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IN THE COMPETITION

Case No.: 1380/1/12/21

APPEAL
TRIBUNAL

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

Monday 1 November – Friday 19 November 2021

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BGL (Holdings) Limited

Applicant

v

Competition & Markets Authority

Respondent

A P P E A R A N C E S

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

Digital Transcription by Opus 2

Friday, 5 November 2021

(9.30 am)

THE PRESIDENT:

THE PRESIDENT: DR GUNNAR NIELS (continued)

THE PRESIDENT: Dr Niels, good morning.

A. Good morning.

THE PRESIDENT: Before we resume, just two timetabling matters. We are obviously starting early and I am very grateful to everyone. What I thought we would do is have a 15-minute break at around 11.15, see how we go, rise for lunch at 12.30, have a 40 minute lunch break, come back at 1.10 and then run through until 2.30 when we rise for the day, if that meets with everyone's approval.

I have also been told that we have a fire alarm scheduled at 10.00. Apparently it will only last two minutes. I will hold them to that, but if it goes off, do not run, it is just a test.

Questions by THE TRIBUNAL (continued)

THE PRESIDENT: Dr Niels, we finished yesterday with,

I think, agreement that the articulation of the relevant market in any given case was evidentially and rationally based, not something that you can just pick and choose?

A. Yes.

1 THE PRESIDENT: I am not going to ask you to comment on
2 this, because it will be a matter for submissions in due
3 course, but I just thought I would put my cards on the
4 table as to why I am seeing market definition as so
5 important.

6 When one is assessing -- oh, I am so sorry.
7 Professor Ulph has vanished. Professor, are you there?

8 (Pause)

9 Right, we had better wait. (Pause)

10 Ah, Professor, can you hear us? No. We will take
11 our first break this morning a little early and we will
12 rise for five minutes while this technical issue is
13 resolved. Sorry about this.

14 (9.36 am)

15 (A short break)

16 (9.42 am)

17 THE PRESIDENT: Professor, just to check, you can hear us,
18 can you?

19 PROF ULPH: I can hear you, yes.

20 THE PRESIDENT: Excellent.

21 So, Dr Niels, I was just going to set out -- and
22 this is very much a sort of provisional view just to
23 give you a road map of where I am fitting this in and we
24 will, I am sure, be arguing about it later on, but when
25 one is trying to establish whether there has been an

1 effects-based infringement of the sort that we are
2 talking about here, you start by identifying the
3 agreement or provision or practice that is said to
4 constitute a restriction on competition. So here we
5 have the wide most-favoured-nation clauses, but that is
6 what we start by doing.

7 Then having identified the offending provision, if
8 I can call it that, you identify the market in which the
9 effects of that agreement or provision are to be gauged.
10 So you want to work out the context in which the
11 offending item operates, and here -- and this is I think
12 the source of the interest that I have and the
13 difficulties that I think we have -- we have two
14 markets, as we discussed yesterday, linked in some way
15 by way of the platform with the result that not only is
16 the platform operating in the two markets but so too is
17 the infringement that one is looking at.

18 Having then identified the relevant agreement or
19 provision and the relevant markets in which it operates,
20 you create a theory of harm -- and that is trite, I am
21 not going to be asking you about that -- and then you
22 measure the nature of the harmful effects by setting up
23 your counterfactual situation and working out what the
24 harmful effects are.

25 To be clear, we have a difficult issue, I think in

1 terms of working out what the effects are in each market
2 and, if they are different, working out how they need to
3 be balanced one against the other. That is something
4 you were articulating, if I may say so, very clearly
5 yesterday and something which is very much on my mind,
6 but I am not going to be asking about that either,
7 because I think that is something which is going to be
8 an area either for other experts to talk about in terms
9 of the effects and you are here, as it were, as
10 Mr Market Definition rather than anything else. But
11 I think this is an area where the legal teams want to be
12 assisting us in the precise analytical process where one
13 weighs different effects in different markets.

14 All I have been really getting to is the second
15 stage in my analysis, which is the definition of markets
16 and whether we are talking about two markets or one
17 market, because that, to my mind, makes a very big
18 difference in how one applies things like the SSNIP
19 which are to do with market definition.

20 That is where I am coming from, just so that you
21 know. With that statement, which I am not going to
22 invite you to comment on, I am saying this so you know
23 roughly where I am coming from, let us look at the
24 second diagram in the notes that I circulated.

25 I am going to take this pretty quickly because

1 I know that you are not here as an expert in the
2 specifics of the market; you are here as a general
3 speaker to market definition. That is why I am going to
4 move fairly briskly through the questions that I have
5 articulated.

6 Doing that, what I have tried to do in diagram 2 is
7 set out not what the CMA's market definition is in this
8 table. This is a much broader picture of what might be
9 said to be a single market for the sale and purchase of
10 home insurance.

11 The bit of the market that has been identified by
12 the CMA is the parts coloured yellow and green in the
13 diagram. So what we see is that within the broad market
14 for the buying and selling of home insurance products,
15 where you just have a single buyer, the insured, and
16 a single seller, the group of insurers, you have
17 intermediating between them, the price comparison
18 website.

19 You see that the way the CMA has defined the market
20 in section 5 of their report or their decision is you
21 have buyers of price comparison services buying from the
22 price comparison website, the price comparison service
23 which they get for nothing. Then the other side of the
24 platform, you have the selling of introduction services
25 to home insurance providers, so they get business

1 through the price comparison website and that is what
2 they are buying and that is the bit coloured in green.

3 So there we get our two markets, if I can use that
4 term. What, in effect, happens is one converts, on the
5 right-hand side of the diagram, the seller of insurance
6 policies into the buyer of customer insurance services.
7 That is how it works, because you have the selling
8 platform selling to both sides of the market.

9 So that is what this diagram is intended to
10 identify.

11 What I want to trip through very quickly is how far
12 you agree with the analytical process that we discussed
13 yesterday. As I say, I do not want to get into the
14 details. Nothing you say is going to be read as any
15 kind of statement of how the market in fact operates.
16 I am still interested in the methodology.

17 What I am really saying is: does one start, when we
18 are seeking to define the market having identified the
19 offending provision, by saying, look, let us look at the
20 yellow side, let us look at the green side and work out
21 what the market is in each case?

22 A. Yes, I think that is the -- in that analytical
23 framework, I think that is a good starting point and it
24 is actually not so different from what I propose is the
25 analytical framework. Because ultimately, both on the

1 yellow side and on the green side, what you want to
2 assess is this particular PCW service that we define,
3 does it compete with the other channels that you
4 illustrate below in that diagram?

5 That is the ultimate question, and that is actually
6 in essence the same as I am proposing, although I call
7 it, as you know, one test leading to one market. But if
8 you do it as two markets, the questions are exactly --
9 those are exactly the right questions.

10 THE PRESIDENT: Thank you. Let me be clear: I am really
11 going through this exercise because of the confusion in
12 my mind more than anything else. It may very well be
13 that you have been telling me this in your reports for
14 months and I have simply not picked it up. The aim of
15 this process is, in a sense, to put our cards on the
16 table, so that a corrective can be applied by counsel in
17 due course.

18 A. Sure.

19 THE PRESIDENT: It may be that you are violently agreeing
20 with me and I should have picked that up long ago, but
21 apologies if that is the case.

22 So looking at the SSNIP on the yellow side of the
23 market first, we obviously have to work out what will
24 happen if the price of the price comparison services
25 offered for free increases.

1 A. Yes, that is one way of doing that, the price from --
2 sorry, I am just getting my head round, this is the
3 consumers, yes. So on the --

4 THE PRESIDENT: Yes, we are looking at the consumer side.

5 A. Yes.

6 THE PRESIDENT: The people that are wanting to buy insurance
7 policies, but what we are saying is they are actually
8 buying what the CMA says, and what I think you agree, is
9 they are buying price comparison services?

10 A. Yes, in that articulation, yes.

11 THE PRESIDENT: In that sense?

12 A. Yes.

13 THE PRESIDENT: So we say we cannot do it by percentage
14 because the service is for free.

15 A. Yes.

16 THE PRESIDENT: But, let us say, what would happen if the
17 price, getting a quotation through ComparetheMarket,
18 moves from zero through to, let us say, £5?

19 A. Yes.

20 THE PRESIDENT: I pick that figure out of the air. You
21 could say 50p, I do not know, but what would happen if
22 you increased the price?

23 A. Indeed, and alternatively, though -- and that is what
24 I have set out -- is there are three dimensions of
25 competition on that side, on the yellow side of the

1 market. PCWs try to get consumers, not just through the
2 zero price, but also through marketing, attractive
3 retail prices and usefulness, the three competitive
4 dimensions.

5 So I would also say, just as an addition, you could
6 also do the SSNIP or SSNIP equivalent. So on the
7 non-price, say, on quality or less expenditure on
8 marketing, fewer cuddly toys, etc, to those other
9 dimensions on the consumer side, to test the yellow side
10 of the market. But you could do it in terms of a price
11 increase from zero to 50p or £5, yes.

12 PROF ULPH: Dr Niels, could I maybe ask a question at this
13 point? Because I think it is quite important to be
14 clear about what we mean by a price that consumers might
15 pay. So you think about the price as having two
16 different aspects to them. One could be just a fee, say
17 an annual fee you pay for access to the price comparison
18 site, and the other could be a price per product bought
19 through that site.

20 So instead of charging just the HIPs a commission,
21 you could charge the customers a commission for buying
22 a product through that site. So prices can be either
23 a fee for access to the site or a fee per unit purchased
24 through the site or some combination of the two.

25 Would you agree there are these two ways of thinking

1 about prices? You might have to think carefully about
2 how you specify that price, if you wanted to do a SSNIP
3 test to say instead of getting this free, you now have
4 to pay for it, but you could pay for it in more than one
5 way.

6 A. Yes, that is absolutely correct, Professor, that price
7 to consumers where there currently is not the price
8 could take different forms. Indeed, these platforms,
9 there are multiple ways of charging, very clever ways
10 these days, also for charging consumers: subscriptions,
11 annual fees or indeed a commission per completed
12 transaction.

13 I would say, in this case, to stick with the
14 hypothetical example, probably the most straightforward
15 is to say: well, let us also charge the consumers, if
16 and when they buy or conclude a contract with a HIP, let
17 us also charge them a commission on a per transaction
18 basis. But you are absolutely right, there could be
19 multiple ways of imposing a charge on the consumer side.

20 The key is, ultimately, again, we want to know what
21 would consumers do if there was such a small charge
22 where previously there was not.

23 THE PRESIDENT: Absolutely, and just to flag up where I am
24 going, so that you can understand where and how to
25 deploy any disagreement you might have, part of the

1 purpose of the SSNIP test is to work out whether your
2 articulation of the market is or is not correct.

3 We see here the yellow side of the market, the
4 purchasers of insurance products have been defined as
5 buyers of price comparison services. That is how it is
6 defined in the Decision, but if you were to conduct the
7 SSNIP, as I am suggesting it, and you increase the price
8 of getting a quotation from ComparetheMarket to £5, let
9 us say, if you were to see in the hypothetical case
10 a rapid movement away from price comparison websites to,
11 let us say, the use of direct channels, that would
12 perhaps indicate -- I stress I am speaking
13 hypothetically here -- that might indicate that in fact
14 the definition of the yellow market is not buyers of
15 price comparison services, but actually the searchers
16 for an insurance product using whatever gateway is most
17 convenient for them in terms of obtaining the best price
18 for the product they want to buy.

19 A. That is absolutely right.

20 THE PRESIDENT: So if we were to see -- and I am not going
21 to take you through this, and you can see the bits
22 I have looked at in annex I to the Decision, which
23 I have set out in questions 32 and following, I am not
24 going to ask you about these, because I do not think it
25 is your area.

1 But what I get from this, and I am sure I will be
2 corrected in due course by later evidence, what I get
3 from these is that there is an interplay between price
4 comparison services, direct channels, use of renewals
5 and perhaps the suppliers of broking services to
6 individual insureds, for those who have perhaps
7 a high-end house to insure. These are all different
8 ways by which the person interested in obtaining
9 insurance for another year can get that insurance.

10 A. Yes.

11 THE PRESIDENT: What we need to test for is what would
12 happen if you increase the market price for price
13 comparison services. Will they or will they not drift
14 away to another channel?

15 A. Yes.

16 THE PRESIDENT: If they do not, then your market is as
17 suggested, the buyers of price comparison services, but
18 if they do move away, if they say: getting the meerkats
19 to give me a quotation for free is one thing, but if
20 they are charging me £5 for the privilege, that is very
21 much another, then it may be that one has to revisit the
22 articulation of the yellow market and say, well, I may
23 not have got it quite right. They are not buying price
24 comparison services. They are happy to use them,
25 because they cost them nothing, but they also use other

1 routes to get the best price for the product they are
2 wanting to buy.

3 A. Yes, I absolutely agree.

4 THE PRESIDENT: I am not asking you to agree whether that is
5 the case. I am asking you to agree about the
6 methodology.

7 A. That is the right conceptual question and the right
8 conclusion in the hypothetical that you just set out,
9 yes.

10 THE PRESIDENT: On that basis, is it fair to say that one
11 can jettison the other considerations that you were
12 referring to as forming part of the SSNIP and simply
13 look at price, because -- and the reason I say that is
14 because you can keep it simple on the SSNIP test,
15 because that is price, I mean, a very good way of
16 gauging the value that the individual consumer places on
17 the service that a price comparison website offers in
18 terms of the rival channels to obtaining home insurance?

19 A. Yes, I think you are right, that that is a correct way
20 of doing it. I would not necessarily say you can
21 jettison the others, because there are also ways of
22 testing substitution on the consumer side, but it is
23 a valid thought experiment for applying the SSNIP test
24 on the consumer side: what would happen if you introduce
25 a price.

1 THE PRESIDENT: Just to be clear -- and I am going to go
2 back to the free newspaper example, because it does seem
3 to me that one has to be quite careful in applying
4 a SSNIP to a product that is free, because it is one
5 thing to move the price of £1 to £1.20, it is another
6 thing to move from zero to 20p. Because if I take my
7 own experience of free newspapers, what usually happens
8 is I am shuttling through King's Cross at a rapid rate
9 of knots, I want something to read on the train, I can
10 grab a newspaper and it costs me no time at all. If you
11 put in place a price, even if it is a tiny price, the
12 inconvenience of extracting that price is itself
13 a reason why I would move away from the free newspaper,
14 even if the price was trifling.

15 A. Absolutely. There is ample literature also on why free
16 is actually -- has some specific psychological weight,
17 not just the inconvenience of having to take out your
18 wallet and pay, but also just the notion of something
19 that you perceive to be free, now it suddenly costs
20 something.

21 So, yes, that would make it likely that probably
22 consumers would switch away.

23 There are digital platforms these days that are very
24 clever at luring you in for free. The freemium models,
25 but then you actually quite willingly pay for a better

1 premium service offering, for example.

2 So those things can happen, but absolutely moving
3 from free to 20p is very different from moving from £1
4 to £1.20, let us say.

5 THE PRESIDENT: I understand. What you are saying, just so
6 I am clear about our terms, when you are saying "a
7 freemium service", is where the entry level product is
8 free and you get burdened with all kinds of
9 advertisements and things like that, but if you pay for
10 premium service, you get a better service minus the
11 irritating revenue producing items that otherwise make
12 the advertising side work for the platform provider.

13 A. Yes.

14 THE PRESIDENT: I am grateful.

15 I think that means we can move quite quickly to the
16 other side of the table, which is the green side. Just
17 to be clear, one does exactly the same thing there. You
18 look at the buyers of customer introduction services,
19 the HIPs, and you say, okay, we will take the commission
20 that is being paid by you and we will increase it by
21 a permanent or long-term significant amount, and we see
22 what happens.

23 A. Yes.

24 THE PRESIDENT: It may be -- who knows -- that HIPs suddenly
25 start thinking: well, you know, these direct channels

1 that we are running, we will just move to those and that
2 is it, but they may not, because the eyeballs they are
3 getting through the price comparison website may mean
4 that they have just got to look at the value of the
5 business that they are getting and they will be prepared
6 to pay quite a bit more. But that is all something you
7 factor in, in terms of the nature of the market that you
8 have on this side of the equation.

9 A. Yes, correct. Maybe with one sort of small nuance that
10 when HIPs have to assess, what do I do after a price
11 increase, it is not about this binary completely
12 switching away or staying. There are also things that
13 HIPs can do, so the partial delisting, but the question
14 is absolutely the right one.

15 THE PRESIDENT: Again, we are not going to get into, with
16 you at least, the consequences of the increase in price,
17 because that we will be told about by the other experts
18 who are coming.

19 A. Yes.

20 THE PRESIDENT: I am going to pause there, but I am getting
21 the intellectual framework in order.

22 The last area that I want to go through with you --
23 and I am rapidly going through the questions that
24 I have, because they were rather more specific on the
25 nuts and bolts on the definition of this market -- the

1 last thing I want you to look at -- and I confess,
2 Dr~Niels, I am using you as a sounding board here,
3 because I want to try and understand the effect of
4 narrow MFNs in a market where you have multiple price
5 comparison websites, multiple home insurers common to
6 those websites subscribing, and a pattern of narrow MFNs
7 and no wide MFNs at all.

8 Just to look at diagram 3, on page 17, we have
9 hypothetically three price comparison websites, which
10 I have coloured and labelled "A, B, C", at the top of
11 the table. Below that we have the coloured grey and
12 numbered 1 to 9, the home insurance providers
13 subscribing to those three websites. So all nine
14 subscribe to all three of these price comparison
15 websites.

16 There will undoubtedly be a market of insurers who
17 subscribe only to one or to two or to none at all.
18 I have given one example, and that may be
19 unrepresentative, but number 10 is our Direct Line does
20 not subscribe to any price comparison website at all,
21 rows its own boat and I have included it in there just
22 so that we have that as a kind of reminder that they
23 exist.

24 Looking at the nine insurers, who all subscribe to
25 all three price comparison websites, in the boxes below,

1 the identification of the insurers, I have hypothesised
2 the effects, or rather I have hypothesised the existence
3 of the a narrow most-favoured-nation clause in each
4 case. So what you see in the case of price comparison
5 website A and insurer 1, it is only in relation to A
6 that there is a narrow MFN. The other two are not
7 subscribing with a narrow MFN at all.

8 What I have tried to do is I have tried to assume
9 the price that is quoted on the website, which is 10 in
10 this case, and then I have tried to work out what the
11 permissible price would be on each of the three price
12 comparison websites.

13 In that case, of course, if you have 10 of the
14 price, A has the benefit of a price that has to be less
15 than or equal to 10, because that is what the NMFN
16 dictates. But as regards the other two price
17 comparators, the price can be whatever the HIP chooses
18 to make it.

19 So here, in this case, one sees that the price has
20 to be 10 in the case of A or less, but can be whatever
21 you like in the case of B or C. What we see is that the
22 constraints imposed on pricing on price comparison
23 websites increase according to the number of narrow
24 most-favoured-nation clauses that are in existence.

25 So when you have a situation where all three price

1 comparators have a clause in their contracts, all three
2 of our price comparisons will have to quote a price that
3 is less than or equal to 10. You see that in the case
4 of insurer 3 here.

5 First of all, is that clear? Does that make sense?

6 A. Yes, I think this is a really good analytical framework
7 to test, to really analyse what is actually the effects
8 of the narrow MFNs. If I may, I would say that perhaps
9 Ms Ralston is actually a better sounding board than I am
10 for this particular topic, because this goes into
11 exactly the link between market definition and then the
12 effects, and she has assessed that in greater detail.

13 THE PRESIDENT: In that case, Dr Niels, having, as it were,
14 aired my understanding of how these things work, I can
15 leave it to others to take it forward, but I will not
16 take it further with you. But thank you for declining
17 to point out any obvious howlers in this. I am very
18 grateful for that at least.

19 That concludes my questioning of you, Dr Niels, and
20 I am incredibly grateful for the time and effort you
21 have given. Professor, do you have any questions?

22 PROF ULPH: No further questions just now.

23 THE PRESIDENT: Ms Lucas?

24 MS LUCAS: No.

25 THE PRESIDENT: What I am going to do now, Dr Niels, I am

1 going to hand you back to Mr Beard.

2 Mr Beard, if you want me to rise for five minutes to
3 think, if you want to ask any questions, please say so
4 and I will, but to be clear, I am not going to oblige
5 you to not lead. It seems to me that the way in which
6 I have posed the questions to Dr Niels, if you want
7 something clarified, you should just lead and get
8 Dr Niels to answer, because I think that is the best
9 course.

10 MR BEARD: I would be enormously grateful for just a couple
11 of minutes to take instructions. I think there probably
12 is nothing, but I have one query I wanted to check and
13 I need to look at the transcript.

14 THE PRESIDENT: Please do. We will rise for five minutes
15 until 10.15.

16 MR BEARD: I am most grateful.

17 THE PRESIDENT: Thank you very much.

18 (10.10 am)

19 (A short break)

20 (10.18 am)

21 MR BEARD: I did talk to those behind me. My question is
22 one that is clear, but I am going to ask it anyway since
23 we have risen and so on.

24 Further examination-in-chief by MR BEARD

25 MR BEARD: It actually goes back to the interaction between,

1 in particular, Dr Niels and Professor Ulph, where there
2 was a discussion about different ways in which you could
3 do pricing on the consumer side, and then it led into
4 the discussion about whether free is different, but you
5 talked about free and freemium, and a possible
6 subscription or a possible particular charge, and there
7 was one other that was raised which was the idea of
8 a commission on completed transactions.

9 I just wanted to clarify, is that effectively the
10 same as saying a small increase in price on retail
11 prices in the consumer's mind?

12 A. It would depend on how it is presented to the consumer.

13 I do not know how consumers generally perceive the total
14 price and then the bits that they pay on commission,
15 which may or may not then be made explicit. It could
16 be.

17 MR BEARD: Thank you.

18 THE PRESIDENT: Thank you very much, Mr Beard.

19 I will just check. Professor, is there anything
20 arising out of that before Ms Demetriou cross-examines?

21 PROF ULPH: No, nothing from me.

22 THE PRESIDENT: Ms Lucas?

23 MS LUCAS: No.

24 THE PRESIDENT: Thank you very much. Ms Demetriou, over to
25 you.

1 Cross-examination by MS DEMETRIOU

2 MS DEMETRIOU: Good morning, Dr Niels.

3 A. Good morning.

4 Q. I am going to start off, please, if I may, before we get
5 to the points of dispute between you and the CMA, I just
6 want to rewind a little bit and establish the points of
7 common ground or the points I believe to be of common
8 ground, and if we could just go through those.

9 I want to, first of all, start by asking you
10 a question in relation to your understanding of the
11 theory of harm that the CMA investigated. I am not
12 anticipating that this is going to be controversial, but
13 can I just check that we are on the same page.

14 The theory of harm is that ComparetheMarket's wide
15 MFNs result in rival PCWs having less incentive and
16 ability to compete to offer lower commissions to HIPs in
17 return for the HIPs offering them lower retail prices,
18 and a reason for that is that any lower retail price the
19 rival PCW could procure would have to be replicated on
20 CTM's website.

21 Do you agree that is part of the theory of harm that
22 is being investigated?

23 A. Yes, I understand that is one of the theories of harm.

24 Q. Thank you, and that the CMA has investigated whether
25 that would reduce the ability of the rival PCWs to

1 expand?

2 A. I think, yes, that is a theory of harm that has been
3 assessed.

4 Q. I am not asking you whether you agree with the outcome,
5 but just with the scope of the theory of harm being
6 investigated. Also, the CMA was investigating -- so
7 part of the theory of harm is that the wide MFNs reduce
8 the incentive of ComparetheMarket to compete on price
9 and make it easier for it to raise its commission fees,
10 and that is because it is guaranteed the lowest retail
11 prices without the need to compete on commission fees.
12 So it does not need to compete on commission fees,
13 because it has guaranteed various retail prices and
14 indeed part of the theory of harm is it can increase its
15 commission fees without any price disadvantage.

16 Again, do you agree that is part of the theory of
17 harm?

18 A. Yes.

19 Q. Similarly, HIPs covered by the wide MFNs would have
20 a reduced ability and incentive to lower their prices on
21 rival PCWs in response to an offer to charge a lower
22 commission fee, because they would have to fund
23 a similar price reduction on ComparetheMarket.

24 Again, do you agree that is part of the theory of
25 harm being investigated?

- 1 A. Yes.
- 2 Q. Thank you. If we turn to your first report at
3 paragraph 2.1, this is at {A/6/8}, you say here that you
4 agree with the CMA that market definition is not an end
5 in itself. So again, we have agreement on that?
- 6 A. Yes.
- 7 Q. Really related to that, I think what you and the CMA are
8 both saying is that market definition is not some
9 theoretical exercise that is carried out for the sake of
10 it. It has a purpose.
- 11 A. Yes.
- 12 Q. Its purpose, I think we can agree, is to identify the
13 competitive constraints acting on a supplier of
14 a particular given product or service. So we are
15 looking at competitive constraints that are operational.
- 16 A. Yes, its purpose is, I would say, twofold, as I have
17 expressed it. So identifying competitive constraints
18 and understanding the effects of the conduct in
19 question.
- 20 Q. When we think about competitive constraints, the reason
21 that we are interested in competitive constraints is
22 because we want to shed light on the competition problem
23 that we are examining; yes?
- 24 A. Yes.
- 25 Q. What that means is that we are interested in identifying

1 the competitive constraints which are relevant to the
2 theory of harm that is being investigated; yes?

3 A. Yes.

4 Q. Turning to what the CMA did in the present case -- and
5 again, I am not anticipating any dispute, though of
6 course you will tell me if you disagree with what I am
7 saying -- if we can go back in your report to page 4,
8 paragraph 1.16 {A/6/4}, and this is a summary of your
9 conclusions. I am going to take it from here because it
10 is in convenient form. You say, if we look at
11 paragraph 1.16:

12 "There is agreement between the CMA and myself on
13 the following points."

14 Let us just run through the points.

15 You say that:

16 "The SSNIP test is a useful conceptual framework for
17 asking the right questions about market definition."

18 So again, no disagreement between you and the CMA on
19 that point?

20 A. Yes.

21 Q. You agree that the focal product here for the SSNIP test
22 is PCW services for home insurance?

23 A. Yes.

24 Q. So the SSNIP test asks whether a hypothetical monopolist
25 price comparison website for home insurance can

1 profitably impose a SSNIP. That is the question?

2 A. Yes.

3 Q. Again, there is agreement between you and the CMA that:

4 "PCWs for home insurance are two-sided platforms
5 that connect [home insurance providers] and consumers."

6 A. Yes.

7 Q. Again, you agree with the CMA that the wide MFNs have
8 potential effects on both sides of the platform, their
9 agreements with HIPs and they relate to the retail
10 prices shown to consumers.

11 A. Yes.

12 Q. Again, you agree with the CMA that the market definition
13 exercise must take account of the interactions on both
14 sides of the platform and consider constraints on both
15 sides?

16 A. Yes.

17 Q. You agree, again, with the CMA that:

18 "PCWs may in principle face competitive constraints
19 on both sides from alternative channels that connect
20 [the] HIPs and consumers, in particular the direct ...
21 channels of [the] HIPs [themselves]."

22 A. Yes.

23 Q. What the SSNIP test is doing is it is focusing on
24 assessing the strength of those constraints from the
25 alternative channels.

1 A. Yes.

2 Q. You agree again with the CMA, there is no dispute
3 between you, that:

4 "Ultimately, the SSNIP test results [here] in
5 defining a single relevant market encompassing both
6 sides of the PCW platform, rather than separate markets
7 for each side."

8 A. Yes, that is where the CMA and I agree on, and this is
9 what we discussed with the Tribunal yesterday as to what
10 are sort of the nuances around that.

11 Q. Exactly. Then if we could turn to the Decision, please,
12 at page 79 {A/1/79}, and I am looking at paragraph 5.15
13 of the Decision.

14 Has that come up on the screen? Sorry, I should
15 have said the whole reference. It is {A/1/79}. Thank
16 you very much. That should now be in front of you,
17 Dr Niels.

18 A. Yes.

19 Q. You see there, the CMA saying that:

20 "An initial question when applying the hypothetical
21 monopolist test to two-sided platforms is, therefore,
22 whether separate markets should be defined on each side
23 of the platform ... or whether it is appropriate to
24 define a single market."

25 Again, to be clear, you agree that that is

1 a question to ask?

2 A. Yes.

3 Q. You agree with the conclusion drawn by the CMA that it
4 is appropriate in this case to define a single market?

5 A. Yes, and that is what I also said in my report, and that
6 is why we have the joint statement agreement on that
7 point.

8 Q. Of course.

9 A. I did note in my first report some caveats. My reason
10 was slightly different to get to that conclusion that
11 you have to define a single market, but that was my
12 perspective indeed.

13 Q. Dr Niels, I accept that and I am going to come to that.
14 At the moment, these are points which really should be
15 uncontroversial points and we are going to come to some
16 of the nuances. I promise you I will come to the points
17 of disagreements between you and the CMA.

18 At paragraph 5.16, just staying with the Decision at
19 the moment, what the CMA is saying here is, either way,
20 whether you define a single market or a two-sided
21 market, you need to take into account the interaction
22 between those two markets, including any indirect
23 network effects.

24 Again, the CMA is identifying this here and you
25 agree in principle with that, do you not?

- 1 A. Yes.
- 2 Q. At 5.19, on page {A/1/80}, over the page, we see there,
3 I am just locating it, the CMA's conclusion that it is
4 appropriate to define a single market, and the reason
5 that the CMA gives for this -- and we see that at
6 5.18 -- is that this is a transaction market. So the
7 options available to consumers, on the one hand, and to
8 HIPs, on the other, are the same channels, including the
9 HIPs direct channel. So that is the CMA's reasoning on
10 this point; yes?
- 11 A. Yes, and I agree with that reasoning, and that is also
12 what I discussed yesterday as to being reasons why one
13 would define a single market, exactly.
- 14 Q. That is correct, so you agree with that.
- 15 A. Yes.
- 16 Q. Thank you. In fact, I think -- and this is perhaps
17 a nuance, but it is not relevant in this case, but
18 I think that you believe that -- and I think you said
19 this yesterday -- this distinction between transaction
20 and non-transaction markets is not a binary distinction;
21 is that right?
- 22 A. Correct.
- 23 Q. I think, in your writing, you have expressed the view
24 that whether or not a market -- a two-sided market is
25 transactional, the HMT still leads to one market

1 definition?

2 A. Yes.

3 Q. In defining the market, the CMA used the conceptual
4 framework, known as the hypothetical monopolist test,
5 and if we turn to your first report at bundle A, tab 6,
6 page 9 {A/6/9} at paragraph 2.8, at the bottom of that
7 page, do you have that, Dr Niels?

8 A. Yes.

9 Q. Thank you. You say that:

10 "The SSNIP test is a useful tool that ... offers two
11 things."

12 The first of those things is at the bottom of this
13 page. You say:

14 "It provides a conceptual framework for asking the
15 right questions about market definition."

16 In other words, what you are saying, I think, is
17 that it ensures that there is some rigour and principle
18 underlying the analysis.

19 A. Yes.

20 Q. I think what you said to the Tribunal in answer to one
21 of the questions, is that it is good, of course, at the
22 outset, to have an overview of who the competitors and
23 potential competitors are, but that is not enough,
24 because what you need to do then is examine the extent
25 of the constraints that those competitors impose.

1 A. Correct.

2 Q. Then moving over the page, to page {A/6/10}, you say
3 that the test also:

4 "... provides a practical threshold for closeness of
5 competition, thus identifying the closest substitutes to
6 be included in the market, and separating them from more
7 remote substitutes, which are excluded."

8 That is really getting at that last point that I put
9 to you, that you can observe just anecdotally in the
10 market that some other entities might be competing, but
11 that is not enough to answer your market definition
12 question, because you need to examine the closeness of
13 those constraints and this test conceptually helps you
14 do that?

15 A. Yes.

16 Q. At paragraph 2.9 of your report, you say that there is
17 also common ground between you and the CMA in terms of
18 the basic logic of how the SSNIP test works.

19 A. Yes.

20 Q. That is why you say, at 2.9, that in explaining the
21 test, which you do, if I may say so, very clearly in
22 your report, you use similar language to the CMA in its
23 Decision, because there is common ground between you as
24 to how this test operates in principle?

25 A. Yes.

1 Q. You say at paragraph 2.10 that:

2 "The SSNIP test seeks to establish the smallest
3 product group ... such that a hypothetical monopolist
4 controlling that product group ... could (or would)
5 raise prices."

6 I am not going to ask you questions about the two
7 variants of the test, because they are not material to
8 my questions, but I understand the point you are making.
9 But in terms of the basic purpose of the test, what you
10 are saying is that it is seeking to establish the
11 smallest product group, such that a hypothetical
12 monopolist controlling that product group could or would
13 raise prices?

14 A. Yes.

15 Q. You have to start, then, with a focal product, and that
16 is you say:

17 "... the product to which the conduct or agreement
18 in question relates."

19 Yes?

20 A. Yes.

21 Q. Just to be clear -- and this is an obvious point but
22 I want to spell it out -- by selecting this focal
23 product, you are testing whether the market can be
24 defined by reference to this product. So it is the
25 starting point for the analysis. It is not the end

1 point. You are not making any assumptions at this stage
2 in the test?

3 A. Correct.

4 Q. What you do is you bring all suppliers of that product
5 within the hypothetical monopolist; yes?

6 A. Yes.

7 Q. You are asking whether it is profitable or profit
8 maximising for them to sustain a SSNIP?

9 A. Yes.

10 Q. Then at paragraph 2.16, on page {A/6/11}, you say that
11 if the answer to the SSNIP question is "yes", so if the
12 SSNIP could be maintained by the hypothetical
13 monopolist, then the market is defined, yes, because
14 that demonstrates they have market power?

15 A. Yes.

16 Q. But if it is a "no", if they cannot sustain a SSNIP,
17 then that must be because there are other close
18 substitutes outside the product group that prevent
19 a SSNIP being sustained?

20 A. Yes.

21 Q. What you have to do, at that stage, you explain very
22 clearly, is to expand the focal group to include the
23 nearest substitute and then you conduct the SSNIP again?

24 A. Indeed.

25 Q. Then you keep doing that, if you have to, until you

1 arrive at your market definition?

2 A. Yes.

3 Q. If we could turn in this same tab, tab 6, please, to
4 page {A/6/17}, at 3.11, we see here that you agree with
5 the CMA that the assessment of the market definition
6 must start with the product that the CMA is concerned
7 about here, which is supply of PCW services for home
8 insurance products.

9 That is the focal product, and again, you agree on
10 that point?

11 A. Yes.

12 Q. At 3.12, you make explicit how the next step works. You
13 say what it involves doing is combining all the existing
14 PCWs in home insurance under common ownership. You say
15 that the CMA does not make this step explicit, but you
16 agree that in fact that is what the CMA has done. That
17 is how it set up its SSNIP test?

18 A. Yes.

19 Q. What I would like to do first is consider with you the
20 operation of the SSNIP test on the home insurance side
21 of the market, as you have put it, so on the HIP side of
22 the market.

23 The price that the CMA has considered in carrying
24 out this exercise is the commission charged by the
25 hypothetical monopolist to HIPs. That is right, is it

- 1 not?
- 2 A. Yes.
- 3 Q. If we look at page 25 of your report {A/6/25},
4 paragraph 3.38, you agree that it makes sense for the
5 CMA to consider commission fees as regards the HIP side
6 of the market?
- 7 A. Yes.
- 8 Q. You agree that PCWs have control over the commission
9 fees they charge?
- 10 A. Yes, they charge -- they are the ones --
- 11 Q. Who are charging them.
- 12 A. They are charging it. Control depends on the bargaining
13 between the two sides. But, yes, they set commissions.
- 14 Q. They set them. You also agree that through these
15 commission fees, PCWs can influence the retail prices
16 paid by consumers?
- 17 A. Yes.
- 18 Q. You agree as well that they do not set retail prices
19 directly because those are set by the insurers?
- 20 A. Yes.
- 21 Q. The CMA concluded that a hypothetical monopolist PCW
22 could sustain a SSNIP in commission fees, did it not?
- 23 A. Yes.
- 24 Q. If we turn back to the Decision, so I am now in
25 bundle A, tab 1 at page 82 {A/1/82}, please,

1 paragraph 5.25 of the Decision, you see here that the
2 CMA says it has considered -- so we are looking at this
3 SSNIP on commission fees, at the moment, Dr Niels -- has
4 considered constraints that PCWs face on both sides of
5 the market.

6 If we turn on to the next page {A/1/83}, to
7 paragraph 5.28, you see that what it is assumed is that
8 the commission fee increase that the SSNIP comprises is
9 passed on in its entirety to the retail prices paid by
10 consumers. Yes? You agree that is what the CMA has
11 done?

12 A. Yes.

13 Q. Taking providers first -- so constraints on the provider
14 side -- if we turn to page {A/1/89} of the Decision, at
15 paragraph 5.48, do you agree with the CMA that from the
16 providers' perspective, it is relevant to consider the
17 strength of their outside option, so including direct
18 channels and retaining customers at the point of
19 renewal, and it is relevant to consider whether those
20 outside options might lead them to stop or to reduce
21 their use of PCWs in the event of a 5 to 10% increase in
22 commission fees?

23 A. Yes.

24 Q. Looking at 5.49, now turning to consumers, page
25 {A/1/89}, do you agree with the CMA that as regards

1 consumers, it is relevant to look at the value placed by
2 them on PCWs as compared with those same outside
3 options?

4 A. Yes.

5 Q. What you are doing, and what the CMA has done, is to
6 consider whether consumers would switch to those
7 alternative channels in the event of a SSNIP on
8 commission fees, assuming those commission fees are
9 passed on in full to the retail prices. You agree that
10 is what the CMA has done?

11 A. That is what the CMA has done, and that is where I am
12 saying that is not testing the consumer side properly.

13 Q. I understand that.

14 A. But that is what the CMA has done in the SSNIP on
15 commissions.

16 Q. On commissions, exactly. At the moment, I am just
17 establishing common ground in terms of what the CMA has
18 done.

19 THE PRESIDENT: Ms Demetriou, just to be clear, the
20 transmission of the SSNIP that you are postulating is
21 pretty much that which Professor Ulph described
22 yesterday in his questions to the witness.

23 MS DEMETRIOU: Yes.

24 THE PRESIDENT: In other words, you have a 100%, you are
25 assuming, pass-through of the price across from one

1 market to the other, if I can use my terminology, but
2 across segments in the market, to use yours, such that
3 the increase is borne by the purchasers of home
4 insurance products.

5 MS DEMETRIOU: Sir, precisely.

6 THE PRESIDENT: However they have bought it.

7 MS DEMETRIOU: What the CMA has done, and Dr Niels agrees,
8 is considered, in relation to the SSNIP on commission
9 fees, is assumed that those have all been passed through
10 to consumers buying on PCWs and has considered whether
11 or not those consumers, because of the impact on retail
12 prices, because of the pass-through, would switch to
13 direct channels. That is what the CMA has done.

14 THE PRESIDENT: Yes, but I think one needs to be quite
15 careful here, because you are not saying that the
16 increase is passed on only to those purchasers of home
17 insurance who have purchased it through a price
18 comparison website.

19 MS DEMETRIOU: I think we are saying that, sir.

20 THE PRESIDENT: Okay, if that is what you are saying.

21 MS DEMETRIOU: Yes.

22 THE PRESIDENT: So, in fact, you are saying that there is
23 a quite deliberate differentiation between a purchaser
24 of a home insurance product who purchased it through,
25 let us say, a direct channel and a purchaser of a home

1 insurance product who purchased it through
2 ComparetheMarket.

3 MS DEMETRIOU: Sir, I feel slightly uncomfortable about
4 answering in broad terms, because I think those are
5 really questions for Dr Walker. But what I want to put
6 to this expert are the stages of the CMA's analysis.

7 What I am establishing, at the moment, is what the
8 CMA has done, if I can talk in those terms rather than
9 generalities --

10 THE PRESIDENT: Specifically, then, the CMA is not -- well,
11 to whom is the increase in price passed?

12 MS DEMETRIOU: The CMA has assumed -- and I do not think
13 there is any dispute about what it has done, so we can
14 see this in the Decision, at paragraph 5.28, on page
15 {A/1/83}, the CMA has assumed for the purposes of this
16 conceptual test that the increase in commission fees,
17 the 5-10% increase in commission fees charged by the PCW
18 hypothetical monopolist to the HIPs, is passed through
19 by the HIPs into the retail prices that they have
20 charged to consumers purchasing off the hypothetical
21 monopolist PCW. That is what it has done.

22 THE PRESIDENT: Right. So you are saying what happens to
23 the prices that purchasers of home insurance through
24 other channels simply does not matter.

25 MS DEMETRIOU: We look at that with the narrow MFNs. At the

1 moment, I am just looking --

2 THE PRESIDENT: I understand what you are saying. I just
3 want to be absolutely clear what it is you are saying.

4 MS DEMETRIOU: Yes.

5 THE PRESIDENT: Then a second related question to that is
6 there is obviously a differentiation even within the
7 class of persons using price comparators, that this
8 increase will be felt, am I right, in the quotations
9 that are produced by the price comparison website? So
10 the quotations will be 1.8 to 3.5% higher to anyone who
11 uses, let us say, comparethemarket.com to get a price.
12 Is that what you are saying?

13 MS DEMETRIOU: Yes, so the question is whether consumers,
14 who would otherwise purchase off the price comparison
15 website, facing those higher quotations and prices,
16 whether they would switch from the price comparison
17 website to the direct channel in view of that increase
18 in the retail price.

19 THE PRESIDENT: Yes.

20 MS DEMETRIOU: What the CMA found -- and that is measuring
21 the constraint, it is measuring the constraint from the
22 direct channels in the event of the SSNIP in commission
23 fees. I do not think there is any dispute between me
24 and Dr Niels as to that part of the process. Dr Niels'
25 point is that the CMA should have done more, and I am

1 going to come to that point.

2 THE PRESIDENT: Ms Demetriou, this is purely so that I get
3 my ducks in a row. That is all I am asking.

4 MS DEMETRIOU: Of course. I do not mean to be unhelpful.

5 I am very happy to clarify questions and what the CMA
6 has done, but in terms of --

7 THE PRESIDENT: You do not want to give evidence.

8 MS DEMETRIOU: I do not want to give evidence and I do not
9 want to say something Dr Walker might disagree with,
10 when he is giving evidence, but I will do my best.

11 If we go back, please, to the Decision at
12 paragraph 5.50, so on {A/1/89}, I think we have just
13 established that what the CMA has done here, Dr Niels,
14 is considered -- it is looking at the SSNIP in
15 commission fees and it is considering whether consumers
16 would switch to other channels, direct channels, in the
17 event of that SSNIP in commission fees, given the
18 pass-through into retail prices; yes?

19 A. Yes.

20 Q. You are not saying, just to be clear, that the CMA has
21 ignored constraints on the consumer side in relation to
22 the SSNIP on commission fees, are you? That is not your
23 problem with the analysis?

24 A. Indeed, that is not what I am saying.

25 Q. Had the CMA found -- I am now hypothesising, because it

1 did not find this, but just in terms of how the test
2 works, had the CMA found that consumers would have
3 switched, then it would have widened out the focal
4 product. That is how the HMT works?

5 A. Yes.

6 Q. But what you are saying -- and this is really the
7 difference between you -- is that the CMA should also
8 have carried out a separate SSNIP test in respect of the
9 consumer side of the market too?

10 A. Yes, subject to the, again, perhaps semantic point that
11 I would call it part of the same SSNIP test, but it is
12 an additional -- my point is it should have tested the
13 effect of a SSNIP on the consumer side as well.

14 Q. I understand. If we go to your --

15 THE PRESIDENT: Again, just to be clear, we are talking
16 about your -- I mean, Ms Demetriou is hypothesising
17 a SSNIP on the consumer side, just one that operates in
18 an indirect route.

19 MS DEMETRIOU: Exactly.

20 THE PRESIDENT: What I think we are debating is whether
21 there should have been, and if so, what it means, if one
22 has a direct SSNIP, if one can call it that, one which
23 directly impacts the price quoted, let us say, the £5 we
24 were discussing per quotation, that sort of thing.
25 That, I think, is the relevance of the debate we are

1 having, is that fair?

2 MS DEMETRIOU: Sir, that is exactly right. I think we are
3 all agreed that if we drill down into it on this
4 particular issue about the SSNIP test, this is the issue
5 between us. There is a separate point on narrow MFNs,
6 I am going to come to that. Let us ignore that for the
7 time being, but Dr Niels agrees with the approach, the
8 conceptual approach -- I am now not getting into
9 Ms Ralston -- but the conceptual approach in relation to
10 the SSNIP on commission fees. He is not saying the CMA
11 disregarded the constraints from the consumer side in
12 relation to the SSNIP on commission fees, because he
13 recognises that the CMA has assumed pass on of that
14 increase to retail prices. He is saying that there
15 should be a separate self-standing exercise on the
16 consumer side.

17 I want to take him, please, now to his first --

18 PROF ULPH: Ms Demetriou, could I ask a question at this
19 point?

20 MS DEMETRIOU: Of course.

21 PROF ULPH: Going through the exercise that you have just
22 outlined, my question is, in doing that exercise, going
23 back to the point that Dr Niels made yesterday about the
24 two-way positive interaction between the two sides of
25 the market, to what extent should the CMA in doing this

1 exercise have taken into account the possibility that if
2 some consumers switched away to direct providers, that
3 would make PCWs a less attractive channel for HIPs to
4 list on?

5 Some HIPs might delist or partially delist from
6 those channels. That would make those channels less
7 attractive to consumers, and some additional consumers
8 might then stop using PCWs. Should that channel of
9 direct interactions have been taken into account when
10 doing that analysis?

11 MS DEMETRIOU: Sir, sorry, is that a question for Dr Niels
12 or for me? Because if it is a question --

13 PROF ULPH: Sorry, it is for Dr Niels.

14 A. Oh sorry, yes. My answer is, yes, conceptually that is
15 very much part of what you need to take into account
16 even when doing the SSNIP on the commission side.

17 PROF ULPH: Thank you. I wanted to be clear what it was you
18 thought should have been done when doing the SSNIP in
19 the way it was outlined, thank you.

20 MS DEMETRIOU: Thank you, Professor.

21 Now, Dr Niels, could we go to bundle A, tab 6,
22 page 19 {A/6/19}. I want to look now at -- in fact, if
23 we start on page {A/6/18}, paragraph 3.16 of your
24 report. In fact, looking at it, 3.16 and 3.17 make the
25 same point, but with a slightly different variance of

1 the hypothetical monopolist test.

2 So let us go back to page {A/6/19}. It is going to
3 be easiest to do it this way.

4 You explain here what the possible results are that
5 could follow, in principle, yes, from the application of
6 a SSNIP test on both sides of the market? You say that
7 there are three types of outcome.

8 The first outcome is that the regulator might find
9 that a SSNIP is profitable on both sides; yes?

10 A. Yes.

11 Q. The second outcome is that the SSNIP might be
12 unprofitable on both sides?

13 A. Yes.

14 Q. The third outcome is that you might have a SSNIP that is
15 profitable on one side, but not on the other; yes?

16 A. Yes.

17 Q. Those are the permutations. At 3.18 of your report, you
18 say that the first and the second results are
19 straightforward to interpret, because for the first
20 result, you say the SSNIP is profitable on both sides,
21 so the candidate group of products form a relevant
22 market; yes?

23 A. Yes.

24 Q. For the second result, for the opposite reason, you say
25 that that is easy to interpret too, because the SSNIP is

1 not profitable on either side, so you say the focal
2 product is not a relevant market and you need to expand
3 it?

4 A. Yes.

5 Q. Then, at 3.19, you say that the final outcome -- so
6 profitable on one, but not the other -- is more
7 difficult to interpret; yes?

8 A. Yes.

9 Q. You say that there are two possibilities. You say that
10 the first possibility -- we see this at 3.20 -- is that
11 it could be concluded that the hypothetical monopoly
12 platform, so the focal product, is a relevant market,
13 because a SSNIP can be sustained on one side; yes? So
14 that is one possible outcome?

15 A. Yes.

16 Q. Secondly, conversely, you say you could conclude that
17 the test does not yet provide the full picture of
18 competitive constraints, because, on side B, the
19 platform faces competition from other substitutes, even
20 if on side A, it is not constrained; yes?

21 A. Yes.

22 Q. At 3.22, you say that the correct interpretation -- so
23 which of these is correct -- depends on the competition
24 concern that market definition is aimed to shed light
25 on; yes?

- 1 A. Yes.
- 2 Q. In other words, you have to ask yourself whether the
3 constraints on the other side of the platform, so where
4 the SSNIP has not been sustained, yes, in this example,
5 you have to ask yourself whether those are capable of
6 affecting the question of whether the theory of harm you
7 are examining can eventuate; yes? Because ultimately,
8 that is what you are looking at here.
- 9 A. Sorry, again, can you repeat that question?
- 10 Q. Yes. Where you say, at 3.22, that the correct
11 interpretation depends on the competition concern that
12 market definition is aimed to shed light on -- let me
13 take it in stages, by "competition concern", you are
14 talking about the theory of harm that is being
15 investigated; yes?
- 16 A. Yes.
- 17 Q. If you find that a SSNIP can be sustained on side A --
18 yes?
- 19 A. Yes.
- 20 Q. -- but cannot be sustained on side B, you have to ask
21 yourself, on side B -- just pausing there, there are
22 possible constraints on the platform's behaviour; yes?
- 23 A. Yes.
- 24 Q. You have to ask yourself: are those constraints relevant
25 to the theory of harm that I am investigating; yes?

1 That is really the question?

2 A. I think that is one way of describing it. I am just
3 thinking aloud here. In my mind, I had actually made
4 a link in a much simpler more basic terms, which is just
5 to say: look, the wide MFN, the conduct in question, and
6 the theories of harm refer to both sides. So when
7 defining markets, you have to consider both sides. It
8 is actually at that very basic level that I say,
9 therefore, you do need -- you cannot just ignore what
10 happens on the consumer side.

11 I think the question put to me makes the link one
12 step further, which is a perhaps perfectly valid link
13 between the actual theory of harm and the constraints on
14 the consumer side. I had not thought about it in that
15 way. I thought about it in a simpler way. But the
16 reason why I am saying you need to look at the consumer
17 side is that clearly the wide MFNs also impact on that
18 side. So you also want to understand competitive
19 constraints on that side.

20 Q. Dr Niels, thank you. At the moment, let us think
21 a little bit conceptually about this. You have accepted
22 that the correct interpretation, whether in fact you --
23 whether the fact that, on side B, the SSNIP is not
24 sustained, so you say whether or not that is relevant
25 depends on the competition concern. That is what you

1 have said at 3.22, so we can agree on that?

2 A. Yes.

3 Q. What I am saying to you is by "competition concern", we
4 mean the theory of harm that is being investigated; yes?

5 A. Yes.

6 Q. To be clear, you are not saying here that it is always
7 necessary to show that a SSNIP can be sustained on both
8 sides?

9 A. Correct. In the hypothetical situation, where the
10 competition concern in question is really only about one
11 side, and there are such cases perhaps, then you could
12 perhaps focus on just one side, or in this situation
13 say: okay, the market is narrow because, on that side
14 that I am really concerned about, there is market power.

15 Q. Thank you, Dr Niels. If we turn to page {A/6/25},
16 paragraph 3.39, you say that on the consumer side, there
17 is no immediate price as PCWs do not charge consumers
18 for their services; yes?

19 A. Yes.

20 Q. But you say that PCWs do compete for consumers on other
21 dimensions than price, and you can apply the SSNIP logic
22 to those dimensions in order to test the closeness of
23 competition. That is what you are saying there at 3.39;
24 yes?

25 A. Yes.

1 Q. When you refer to "other dimensions" you are referring,
2 I think, to, for example, marketing expenditure or
3 investments into the usefulness of the platforms?

4 A. Yes, the three dimensions that are in the next
5 paragraph, 3.40, that we have seen before, and those
6 dimensions were actually, in my recollection, originally
7 identified by the CMA at some stage in the
8 investigation. I think there has always been agreement
9 that those are three key dimensions of competition on
10 the consumer side.

11 Q. So, Dr Niels, let us focus for the moment on the first
12 two of those, so marketing and advertising, and
13 usefulness of the comparison service; yes?

14 A. Yes.

15 Q. What you are saying is that the SSNIP can be applied,
16 the HMT can be applied by conceptualising a small but
17 significant reduction in such expenditure; yes?

18 A. Yes.

19 Q. Let us imagine that the theory of harm being considered
20 by the CMA was the deterioration by the PCWs of their
21 offering to consumers; yes? Let us assume, because that
22 is a possible theory of harm, let us imagine that that
23 is what the CMA had been investigating in this case.

24 In those circumstances, the SSNIP, you suggest,
25 would examine whether there are any competitive

1 constraints preventing PCWs from engaging in that type
2 of deterioration; yes?

3 A. Yes, such a SSNIP would examine whether the other
4 channels or the direct channels impose a competitive
5 constraint. For example, if you reduce your marketing
6 expenditure, say, on Google, would you lose customers?
7 I am just trying to take it into two steps here. The
8 first step is identifying the competitive constraints,
9 which in itself I think is a very important and relevant
10 question. The second step is then the question put to
11 me: how do you link that to the theory of harm?

12 If you identify competitive constraints, so direct
13 channels do constrain the PCWs because they have to
14 compete very hard in marketing and advertising, then
15 that tells you something, there is competitive
16 constraint. Whether such a competitive constraint
17 completely prevents you from engaging in the theory of
18 harm or in the harmful conduct that has been alleged,
19 I always see that as sort of the next step in the
20 analysis. The market definition informs on that step,
21 but there may be other things in that analysis of the
22 effects.

23 Q. Dr Niels, you are jumping ahead of me, because you are
24 a much better economist than I am, I am not an economist
25 at all, but if we can just take the questions in my

1 order.

2 I am just asking you to imagine for the moment that
3 the theory of harm that the CMA was investigating was
4 one connected with deterioration of its offering to
5 consumers in terms of marketing or usefulness. I am
6 just asking you to agree that, in those circumstances,
7 the type of SSNIP that you are envisaging here, so
8 conceptualising a small but significant reduction in
9 such expenditure, would be valuable in those
10 circumstances, no? Because you would be identifying any
11 constraints that prevented that theory of harm from
12 eventuating.

13 A. Yes.

14 Q. I think we can agree that that was not the theory of
15 harm being considered by the CMA, in this case, was it?
16 The CMA was not examining whether the wide MFNs caused
17 PCWs to spend less on marketing or on the usefulness of
18 their platforms?

19 A. Correct.

20 Q. In fact, examining whether there are competitive
21 constraints preventing PCWs investing less in marketing
22 or in the usefulness of their platforms does not shed
23 any light on the theory of harm, in this case, does it?
24 It does not shed any light on whether the wide MFNs
25 dampen competition in relation to the commission fees

- 1 charged by PCWs, does it?
- 2 A. I think it does shed light on the competitive
3 constraints faced by PCWs on the consumer side. You do
4 need to take that into account in the round in your
5 analysis. To make the direct link, I can see where you
6 are heading to or what is implied in the question, is
7 there a direct link between competition on advertising
8 and the particular theory of harm investigated? Maybe
9 there is not that direct link, because it relates now to
10 other dimensions of competition. But is it relevant for
11 the overall analysis of competitive constraint? I would
12 say yes.
- 13 Q. Well, Dr Niels, I understand that that is your position.
14 What I am putting to you is that actually we agree that
15 market definition is an intermediate step, it is not an
16 end in itself. We have said that, you have accepted
17 that, so one has to be very, very careful about asking
18 yourself: why are we conducting this market definition
19 exercise; yes?
- 20 A. Yes.
- 21 Q. What I am saying to you is that the reason that we
22 conduct the market definition exercise in this type of
23 case is to shed light on -- I think you have agreed with
24 this -- the theory of harm actually being investigated,
25 the competition concern, as you have put it, that is at

1 issue; yes?

2 A. Yes.

3 Q. Here the theory of harm -- and you have accepted this --
4 relates to a softening of competition in relation to
5 commission fees and how that might feed through to
6 retail prices; yes?

7 A. Yes.

8 Q. We have seen already --

9 THE PRESIDENT: Ms Demetriou, I am so sorry to interrupt,
10 but I am beginning to think that the problem that exists
11 in this case is that we do not really have a commonly
12 agreed process for actually determining whether there
13 has been an effects-based infringement.

14 You are postulating that the theory of harm drives
15 the market definition.

16 MS DEMETRIOU: Sir, I am, yes.

17 THE PRESIDENT: That is the whole subject of your questions.

18 MS DEMETRIOU: Of course. That is what I am doing.

19 THE PRESIDENT: But can that be right? Because what you are
20 doing is you are confining your understanding of the
21 market to the theory of harm. In other words, what you
22 are potentially doing is you are saying: there are
23 certain questions we are simply not going to ask,
24 because they do not accord with our theory of harm.

25 It is quite clear that Dr Niels has a problem in

1 defining what exactly he means by a SSNIP, because he is
2 using it in a somewhat different way to the way in which
3 it was used in ordinary matters, because he is referring
4 to, as it were, reductions in service, not to
5 hypothetical increase in price. That may be fine, but
6 we have a definitional problem in terms of what Dr Niels
7 understands by a SSNIP test.

8 What we have in your case, and why I am intervening
9 now, is you are saying: we, frankly, do not care. We
10 have not looked at the increase in price to the buyers
11 of price comparison services -- let me finish.

12 MS DEMETRIOU: Yes.

13 THE PRESIDENT: We are not interested in a direct increase
14 at all, because that is not the harm that we are looking
15 at.

16 MS DEMETRIOU: Yes.

17 THE PRESIDENT: It seems to me that it is better to
18 understand the operation of a SSNIP on both markets,
19 even if once you have worked out how the SSNIP works on
20 both markets, you say: actually, I am rather less
21 interested in this side than in the other side.

22 I think what the CMA's position is on this -- and
23 I may be wrong -- is that if you were to say it is a £5
24 per quote price as opposed to a zero price on price
25 comparison websites, there would be a massive shift away

1 from price comparison websites to use the free direct
2 channels -- let me finish.

3 MS DEMETRIOU: Yes, I am listening.

4 THE PRESIDENT: But you do not consider that shift to be
5 relevant given the theory of harm that you are
6 articulating.

7 MS DEMETRIOU: Sir, precisely, yes.

8 THE PRESIDENT: Right. Does it mean though -- just so
9 I understand how the broad picture operates, which I do
10 not think you have done -- that if you were to apply
11 a SSNIP to this side of the market, without saying
12 anything about its relevance, but if you were to do so,
13 there would be such a flight away from price comparison
14 websites to direct channels or renewals?

15 Do not answer that now. I see you are looking and
16 I can quite understand why you are looking.

17 MS DEMETRIOU: Sir, you have understood the case that I am
18 putting to Dr Niels.

19 THE PRESIDENT: Yes.

20 MS DEMETRIOU: We do say that market definition is an
21 intermediate step and depends on the theory of harm that
22 you are investigating.

23 Sir, I am so sorry, but the point that you put back
24 to me is, no doubt, Dr Niels' answer, that is CTM's
25 case, but I am trying to test it in cross-examination.

1 You have identified the issue between us, with respect,
2 which is very helpful, but I do not think it is going to
3 be helpful for me to answer questions as opposed to
4 Dr Walker to answer questions. What I need to do is put
5 our case to Dr Niels.

6 THE PRESIDENT: No, I understand. The reason I am raising
7 this now is because it may be that an awful lot of the
8 questions that I have for Ms Ralston, and indeed for
9 Dr Walker, actually fall away, because you are going to
10 be saying that, "The points I am interested in are
11 correct, but irrelevant." The thing is, I want to know
12 whether they are correct first before I decide that they
13 are irrelevant.

14 MS DEMETRIOU: Sir, I understand that. Just to try to
15 engage in, I hope, a more helpful way with the question
16 that you are putting to me, I think the difference
17 between us, as it is emerging in this cross-examination,
18 is that it really comes down to what Dr Niels has very
19 helpfully and correctly set out as to the possible
20 outcomes of the SSNIP on the other side.

21 Really, what we say is that we are in the first of
22 his territories, where actually it does not matter what
23 the SSNIP does on the other side, because the theory of
24 harm is the increase in commission fees. You have
25 tested the consumer reaction to that, because of the

1 pass-through.

2 What Dr Niels says is, no, you have to take, as
3 I understand it, a broader view of the competitive
4 interactions in this market.

5 So that is an issue between us, and it is going to
6 have to be resolved by the Tribunal, but I do not think
7 it can be resolved in advance of Ms Ralston's evidence,
8 because it will no doubt form part of your judgment.

9 There will be submissions on it too in due course and
10 you will have to hear from Dr Walker on it.

11 THE PRESIDENT: I think that is probably right. I think the
12 concern I have, and the reason we have gone through this
13 whole process of an extended examination-in-chief of
14 Dr Niels, is that the CMA and ComparetheMarket are in
15 violent agreement about something which is deeply
16 troubling me. That is the problem.

17 MS DEMETRIOU: Right, yes. I saw that, sir.

18 THE PRESIDENT: You see it may be that the problem is simply
19 one of a discretion in the CMA as to how it chooses to
20 define the market, but the way I see the test
21 applying -- and we will have submissions on this,
22 certainly -- is that the market definition process
23 precedes the articulation of the theory of harm. In
24 other words, you understand the way in which the
25 provision that is said to be anti-competitive works in

1 all relevant markets first, and then you work out which
2 bits you need to focus on.

3 What we are doing is packaging the same question in
4 different ways. I try and articulate the issue by
5 having a nice easy-to-understand traditional SSNIP
6 applied on both markets. I am not saying that it is
7 equally important on both markets, but you do that so
8 you know what you are talking about.

9 MS DEMETRIOU: Sir, I understand, but we say that that is
10 not correct. So our response to that, in principle, is
11 that market definition is not an end in itself. One
12 does not generally define the market in the case.

13 THE PRESIDENT: It is not an end, it is a means, we are
14 agreed on that. What I am putting is: do you not want
15 to know the substitutes on both sides of the market or
16 in both markets, however you want to do it, before you
17 go on to say that one side is more relevant than the
18 other?

19 MS DEMETRIOU: Sir, no, we say -- and we will have to deal
20 with it in submission, we will have to explore it with
21 Dr Walker as well, but we say that the exercise is
22 targeting looking at competitive constraints and there
23 is common ground on that, and you have to ask yourself:
24 what is the purpose of looking at the constraints? It
25 is to see whether this theory of harm can take place.

1 So it is not to look at other theories of harm that
2 are not in the picture; it is to examine whether this
3 particular theory of harm can -- whether there is market
4 power which can enable it to take place or whether there
5 are constraints in the market which prevent it taking
6 place.

7 That is the CMA's case, and that is what I am
8 putting to Dr Niels.

9 We all agree it is an intermediate step, but the
10 question really -- and this is a question the Tribunal
11 will have to grapple with -- is what is the purpose of
12 that intermediate step? We say it has a specific
13 purpose.

14 So that is our case, and we will take you to case
15 law insofar as there is case law in submissions on this.
16 Of course, you will be able to explore it with
17 Dr Walker. We say you do have to be precise.

18 Dr Niels and I agree that the purpose of market
19 definition is to identify competitive constraints in
20 relation to the competition concern, so we agree with
21 that. What I am putting to him is that when you are
22 deciding whether constraints on the other side of the
23 market -- first of all, to be clear, we have examined
24 constraints on the other side of the market in relation
25 to the increase in commission fees. What Dr Niels is

1 saying is that the CMA had to go further, and we are
2 saying no.

3 THE PRESIDENT: Yes, that is the packaging problem.

4 MS DEMETRIOU: Yes.

5 THE PRESIDENT: The thing is, what, if I may, with all
6 respect, say to Dr Niels, is that the mechanism by which
7 he says the CMA needs to go a stage or two further is
8 one that is very hard to articulate.

9 MS DEMETRIOU: Sir, yes.

10 THE PRESIDENT: But that does not mean to say it should not
11 be articulated. I suppose what I am getting at is you
12 are saying that it is a somewhat moveable feast as to
13 how one defines a two-sided market. It might be one
14 market, it might be two, it might be more than two. You
15 have taken the view here that it is a single market
16 defined by reference to buyers of price comparison
17 services and buyers of customer introduction services,
18 and that is it.

19 Whereas if you applied a SSNIP to define the market
20 simply on the basis of the buyers of price comparison
21 services and therefore you increased the direct price
22 payable, the quotation moving from zero to £5, you would
23 see a very different market to that which you have
24 articulated in paragraph 5.2 {A/1/82} of the Decision.

25 Your answer to that is that may be right, but is

1 irrelevant.

2 MS DEMETRIOU: Sir, yes. Of course, sir --

3 PROF ULPH: Ms Demetriou, could I ask a question? Could
4 I make sure I really understand what you are claiming.
5 You are claiming that the way in which the CMA
6 articulated the theory of harm should actually constrain
7 the way in which the SSNIP test is actually going to be
8 carried out. So are you saying that, because the CMA
9 did not claim that the wide most-favoured-nation clause
10 had an impact on advertising, therefore it would be
11 illegitimate to conduct a SSNIP test on the consumer
12 side, by looking at the fact of an increase or decrease
13 in advertising, so you are actually saying that this
14 constrains the methodology for doing the SSNIP test?
15 Have I understood you?

16 MS DEMETRIOU: Professor, you have broadly understood me,
17 but may I just slightly tweak the terminology in
18 response? We are not saying it would be illegitimate to
19 carry out a SSNIP test on the other side. A SSNIP test
20 on the other side might demonstrate that PCW enjoys
21 market power on the other side and can deteriorate
22 quality and so on, and that would be an additional
23 theory of harm.

24 We are not saying it is illegitimate, but we are
25 saying in relation to this particular theory of harm

1 being examined, it is not informative, because what the
2 CMA has done is define the market by reference to the
3 theory of harm it is examining, and that is because it
4 is trying to identify the competitive constraints that
5 might constrain that theory of harm.

6 So, Professor, I hope that is an answer to your
7 question, but I am a little bit troubled by me being
8 questioned about this, because really I am trying to
9 pursue a line of cross-examination. It is really for
10 Dr Walker to explain the CMA's thinking on.

11 THE PRESIDENT: Yes, I can understand your concern,
12 Ms Demetriou. The reason I am raising it, though, is
13 because we are here on the edge of where economic
14 analysis begins and legal -- well, economic analysis
15 ends and legal analysis begins. One of the things that
16 is very important is that we articulate in due course
17 the relevance of certain questions.

18 The reason I am pressing you on this, and have
19 indeed pressed Dr Niels and will press Dr Walker, is
20 that I get a sense that there is a putting the cart
21 before the horse if you allow your analysis of the
22 market to be circumscribed by the theory of harm.

23 It seems to me that you need to understand how the
24 market operates, including if you are talking about two
25 markets, the interaction between the two before you then

1 say: well, our theory of harm in this market, broadly
2 understood, means we must focus on this particular bit.

3 MS DEMETRIOU: Sir, I understand. Can I just show you
4 Dr Walker's report in relation to this? If we go to
5 bundle A, tab 8, page 10 {A/8/10}, I just want to show
6 you that this is clearly in dispute between the two
7 experts. If we look at paragraph 35:

8 "In this case, the CMA found that a SSNIP on
9 commission fees would be profitable, which means that
10 a hypothetical monopolist over PCW services for home
11 insurance would be able to exercise market power. The
12 market can thus be defined narrowly."

13 So this is relating to commission fees, yes? Then
14 he says, a SSNIP, so a deterioration on quality on the
15 other side:

16 "... might show that the hypothetical monopolist
17 could also profitably reduce quality, but this would
18 only strengthen the CMA's conclusion that the market
19 should be drawn narrowly; it is not a necessary finding
20 for that conclusion. For the reasons already given,
21 a finding that the hypothetical monopolist could not
22 profitably reduce quality would not justify a widening
23 of the relevant market."

24 So, sir, the reason -- I am not trying to be
25 unhelpful. I do recognise that, to some extent, there

1 is going to be a legal debate about this, because there
2 may be cases that can shed light on this, but what I do
3 feel a little uncomfortable about is trespassing -- this
4 is really the point on market definition between the two
5 experts. So I do understand that the Tribunal wants to
6 get to the bottom of it, and of course you need to, and
7 it is very important that you do, but in advance of
8 Dr Walker giving evidence, I am uncomfortable about
9 myself explaining his analysis. I hope you can see
10 that.

11 What I would like to do really is ask Dr Niels about
12 it, and then of course Dr Walker will speak to this when
13 he gives evidence on Monday.

14 THE PRESIDENT: Of course, I understand that, Ms Demetriou.

15 What I am really trying to have clear in my mind is the
16 extent of the disagreement between the points I was
17 putting to Dr Niels and Dr Niels' position.

18 MS DEMETRIOU: Yes.

19 THE PRESIDENT: I think his position -- we will go through
20 that with Ms Ralston -- is that if I were to apply
21 a SSNIP simply to the yellow market, as I have called
22 it, the buyers of pure comparison services, and do that
23 by reference to the quotations provided, one would
24 define that market very differently. But you say -- and
25 here you are in violent agreement with Ms Demetriou --

1 that is not the right question.

2 A. What I have been saying is it is the right analytical
3 mechanism that you need to do, you do need to ask those
4 questions. The only difference I think between us is
5 that I would not call it two markets, I would still go
6 to it is one market where you have analysed the two
7 sides. But I agree with the proposition about testing
8 the constraints on the consumer side.

9 THE PRESIDENT: So you see where I am at, Ms Demetriou. We
10 have, on the face of the reports between the experts, an
11 absence of disagreement about paragraph 5.2 {A/1/82} of
12 the CMA's Decision.

13 MS DEMETRIOU: Yes.

14 THE PRESIDENT: But when one presses, one sees that actually
15 there is perhaps more disagreement than appears on the
16 face of the reports themselves, because what Dr Niels
17 has just said is that the question I am asking is
18 dealing with the points he is raising, albeit in
19 a different way.

20 I do not want to commit you, I do not want to commit
21 Dr Walker to anything, we will come to these in due
22 course, but what we are talking about is not so much
23 what is going on in this market, but the way in which
24 one arranges the building blocks in order to reach the
25 correct outcome.

1 The arrangement of the building blocks is, of
2 course, a matter of law on which I will hear from you
3 and Mr Beard in due course, but I do think we need to
4 have at least an understanding of the shape of the
5 building blocks, even if you say, at the end of the day,
6 "They are completely irrelevant and should not feature
7 in our position." Because at the moment, I just want to
8 know what those blocks are, even if, in due course,
9 I drop them in the bin and say, "I am going to be
10 ignored."

11 I do not think, with great respect, that I can
12 simply not ask these questions, because there is on the
13 face of the paper reports, between the parties, an
14 agreement with paragraph 5.2 {A/1/82} of the Decision.
15 Because at the end of the day, we have to assess whether
16 you have got this right.

17 That is why I am pressing you, and that is why I am
18 pressing Dr Niels. I do not know where we are going to
19 end up, but that is what I mean.

20 MS DEMETRIOU: Sir, of course, I understand that the
21 Tribunal does not have to accept what is common ground
22 between the parties, so the Tribunal can reach
23 a different view, if there is material before it on
24 which to reach a different view. So nothing I am saying
25 is, of, course intending to tread on the Tribunal's toes

1 in that way.

2 However, I am just acutely conscious that this issue
3 is one of principle, which is really what the main
4 dispute is between the experts on the face of the
5 report. There may be a legal submission aspect to this.
6 There is also an economic opinion aspect which is, well,
7 what is all of this about? Why is it useful to carry
8 out this?

9 So it is that which I am just hesitant about
10 drilling down into on my feet. I can tell you what our
11 case is, I think it is clear what our case is in the
12 questions that I am putting to Dr Niels, but I think
13 more granular questions about whether that is right or
14 wrong in economics should be for Dr Walker rather than
15 for me.

16 To be clear, our case is that you define the market
17 for a purpose. It is to examine the competitive
18 constraints relevant to the commission -- the
19 competition concern.

20 Really just to turn back to Dr Niels, if I may, the
21 point that I am putting to Dr Niels is the one that
22 I have just shown you in Dr Walker's report, that in
23 terms of the harm being considered by the CMA -- so
24 softening of competition on commission fees -- the CMA
25 has looked at the consumer side, you have agreed,

1 because it has looked at the pass-through of those fees,
2 and actually considering whether or not quality in terms
3 of usefulness or marketing could be deteriorated, does
4 not actually shed light on that theory of harm, does it?
5 It does not tell you whether that theory of harm will
6 eventuate or not?

7 A. Yes, I understand the proposition, and I think I will
8 repeat my point, but with an example, that --

9 Q. Could you, first of all, answer that question, then you
10 can give your example? Am I right in saying that
11 conducting the SSNIP on quality, deterioration of
12 quality, does not shed light on whether actually an
13 increase in commission fees can be sustained?

14 A. I do not think that is right, because I think you do
15 overlook -- there is a risk that you are overlooking
16 certain elements of competition that are relevant for
17 the assessment of the theory of harm. So there is
18 a risk that if you are too guided by the theory of harm
19 already directly and therefore do not look at the wider
20 competitive landscape first, that you can overlook
21 things in the conclusions.

22 Apologies, but let me give the example of the case
23 of an ice-cream freezer cabinet exclusivity in small
24 shops, there have been cases like that, abuse of
25 dominance cases. The theory of harm is that through

1 that exclusivity, you foreclose other ice-cream vendors.
2 I think it is still a very useful step first to assess
3 the competitive landscape more widely, do these small
4 shops compete with other distribution channels for
5 ice-cream? You should not, I think, at that stage,
6 already say: no, we are just testing the theory of harm,
7 which is the exclusivity, we are just testing the SSNIP
8 test on that particular sales channel. You have to look
9 first more widely.

10 There is a risk that you overlook the competitive
11 constraints. That can impinge on the wider effects,
12 because just to pick up on one other bit that was put in
13 the question, the theory of harm market definition
14 testing competitive constraints is partly to test
15 whether the theory of harm can take place, I think that
16 is the wording used, but it is also to test the effects.

17 Again, when it comes to effects, even if the conduct
18 takes place, so even if there is, let us say, an
19 increase in commissions or freezer exclusivity,
20 ultimately, in the wider market, do competitive
21 constraints mean that still overall there are very few
22 effects?

23 Q. Dr Niels, can I just pause there? Can we take that in
24 two stages?

25 Where you say "theory of harm takes place", let us

1 just stick with that for a minute, because that is what
2 I want to ask you about. Then I will come back to your
3 second point which is about overall effects.

4 Can we agree that in terms of examining whether this
5 theory of harm, which consists in softening of
6 commission fees, can we agree that the SSNIP on the
7 other side that you are canvassing in terms of
8 deterioration of quality, that does not shed light on
9 whether the theory of harm can take place?

10 I appreciate you have a second point about effects,
11 but do you agree that that second SSNIP is not going to
12 tell us whether that theory of harm, which comprises the
13 increase in commission fees, can take place?

14 A. It is a good question. I am just thinking aloud. I do
15 agree, that is absolutely right, that competition on
16 advertising and marketing would not constrain an
17 increase in commission, on the basis of the premise.

18 Now, the theory of harm, I think, that is the bit
19 I am thinking aloud, it is a bit more nuanced or it is
20 a bit more indirect than that. The theory of harm is
21 also that commissions increase, but not in the sense of
22 a hypothetical monopolist directly. So I do agree it is
23 a good point to have raised, that competition on
24 marketing would not prevent -- by definition, if you
25 find that a commission SSNIP is profitable, it would not

1 prevent higher commissions through a direct imposition
2 of them.

3 The theory of harm, I have not got my head fully
4 round the theory of harm, has some mechanisms between
5 wide MFNs and the increase in commission, which are
6 slightly different. They are more to do with dampening
7 of competition, not directly the SSNIP.

8 Having thought about this now a bit aloud, I think
9 I can see the premise of the proposition put to me.

10 Q. So you agree with that proposition; yes?

11 A. Well, subject to --

12 Q. Subject to the next point, which is overall effect.

13 A. Subject to the qualification that, yes, it undermines or
14 it would not prevent a direct SSNIP, and subject to the
15 nuance of the theory of harm, which I do not have
16 clearly in front of me right now.

17 Q. That is fair enough. The next point you make is you
18 say, well, the SSNIP on the other side is relevant to
19 look at overall effects, yes, that was the point you
20 made?

21 A. Yes.

22 Q. I think what you are thinking about there is a possible
23 interaction -- I think you use the word "benefit" --
24 a possible interaction between sustaining an increase in
25 commission fees and how that might translate into

1 benefits for consumers on the other side. Is that what
2 you have in mind?

3 A. Sorry, I cannot now recall where the term "benefit"
4 comes from.

5 Q. It may be I used that and you did not use it, in which
6 case I apologise, but when you say "broader effects",
7 you are thinking about a possible interaction --

8 A. No, what I mean is effects, exactly on the theory of
9 harm, so prices on the consumer side, because my
10 understanding -- but again, I do defer to Ms Ralston and
11 the other experts who have opined on this, but the
12 theories of harm are also about effects on the consumer
13 side.

14 Therefore, to understand those effects, having
15 a good picture of the competitive landscape on the
16 consumer side is important, is crucial to have. That is
17 not talking about benefit effects of consumers, but just
18 effects in terms of do they get a worse -- is their
19 offering worsened?

20 Q. Just to focus on one of those effects on the consumer
21 side, which is the translation -- the effect on retail
22 prices of an increase in commission fees. Yes? We have
23 agreed that that particular effect has already been
24 tested through the pass-on mechanism?

25 A. That has already been tested, yes, in the way the CMA

1 has done that, yes.

2 THE PRESIDENT: Ms Demetriou, would that be a convenient
3 moment? I do not want to interrupt you.

4 MS DEMETRIOU: Sir, I have maybe two more questions on this
5 topic and then I can draw a line and move on to narrow
6 MFNs, and that would be a little bit more convenient if
7 you just gave me an extra minute or two.

8 THE PRESIDENT: Of course, absolutely.

9 MS DEMETRIOU: Thank you very much.

10 Just to be clear about what we are saying, you say
11 that the CMA has tested the pass-through of the increase
12 on commission fees into prices, but you say that does
13 not go far enough, because that does not amount to a 5
14 to 10% increase in retail prices; yes?

15 A. Yes.

16 Q. Of course, that, we put to you, is not the theory of
17 harm that the CMA is examining, is it? It is not
18 examining a freestanding increase on retail prices by
19 the PCWs because they cannot control retail prices. All
20 they can do is affect retail prices through the
21 mechanism of the commission; yes?

22 A. Yes, but the SSNIP test in general, going back to the
23 conceptual point, the mechanism of the SSNIP test, the 5
24 to 10 price increase, 5 to 10% price increase, does not
25 have to be driven by the theory of harm as such. It is

1 to test substitutability on that side on the product
2 that you are looking at.

3 MR BEARD: I am sorry, just to intervene. There is an issue
4 about the way in which a number of these questions have
5 been put this morning. Ms Demetriou started off with
6 questions about what the theory of harm was and tried to
7 get Dr Niels to agree to her formulation. He accepted
8 it was a theory of harm referring to the commissions.

9 He has just given evidence, without saying that he
10 knows about the precise terminology used in the Decision
11 about the theory of harm, that it also includes retail
12 prices. Ms Demetriou is going back to treating the
13 theory of harm only about commissions.

14 If Ms Demetriou is going to put forward a clear
15 story on: you can only do the SSNIP in relation to the
16 theory of harm, she really needs to be very, very clear
17 about what the theory of harm is she is putting here.

18 We will make submissions in due course, but there is
19 a grave danger that the witness is being slightly misled
20 as to what the question is focused on.

21 MS DEMETRIOU: Sir, this is really unfair. If Mr Beard has
22 submissions to make about the questions I am putting, he
23 can put them in due course, but I really do want to ask
24 the questions that I am asking.

25 THE PRESIDENT: Ms Demetriou, let me be clear, you ask the

1 questions as you wish, and Mr Beard will in due course
2 make the points that he wishes. The only thing I would
3 say is that I have a strong intuition that definitional
4 questions and what terms you are using and what they
5 mean, are really going to matter in this case.

6 So when we go back to the transcript of the evidence
7 and try and work out what exactly the witness is saying,
8 we are going to be assisted by -- I am not saying you
9 have not been clear so far. All I am saying is, more
10 than in most cases, this matters extraordinarily when we
11 look at it. I say that as a warning to everyone in this
12 room, myself included. The building blocks are moving
13 in a very different way.

14 MS DEMETRIOU: Sir, yes. In that case, can I ask

15 a follow-up question to Dr Niels, just to make sure we
16 are on the same page?

17 THE PRESIDENT: Of course, absolutely.

18 MS DEMETRIOU: Dr Niels, you have looked at the theories of
19 harm that are investigated in this case, have you not?

20 A. Yes.

21 Q. You would agree there is no theory of harm that
22 comprises a direct increase in retail prices to
23 consumers charged by PCWs, because they cannot charge
24 prices?

25 A. Yes, I agree that that would not be a theory of harm.

1 I am just thinking aloud again. I do not have it in
2 front of me, but there was something in the theories of
3 harm about effects on retail prices.

4 Q. What I have put to you -- and you understand the
5 question I have put to you -- is that the theory of harm
6 that the CMA has been considering, in terms of retail
7 prices, relates to the effect on retail prices that is
8 brought about by softening of competition on commission
9 fees. You understand the questions I put to you?

10 A. Yes, you would have to -- again, I do not have in front
11 of me, I know, at some point, there were four theories
12 of harm. Dampening of competition on commissions was
13 one and effects they had on retail prices. I do not
14 have it in front of me right now, how the theories of
15 harm were precisely referring to retail prices, but
16 I accept that the commission -- dampening commission
17 competition leading to worse retail prices was one
18 theory of harm.

19 Q. You have also accepted, I think, that in looking at the
20 outcome, so when you had your three possible outcomes in
21 terms of whether a SSNIP on the other side of the market
22 is necessary -- and you say sometimes it is necessary,
23 sometimes it is not -- that the question of whether it
24 is necessary depends on the competition concern, the
25 theory of harm that you are looking at. So that is your

1 own evidence; yes?

2 A. Yes.

3 MS DEMETRIOU: Sir, I think that is a good time to take
4 the break, and I can move on to a different topic after
5 the break. Thank you for bearing with me.

6 THE PRESIDENT: Not at all. We will rise and resume at
7 11.50.

8 MS DEMETRIOU: Thank you.

9 (11.37 am)

10 (A short break)

11 (11.54 am)

12 MS DEMETRIOU: Dr Niels, before moving on to narrow MFNs,
13 I just want to ask one follow-up question relating to
14 what you have referred to in your report as the
15 competition concern. I just want to think about what is
16 being examined in this case, which are the wide MFNs;
17 yes? What the wide MFNs do are place contractual
18 restrictions on the retail prices quoted by home
19 insurance providers on PCWs; yes?

20 A. Yes.

21 Q. The follow-up question is examining whether there are
22 constraints to a deterioration in usefulness of
23 marketing, does not shed light on those prices, does it?

24 A. It does not shed direct line on those prices. As I have
25 said before, it does shed light on the competition

- 1 analysis that you have to carry out for wide MFNs.
- 2 Q. But not the competition analysis in relation to those
3 prices, Dr Niels, does it? You are talking about the
4 wider competition analysis.
- 5 A. To the extent, as I said before, to understand even
6 those prices, you need to understand the competitive
7 landscape. You do want to take that -- it is relevant
8 for that, to understand who are the competitors in the
9 market.
- 10 Q. The question I am asking you is a more specific one,
11 which is deterioration of quality or usefulness or
12 constraints in relation to reduction in usefulness or
13 less marketing spend, those constraints, do not affect
14 the retail prices which are tackled by -- they are not
15 relevant constraints in terms of the retail prices?
- 16 A. Yes, I would say not directly. There could be indirect
17 links, because these competitive dimensions on the
18 consumer side are all linked, they are not completely
19 separate. They are also determined in parallel with
20 each other. But subject to that, I accept there is no
21 direct link perhaps.
- 22 Q. Thank you. I am going to move on now to the second
23 conceptual objection that you raise to the CMA's
24 analysis, and this relates to the narrow MFNs. Just to
25 locate the discussion, let me take you to some

1 paragraphs in the CMA Decision, which set out the CMA's
2 approach to this issue. I know that you have read
3 these, but if we go to {A/1/103}, (Pause)

4 A. Apologies, it is not on the screen.

5 THE PRESIDENT: It is not on the screen yet, no.

6 MS DEMETRIOU: The operator is just pulling it up.

7 THE PRESIDENT: Do not worry, Dr Niels, we are all in the
8 same boat. (Pause).

9 A. I also could not find a hard copy in the bundle.

10 MS DEMETRIOU: No, I am sorry. I will not ask you anything
11 about it until we have it on the screen. (Pause)

12 THE PRESIDENT: Do you have it, Dr Niels now?

13 A. Yes.

14 THE PRESIDENT: Excellent.

15 MS DEMETRIOU: Again, I am just at the moment locating the
16 area of debate.

17 So 5.86, you see the CMA's finding there that the
18 vast majority of sales made through PCWs were made by
19 providers covered by narrow MFNs; yes?

20 A. Yes.

21 Q. Just at 5.96, on page {A/1/106}, we see that BGL itself
22 has recognised the importance of narrow MFNs to the PCW
23 business model. We see why they say that, because the
24 main efficiency justification is to prevent home
25 insurers from undercutting the retail price offered on

1 the PCW and limit their ability to free ride on the
2 marketing and advertising investments of PCWs; yes?

3 A. Yes.

4 Q. Then if we go back to page {A/1/103}, paragraph 5.88,
5 what the CMA found in terms of the conclusion is that
6 consumers looking to avoid the impact of a commission
7 fee increase -- because that is what it has been
8 examining -- would be unlikely to do so by turning to
9 the direct channels, because of the narrow MFNs; yes?
10 So that is the conclusion?

11 A. Yes, I can see that is the conclusion.

12 THE PRESIDENT: Again, this is for my benefit, just to be
13 absolutely clear about this, applying your, as it were,
14 indirect SSNIP, Ms Demetriou, or the CMA's indirect
15 SSNIP, we have a SSNIP increase in commission, so
16 a significant increase in commissions, which by the
17 operation of the price transmission mechanism is
18 intermediated into a far lower increase in the product
19 that is being quoted for, let us say, 3%, but I know
20 your range is 1.8 to 3%.

21 MS DEMETRIOU: Yes.

22 THE PRESIDENT: So that is small in itself, but what you are
23 saying is if a consumer were to seek to get a price for
24 the same insurance policy on a PCW and on a direct
25 channel, there would not actually even be the 3%

1 difference because of the operation of a narrow MFN.

2 MS DEMETRIOU: Sir, that is exactly right. Of course, the
3 narrow MFNs were not in place with absolutely everybody,
4 and, of course, there are some insurers that are not on
5 price comparison websites, just going back to Ms Lucas'
6 question of yesterday, but that has been considered by
7 the CMA and they have found that given the narrow MFN
8 landscape, if I can put it that way, that price
9 increase, the feedthrough, the small price increase,
10 would be replicated on the direct channels of insurers
11 with the narrow MFNs.

12 So that would mean that insufficient consumers would
13 react to the increase in commission by going to those
14 direct channels, and so those direct channels are not
15 a constraint. So you are absolutely right.

16 THE PRESIDENT: I just want to make sure I was in the clear.

17 MS DEMETRIOU: Thank you, sir, that is helpful.

18 MS LUCAS: Can I just clarify something?

19 MS DEMETRIOU: Of course.

20 MS LUCAS: Does the CMA accept that some consumers would
21 move to direct channels without narrow MFNs? It is just
22 the number would not be sufficient for present purposes.

23 MS DEMETRIOU: Can I come back to give you a more accurate
24 response to that question? Because I am slightly
25 worried that if I answer it on my feet, I need to go

1 back and find the relevant part in the Decision, but
2 I have it in mind, and it is a good question.

3 Can I come back to you?

4 MS LUCAS: That is fine.

5 MS DEMETRIOU: I am not trying to duck it.

6 If we turn, please, to your first report, so at
7 {A/6/30}, and I am looking at paragraph 4.6, you say
8 that:

9 "The SSNIP test is based on a demand system where
10 market forces function freely: suppliers can set prices
11 at profit-maximising levels, and the demand for products
12 can react to changes in relative prices between
13 products."

14 Then at 4.7, you say that this means that the prices
15 of all other products have to be kept constant; yes?

16 A. Yes.

17 Q. You have agreed with me that the function of defining
18 the market is to shed light on the competition concern
19 that we are looking at; yes?

20 A. Yes.

21 Q. Including the competitive constraints on PCWs; yes?

22 A. Yes.

23 Q. You agree that, as a matter of fact, the CMA has found
24 that the narrow MFNs force insurers to match any price
25 increase they make on the PCW with a price increase on

- 1 their own direct channel; yes?
- 2 A. Yes.
- 3 Q. In other words, in the real world, the narrow MFNs
4 prevent the direct sales channels from the insurers
5 operating as a competitive constraint?
- 6 A. Yes, I accept that the narrow MFNs in the real world
7 impose that constraint. I mean, subject to the
8 assumptions we talked about in terms of coverage,
9 whether they are biting constraints, but I accept that,
10 yes.
- 11 Q. In order to assess the real world competitive
12 constraints on PCWs, it is essential, is it not, to take
13 account of the narrow MFNs?
- 14 A. I think, ultimately, for the analysis of competitive
15 constraints, yes, but whether you do that in the stage
16 of market definition, that is questionable. That is
17 where I have a different perspective because -- and
18 again, this is one of these -- so it violates the
19 assumption of the ceteris paribus price that you have to
20 keep the prices of the other products constant. That is
21 for a reason. It may be we will come to that.
- 22 So at the stage of market definition, you do want to
23 identify who are the competitors to, in this case, the
24 PCWs? To me, one of the risks or one of the dangers of
25 taking this approach here is that you would conclude

1 that direct channels are not competitors whereas the
2 whole rationale for having the narrow MFNs is that they
3 are competitors. So it depends at what stage you bring
4 in the narrow MFNs.

5 I do accept that narrow MFNs are relevant and exist
6 in the real world. Whether you take them into account
7 in the market definition stage, that is where I would
8 say do not do that, because that is a risk that you sort
9 of rule out direct channels completely, whereas direct
10 channels do also compete on other dimensions.

11 Q. Thank you, Dr Niels. If we go to your second report,
12 please, at {A/10/17}, I am looking at paragraph 4.8, you
13 seek to draw an analogy here. You say that you remain
14 of the opinion that ruling out a competitive constraint,
15 based on existing contractual arrangements, defeats the
16 purpose of market definition, and you draw an analogy,
17 so you say:

18 "Take a hypothetical market in which the competing
19 suppliers have reached a legal agreement not to compete
20 with each other on prices. Application of the SSNIP
21 test according to the CMA would result in the conclusion
22 that these suppliers are not competitors to each other,
23 because they have contractually agreed not to compete.
24 But that conclusion ignores the fact that [they] are in
25 fact competitors, as that is the reason why they felt

1 the need to reach the agreement in the first place."

2 Let us assume that they have reached such an
3 agreement not to compete, and let us assume that that
4 agreement is a lawful one, right, and not an
5 anti-competitive one for the purposes of the analogy?
6 Then it is correct, is it not, that in the real world,
7 they are not competitors, because they have excluded
8 themselves from the market; yes?

9 A. Yes, again, this discussion is -- in a way, you get this
10 strange circularity. In both directions, I fully
11 accept. I would still say they are competitors, but
12 they have agreed not to be competitors.

13 Q. Right. Then let us imagine a further hypothetical
14 situation. Let us imagine that one of the potentially
15 competing suppliers in a market is in the same corporate
16 group as the HMT; yes? Let us say you have a direct
17 channel which is in the same corporate group as
18 a platform. You would accept in that case you would not
19 generally include that company as a possible competitive
20 constraint; yes? Because it is part of the same
21 corporate group and would not compete.

22 A. Again, that all depends on when you do the SSNIP test,
23 what you assume about that ownership relationship in
24 this hypothetical example. So it all depends, do you
25 treat them as being part of the -- what the hypothetical

1 monopolist owns or not? If you do, then, yes, that is
2 not a competitor, that is correct.

3 Q. Coming back to the present case, although you say that
4 the narrow MFNs are indicative of competition existing
5 between the insurer's direct channel and the PCW, the
6 reality is that the narrow MFNs actually remove that
7 competitive constraint, no?

8 A. They remove or seriously limit it, yes.

9 Q. If we look at paragraph 4.10, it starts at the bottom of
10 this page {A/10/17} and then going over the page
11 {A/10/18} we see this, that the statement, that is
12 Dr Walker's statement:

13 "... is irrelevant as it does not contradict the
14 fact that direct channels impose a competitive
15 constraint on PCWs absent the narrow MFNs."

16 So basically, what you are doing is you are saying
17 the competitive constraint is there, if you ignore the
18 narrow MFNs; yes?

19 A. Yes.

20 Q. At paragraph 4.9, so going back a page {A/10/17}, what
21 you seek to do -- this is the second observation that
22 you make. We have just looked at the first; this is the
23 second. You seek to draw an analogy in this paragraph
24 between the present situation and the situation where
25 outside suppliers choose not to react to a SSNIP by

1 competing but instead raise their own prices; yes?

2 A. Yes.

3 Q. So we are in a situation where the hypothetical

4 monopolist raises its prices by 5 to 10%, in our

5 conceptual exercise, and a potential competitor outside,

6 a competing supplier, does not react to that by

7 competing, by lowering its price or keeping its price

8 low, so as to steal market share, but instead exercises

9 the trade-off in a different way and says, "We will have

10 a bit of that ourselves, we will raise our prices too",

11 yes, that is the situation you are looking at?

12 A. Yes, and that is exactly the situation why you have --

13 that can occur in reality, and, therefore, why you have

14 to, as part of the SSNIP test, make the assumption that

15 the other products do not react in that way, they stay

16 the same. Otherwise you cannot test the price

17 differential through the SSNIP, so otherwise you cannot

18 carry out the SSNIP test.

19 That is exactly the reason why you have to make that

20 assumption, and I am saying that assumption also applies

21 to the narrow MFNs. Yes, that introduces a slight

22 artificiality or a slight divorce from reality. My

23 answer to that is that you do that also, as I say in

24 this paragraph, you do that already anyway, even without

25 narrow MFNs.

1 In reality, outside products would also react, if
2 they are indeed competitors. As it was put in the
3 wording, they may want some of the pie of that price
4 increase, because they are competitors. But by allowing
5 that, you cannot test whether they are competitors in
6 the first place.

7 So the assumption of all the other prices must
8 remain the same, and that is a commonly accepted
9 assumption by all competition authorities, when they
10 apply the SSNIP test, it does make sense from that
11 perspective, despite it introducing this slight divorce
12 from reality.

13 So the fact that it is divorced from reality and it
14 is also in the case of narrow MFNs is, to me, not
15 a reason to reject that assumption.

16 Q. Thank you, Dr Niels, but I just want to ask one --

17 THE PRESIDENT: Sorry -- oh, do go on. I will come in
18 later.

19 MS DEMETRIOU: If you are sure. I just want to ask one

20 question about that particular hypothetical example.

21 I just want to check whether you agree with me that
22 there is a factual distinction, is there not, between
23 your example, in 4.9, and the present case, in the sense
24 that, in your example, in 4.9, as a matter of fact,
25 there is no legal bar to the outside suppliers actually

1 deciding to compete instead, is there?

2 A. Correct, yes. It is purely based on market forces, this
3 example.

4 MS DEMETRIOU: Thank you. That was my question, sir. Now,
5 please do.

6 THE PRESIDENT: You have mentioned a couple of times
7 "divorced from reality". In a sense, this whole process
8 is divorced from reality, because it is a hypothetical
9 process. Just to articulate, so I understand it, the
10 difference between you and Ms Demetriou, or the CMA,
11 really we are arguing about how far the "all other
12 things being equal" rule should be abrogated.

13 Obviously, the point about the SSNIP is to say the
14 price of the product in question increases, and you are
15 testing for what happens in the market, all other things
16 being equal, if that happens. Ms Demetriou's point is,
17 all other things being equal, you have a market with
18 narrow MFNs and so the prices in the competitors adjust.

19 Your point is that because the effect of the narrow
20 MFN is to require an adjustment in prices, amongst the
21 other parties in the market, you have to insert
22 a further exception, which one would not normally do in
23 a question of economic testing, but you have to
24 introduce a further departure from all other things
25 being equal, and say, not only do you postulate the

1 SSNIP, but you also postulate a world without narrow
2 MFNs, and only then can you have a meaningful test.

3 That is the debate. I am not saying who is right
4 and who is wrong, but that is the debate between you.

5 A. Yes, it is.

6 THE PRESIDENT: Do we have one other inequality, as it were,
7 inserted into the question? One other variable, sorry,
8 not inequality.

9 A. Yes.

10 MS DEMETRIOU: Sir, yes, it is a short point between us.
11 You have got to the heart of it.

12 THE PRESIDENT: Yes. The follow-on to that is that the
13 reason we have this debate is because the theory of harm
14 focuses on the wide MFNs. If the theory of harm was to
15 say, actually, all MFNs were wrong, we would clearly
16 have in the market a 3% mismatch, because the constraint
17 would obviously have to be hypothesised away, because
18 you would be testing something different.

19 A. Yes.

20 MS DEMETRIOU: Sir, thank you. That, in fact, is a short
21 point on narrow MFNs. I can move away from that now.

22 I can now move on to the last piece of the
23 cross-examination which relates to supply-side
24 substitution.

25 This is the final point you make, Dr Niels, is it

1 not? If we go back to the Decision, please, again just
2 to locate it, so it is bundle A, tab 1, page 139
3 {A/1/139}, and it is paragraph 5.185.

4 Again, we can see from this paragraph that the CMA
5 has indeed considered whether supply-side substitution
6 is reasonably likely to take place and whether it would
7 constrain a hypothetical monopolist; yes?

8 A. Yes, that is what the CMA says here, yes.

9 Q. You see at 5.186 to 5.188 that what the CMA has found is
10 that PCWs face considerable significant barriers to
11 entry and expansion, mainly because of marketing and
12 advertising spending and the integration cost providers
13 need to incur to list on the PCWs. That is the CMA's
14 finding; yes?

15 A. Yes.

16 Q. We see that the CMA thinks that those barriers are
17 strong barriers to entry. Then at 5.190, on page
18 {A/1/141}, we see the conclusion that:

19 "The existence of these material barriers to entry
20 and expansion mean that it is unlikely that a [SSNIP on
21 commission fees] ... would be rendered unprofitable by
22 supply-side substitution."

23 So that is the CMA's finding?

24 A. Yes.

25 Q. Then if we go to your second report, it is {A/10/21},

1 please. Looking, first of all, at paragraph 5.3, at the
2 bottom of the page, you say that you:

3 "... accept that the CMA analysed entry barriers and
4 found that Tesco compare and Google have not been able
5 to successfully challenge the Big Four PCWs, and that
6 three insurance groups considered setting up a PCW but
7 felt that the entry barriers were too high."

8 You say:

9 "The CMA reasonably rules these out as instances of
10 supply-side substitution."

11 So, so far, no quarrel; yes?

12 A. Yes.

13 Q. Then you say, though -- this is your point -- that the
14 CMA should have considered current PCWs and you say that
15 the CMA should have taken account of their ability to
16 expand their offering; yes?

17 A. Yes, their offering in home insurance.

18 Q. You have put forward, at 5.7, so if we can go on to page
19 {A/10/22}, the classic example which indeed you refer to
20 in your book of supply-side substitution in paper. So
21 from a demand side perspective, you say high quality
22 paper and low quality paper are not substitutes, from
23 the point of view of consumers, but from a supply side,
24 manufacturers do switch.

25 But, Dr Niels, the reason that they switch is

1 because suppliers of low quality paper have already
2 overcome the main barriers to entry in the supply of
3 high quality paper. In other words, the machinery that
4 they need to produce the paper; yes?

5 A. Yes, exactly.

6 Q. So what they are able to do is quickly and easily
7 allocate their production capacity between different
8 qualities of paper in response to changes in demand
9 between the two products?

10 A. Yes, those are the criteria for supply-side
11 substitution. It needs to be rapid, timely, and also
12 not require sunk investments.

13 Q. By that, you mean if demand switches the other way
14 again, they can quickly re-allocate back here to low
15 quality paper, yes, so there are not significant sunk
16 costs?

17 A. Yes.

18 Q. Could we turn, please, to your book on market
19 definition, your very helpful book, if I may say that,
20 on market definition for competition lawyers. If we go
21 to {F/621/36}. If we could look at paragraph 2.107,
22 please -- no, let us look at the bottom of the page.

23 There is a heading:

24 "The risk of overstating competitive pressure from
25 supply-side substitution."

1 If we look over the page, at the top of the next
2 page, {F/621/37}, 2.107, what you are saying is that --
3 in fact, it may be that one has to read 2.106 and 7, as
4 a whole, but can I just state the principle and you tell
5 me whether you agree, because you are the author.

6 You are saying that there is a risk of overstating
7 the importance of supply-side substitution as
8 a competitive constraint, and thereby, in the context of
9 mergers, for example, understating the merged entity's
10 market power; yes?

11 A. Yes.

12 Q. Looking at why you say that, you say that this risk of
13 overstatement arises, because going back to the paper
14 example, you have assumed that all production of low
15 quality paper can readily be switched to high quality
16 paper, and you say there may be various reasons why some
17 of that capacity cannot be readily switched. In fact,
18 you have given some examples of what those may be; yes?

19 A. Yes.

20 Q. Going back to the Decision -- in fact, we do not need to
21 go back to it, because I have shown it to you, but the
22 CMA found that the main barriers to entry and expansion
23 are marketing and advertising spending, on the one hand,
24 and the integration costs insurers need to incur to
25 integrate with a PCW platform. There is a chicken and

1 egg problem that the CMA has described; yes?

2 A. Yes.

3 Q. Can we go to another document? This is a document in
4 the F bundle, {F/339/1}, have you seen this document
5 before relating to -- it is confidential, so I am not
6 going to read out the name of the company, but have you
7 seen this document?

8 A. I have.

9 Q. This is evidence from this particular company, and it is
10 talking about the barriers to entry. So it already has
11 a PCW offering, yes, in home insurance? It is talking
12 about the barriers to expansion.

13 A. Yes.

14 Q. If we look at page {F/339/2}, paragraph 4, for example,
15 you can see there what the main barrier to expansion
16 that this entity says it faced, in relation to home
17 insurance, was the integration work with insurers
18 required for collecting consumer data to generate
19 quotes.

20 Then you see that, because they are only a small
21 player, in order to gain higher volumes of sales, they
22 needed to get larger insurance brands on their panel.
23 So you are back to this chicken and egg problem that the
24 CMA has identified; yes?

25 A. Yes.

1 Q. If we go on to page {F/339/3}, please, paragraph 10,
2 here you can see again a comparison between what is said
3 about motor and home insurance, in terms of the barriers
4 to entry and expansion, and you see that home insurance
5 is a more complex area requiring more questions to be
6 asked upfront to consumers in order to produce quotes
7 requiring higher investment and time, concerning IT
8 integration costs. Also, less attractive in terms of
9 sales.

10 Then if we turn to perhaps page {F/339/4} at
11 paragraph 13, this makes the point that marketing is
12 a critical factor and that the level of marketing for
13 home insurance required is very high; yes?

14 A. Yes.

15 Q. You can see that this is all consistent with the
16 barriers to entry identified by the CMA in its Decision;
17 yes?

18 A. Yes.

19 Q. You can see that the barriers to entry identified by the
20 CMA, in its Decision, this is evidence showing that they
21 would still operate in respect of a PCW that wishes to
22 expand in home insurance?

23 A. Apologies, can you repeat that?

24 Q. Sorry. The question is, what we can see from this
25 document is evidence that these barriers to entry would

1 still be there, the barriers consisting the integration
2 costs and the marketing spend would still apply to an
3 entity which already has some presence, but wishes to
4 expand its offering?

5 A. I think that is a fair description. I mean, this
6 particular company is an interesting one, because my
7 understanding is that they are in the market and have
8 actually made inroads into home insurance, but I have
9 not assessed that as evidence, so I think it is a fair
10 description.

11 Q. But you would accept, as a matter of principle -- and
12 I think this goes back to the point you were making
13 about the risk of overstatement -- you would accept, as
14 a matter of principle, that if a PCW had some presence
15 in home insurance, but wanted to expand its offering,
16 integration would require further work, right? So that
17 is not all done, it would require further work, because
18 you are trying to attract more home insurers to the
19 platform?

20 A. I accept that certainly for this company. There is
21 still another outstanding question about the other three
22 larger PCW competitors. I do not know the extent to
23 which the same barriers and obstacles would apply to
24 them as well, and that is part of my argument on
25 supply-side substitution, that one should also look at

1 those. But I accept the proposition for this particular
2 company.

3 Q. It is not fair to ask you about the facts, because you
4 are looking at things at a conceptual level, so let me
5 just be clear about what I am asking. I am asking you
6 to accept that, as a matter of economic theory or
7 principle, you accept that these barriers identified by
8 the CMA are liable or likely to apply in respect of
9 a PCW that has some presence in the home insurance
10 market, but wants to expand, it would need to incur
11 integration costs and they would need to incur marketing
12 costs and get over the chicken and egg problem?

13 A. I accept that, certainly for this particular company, it
14 was very small. It all depends, because the other three
15 were quite big, whether they were beyond that threshold
16 point where the investment in marketing, for example, is
17 much more straightforward, because the same brand
18 applies, whether it is home or car. So there is
19 a threshold below which you definitely face these
20 barriers, and I accept that, and I also accept that this
21 particular company faced those barriers.

22 Q. Just looking at the integration costs, those integration
23 costs are incurred in respect of new home insurers that
24 you want to join the platform, so they are costs that
25 you have to persuade the home insurance provider also to

1 incur in order to integrate with the platform?

2 A. I do not know to what extent those costs are significant

3 or not.

4 MS DEMETRIOU: Dr Niels, thank you. That completes the

5 questions that I have for you. Thank you very much.

6 THE PRESIDENT: Thank you very much, Ms Demetriou.

7 Professor, do you have any questions for the witness

8 in addition to the ones we have already asked?

9 PROF ULPH: No, I do not.

10 THE PRESIDENT: Ms Lucas?

11 MS LUCAS: No.

12 THE PRESIDENT: Dr Niels, thank you very much.

13 Mr Beard, if you are going to be short, but I do not

14 want to hold you to it, we will let you finish now.

15 MR BEARD: I will be astonishingly short. I am going to

16 be -- no questions.

17 THE PRESIDENT: Well, I am glad I asked the question,

18 Mr Beard. No questions at all?

19 MR BEARD: No.

20 THE PRESIDENT: Dr Niels, thank you very much. You are

21 released from the witness box and thank you for bearing

22 with us all. We are very grateful for your assistance,

23 thank you.

24 A. Thank you.

25

1 Housekeeping

2 THE PRESIDENT: Because we might run up to the wire at 2.30
3 in dealing with Ms Ralston, we have received
4 a communication, and I am sure the parties have had
5 a copy of it, regarding the question of confidentiality.
6 I am not going to mention the law firm or the party
7 involved, but it is in response to the CMA's very
8 helpful articulation of my concerns about
9 confidentiality.

10 The short point, we will make sure the letter is
11 available, if you have not seen it --

12 MR BEARD: I have not seen it, sir. I turned behind me and
13 I saw one or two blank faces, so I think I had better
14 wait until we have seen it.

15 THE PRESIDENT: I hope one of the referendaires will make it
16 clear what we have got and ensure that you have it.

17 Suffice it to say, it is a statement that there is a
18 concern of this particular party regarding prejudice, if
19 we refer to certain matters which are marked
20 "confidential", including, to be clear, the identity of
21 persons. So it extends to names and it is essentially
22 a request, I think, to maintain the rather broad
23 confidentiality that the CMA has imposed.

24 I do not intend to make any decision one way or the
25 other on this. What I am minded to do is to have an

1 hour allocated, and I was thinking of a week today,
2 Friday next week, 10.30, at which any interested party
3 can appear and we can deal with the questions of
4 objections to lifting confidentiality, hearing from the
5 persons most directly interested.

6 I raise it now, because I want to put on the record
7 that that is what I am planning to do. But, first of
8 all, is that a helpful date? It is one of the dates we
9 are not sitting. I suspect on the dates we are not
10 sitting, parties may very well have better things to do.

11 MR BEARD: I would not want to prioritise whether they are
12 better or other, but there certainly would be other
13 things. I think given that closings in writing will be
14 required by the Monday.

15 I envisage there might be a couple of issues with
16 that timing. It may well be that the other responses
17 that the CMA are looking for, I do not know what
18 deadline they put on --

19 THE PRESIDENT: They did not put a deadline, because I did
20 not mention a deadline, and that is one of the reasons
21 I have given a significant run-up to the date, I am
22 floating with you, so that we can have others appearing
23 if so advised. Ideally, I hope they will simply
24 instruct a single representative to speak for all
25 objections.

1 It may be that we ought to keep your Friday free and
2 say we will simply have something at 9.30 on the
3 Thursday, which means you have a longer day, but you
4 will equally have a free day on the Friday to do the --

5 MR BEARD: I would imagine that would probably be --

6 Ms Demetriou is nodding. So on counsel's side, I think
7 that would be preferred, but I do not know whether or
8 not that works in terms of practicalities. The burden
9 on this will lie much more with Ms Demetriou than it
10 will with me, because I put our position and then it is
11 really a matter for others to deal with and for us to
12 comment further.

13 Other than explaining the extent to which my clients
14 have already seen things, there is not an awful lot
15 I can do. I think, in many ways, it is for Ms Demetriou
16 than for me.

17 THE PRESIDENT: I understand.

18 I am helpfully told that Thursday is an envisaged
19 half day, so perhaps I could say we will deal with this
20 matter after we have finished with Professor Baker,
21 whenever that is on the Thursday. I am minded to impose
22 a guillotine and to say we will be arguing about this no
23 more than an hour and a half and I will either then
24 reserve or make a ruling right away.

25 But it does seem to me that although it is late in

1 the day, we ought to have these objections bottomed out,
2 in part so that the CMA actually has a rather clearer
3 understanding of where the Tribunal will come out on
4 these questions in future cases.

5 But, Ms Demetriou, I do not want to add to your
6 burdens.

7 MS DEMETRIOU: Sir, I think in terms of timing, that sounds
8 sensible and is preferable to Friday. I am now just
9 thinking aloud, so forgive me, but I am just trying to
10 think about the most practical way of making this work.

11 I think probably the CMA ought to write back to the
12 parties explaining that that is what the Tribunal has
13 decided and explaining that there is this guillotine and
14 so it is Thursday that they would have to appear to
15 justify the position.

16 I am just wondering whether or not -- I have no
17 idea, and obviously it is outside our control, who they
18 might instruct or how they might organise themselves.
19 I am just wondering whether they have to physically
20 appear or whether they might be able to have a remote
21 link to make their argument. I just do not know how
22 many of them there are going to be.

23 THE PRESIDENT: That is entirely fair. What we will do is
24 we will put on the Tribunal website, as well as through
25 the CMA's good offices, an indication that a hearing

1 will take place. I am entirely agnostic as to whether
2 it takes place remotely or in person, and we obviously
3 need to keep things fluid, because we do not know what
4 is going on.

5 Also, I have very much in mind that we do not really
6 have an efficient means of notifying potential
7 objectors, and the CMA has helped enormously, but it is
8 not perfect. Equally, if there were to be a point
9 saying, "We could not possibly be ready to articulate
10 our objections by Thursday afternoon", that is something
11 I would be inclined to be very sympathetic towards, if
12 someone had that sort of objection.

13 But it seems to me, provisionally, we ought to be
14 saying, let us try and lance this particular boil in the
15 course of Thursday afternoon, but that is absolutely not
16 written in stone.

17 MS DEMETRIOU: Sir, thank you. I understand. Obviously,
18 a point that occurs to me, and I think has occurred to
19 you too, is that in an ideal world, if there were
20 several objectors, they would --

21 THE PRESIDENT: Coalesce?

22 MS DEMETRIOU: Coalesce. There is certainly no way we can
23 require them to do that.

24 THE PRESIDENT: No, I would not expect you to do so. All
25 I would say is that each objector will have their time

1 lessened, if they are multiple objections, whereas if
2 they appear by one representative, they will get pretty
3 much half the time, possibly even a bit more. So they
4 will have to be sensible.

5 Again, like you, I cannot prescribe how they wish to
6 articulate their points and there may of course be
7 differences in position. We have only had one response.
8 There may well be more. I will, as I said earlier, be
9 flexible about how we deal with this, because of course
10 objections have to be properly resolved and heard and
11 nothing I am saying is going to gainsay that fundamental
12 principle.

13 MS DEMETRIOU: Sir, thank you.

14 THE PRESIDENT: So it is writ in soft butter, not in water.

15 MS DEMETRIOU: Sir, thank you.

16 THE PRESIDENT: It is suggested that if you could copy the
17 Tribunal into whatever letter you send, that will
18 assist.

19 MS DEMETRIOU: Yes, of course.

20 THE PRESIDENT: But what we will do is during the short
21 adjournment, we will try and make sure that there are at
22 least a couple of copies of this for you and for
23 Mr Beard to look at. I am quite sure they will wend
24 their way to you in due course, but equally, I am quite
25 sure that that course may be a somewhat long one and you

1 ought to have it as soon as possible. So we will try
2 and do that over the short adjournment.

3 MS DEMETRIOU: Sir, thank you.

4 MR BEARD: There may be an extent to which it is important,
5 if the CMA is writing, to just explain, even in just
6 very simple outline, the extent to which our clients
7 have already seen things, because there may be a concern
8 on the part of these insurers that they think, "Oh no,
9 actually, CTM has seen nothing at all", and that is not
10 the case. Our clients know all the identities of all of
11 these people, they know vast amounts about all the
12 material that has been submitted. Our clients have only
13 not seen very small passages that have been blacked
14 out/redacted.

15 What would be really unfortunate is if this whole
16 process goes forward, we are then thinking, actually, we
17 can assert that we are effectively not known to these
18 proceedings for the purposes of dealing with CTM, or
19 whatever. That would just be the wrong basis. I do not
20 want that to skew the way in which this goes, because
21 that would not really be helpful.

22 THE PRESIDENT: Well, that is very helpful, Mr Beard, to
23 articulate that. Let me make it clear that there is
24 a combination of soft and hard confidentiality markings.
25 We have certain hard where what ComparetheMarket see is

1 literally the black blanking out, whereas the vast
2 majority of the blanking out is highlighted yellow, so
3 that we know that, in the course of this hearing, we
4 need to be particularly careful so far as the outside
5 world is concerned about what is seen.

6 MR BEARD: You have articulated it better than me. That is
7 the point. They need to understand that actually for
8 the protagonists in these proceedings, pretty much most
9 of the stuff that actually matters, we know about. It
10 is a matter of the public awareness, because I envisage
11 that if there were to be confusion -- because if you ask
12 competitors in a market and you ask their legal counsel,
13 "Should we object to our name being out?" They
14 immediately say, "Object", because that is a perfectly
15 reasonable starting point.

16 But if they actually realise that most of those
17 involved in the matter know about this, they might take
18 a slightly different view about whether or not they
19 actually need to turn up and trouble anyone next
20 Thursday.

21 THE PRESIDENT: It is the horse has bolted point I think is
22 the point that one might make here.

23 MR BEARD: I do not know there is a horse here, but I am not
24 going to get into what ponies I have in which races.

25 THE PRESIDENT: The hypothetical horse has bolted. What

1 I am going to suggest is that if someone in your team
2 could identify the relevant portions of the transcript,
3 where we have debated confidentiality, including this
4 passage today, that can be identified for any third
5 party to look at, then they can inform themselves that
6 way rather than to put the CMA or anyone else in the
7 position where they have to actually articulate what is
8 at issue.

9 I would hope that what is in issue is helpfully
10 articulated in the various debates we have had,
11 including the ruling I made on going into private
12 session with our first witness.

13 If that is done, then I do not think anything more
14 need be done by the CMA or anyone else to inform
15 parties. Of course, if they have queries, they know who
16 to turn to. They will be able to ask more.

17 MS DEMETRIOU: Sir, that all sounds fine, thank you very
18 much. I do not want to raise it now, because of time,
19 but I have one further housekeeping matter that I do
20 want to raise before the end of today about the exercise
21 on the documents that you asked the CMA to do.

22 THE PRESIDENT: Do you want to do it now?

23 MS DEMETRIOU: Do you mind?

24 THE PRESIDENT: Not at all, no. We are very grateful for
25 all your help.

1 MS DEMETRIOU: Sir, we want to assist the Tribunal, but the
2 exercise is extremely extensive. Can I explain why?
3 Because from the CMA's perspective, the evidential basis
4 for a finding of infringement is all set out in the
5 Decision, so it is all there. The Decision does
6 highlight, during the course of the narrative, the
7 particular documents on which the CMA places emphasis,
8 and the documents are all in the F bundle. So I do not
9 think that portion of the F bundle is 36,000 pages,
10 I think it is more like 9,000 pages, but they are all
11 there.

12 Now, I do understand that 9,000 pages-odd is still
13 a lot for the Tribunal to read. What we do want to do
14 is order the documents, both chronologically and by HIP,
15 and highlight the passages on which the CMA places
16 reliance, because we can see that that is an easier way
17 for the Tribunal to approach the documentation. But we
18 do have a small team, and a team which is assisting on
19 the appeal, and I do not think we are going to be able
20 to do that in advance of our closing submissions without
21 taking people, who are necessary for the appeal, away
22 from their work.

23 There is no fairness issue, may I say that, because
24 of course, BGL have read the Decision and they have made
25 the points on it and they have all the underlying

1 documentation. So there is no additional document that
2 we are going to be putting in this bundle. It is an
3 exercise in re-ordering and highlighting, but it is
4 extremely work intensive. We are going to do it, but it
5 will not be in advance of closing submissions without
6 unfairly really taking people off the appeal.

7 THE PRESIDENT: I understand. The reason for the request
8 was in part to enable Mr Beard's clients to focus on
9 what the CMA said really mattered, but I take your point
10 that the Decision is there for a reason.

11 MS DEMETRIOU: Yes.

12 THE PRESIDENT: It was more particularly to ensure that we
13 could drill down more easily into the statements made in
14 the Decision by looking at the primary documents,
15 because, of course, neither of you have had the chance
16 to take us through each and every primary document,
17 because that is an impossibility given the time that we
18 have.

19 So it was a device to enable us to look at things
20 more closely. I certainly do not want to cause any
21 prejudice to the CMA's process. What I am minded to
22 suggest -- and, Mr Beard, perhaps you could think about
23 this, but not respond now -- what I am minded to suggest
24 is that we do as you suggest and you take the time you
25 need, and I know you will do it as quickly as you can,

1 but you take the time you need.

2 We will then inevitably, post-hearing, look at this
3 material, but we will give a liberty to Mr Beard to
4 raise points where there is perhaps a mismatch between
5 what is said in the Decision and what is said in the
6 documents relied upon.

7 Going the other way, a liberty in the Tribunal to
8 say after the hearing, "We are a little bit troubled by
9 what is said here and what is said in the underlying
10 documents, can both parties explain their position on
11 this?"

12 So, in other words, have the process, if necessary,
13 informed after the hearing, because one cannot do it
14 during the hearing. Frankly, that would probably
15 happen, given the volume of documents we are talking
16 about, even if you produce the material tomorrow.

17 MS DEMETRIOU: Sir, we are very grateful. Just to be clear,
18 we are not going to be providing any narrative or
19 further narrative at all.

20 THE PRESIDENT: No, you are not, you are absolutely not.

21 MS DEMETRIOU: Sir, just to reassure Mr Beard and his
22 clients, nothing is going to be material that he has not
23 already seen and that is not already highlighted in the
24 Decision.

25 THE PRESIDENT: It is a zoning in.

1 MS DEMETRIOU: Yes.

2 THE PRESIDENT: We have moved from 120 lever-arch files,
3 which is unmanageable, to about 30 lever-arch files,
4 which is also not particularly great. My desire is for
5 both sides to enable the Tribunal to focus on what they
6 say matters. It seems to me the starting point is what
7 you say matters and then Mr Beard will have views on
8 that.

9 So I, for one, think, given what you have said, it
10 is inevitable that we are going to be running
11 post-hearing.

12 Mr Beard, do take time to think about it, but if you
13 have a desire to hold the CMA's feet to the fire and
14 say, "It is absolutely imperative that you get this
15 sooner", then now is the time.

16 MR BEARD: I will take instructions over the short
17 adjournment. I think the real concern is the idea that
18 there can be effectively further identification of
19 materials being relied upon that are not specified in
20 closing. I am not talking about in the Decision, but
21 that is the difficulty I have. Let me take it away and
22 I will --

23 THE PRESIDENT: Take it away.

24 MR BEARD: But that is the issue, because the idea that we
25 can end up having effectively sort of rolling closings,

1 where we are arguing about what has been highlighted,
2 that would be troubling.

3 THE PRESIDENT: That would be troubling and that, to be
4 clear, is not what I have in mind. What I have in mind
5 is that we need to have our reading focused, and we
6 obviously will pay primary regard to the Decision, but
7 with the best will in the world, one cannot simply track
8 through each and every reference to the underlying
9 documents just like that.

10 So what I am looking for is an ability to conduct
11 a sense check, where we see what the CMA says really
12 matters in the underlying documents by highlighting, how
13 we can then transpose that with the Decision, but I do
14 not think it is going to turn on individual references
15 or anything like that. It is a much more broadbrush
16 impressionistic line.

17 MR BEARD: I think it is one of those things where it would
18 have been lovely to have had this six months ago, but we
19 are again where we are.

20 THE PRESIDENT: We are where we are, I fear that is right,
21 but by all means take instructions.

22 MS DEMETRIOU: Sir, on that point, I do not accept that
23 implied criticism, because of course the Decision is
24 where we rest our case, and BGL have pored all over the
25 decision and the underlying documents and have had every

1 opportunity to address the Decision. So we do not
2 accept that there is some unfairness. We do want to
3 help the Tribunal.

4 Of course, we are not going to have rolling closing
5 submissions with narratives, but neither are we going to
6 refer to every single document in the Decision in our
7 closing submissions. We are obviously going to take the
8 Tribunal to the key documents, but we rely on the whole
9 of the Decision. What we will do is re-order the
10 material, with the Tribunal's permission, after closing,
11 in a way which makes it easier for the Tribunal to read
12 the documents, so, for example, cutting down larger
13 documents into the chunk that really matters, and we
14 will do it in a way which is even-handed and includes
15 documents on which my learned friend relies. Of course,
16 he can supplement the bundle, but we would be most
17 grateful if that were --

18 THE PRESIDENT: Of course, we will proceed in that way.

19 Ms Demetriou, my concern is simply this: both sides
20 are -- and this is entirely proper -- going to pick
21 their best examples. Of course, they are. That is as
22 true for you as it is for Mr Beard. What I want to do
23 is get some feel for the middle ground, the things that
24 neither of you refer to, because time is limiting and
25 you have to pick your best examples, and do the reading

1 in a manageable way.

2 It may not matter at all. The representatives in
3 your submissions may be all in all sufficient. It is
4 simply that given the volume of references in the
5 Decision, I would feel a little uncomfortable publishing
6 a judgment, which said, "We are going solely on the
7 Decision, and frankly, we have not chased through any of
8 the references apart from a selected few that we decided
9 looked particularly interesting."

10 That is my concern. It may lead us nowhere beyond
11 a few wasted hours reading, but that is something which
12 we feel we ought to undertake. You are helpfully
13 providing us -- both of you -- with the tool for doing
14 that, because 120 lever-arch files is not do-able,
15 I think. Chancery listing would have something to say
16 about that if we spent four weeks reading those.

17 MS DEMETRIOU: Sir, thank you very much.

18 THE PRESIDENT: Well, thank you both. I see the time. We
19 will start at 1.20. That will give us an hour and 10
20 minutes to make a start on Ms Ralston, and I will give
21 some thought as to how brief I can be about the
22 questions that I have, because I think -- well, can you
23 answer this: has she been listening into the debate so
24 far?

25 MR BEARD: She has, yes. She has been in court, so she has

1 heard what has been discussed, and therefore, can join
2 in the conversation somewhere down the track.

3 THE PRESIDENT: In that case, I think it may be
4 a commendably brief conversation that I will be having
5 with her. Thanks are due to both counsel and Dr Niels
6 for the assistance provided today. So thank you all
7 very much. 1.20.

8 (12.50 pm)

9 (The luncheon adjournment)

10 (1.22 pm)

11 MR BEARD: Sir, good afternoon. I have invited Ms Ralston
12 to take a seat in the witness box, because I think
13 unless Ms Demetriou has anything else, the next stage is
14 to call Ms Ralston.

15 MS HELEN RALSTON (affirmed)

16 THE PRESIDENT: Ms Ralston, good afternoon. Do sit down,
17 make yourself comfortable. You have some water there
18 and I see you have a couple of bundles --

19 A. Yes.

20 THE PRESIDENT: -- to which you shall be referred. Also the
21 screen before you will come up with any documents. If
22 you need to see anything other than the documents that
23 come up on the screen, do say. If you do not understand
24 any questions, do say. Subject to that, I will hand you
25 over to Mr Beard.

1 Examination-in-chief by MR BEARD

2 MR BEARD: Sir, thank you. Ms Ralston, you have provided
3 two reports in these proceedings. If we could go to
4 {A/5/1}, please -- actually, if you just go back a page
5 from there {A/5/0.1}, thank you. Is that the front page
6 of your first report, Ms Ralston?

7 A. Yes, it is.

8 Q. Could we go to page {A/5/183}, please. Is that your
9 signature at the bottom of the page?

10 A. Yes, that is.

11 Q. Is this report true to the best of your knowledge and
12 belief?

13 A. Yes, that is correct.

14 Q. Thank you. I should say the signature you will see at
15 the bottom has a parentheses:

16 "(Updated for minor corrections as at
17 18 October 2021)."

18 There were various typographical and small matters,
19 we raised those with the CMA, the CMA helpfully took no
20 issue, and therefore we have substituted in the version
21 in the bundle including the corrections.

22 THE PRESIDENT: I am very grateful, thank you very much.

23 MR BEARD: If we could then go to {A/9/0.1}, please, first
24 page. Is that the cover page of your second report?

25 A. Yes, that is.

1 Q. If we could go to page {A/9/168}, again, is that your
2 signature?

3 A. Yes, that is right.

4 Q. Is this report true to the best of your knowledge and
5 belief?

6 A. Yes, that is correct.

7 MR BEARD: Excellent. Thank you very much. I do not have
8 any questions for you, Ms Ralston. Obviously, you have
9 heard the process, because you have been in court, as to
10 what has happened with Dr Niels. I think the Tribunal,
11 both the Chairman and potentially Ms Lucas and
12 Professor Ulph may have questions for you.

13 You have seen that list of questions that Dr Niels
14 was dealing with. So insofar as, sir, members of the
15 Tribunal, you want to refer to those, Ms Ralston is
16 aware of them. Do you have a copy of that in front of
17 you?

18 A. I am not sure. I cannot see it in the bundle.

19 MR BEARD: I am very sorry.

20 THE PRESIDENT: We will pass over another copy of that.

21 MR BEARD: Again, I am so sorry not to have anticipated
22 this.

23 THE PRESIDENT: This is our fault, it is our document.
24 I think the diagrams, but not the questions, will be
25 going up on to Opus in due course, just because they are

1 referred to in the cross-examination.

2 MR BEARD: Yes, that makes a great deal of sense. I am so
3 sorry, I should have ensured they were properly
4 provided.

5 With that, unless I can assist further, I will ...

6 THE PRESIDENT: Thank you very much, Mr Beard, I am much
7 obliged.

8 Questions by THE TRIBUNAL

9 THE PRESIDENT: Ms Ralston, good afternoon. You will have
10 seen the process of questioning that we have gone
11 through with Dr Niels, because you have been in court
12 this afternoon, this morning and yesterday.

13 A. Yes.

14 THE PRESIDENT: Can I, first of all, then, you having heard
15 the exchanges of the Tribunal with Dr Niels, invite you
16 to say anything that you would like to say, by way of
17 general comment, because I am not going to go through
18 the same exercise with you that I did with Dr Niels.
19 But if you have anything to say by way of expansion,
20 disagreement or whatever, then I am very happy to hear
21 what you have to say.

22 A. I have nothing to add.

23 THE PRESIDENT: I am grateful. In that case, what I am
24 going to do is I am going to take an awful lot of what
25 I asked Dr Niels as read and really go down to a few

1 questions, and I think Professor Ulph will have a few
2 other questions, but a few questions on diagram 2, which
3 is at page 16 of the note.

4 A. Yes, I have that.

5 THE PRESIDENT: What you see is the coloured parts are what
6 I understand the CMA has defined as the market in
7 paragraph 5.2 of the Decision. Do you see that and
8 understand what I have marked?

9 A. Yes, I understand that.

10 THE PRESIDENT: Do you agree with that as a definition of
11 the market in this case?

12 A. I disagree with the CMA's definition of the market.

13 THE PRESIDENT: In what way do you disagree?

14 A. The CMA has defined the market to be limited to only
15 PCWs. I consider the market based on the evidence to be
16 broader, to include channels, the direct channels of
17 insurers, both direct to new customers but also some
18 renewal customers.

19 THE PRESIDENT: So what you are wanting to include, as it
20 were, in the yellow bit, is direct channels or some
21 direct channels?

22 A. So sometimes direct channels is to capture the fact
23 you're communicating with a home insurance provider
24 directly, so would it capture direct to new customers as
25 well as direct to renewal? So, yes, I think are you

1 referring specifically -- what do you mean by "direct
2 channels" there?

3 THE PRESIDENT: That is what I meant. I meant where you,
4 for instance, have either a sole direct channel, as it
5 were, to Direct Line or an insurer's own channel, even
6 though they are also appearing by way of a quotation on
7 a price comparison website. So I am eliding the two.

8 A. Yes, and the customers that might be attracted, would
9 that capture, for example, an auto renewal customer or
10 someone who did not make an action, or ...?

11 THE PRESIDENT: I confess, Ms Ralston, that that is
12 something that entirely passed me by when I did this
13 diagram, so the short answer to that is, I do not know,
14 but I am not sure for our conversation that this
15 particularly matters.

16 What I am going to ask is, on what basis, or by what
17 process do you test whether the boxes or other boxes or
18 differently framed boxes, which I have not coloured
19 yellow, ought to be coloured yellow? What is your
20 process of reasoning?

21 A. So I have looked at various -- as much evidence as
22 I could see on market facts as to how price comparison
23 websites compete for both types of consumers, the
24 consumers and the insurers. I then use the SSNIP test
25 as a conceptual framework to help inform how I interpret

1 that evidence and where those lines as to market
2 boundaries should be drawn.

3 THE PRESIDENT: I suspect that the SSNIP test is going to be
4 one of those terms that we are going to want to be
5 extremely definitionally careful about. You have
6 already heard this morning, that we have what I am
7 already beginning to call an indirect SSNIP test, where
8 an increase hypothesised to the commission payable is
9 transmitted by way of a price increase to quoted prices
10 on the price comparison website. So that is one way in
11 which one does it.

12 You will also have heard, I suspect too much of my
13 suggestion of a SSNIP, which would be a direct increase
14 to the quoted price on the price comparison website
15 resulting in a move from zero to a positive price paid.

16 I do not want to get into any kind of debate, at
17 least not at this stage, about what is right and what is
18 wrong. What I would like to do is understand exactly
19 what you mean by the SSNIP that you applied to test your
20 market definition.

21 A. Yes, okay. I might add at the start something on
22 terminology. So I think "indirect" is a word we should
23 be careful of in this case, so there is the indirect
24 pass-through of a SSNIP on commissions to consumers,
25 which I think is what we are referring to here.

1 THE PRESIDENT: I think that is what we are referring to,
2 yes.

3 A. The CMA referred to what Gunnar and I refer to as
4 two-sided network effects, so the interaction between
5 consumers and insurers sometimes is an indirect network
6 effect. So there is a difference of opinion about
7 whether looking at an indirect pass-through is capturing
8 indirect network effects, so that is a side.

9 THE PRESIDENT: But just to pause there, and what I am going
10 to do is I am going to rearticulate your answer, so that
11 you can tell me just how far I have misunderstood what
12 you have just told me.

13 It is trite in two-sided markets that there is the
14 potential at least for what we call network effects and
15 to go back to my trusty, albeit Dr Niels did not like it
16 very much, newspaper example, you have a relationship
17 between the two markets in that advertisers are
18 interested in the number of people reading with interest
19 their newspaper, because of course that projects the
20 product they are trying to advertise for.

21 I think Dr Niels made the point, and as far as it
22 goes, it seems to be right that one does not have quite
23 so much network effects going the other way, in that the
24 readers in my newspaper example might be tolerating no
25 more than that, the advertisements, and really wishing

1 that they could pass over very quickly, the
2 advertisements and move on, which is less of a network
3 effect than, let us say, a price comparison website
4 where both sides of the market, or both markets,
5 depending on how you express it, are interested in
6 volume.

7 So the insurer is interested in volume of eyeballs
8 on the site, but the eyeballs are interested in the
9 volume of participating insurers, because it means they
10 can go to less or fewer price comparison websites.

11 A. Right.

12 THE PRESIDENT: Thank you, that is helpful. What you are
13 saying is, what I have termed the indirect SSNIP might
14 be capturing just a fragment of the network effects that
15 exists between in the markets. One is looking at
16 something, which I think we are all accepting, happens,
17 or can happen, namely an increase in price on one side
18 of the market is transmitted through to the other side
19 of the market.

20 A. So I think --

21 THE PRESIDENT: Am I misunderstanding?

22 A. I am actually saying something stronger.

23 THE PRESIDENT: Right.

24 A. Professor Ulph took us through the tax incident example,
25 some might call it derived demand. When you look at

1 indirect effects, we are not at all picking up any
2 network effects. We are just saying a reaction someone
3 might do to higher prices, if they are the insurer, is
4 to delist or to increase retail prices and pass it
5 through. That is quite different, this could happen in
6 a market which did not have two-sided platforms. It
7 could happen -- you are nodding, you probably have many
8 more examples than me in your head.

9 I could think of maybe BMW windscreens, if I was
10 defining the market for the windscreen, I might look at
11 how the demand for BMWs, how sensitive that is, and how
12 much of the windscreen price would pass through. I have
13 not defined the market for BMWs, I do not know if I am
14 getting myself into trouble, but I am just saying in
15 one-sided markets, you might also look at indirect
16 effects to inform about an upstream market.

17 So I see that as not really doing anything special
18 for two-sided platforms.

19 THE PRESIDENT: To take an example as to home, if we look at
20 our hypothetical direct channel with a home insurance
21 provider, who has no interest in price comparison
22 websites, if you found that for whatever reason the
23 costs of that direct channel increased dramatically, let
24 us say, because hosting services increased a thousand
25 times in terms of price, that price increase, a cost

1 increase, would be reflected in the manner in which the
2 insurer would recover costs. So somehow they would find
3 their way into the quotations that would be provided to
4 persons seeking to buy insurance from this particular
5 insurer?

6 A. Yes.

7 THE PRESIDENT: Well, thank you. That arose out of the
8 definitional issues of what I have called indirect
9 SSNIP, and let me be clear, that is my term and it may
10 be a bad term. But let us move on to what you
11 understand or what you have done in terms of applying
12 your SSNIP to define the market.

13 A. Yes, you asked the question, I think you asked and we
14 have discussed quite a bit why did we not test
15 introducing a price to consumers? So we have discussed,
16 I think it was before the Decision, the CMA's Decision,
17 about introducing a consumer price. When I say
18 "discussed", there has been some to and fro between the
19 CMA and through the Oxera reports, and some of it may
20 not have made reports. But I did check, while I was
21 listening, and I think Gunnar has responded actually to
22 the point of this in his second report.

23 So the CMA asked some of the PCWs in the RFIs, one
24 summer, what would happen if they introduced a consumer
25 price. I helped BGL as part of the Oxera team

1 supporting BGL, so I saw these questions, and I have
2 subsequently seen answers and the insurers -- sorry, the
3 price comparison websites sort of explained, quite
4 intuitively, consumers would not tolerate a fee. They
5 are used to a free service. They would switch away.
6 This would not be feasible.

7 I understood the CMA has explained that they did not
8 take that approach in the Decision, because of the idea
9 that it would not be feasible and, as has been
10 explained, you should introduce -- you should do a SSNIP
11 on something that can be done in a short time period.

12 I disagree that those are the right reasons to not
13 do that test, because it is exactly showing in my
14 opinion the high elasticity of demand by consumers for
15 the PCW. They would not tolerate a price. It may be
16 I should have done that test, but I --

17 THE PRESIDENT: Pausing there, just so that I am clear, your
18 view -- and I appreciate you have not done the hard
19 yards on this -- but your view is that if one were to
20 take the SSNIP that I am suggesting, the increase from
21 free, there would be a falling away of demand and the
22 substituted products that they would drift away to, the
23 eyeballs, would be -- well, we do not want to be too
24 specific, but it would be things like direct channels,
25 increased reliance on renewal business, that sort of

1 thing?

2 A. Yes.

3 THE PRESIDENT: So applying that test -- and let me be
4 clear, I am not saying it is the correct test to apply;
5 I am just trying to understand what might happen if it
6 was applied. But applying that test, you would want to
7 expand my yellow to extend to some of the boxes that are
8 at the moment not yellow?

9 A. Yes.

10 THE PRESIDENT: On that basis. But that is not the test you
11 applied?

12 A. No.

13 THE PRESIDENT: First of all, why did you not regard this as
14 a useful test? Then, secondly, what test did you apply?

15 A. The SSNIP test is always hypothetical, we discussed
16 that. I did see this in quite a hypothetical or quite
17 an abstract idea, you do see this as quite a big change.
18 It was also agreed, the CMA highlighted that in,
19 I think, the DCT market study, they drew a nice picture
20 of how PCWs compete and they put on the consumer side,
21 usefulness, retail prices, advertising, I think those
22 three dimensions. We thought: well, let us just take
23 the CMA's point as to the way they think PCWs compete on
24 consumer side to avoid -- to get off the ground
25 basically, to start the question in the same way, and

1 just went with that approach. So that was why we took
2 that approach.

3 THE PRESIDENT: Let us move away from the charged area or
4 arena of PCWs, because everyone has a bit of an interest
5 in those. Let us talk about how one would do it, let us
6 say, if one were looking at Google versus Bing as
7 a search engine.

8 A. Okay.

9 THE PRESIDENT: If you were applying your kind of SSNIP,
10 what you would be looking at is, given that there is no
11 difference in price, it is a free service to both, you
12 would be trying to articulate what factors, other than
13 price in Google, make it harder for the user to move to
14 Bing or vice versa. What you are doing is actually you
15 are applying something which cannot, by any stretch of
16 the imagination, be called a SSNIP, because price is
17 nothing to do with it. You are not talking about an
18 increase in price or decrease in price. You are talking
19 about what is it that makes Google or Bing special or
20 not special when one looks at the whole market.

21 So it is a much more judgmental approach by which,
22 I mean, you have to exercise your brain to work out what
23 matters to the users of this service.

24 A. I have thought a bit about what to do in zero price
25 markets outside of this case. I have thought about it

1 in the -- European Commission is consulting on how to
2 update its notice on market definition, and in one of
3 the paragraphs, that is where it introduced the SSNIP
4 test, and this was a couple of months ago, but from
5 memory, it introduced the concept of using price, to
6 basically operationalise the test. Because this article
7 that is now very old, something 1980s, and price in many
8 markets was a very important -- or is a very important
9 decisive tool and, as an economist, price helps us
10 understand willingness to pay and the value of
11 a product.

12 But we are now talking about markets where price, as
13 we say in zero price markets, we have not got that
14 starting point. So I think you want to think about the
15 most important dimensions of competition. So I am not
16 going to try and think what they are -- well, I could
17 try for Google and Bing, but I have not thought about it
18 before, but in the price comparison websites, that is
19 where we went. We said, well, what is really important
20 to consumers about these price comparison websites and
21 let us apply the SSNIP framework to those dimensions.
22 So I hope that helped.

23 THE PRESIDENT: That does. My last question, I think,
24 before I hand over to Professor Ulph, I think he has
25 some other questions for you, is this: I think it is

1 probably fair to characterise the approach that I have
2 been putting to both you and Dr Niels as something of
3 a mechanistic approach in that I am just looking at
4 price, and all I am doing is mechanically applying the
5 SSNIP, as you can read it in any economics textbook
6 without reference to the complexities of free products.

7 I am simply saying, apply the SSNIP, define the
8 markets accordingly, in which case, I think, on that
9 basis, we are agreed at least that you would get much
10 more yellow than is on the diagram 2. I am not sure
11 whether you would get much more green. I suspect that
12 is a rather harder question and I am not going to ask
13 one way or the other.

14 My point is that what you would end up with is
15 actually a mismatch between the products that are
16 relevant on one side of the market and the products that
17 are relevant on the other side of the market.

18 A. I think that is a possibility. I hope you can read it
19 in my report, but I think there is quite a bit of
20 evidence that the insurers would switch away, so
21 I would -- yes, I have found, as I have written in my
22 report, that direct channels, even just considering the
23 insurer's response --

24 THE PRESIDENT: Would move over?

25 A. -- would move over.

1 THE PRESIDENT: I was probably not being quite clear. What
2 I am trying to do is articulate -- and I think you are
3 agreeing -- that whether the ambit of the two sides of
4 the market are the same, are two distinct -- applying my
5 SSNIP approach, two distinct questions. In other words,
6 if it happens that the green extends to the same extent
7 as the yellow, that is according to altogether different
8 criteria. It may happen, of course, but it may not.

9 A. I agree very much with where you are coming from.
10 I hesitate, because an economic market is about the
11 arena within which the relevant market agents exist. To
12 me, when you have a two-sided platform, where there are
13 these network effects, you can never forget the other
14 side. I think this is consistent with what Dr Niels was
15 saying, that maybe go down that route, but do not forget
16 the other side. That is why we always want to -- we,
17 myself and Gunnar, would not want to define it as two
18 separate markets, because there is a risk we forget
19 about the other side.

20 THE PRESIDENT: Yes, I see exactly what you are saying, but
21 let me try and unpack that a little bit more, just to
22 see the extent of the merit in what you say is your and
23 Dr Niels' approach.

24 I quite understand the nexus between the two
25 markets, as I am now going to call them, because I think

1 that is an area where we are articulating different
2 visions of the same thing. So let us talk two markets,
3 and, therefore, two SSNIPs and two very mechanical
4 SSNIPs in that we are just looking at price.

5 Now, first point is if one applies the SSNIP
6 entirely separately in the two different markets,
7 looking only at an increase in price in the relevant
8 product, you are asking two separate questions that
9 require separate analysis and consideration.

10 A. Yes, that is correct.

11 THE PRESIDENT: You may end up with very divergent answers
12 as to what the relevant market is on each side.

13 A. Yes, that is correct.

14 THE PRESIDENT: But you may not, because of the nexus
15 between the two markets. You may find that, in fact,
16 the different questions lead to the same answers in
17 terms of market definition.

18 A. I agree with that, yes.

19 THE PRESIDENT: That would all depend on the nature of the
20 market you are talking about.

21 A. Yes.

22 THE PRESIDENT: Or the markets, if we are taking my
23 description.

24 A. Yes, and on the facts of the case, yes.

25 THE PRESIDENT: I do not want to press you any further on

1 that, because I am sure to the extent that there is
2 disagreement with your analysis on market, that will be
3 put to you in cross-examination. I do not want to
4 trespass on that. I am much more interested in how
5 these things work in the abstract, so that I can fit in
6 the specific answers when I come to consider it.

7 But let us suppose -- and it does not have to be
8 this market, we can think about any two-sided market,
9 but let us suppose one has done the analysis as
10 I suggest and one has radically different markets on
11 each side, but what they have in common is the same
12 provision or practice, because it is a common platform
13 operating on both sides.

14 So one has, in this case, the wide
15 most-favoured-nation clause, which has implications on
16 both sides, but I do not want to talk about wide
17 most-favoured-nation clauses, because again, that is
18 a bit too loaded. We will just talk about practice A,
19 which is of interest, of effect, in both markets.

20 Let us also suppose that practice A has beneficial
21 effects in one market and adverse effects in the other.
22 That question is not one that is resolved by my
23 mechanical application of the SSNIP. All you can do is
24 create the description of the landscape in which those
25 effects can be identified. It says absolutely nothing

1 about what you should do about the effects.

2 Would it be fair to say that what you are trying to
3 do in looking at, as it were, the more nuanced SSNIP
4 that you have articulated, trying to mediate between the
5 positive and negative effects of provision A, as I have
6 called it?

7 A. I have considered effects quite -- after defining the
8 market, so I did not try and balance any effects of
9 a practice in the market definition. I am thinking
10 I have considered the -- yes, I have not generally used
11 network effects to conclude on actually whether a SSNIP
12 would be profitable or not. I have generally looked
13 first at the direct effect of the SSNIP to the party and
14 the indirect pass-through, but I have not thought about
15 the reinforcing feedback effects. I generally comment
16 in my second report, you know, if we were to include
17 that, that would only exaggerate the unprofitability of
18 a SSNIP.

19 So I may have missed your question there.

20 The start of your question was about the balancing
21 of A and B, and I have views on that, but they are not
22 really in the market definition. So answering your
23 question about whether my market definition deals with
24 potentially negatives on one side and positives on that
25 side, in the way I have applied it, I would have to --

1 THE PRESIDENT: Your answer is "no"?

2 A. Yes, I think so.

3 THE PRESIDENT: Or perhaps an equivocal "no", because the
4 question was not a very good one, which is fair enough.

5 Well, thank you very much. Professor, do you have
6 any questions arising out of that or indeed at all?

7 PROF ULPH: Yes, I have three questions I would like to put
8 to Ms Ralston, some of which arise out of the discussion
9 you just had and one of which I think is slightly
10 different.

11 My first question relates to the issue of doing
12 a SSNIP test on the consumer side.

13 You articulated, very clearly so, the reasons why
14 you thought it was quite difficult to undertake the
15 exercise of going from a zero price to a non-zero price
16 on the consumer side.

17 Would you accept that another reason why it is
18 difficult to do that is the reason I put to Dr Niels,
19 which is that potentially there are many different ways
20 in which you could charge consumers? You could have
21 some elements of a flat fee, you could have some
22 elements of a fee per transaction completed. So in
23 order to consider how you moved away from a zero price,
24 you would have to think quite carefully about which type
25 of non-zero price you would have to introduce.

1 So would you agree that is another complication of
2 going down that route of going away from the zero price?

3 A. Yes, I agree that is something you would need to think
4 about.

5 PROF ULPH: Okay. So you thought about doing this exercise
6 where you lower, say, the advertising by 5% or 10%,
7 these are two other dimensions of competition that both
8 you and the CMA have identified.

9 Now, I agree that doing that is not a literal SSNIP
10 test, because SSNIP tests we tend to think of as being
11 applied to prices. I think the terminology you used was
12 it was in the spirit of a SSNIP test. Would you still
13 say this is a SSNIP test, even though you are doing it
14 on some other dimension, it still counts as a SSNIP
15 test?

16 A. Yes, I consider it is still a SSNIP test.

17 PROF ULPH: The second issue I want to explore with you,
18 again, is one of the exercises you did, was this
19 exercise of increasing commissions by 5% to 10%, working
20 through the implications of retail prices and then
21 carrying out the calculation of whether or not such an
22 increase would be profitable.

23 The question I have is -- I think you have to some
24 extent answered this -- in doing that exercise,
25 potentially one effect you could think about would be

1 that if that increase in price to consumers causes some
2 of them to leave the PCW market and go straight to the
3 direct channels, that could make PCW channels less
4 attractive to HIPs. So some HIPs might delist from
5 those channels, but because the HIPs delist, that causes
6 other consumers to leave the PCW channel as well,
7 because of this two-way interaction between the two
8 sides of the market.

9 So my question is, when you did that exercise, did
10 you actually take account of this dynamic two-way
11 interaction?

12 A. I did not quantify the feedback, any additional -- no.

13 PROF ULPH: That was my understanding. I think you said
14 that your understanding was that had you been able to do
15 that -- and I can see it is quite difficult to try to
16 quantify that interaction, but I think you said that had
17 you been able to do that, that would have somehow
18 reinforced the proper reducing effects. Is that what
19 your position is?

20 A. That is my position. I also note it is in footnote 541
21 of the Decision, that they confirm that the feedback
22 effects would reinforce, and absent accounting for that,
23 we could underestimate or overestimate the
24 profitability.

25 PROF ULPH: The third issue I wanted to explore with you

1 relates to renewals.

2 When I think about the consumer side of the market
3 or PCW services, it seems to me there are two broad
4 groups of consumers. You might think of consumers, who
5 currently do not have a home insurance policy, so they
6 are new consumers, and are simply searching the market
7 with a view to setting up a policy now or maybe just
8 finding out what is available, and maybe at some point
9 in the future thinking of going out and taking out
10 a policy, and potentially, there are consumers who
11 already have an existing home insurance policy and who
12 are not contractually obliged to automatically renew the
13 policy with the existing provider.

14 So would you want to include those renewal customers
15 as part of the consumer market rather than taking
16 renewals as a separate market, renewal customers are
17 just part of the consumer group that you have been
18 thinking about in the market?

19 A. Yes, I think renewals is -- it is a broad church, there
20 are many types of renewals, and there will be people
21 that are the most inert, that is those that are subject
22 to the FCA's concerns about price walking, where there
23 will be those approaching renewal that are looking
24 around. I have, in my empirical work, tried to draw
25 a line where I think it is appropriate about which

1 customers would likely be in the relevant market.

2 PROF ULPH: Also just recognise there might be some
3 consumers who automatically renew one year, because the
4 renewal notice comes up at a particular time when they
5 are very busy and they do not have the time to get into
6 the hassle, but might go down a more direct search
7 another year. So, fairly randomly, consumers might fall
8 into one group or the other, just depending on their
9 circumstances.

10 So that is why I would say that maybe the market is
11 more those who are simply not absolutely contractually
12 tied into automatically renewing, whether or not they
13 choose to renew is a somewhat different question, but
14 they are still potential customers for the market for
15 PCW services. Would you agree with that?

16 A. Yes, absolutely.

17 PROF ULPH: Those are the three issues I wanted to explore
18 with you, thank you.

19 MS LUCAS: I just had one question, and I am hoping you can
20 clarify something which is probably a very basic
21 question.

22 If we look at diagram 2, and at the bottom of the
23 diagram, we see "Home insurance broking services". It
24 is not mentioned in your report or actually in the CMA
25 Decision or I do not think anybody else's report about

1 that, and yet looking at it, perhaps not through an
2 economist's spectacles, you think that that is quite
3 similar to a PCW set-up. So I just wondered why
4 insurance broking is not really featuring?

5 A. So I have a diagram in a report. I see brokers, so home
6 insurance brokers have become quite different to the
7 traditional broker, insurance broker, where you might
8 ring up and them help. Yes, they work as your agent,
9 they give you the best insurance, so they still are the
10 agent of the customer. So brokers now are like -- they
11 often have a panel of underwriters above them and you
12 can think sometimes like brokers could seem a bit like
13 affinity partners or you may have heard of -- I am just
14 going to name some brands, and there is nothing to do
15 with confidentiality here, but you have heard Tesco, you
16 have heard M&S. You also have brokers that sort of, in
17 my view, fit at that same point in the value chain.
18 They are just another label to wrap around the
19 underwriting product that is further upstream.

20 So if we had an issue in the broker market, I might
21 look at them separately and think about their
22 competitors, but when I am looking at a concern
23 downstream of them at the price comparison website
24 level, I do not see the need to distinguish between
25 a broker, an affinity partner, Sainsbury's or anything,

1 or AXA or Zurich, you know, a clear underwriter. They
2 all sort of are the suppliers going into the PCW and
3 then the consumers below. I treat them just the same as
4 underwriters, if that helps.

5 MS LUCAS: Yes, that is helpful. So it is not, as I would
6 perceive, an insurance broker, which is the first
7 description you provided, which was basically acting as
8 my agent?

9 A. Yes.

10 THE PRESIDENT: Just to expand on that, there are two boxes,
11 one on each side, in diagram 2. Brokers can, of course,
12 act as agents, either for the insurer or for the
13 insured. I think in the bottom most box, where the
14 agent is that of the insurer, that would embrace your
15 affiliates, the people who are essentially on the
16 insurer side of the market, and owe no duties regarding
17 careful selection to the proposed insured.

18 A. Yes.

19 THE PRESIDENT: So I think Ms Lucas' box of interest is the
20 one above that, above and to the left, which is where
21 the agent is that of the insured and where there is an
22 obligation in that agent to find the best deal
23 irrespective of who is providing it to the person who
24 wants insurance cover.

25 Would it be fair to say that this area of the home

1 insurance market, inevitably there is a price to be paid
2 by the insured or the proposed insured? Because they
3 are getting something rather more than a website
4 service, and for that reason, is this such a small
5 market, submarket, and you cannot really take it into
6 account or do not need to take it into account?

7 A. That is what I have done. I have not taken that market
8 in -- yes, I think the data would capture all sales, so
9 we generally take as a sense check or as one source of
10 information as the ABI data of all insurance policies in
11 force. So all insurance, whether they came through
12 a broker acting as such, that would be captured in the
13 data, but it is focused more on the data, the data cuts
14 that exist, and they currently mainly exist as per PCW,
15 PCW, as a whole, insurers direct sales to new and
16 switching customers, and then we have this lump of
17 renewals, huge size.

18 Perhaps it was just a practical basis, but I have
19 not seen data that would pull out that specific segment,
20 market segment.

21 THE PRESIDENT: I think we are articulating an area where
22 there is a degree of common ground between the parties
23 in that this is something which is not of sufficient
24 significance to be of interest in either side's analysis
25 of the market. Would that be a fair sort of

1 articulation?

2 A. I can see it would be a further constraint on PCWs, so
3 it perhaps would have been something that would have
4 been useful for my client had we been able to call that
5 out, but I have not done so.

6 THE PRESIDENT: Thank you. Ms Ralston, thank you very much.
7 I am now going to hand you back to the capable hands of
8 Mr Beard, who may or may not have some further questions
9 for you.

10 MR BEARD: I do not have any questions for Ms Ralston,
11 because I think we focus for Ms Ralston at the moment on
12 the more abstract issues rather than issues to do with
13 the operation of the SSNIP. Although the Tribunal asked
14 some questions about what Ms Ralston had done, I am not
15 going to invite in examination-in-chief to take
16 Ms Ralston through those matters. I will pick anything
17 up in re-examination as and when necessary. I am
18 conscious the Tribunal has read these matters in any
19 event.

20 THE PRESIDENT: Absolutely. To be clear, I simply wanted
21 you to be able to field any loose balls that emerged
22 from our questioning of the witness.

23 MR BEARD: No.

24 THE PRESIDENT: Obviously, now we go back to the usual
25 format of cross-examination.

1 MR BEARD: I think it is not a question for Ms Ralston, but
2 I do not know if in relation to Professor Ulph's
3 question, there was a sense that there could be any
4 circumstances where you are contractually obliged to
5 renew an insurance policy. I do not think you are ever
6 contractually obliged. I think what you have are
7 automatic rollovers, where if you do not do anything,
8 then you get renewed, and then you have the interaction
9 with non-resolicitation, and so on.

10 I just wanted to clarify that, just because of some
11 of the phraseology which was used, but I think
12 Professor Ulph is fully aware of that.

13 THE PRESIDENT: I think that is right.

14 PROF ULPH: That was helpful, thank you. Thank you for
15 clarifying that, yes.

16 THE PRESIDENT: We were certainly proceeding on the basis
17 that there is no obligation to stick with an insurer.

18 MR BEARD: I wanted it to be clear. It was only because of
19 some language that was used.

20 THE PRESIDENT: It is always good to be clear, thank you,
21 Mr Beard. Ms Demetriou.

22 MS DEMETRIOU: Sir, Mr Lask is going to cross-examine
23 Ms Ralston in relation to the market definition issues.

24 THE PRESIDENT: Mr Lask, over to you.

25 MR LASK: Good afternoon. Before I start, may I raise the

1 thorny issue of confidentiality? I am mindful, of
2 course, of the ruling you gave yesterday, where you
3 reluctantly went into private session, and Mr Beard
4 asked questions concerning confidential material.

5 I should say that a large part of the material that
6 I need to ask questions of Ms Ralston on is marked as
7 "confidential". In some cases, it may be possible for
8 me to show Ms Ralston the material and ask questions in
9 a way that do not reveal confidential information, for
10 example, where it concerns the name of an insurer. But
11 I appreciate it may unfairly hinder Ms Ralston's ability
12 to answer, if she has to worry about what she can and
13 cannot say.

14 Moreover, in many cases, I should say, the
15 confidential information consists of figures or analysis
16 that I cannot sensibly ask questions on without actually
17 referring to the information itself.

18 THE PRESIDENT: Well, Mr Lask, I am going to ask you to stop
19 your examination in mid-flow at 25 past, if you can
20 manage that. Are you going to be able to confine your
21 questions to reference, without explaining what it is,
22 confidential material, in that time, or are you going to
23 plunge straight into material that is going to be
24 private? In which case, it is rather like Mr Beard's
25 point, we reach a point where it is just not sensible

1 for you, even if it is do-able for the witness, to
2 proceed in public.

3 MR LASK: The first issue that I need to cover involves
4 confidential information but of the nature of insurer
5 names. So, in theory, it may be that this sort of issue
6 we can cover without referring to the names, but as
7 I say, I do not want to cause any practical
8 difficulties.

9 THE PRESIDENT: Your concern is quite rightly with the
10 witness.

11 Ms Ralston --

12 A. I do not have a cipher.

13 THE PRESIDENT: You do not have a cipher. That will be
14 a problem.

15 MR BEARD: I have one, but mine has mark-up. I am sorry, we
16 have versions with different annotations. Let me see if
17 there is another one. Mr Armitage is going to sacrifice
18 his. (Handed). Thank you.

19 THE PRESIDENT: Ms Ralston, that solves the superficial
20 point, but what I do not want you to feel under any
21 difficulty with is a sense that you are going to have to
22 concentrate in part on avoiding to discuss confidential
23 material, because you have other fish to fry, in terms
24 of answering as helpfully as you can the questions that
25 are being put.

1 ought to have included direct channels and at least some
2 renewals in the relevant market, is that fair?

3 A. That is correct.

4 Q. Thank you. The first issue I would like to explore with
5 you is whether and to what extent HIPs would switch away
6 from a hypothetical monopolist PCW in response to
7 a SSNIP. It has been referred to by the CMA and by
8 yourself as delisting. What I would like to do first is
9 remind you what the CMA said about this and then ask you
10 some questions about your own analysis.

11 Could you please look at the Decision,
12 paragraph 5.132, which is at bundle {A/1/118}. Do you
13 have that on the screen?

14 A. Yes. Could you repeat the paragraph number?

15 Q. It is the first full paragraph, 5.132, under the main
16 heading. This is where the CMA is considering
17 providers' alternative consumer acquisition strategies.
18 We see here that the CMA assessed whether delisting from
19 a hypothetical monopolist was a likely response to
20 a SSNIP on commissions, but it concluded that this would
21 lead to a significant loss in sales volumes and profits
22 for HIPs that would be impossible or very costly to
23 replace.

24 Then what the CMA does is it goes on to give its
25 detailed reasons for that conclusion, but you see that

1 overall conclusion at 5.132.

2 If you look next at the same bundle, page 82
3 {A/1/82}, paragraph 5.25, you will see here in
4 a footnote, footnote 250, that the CMA responded to
5 a specific argument raised by BGL in relation to partial
6 delisting. That would be reducing the number of risk
7 profiles on the hypothetical monopolist PCW rather than
8 fully delisting. But the CMA observed, based on the
9 evidence referred to in that footnote, that only two
10 HIPs had even mentioned this as a possible response to
11 commission increases and neither saw it as a good
12 strategy.

13 You may have seen, if you have read all of the
14 annexes to the CMA's decision, in annex B, it explains
15 the investigatory process and how it sent the pre-SO
16 Section 26 notices to 23 HIPs and then contacted four
17 more afterwards. So out of all of the HIPs that were
18 asked, two mentioned partial delisting.

19 A. I disagree. I do see in my second report, three others
20 referred to partial delisting.

21 Q. Yes, I will come on to that, if I may.

22 But it is fair to say, is it not, that the CMA did
23 address both full delisting and partial delisting in the
24 Decision?

25 A. No, I disagree. I have copied the questions in, I think

1 a footnote in my report. I do not think they tested
2 either full delisting properly. I think they asked
3 a question about "what would you do if commissions were
4 to rise? But please do not tell us about delisting,
5 because we will talk about that later in the
6 questionnaire."

7 Then on the questions on delisting, they were not in
8 the context of some hypothetical SSNIP. I do not think
9 they ever asked about partial delisting or selective
10 quoting or using the language of Natasha Glasgow
11 "quotability".

12 I find the evidence that CMA has put forward quite
13 contradictory to what we see when we read -- we heard
14 what Natasha said, we hear about -- yes, we are private
15 now -- Confused's desire to improve quotability on its
16 platform as well. If we want -- when we turn to the
17 other testimonies by the HIPs, that selected quoting was
18 something that they did.

19 Q. The answer you have given is that, in your view, the CMA
20 did not consider partial delisting adequately. The
21 question I asked was for you to agree that it did
22 address the issue in the footnote we have seen at
23 paragraph 250.

24 A. I do not think that referring to -- I do not think that
25 referring to BGL, pointing out that someone has not done

1 something, is addressing the issue.

2 Q. I will leave that point there. Turning to full
3 delisting, if you could look at your first report, which
4 is at tab 5, and I would like to go to page 45 {A/5/45}.

5 We see here at paragraph 4.13, towards the bottom of
6 the page, you acknowledge the CMA's finding that HIPs
7 were unlikely to fully delist from a hypothetical
8 monopolist in response to a SSNIP.

9 Then at 4.14 {A/5/46}, you make essentially the
10 point that you have just been making now, that this only
11 considers full delisting and it is possible that the
12 PCWs might partially delist. But, at this stage, in
13 your first report, you are not, as I see it, advancing
14 any objection to the CMA's conclusion on full delisting,
15 are you?

16 A. As is in the joint statement, I have not -- we are not
17 sure, I cannot be sure whether full delisting would
18 constrain the hypothetical PCW.

19 Q. Yes, and you do not take any issue with it in your first
20 report. If you then turn to your second report, if you
21 look at your second report, which is at tab 9 at
22 page 21, please {A/9/21}. Paragraph 2.25, on the
23 previous page, it might be helpful to look very briefly
24 at the previous page {A/9/20}, you see "full delisting",
25 and then at paragraph 2.25, you say:

1 "I do not rule out full delisting as a possible
2 response by HIPS to a SSNIP by a hypothetical
3 monopolist ..."

4 What you do there is you go further than you went in
5 your first report. There is no reason you could not
6 have made that point in your first report, but it is
7 introduced for the first time here in your second
8 report. That is right, is it not?

9 A. I am just reading what I wrote in my first report to
10 confirm. I think my position has not changed, if that
11 is what you are implying, that the CMA did not fully
12 test full delisting or partial delisting.

13 Q. In your first report, you do not say that the CMA did
14 not fully test full delisting. Your response to what
15 the CMA said about full delisting is: well, be that as
16 it may, it has not fully considered partial delisting.

17 What I am putting to you is that you raise no
18 objection to what CMA said about full delisting in your
19 first report, but instead raised this for the first time
20 in your second report. It is a short point, and I would
21 not expect it to be controversial, but of course it is
22 for you to confirm that or not.

23 A. I try to be positive with my evidence rather than
24 negative, so I try to put forward cases and evidence.
25 So it could well be that I did not criticise the CMA at

1 that point.

2 Q. All right. Well, let us see what you say about it here.

3 We have seen that you say you do not rule it out and
4 I think you said, a moment ago, words to the effect of
5 "I just do not know". So is it fair to say that you do
6 not offer any conclusion on whether full delisting would
7 be a likely response to a SSNIP on commissions?

8 A. I would agree with what I have written in 2.25, I do not
9 rule it out as a possible response. "Possible" is less
10 than likely, I agree, if that is --

11 Q. Yes, so I think you are agreeing with me that you do not
12 offer any conclusion to the effect that it would be
13 a likely response to a SSNIP on commissions?

14 A. I do offer a conclusion, and I have presented that in
15 2.25.

16 Q. If you could go back to the previous page, please
17 {A/9/20}, we see the first of two points that you make
18 in connection with this.

19 First, you say under the first bullet point of 2.25
20 that the CMA failed to ask a price diversion question
21 when asking HIPs about delisting, and am I right to
22 think that what you mean by a price diversion question
23 in this context is something like what would the HIPs
24 have done if commissions had increased by X%. Is that
25 the sort of thing you have in mind?

1 A. I think I go further than just the price change, but
2 looking at the question which is in the footnote, it did
3 not position it as this is across all PCWs in this
4 hypothetical world. I am not suggesting the CMA had to
5 say that type of jargon, but it was not clear to me
6 reading that section, that section 26 notice, that the
7 insurers were being asked about what they would do if
8 PCWs across the board increased their commission fees.

9 Q. What I am trying to get at is what it is that the CMA
10 did not do that you say it ought to have done.

11 A. So I think they ought to have put it to them like that.
12 The Section 26 notice did not give me that impression as
13 a reader, that we were talking about a market-wide
14 increase in commissions, how would you have responded.
15 It did not come across to me as a market definition-type
16 question.

17 Q. I see. You say here that the sort of question you had
18 in mind would have enabled the CMA to quantify the SSNIP
19 test insofar as it applied to HIPs?

20 A. That is what I state.

21 Q. Yes, but you accept that the CMA was not in this case
22 seeking to conduct a quantitative SSNIP test?

23 A. That is not stated in the CMA Decision that they were
24 not trying to quantify the SSNIP test, because I did not
25 know that when I wrote that point.

1 Q. Does one not see from the Decision, is it not implicit
2 in the fact that it does not conduct a quantitative
3 SSNIP test that that was not what it was seeking to do?

4 A. No, if you cannot do -- you can seek to do something,
5 but you cannot do it because the evidence is not
6 available, and that is why I find it odd when you have
7 an opportunity to ask a question that could give you the
8 information, you do not ask that question.

9 MR LASK: I want to come on to what the CMA did actually ask
10 in the Section 26 notices. Sir, I am mindful of the
11 time. I am very happy to carry on.

12 THE PRESIDENT: No. As we explained, we have a time
13 constraint. If that is a convenient moment for you,
14 then it is a convenient moment for us.

15 MR LASK: It is.

16 THE PRESIDENT: Thank you very much, Mr Lask, I am very
17 grateful.

18 Ms Ralston, I give this warning to all witnesses,
19 but it is going to be a rather nuanced warning to you:
20 do not talk to anyone about your evidence. That is the
21 headline point. The subsidiary carve-out from that is
22 that you are giving your evidence as it were on two
23 topics. At the moment, you are giving your evidence on
24 market definition and will go on to what I will call
25 other econometrics in due course.

1 You must not talk to anyone, including your legal
2 team, about the subject matter on which you are giving
3 evidence now: market definition. You may talk to your
4 legal team about any other points regarding the case,
5 but I would ask you to be careful about who you speak to
6 and what you say, and what I would suggest is that you
7 take a responsive approach to the legal team. I know,
8 because they are a very capable legal team, that they
9 will think very carefully about what it is they ask you
10 before they do, and I think you can take it from me that
11 Mr Beard will have careful control of this process and
12 he will approach you only appropriately. So if he does
13 or one of his team does, then feel free to answer and do
14 not feel inhibited beyond the broad guidance I am giving
15 you now, but tread carefully. I think you know what
16 I am saying.

17 A. I understand, yes.

18 THE PRESIDENT: Mr Beard.

19 MR BEARD: I am most grateful for you for providing that
20 detailed warning, and obviously we will apply our
21 self-denying ordinance in any event with a degree of
22 caution, but we are most grateful for that. I do not
23 have any other matters, but I think perhaps on behalf of
24 all of those here to wish you congratulations on the
25 announcement earlier today.

1 THE PRESIDENT: Well, that is very kind, thank you very
2 much.

3 I have one other very minor point, which is this:
4 Mr Ben Tidswell is a newly appointed chairman to this
5 Tribunal.

6 MR BEARD: Yes.

7 THE PRESIDENT: In the ordinary course, he is keen to see
8 how things work on the far side, and I am minded to
9 invite him to attend in court just to see how things go
10 on and familiarise himself with our processes. He will
11 not obviously take any part in the deliberations of the
12 Tribunal. He is simply familiarising himself with
13 things. The reason I raise it is because we are of
14 course in private session at the moment and I wanted to
15 check whether there were any issues -- he will obviously
16 be told about the constraints -- of him sitting in. If
17 there is a problem, then I will tell him simply not to
18 come.

19 MR BEARD: I cannot remotely think there would be any
20 practical issue. Obviously my clients are not with me,
21 so I cannot take instructions, so I will do it over the
22 weekend.

23 THE PRESIDENT: Please think about it.

24 MR BEARD: I do not imagine there will be. The only thing
25 is that I do not know whether as a matter of the

1 formalities he actually needs to be signed up under the
2 confidentiality ring, because he is not a member of the
3 Tribunal, or covered with whatever confidentiality
4 protections operate as the ancillary protection for all
5 of the CAT staff and Opus 2 and so on. So I just do not
6 know the formal answer as to whether or not he actually
7 needs to sign something.

8 I will liaise with Ms Demetriou and the CMA, but it
9 may well be that within the resources of the
10 institutional knowledge, as I think they put it, of the
11 CAT you actually know the answer to that, because
12 otherwise that would be the only thing, but I cannot
13 imagine that my clients have any issue with it at all.

14 THE PRESIDENT: No, indeed. Both of you think about it over
15 the weekend. I will certainly ensure that he knows
16 about this, and I will take up your point about, as it
17 were, institutional protection because my inclination
18 would be to avoid him having to sign something.

19 MR BEARD: I would much prefer that.

20 THE PRESIDENT: Indeed.

21 MR BEARD: I only raise it because I just do not know the
22 answer and you raised the point now.

23 THE PRESIDENT: Absolutely.

24 MR BEARD: From our point of view, I think you can presume
25 our clients would have no objection and it is quite

1 understandable.

2 THE PRESIDENT: Thank you, Mr Beard. Mr Lask, do you have
3 anything to add or Ms Demetriou?

4 MR LASK: Sir, just in case it helps, it may be obvious, but
5 the questions I am proposing to ask on Monday morning
6 will still need to be in private session.

7 THE PRESIDENT: You are absolutely right. I am assuming --
8 and let me direct now -- that we will carry on in
9 private session as we have done. You are absolutely
10 right to raise that, Mr Lask. Otherwise we will have to
11 waste five minutes clearing the courtroom again and that
12 would be undesirable.

13 MR BEARD: I have already informed my clients it will be
14 a notionally late start for them.

15 THE PRESIDENT: I am very grateful. Those who are arranging
16 our live feed, please do not. That is all I will say
17 there.

18 Well, thank you all very much. As ever, we are
19 incredibly obliged to everyone. We will resume at 10.30
20 on Monday morning. Thank you very much.

21 (2.32 pm)

22 (The hearing adjourned until 10.30 am on
23 Monday, 8 November 2021)

24

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