13 pattern; in other words, I will put it this way, I do
14 not find it at all surprising that two regulators in
15 respect of, broadly speaking, the same responsibilities
16 may reach different outcomes on what are difficult
17 questions. So to the extent that you are going to want
18 to say that special weight needed to be attached to the
19 FCA that, I think, we would require some persuading of.

20 We will take it into account, clearly it is relevant
21 as you are accepting, but it is part of the pattern.

22 MS DEMETRIOU: Sir, thank you. In view of the time I am
23 going to just wrap up in 30 seconds, ahead of the
24 extended time that you gave me.

25 I think what I want to say is that I have shown the

1 Tribunal, in our respectful submission, clear
2 contemporaneous evidence and clear further evidence and
3 by that I mean responses not strictly contemporaneous
4 but responses to section 26 requests and so on, clear
5 evidence showing that these wide MFNs had an effect on
6 pricing behaviour. So really it is impossible to ignore
7 that evidence, we respectfully submit, because it
8 demonstrates unequivocally that actors, and important
9 actors in the market, were refraining from engaging in
10 price competition as a result of the wide MFNs.

11 That evidence is consistent with the predictions
12 made in the economic literature as to the effects that
13 you would expect these clauses to have. So we say that
14 in light of the evidence which I have highlighted to
15 you, but of course of which there is more, we say that
16 it is impossible, we respectfully submit, to conclude
17 that these wide MFNs had no effect on competition and
18 indeed such a conclusion would be implausible in light
19 of CTM's own attitude towards them at the time.

20 So it is implausible to say they did not have the
21 effect that the CMA has found because in view of how CTM
22 regarded them itself at the relevant time and so really
23 the question for the Tribunal is whether that effect is
24 more than de minimis, so whether it is appreciable and
25 we say, yes, it is more than de minimis for all of the

1 reasons that I took you to that were summarised at the
2 end of chapter 9 that I took you to just after lunch --
3 it seems like a long time ago now -- but that were
4 summarised at the end of chapter 9 on the basis of the
5 evidence in the decision relating for example to CTM's
6 market position and the importance of these insurers and
7 the network effect and the importance of price
8 comparison websites as a channel for the sale of home
9 insurance. So, sir, we say really that is the critical
10 question.

11 Whether they had an effect we say is clear and we
12 say that is clear that there was an effect because you
13 can just see that on the face of the documents. The
14 question is whether that effect was appreciable in the
15 sense of being more than de minimis. That is really
16 where the key battleground lies and of course the
17 evidence that you are going to be listening to will shed
18 light on that question which we will address in more
19 detail in our closing submissions.

20 But unless I can assist further by way of opening,
21 that is what I wanted to say by way of overview of the
22 planks of the CMA's analysis in finding the infringement
23 in this case.

24 THE CHAIRMAN: Thank you very much. I do not know if
25 Ms Lucas or Professor Ulph have any questions for you.

1 I see shaking of heads.

2 MS LUCAS: No, I am fine.

3 THE CHAIRMAN: No. Me neither. I think just one point that
4 I should put on the record just so that you can
5 understand how we are treating it. In a sense
6 forensically you have, in opening, a rather harder job
7 than Mr Beard. I mean Mr Beard can conduct, as it were,
8 a smash and grab approach and identify those bits which
9 he says the CMA have got wrong and of course you respond
10 to those. But we are very conscious that an immense
11 amount of work has gone into the decision which you
12 cannot read out or indeed cover in whole. But we have
13 of course got well in mind that we must view the points
14 that Mr Beard is taking in the context of the decision.

15 You cannot originate new points, that is obviously
16 right, you can only respond to the points that Mr Beard
17 is making by way of further articulated submission but
18 we will have throughout this hearing in mind the fact
19 that the decision needs to be regarded as a whole and
20 the attacks on it need to be seen in context of the
21 decision. So I know you have gone through matters at
22 a breakneck speed, but I do not think you need worry
23 that that speed is in any way disadvantaging the CMA, so
24 thank you very much for your submissions.

25 I had one point. It is not apropos anything beyond

1 wanting to understand whether there is evidence in the
2 record to which we should read, but I am intrigued by
3 the fact that we have got, I think it is 32 sign-ups to
4 wide MFN clauses in the CTM stable and I think it is 12
5 who have only signed up to narrow most-favoured-nation
6 clauses and if there is material that we can read as to
7 why some fell into one camp and some fell into the
8 other, it would be helpful to have that reference to us.

9 I do not want either of you to go haring off to find
10 new material, but if there is material that explains
11 those two camps, it cannot be bargaining power because
12 you have got some pretty big players in the wide MFN
13 camp, but it is just something which struck me and if
14 there is an answer I would quite like to have it, but if
15 there is not do not worry.

16 MS DEMETRIOU: Sir, of course. I believe it is a question
17 that the CMA asked of CTM during the investigation and
18 I think never got a satisfactory response to, but I will
19 double check that and if there is anything then I will
20 show the Tribunal where it is. I do not believe there
21 is.

22 Sir, might I just raise one housekeeping query which
23 relates to the timetable going forward. We are all in
24 person I think, with the exception of Professor Ulph,
25 tomorrow and the order of events is that we are calling

1 Ms Glasgow to give evidence which in the timetable is
2 scheduled for the morning and then in the afternoon it
3 is Dr Niels on market definition. At the moment,
4 Ms Ralston on market definition is Friday morning and
5 then there is potentially a gap because Dr Walker cannot
6 give evidence until Monday morning. Really the question
7 is: if we get through, which I am not sure we are likely
8 to, but if we get through Ms Glasgow and Dr Niels
9 earlier than expected, are ComparetheMarket proposing to
10 call Ms Ralston before the end of tomorrow or will that
11 be Friday morning in any event? It would be quite
12 helpful to know just for planning purposes.

13 THE CHAIRMAN: Before, Mr Beard, you answer that, I think it
14 raises the -- you will not have had a chance to consider
15 this because I think the outline of the questions that
16 we had for Dr Niels will have come to your team during
17 the course of the court day, but I was slightly
18 horrified when I finished it last night that it ran to
19 quite a lot of questions and obviously Dr Niels will
20 have some time, but not as much as one would like, to
21 consider those questions.

22 But going through them is I think going to take some
23 time since I am explicitly framing those questions to
24 provoke debate because I think that is the best way
25 Professor Ulph, Ms Lucas and I can understand the issues

1 that are troubling us. So I think things are going to
2 go rather slower. Our present inclination is that we
3 treat the questioning of Dr Niels as I think Mr Beard
4 suggested, effectively, in chief. So the witness will
5 be called, his evidence will be put in and he will speak
6 to it and make such corrections as necessary. We will
7 then I think put the questions to him and hear his
8 answers and then this will be the same for Dr Walker, if
9 the parties are agreed.

10 Then whoever is calling the witness can ask whatever
11 further questions they wish to conclude their, as it
12 were, examination-in-chief and I will signal now we
13 would be pretty inclined to allow in the course of that
14 in chief leading questions just to explore matters
15 because, frankly, we are having a debate here and if
16 something needs to be cleared up, I do not think we want
17 to be too elliptical about it, and then one moves on to
18 the cross-examination which can take into account the
19 answers to the questions to the extent there is any
20 overlap, which there may or may not be.

21 But I can see it is taking quite a bit longer, so
22 I think the chances of us being finished with Dr Niels
23 tomorrow afternoon seems to me to be pretty unlikely but
24 I may be wrong. With that sort of caveat -- and
25 I appreciate neither of you will have had a chance to

1 really look at the questions we have articulated -- but
2 with that caveat I will hand over to Mr Beard to see
3 what he thinks about the timetable.

4 MR BEARD: Actually, it fits rather with what, sir, you were
5 just articulating. I have not had contact directly with
6 Dr Niels, but I did have a communication from him
7 saying, look, if we are going to run through these
8 questions and we are going to have a discussion about
9 them it might take more than Thursday afternoon was
10 actually the message he sent.

11 THE CHAIRMAN: Yes.

12 MR BEARD: Now, in those circumstances I think to some
13 extent Ms Demetriou's question becomes academic because
14 I think if the Tribunal is thinking that, we are
15 thinking that, I do not think we would be conceding
16 anything by saying: Okay, Ms Ralston Friday morning at
17 the earliest. That is fine if that is of assistance to
18 the CMA. We have obviously got a little bit of space on
19 Friday because Dr Walker has been moved out of there, so
20 I do not see any knock-on effect, I do not see any
21 problems in that regard, and I am happy to give that
22 sense to the CMA so that insofar as Ms Demetriou wants
23 to have confidence she is not going to have to be asking
24 questions of Ms Ralston immediately tomorrow afternoon,
25 that is absolutely fine.

1 In terms of the process of answering questions as
2 I have just anticipated in line with your comments, sir,
3 Dr Niels suggested that it was more sensible that those
4 questions and the interaction with you as the Tribunal
5 occurred before the cross-examination. It might take
6 a little time, I am grateful for the indication about
7 examination-in-chief. At the moment, I am intending to
8 leave the Tribunal, after we have sworn Dr Niels in, to
9 ask the various questions. I do not think there is
10 anything particularly I am intending to ask in
11 examination-in-chief. It depends where we get to in
12 those questions with you. I note the indication in
13 relation to leading in exam-in-chief but we will see how
14 that is necessary or not.

15 But we were of the same mind as to how the process
16 should work because if we do it a different way, where
17 I call Dr Niels, Ms Demetriou cross-examines, we then
18 end up with a situation of perhaps frustration for
19 the Tribunal where you may be seeking to interject
20 various of your questions along the way or sweep them up
21 at the end and that does not seem to me to be an
22 appropriate way having glanced at the list of questions
23 that you provided for which we are most grateful.

24 So that is our suggestion. I think that fits with
25 what Ms Demetriou was asking for in any event.

1 I do have one other timing question I would like to
2 bring up, but I will pause there because we are talking
3 about the next two days first.

4 THE CHAIRMAN: Indeed. Ms Demetriou, two questions; first
5 of all, does that resolve your understanding of the
6 timetable?

7 MS DEMETRIOU: Yes, thank you.

8 THE CHAIRMAN: But, more fundamentally, do you have any
9 point about the process that I have articulated?

10 MS DEMETRIOU: No, I have not been able to see the questions
11 yet, but I think that I do understand the process that
12 you have articulated and I think that sounds sensible.
13 I do not want to say anything about that. I am happy to
14 follow that process.

15 THE CHAIRMAN: Thank you.

16 MS DEMETRIOU: I just wanted to update the Tribunal, this is
17 on a different topic, in relation to confidentiality.
18 I do not know if you want me to do that now or if
19 Mr Beard wants to go first on his additional point.

20 MR BEARD: My only point was in relation to timing for next
21 week. I just actually wanted to check what the position
22 is in relation to Professor Baker. At the moment we are
23 currently envisaging that he is going to be
24 cross-examined or providing his evidence on the 10th and
25 11th, which is Wednesday and Thursday next week. Now,

1 I do not at the moment envisage that the exercise we are
2 talking about over the next two days will go beyond
3 Friday and into Monday. Equally, I do not imagine that
4 there will be necessarily any spillover on Monday into
5 Tuesday, but the question I have got is there must be
6 a risk because Mr Walker is down for half a day and
7 if -- I am sorry, Dr Walker, I apologise. Dr Niels, if
8 he is indicating having seen the questions, it might
9 overall take more than half a day.

10 I am just concerned about the knock-on effects and
11 what I wanted to be clear about was a) whether or not we
12 have confirmed whether Professor Baker is going to be
13 only on videolink, which is what I had previously
14 assumed, or is he going to be live?

15 MS DEMETRIOU: I think we have confirmed that he is live.

16 MR BEARD: I am grateful.

17 THE CHAIRMAN: Excellent.

18 MR BEARD: He then will be able to -- if there were to be
19 any knock-on effect, then he will be able to deal with
20 matters on the afternoon of the 11th, so I think that
21 the timetabling issues are not problematic.

22 I am grateful. I am sorry if I missed that
23 confirmation.

24 MS DEMETRIOU: No, not at all. He would be available if
25 necessary on the afternoon of the 11th.

1 MR BEARD: It may not be necessary at all, but just so we
2 are all square on timing.

3 THE CHAIRMAN: I think it is helpful to raise that because
4 I do not know how far the answers that Dr Niels provides
5 will actually be answers that Dr Walker will be happy
6 with; in other words, given that we are really seeking
7 to clear up misunderstandings or a failure to understand
8 how these markets work it could well be that by the time
9 Dr Niels is finished with me, he has cleared things up
10 sufficiently that Dr Walker has nothing to say.

11 But I think it is probably wise to proceed on the
12 basis that Dr Walker should have as much time as he
13 wants to answer these questions and we ought to proceed
14 on the basis that he may not completely or at all agree
15 with what Dr Niels says. If he does, that is fine, but
16 I am going to proceed on the basis that the indications
17 Dr Niels has given about length of time will apply
18 equally to Dr Walker and I think we should proceed on
19 that basis in terms of timetabling and see where we go.

20 MR BEARD: It seems to me that that does not seem to create
21 a problem because it is only the backstop at the end of
22 the week that creates the issue and since we have
23 confirmed the position there, I do not see any
24 difficulty with it. My experience with economists tends
25 to be that agreement may be more of a struggle than one

1 would hope but I live in hope not expectation in those
2 circumstances.

3 THE CHAIRMAN: Thank you very much, Mr Beard.

4 Ms Demetriou, anything on that and then we will go
5 on to confidentiality?

6 MS DEMETRIOU: No, nothing on that, sir. I am happy with
7 that. On confidentiality it is just an update so we
8 obviously considered the point that you made, sir, about
9 confidentiality.

10 So one issue that the CMA faces in relation to this
11 is that one of the reasons why some of the HIPs at least
12 were expressing concerns about confidentiality was
13 because of their ongoing commercial relationship with
14 CTM, so they were concerned that the information that
15 they provided to the CMA should not be revealed or at
16 least that they had not revealed they were helping the
17 CMA in any way, so that was one of the confidentiality
18 concerns that the CMA was keen to protect.

19 So what the CMA has done has been to, in accordance
20 with, sir, your provisional -- your proposal rather is
21 to write to the home insurance providers, indicating the
22 provisional view that the Tribunal took and asking them
23 to come forward if they have any concerns about that
24 approach. So that has been put in train and I hope that
25 is acceptable. I think that if any insurers have

1 a concern then they will approach the Tribunal because
2 it is not really for the CMA to be arguing the case for
3 them.

4 THE CHAIRMAN: Indeed. It seems to me you are very much
5 piggy in the middle there and if there is a problem it
6 is not really for you to articulate so I am very
7 grateful that you have taken the trouble to engage with
8 the third party interests and we will see what comes
9 out.

10 My inclination is that we will see what objections
11 there are. If there are none then what I am minded to
12 do is say: Look, let us keep a watching eye on the bits
13 that are yellowed, let us use our common sense, some
14 things are obviously likely to be more sensitive than
15 others, but, on the whole, let us call spades spades and
16 HIPs by their proper name. But let us see what emerges
17 in response. Mr Beard.

18 MR BEARD: I am really sorry. Only one quick coder on that.

19 I just want to be clear. CTM has seen all the names
20 of the HIPs. They have only not seen certain
21 substantive yellowed redactions in these documents. So
22 when Ms Demetriou was making submissions earlier about,
23 you know, threats and allegations they know full well
24 about the existence of that witness statement. They
25 have seen it. They have not seen all of it because it

1 was redacted.

2 So the course that the CMA are following we are not
3 criticising, but I think we have got to be alive to the
4 fact that actually the CMA have asked for redactions in
5 relation to this process that are greater than the
6 protections that have actually been imposed in relation
7 to BGL, but we will leave that to another time.

8 THE CHAIRMAN: No, I think -- and Ms Demetriou will correct
9 me if I am wrong -- what we have got is a kind of
10 grandfathering of promises that have been made in the
11 past by the CMA with a view to obtaining evidence, which
12 have persisted.

13 MR BEARD: I see that. But the scope of those promises is
14 not that wide, that is the point I am making, because
15 the grandfather promises -- if the grandfathering is:
16 Well, we are concerned about BGL, that has already
17 been -- I am not saying it (inaudible) just did not
18 matter and all this notion that BGL is looming over
19 people and threatening, I mean they are not.

20 MS DEMETRIOU: No. So I did not want to over -- if
21 I misspoke, I was not overstating the point. I think
22 I was clear to say part of the confidentiality concern
23 relates to elements that have been redacted and that is
24 one of the issues. Part of it relates to matters being
25 read out in court because they proceeded on the basis

1 that they will not be read out in court and so that is
2 all I was saying.

3 I was not intending to make a wider point than that
4 and we have attempted to follow, sir, your proposed
5 course, which is to write to them to see --

6 THE CHAIRMAN: No, I am very grateful, as I say, and
7 I suspect this is going to end up with no-one putting
8 their head above the parapet because they will be met
9 with the usual question that I ask anyone who wants
10 redactions which is: Why do you need it? It is
11 amazing, when one circulates a judgment and the parties
12 come back, having labelled pretty much everything as
13 confidential, and you say: Right, we will have to have
14 a hearing about this... The moment you have a hearing,
15 the yellowing miraculously evaporates and that I think
16 is going to be the outcome here.

17 What I am seeking to do, and it seems to be working,
18 is to not oblige the CMA to take points that are not
19 actually its points. I am quite sure that if the CMA
20 itself had concerns about the importance of preserving
21 confidentiality then you would be advancing those with
22 great force. But what I do not want you to be in
23 the position, Ms Demetriou, is of having to argue
24 a point that actually you are only arguing because you
25 are worried that someone will tell you that you should

1 be arguing it.

2 MS DEMETRIOU: Sir, thank you. We understood that and we
3 are grateful to the Tribunal for its consideration of
4 the CMA's position in that regard and, in accordance
5 with that proposal, we have contacted the insurers as
6 I have said. So I think we can then see what, if
7 anything, they say and take it from there.

8 Thank you very much.

9 THE CHAIRMAN: Very good. So 10.30 tomorrow. I do not
10 think we need to start earlier, but we are very happy to
11 if anyone sees any benefit in that. Deafening silence.
12 Excellent. Thank you all very much. We are very much
13 obliged to you all for the continued assistance you are
14 providing. Until tomorrow morning, 10.30. Thank you.

15 (5.00 pm)

16 (The hearing was adjourned until 10.30 am,
17 Thursday, 4 November 2021)

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Opening submissions by MS DEMETRIOU1

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