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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

Monday, 8 November 2021

(10.32 am)

In private

Housekeeping

THE PRESIDENT: Ms Ralston, do come in and make yourself comfortable. You are still under oath, we will not be reswearing you or anything like that, so welcome.

Just a couple of housekeeping matters and I do not know if counsel have any themselves.

We sent either very early this morning or very late last night an indication that Professor Ulph would be wanting to put to Ms Ralston in her next cross-examination, and Professor Baker when he comes to give evidence, the paper at {F/565/1}. We felt that to the extent possible the witnesses and indeed counsel should have the pleasure of looking at the equations in that particular paper because Professor Ulph may have some questions about it. Nothing for you to worry about this morning, Ms Ralston.

So that is by way of advance notice. If -- it goes without saying but I will say it nonetheless -- if any witness needs more time out to consider these things of course they will have it and I want them to ask for that, but a bit of advance notice never does any harm.

So that was the first point.

1 The second point is I have over the weekend
2 considered the position of Mr Tidswell and I think
3 because in my judgment his presence is necessary for
4 development purposes he is in the position of all of us
5 at the CAT, namely bound by the rules that bind us all.
6 I have unsurprisingly got his assurance and I know that
7 is not a point but I will put it on the record. So he
8 is present in court, and I am assuming there are no
9 issues with that, but obviously if there are I will
10 hear.

11 MR BEARD: No, there are no issues on our side. But it is
12 very helpful and it is good that no further logistics
13 are required.

14 I think there was one issue that Ms Demetriou and
15 I were just canvassing, since you were asking about
16 housekeeping, I thought it would be worth picking up.

17 THE PRESIDENT: Of course.

18 MR BEARD: It is actually the timing for when the Tribunal
19 wants written closings, because I do not think we have
20 actually decided precisely when that is. At the moment,
21 we have oral closings starting Tuesday afternoon, which
22 obviously would give the morning, but given that the
23 closings may include a number of document references and
24 so on, we were conscious that from our side of course we
25 always want to be able to submit these things as late as

1 possible, but obviously we want to ensure that the
2 Tribunal has proper opportunity to read through the
3 written closings beforehand.

4 So it is not necessarily a question that requires
5 answering right now, and it may be something that the
6 Tribunal wishes to discuss amongst themselves in order
7 to work out what would be convenient, but it would just
8 be helpful for planning for teams on both sides for
9 later in the week if the Tribunal would give us an
10 indication as to when they want written closings,
11 I would be grateful.

12 THE PRESIDENT: That is an entirely fair point. We will
13 take it away and think about it.

14 MR BEARD: Thank you.

15 THE PRESIDENT: Like you, we are conflicted in that we want
16 to give the parties as much time as possible to write
17 them, but we are quite conscious that the parties would
18 like us to read what they have written, so it is
19 something we will think about and come back to you.

20 MR BEARD: I am grateful, thank you.

21 THE PRESIDENT: Thank you. Mr Lask.

22 MS HELEN RALSTON (continued)

23 Cross-examination by MR LASK (continued)

24 MR LASK: Thank you, sir. Good morning, Ms Ralston.

25 A. Good morning.

1 Q. On Friday we were discussing your evidence on full
2 delisting as a response by HIPs to a SSNIP on commission
3 fees. I would like to come on now to what you say in
4 your evidence about partial delisting. If you could
5 please have on the screen in front of you your first
6 report, tab 5, page 46 {A/5/46}.

7 In this section of your first report, you present
8 some analysis based on consumer intelligence data which
9 you say shows that HIPs are able to vary how many quotes
10 they return on PCWs relative to their direct channels.

11 Now, there is obviously some disagreement between
12 you and the CMA as to how robust the CI data is.

13 I would like to leave that to one side for present
14 purposes, but your analysis on this is at paragraph 4.17
15 onwards, and there is also some further more detailed
16 analysis in appendix A2 which I do not think we need to
17 turn to at this stage, but essentially you find examples
18 where the number of risks returned by a HIP on a given
19 PCW and its direct channel varies each month.

20 At 4.20, this is page {A/5/47} now, 4.20 you say you
21 do not speculate as to why the HIP has chosen to vary
22 how many quotes it returns on PCWs relative to its
23 direct channel, but you consider that this confirms that
24 partial delisting could be a potential response by HIPs
25 to a SSNIP on commissions.

1 If you could then please have in front of you what
2 Dr Walker says about this which is tab 8, page 16
3 {A/8/16}, and it is paragraphs 61 to 62, and would you
4 mind taking a moment to re-read those paragraphs,
5 please. (Pause)

6 A. Yes.

7 Q. Thank you. So what Dr Walker says, at least his first
8 point is that your analysis in his view is not very
9 informative because it does not show that HIPs would be
10 likely to respond to a SSNIP by partially delisting or
11 that any such response would lead to a sufficient
12 reduction in sales to be unprofitable. Then you address
13 this in your second report at paragraph 2.40 which is
14 tab 9, page 25 {A/9/25}. You see at paragraph 2.40 you
15 disagree with Dr Walker, and you suggest that since some
16 HIPs refer to partial delisting as a possible response
17 to an increase in commissions, it is possible that the
18 variations you observed in your analysis in your first
19 report were a reaction by HIPs to past changes in
20 commissions. But you do not know whether that was in
21 fact the case, do you?

22 A. I think the statements by some of the HIPs that I am
23 referring to there, where they say that they have
24 considered partially delisting and they would have to
25 should commissions continue to increase in the future is

1 correct, I cannot prove the link, but it is possible as
2 a conservative assessment of the data.

3 Q. So it is possible, but not established?

4 A. That is correct.

5 Q. Even if it was the reason for your observed variations,
6 Dr Walker is right, is he not, to say that it does not
7 follow from that that HIPs would partially delist in
8 sufficiently large numbers to render a SSNIP on
9 commissions unprofitable?

10 A. This is part of the evidence in itself. It does not
11 prove that point.

12 Q. If you look next -- I am sorry to jump back and forth
13 between your reports, but back to your first report at
14 appendix A2 which is tab 5, page 187 {A/5/187}, can you
15 see there at paragraph A2.3 you list the brands for whom
16 you conducted this analysis. So it was not all brands,
17 but I think you have between 10 and 12 brands there. So
18 those are the ones for whom you present graphs in the
19 following pages of the appendix.

20 You mentioned a moment ago that some of the HIPs had
21 mentioned partial delisting in their responses to the
22 CMA. It is right, is it not, that only three of the
23 HIPs that you analyse here mentioned partial delisting
24 to the CMA. That is AA, Tesco and Churchill/Direct
25 Line?

1 A. Those three certainly did. It was not easy to navigate
2 through all the URNs to confirm whether every insurer
3 the CMA approached presented any evidence on this. In
4 response to Dr Walker's report I went back to some of
5 the testimonies to see what they said in response to
6 that question, and I identified three further insurers
7 to the two referred to in the CMA's Decision. So I have
8 not -- it could be that of those other seven insurers
9 some of them could have also referred to it. I have not
10 ruled that out.

11 Q. I see, but between yourself and the CMA the only ones
12 who have been identified, so far at least, as having
13 referred to it are the three I have just mentioned?
14 I appreciate you have identified two others in your
15 evidence, but they are not included in the list of
16 insurers that you analysed in appendix A2.

17 A. So the five are -- the CMA put forward Tesco and I think
18 AA. Then I identified three more, Direct Line, Deeside
19 and Admiral, and in this list we see AA, Tesco and
20 Churchill, so -- sorry, I am getting lost with the
21 names. The question was whether the other seven might
22 have made statements?

23 Q. Well, the way I put it was really to seek your
24 confirmation that of all the HIPs whose quote variations
25 you have analysed, we are only aware, between us, of

1 three having mentioned to the CMA that they considered
2 or engaged in partial delisting?

3 A. I am thinking Saga might have said something similar
4 because they have said a lot about cross-selling to
5 their existing members and the extent to which they see
6 PCWs as a distribution channel, so I would -- if this
7 was an important point I would want us to look through
8 those ten insurers' testimonies.

9 Q. You would want to go and recheck them all?

10 A. Yes, I did not think in my second report it was
11 necessary to go through every insurer and seek out
12 whether they referred to partial delisting.

13 Q. I see. Well, that is very fair.

14 I would like to turn now to look at what those HIPs
15 who we do know mentioned it.

16 A. Yes.

17 Q. What they said about it, and the first one is the AA,
18 which is at tab {F/304}. This is the AA's response to
19 a Section 26 notice. If we turn firstly to page
20 {F/304/5} of this document, we see question 5 from the
21 CMA:

22 "Please describe to what extent changes in the
23 Commissions paid by AA to PCWs have affected the
24 premiums set by AA for Home Insurance on PCWs, or on
25 other Channels, over the Relevant Period."

1 We see AA's response, and I will not read all of it
2 out but I would just like to focus on the third
3 paragraph of the response:

4 "Alternatively [this is an alternative, I think, to
5 passing on the commission -- a commission fee increase]
6 suppliers could choose to ... only quote on consumer
7 risks that are profitable within the more expensive
8 channel [so I think that is what we might call partial
9 delisting] or (2) withdraw from expensive PCWs
10 altogether. Neither of these options would provide
11 a good outcome for consumers nor for the AA's insurance
12 business. This in effect leads to the same price points
13 that a wide MFN would demand."

14 So we see there the AA referring to partial
15 delisting, although without at this stage calling it
16 partial delisting, but it does not consider it a good
17 outcome for itself or for consumers.

18 Then if we go --

19 A. Can we look at question 7, their response?

20 Q. Yes, I am coming on to that. If we then go to actually
21 question 6(f) next, which is at page {F/304/10}, on the
22 left-hand side:

23 "Please indicate what strategy or strategies AA has
24 adopted (excluding delisting or where delisting was
25 considered which are covered in Questions 7 and 8 below)

1 to resist Commission increases and how successful each
2 strategy was."

3 So that is the CMA asking the insurers to explain
4 what strategies they have adopted in the past or
5 considered adopting to resist commission fees, but it is
6 saying insofar as you have tried delisting, please deal
7 with that below, and then we can go on to -- well,
8 question 7 is there on the same page:

9 "Please explain whether AA has considered delisting
10 from a PCW, but ultimately not delisted, during the
11 Relevant Period."

12 Then AA's response, I think this is what you wanted
13 to look at:

14 "The AA has considered the possibility of delisting
15 in a general sense -- however the AA's business relies
16 enormously on the PCW channel such that the potential
17 damage to growth and future relationships that would
18 occur if AA delisted prevents it from actually
19 delisting. We have therefore never actually chosen to
20 delist completely ..."

21 Then:

22 "From time to time, we have ceased providing quotes
23 through PCWs for specific segments of business, to
24 protect the AA's profitability for such segments. This
25 would have occurred across all PCWs. Although this is

1 not delisting in the strictest sense, it could be
2 considered to be a form of partial delisting."

3 Then the next question, question 8, is a similar
4 question, but it is asking about what they have actually
5 done rather than what they have just considered doing.

6 The first point I would like to put to you is where
7 you say in your report that CMA's questions were binary,
8 and this is at paragraph 2.24 of your second report
9 which I do not think we need to go back to just yet, but
10 you say the CMA's questions were binary and they were
11 only concerned with fully delisting or not delisting at
12 all, and they did not take into consideration the
13 possibility of partial delisting, but, as we have seen
14 from the questions asked there, the CMA has not ruled
15 out partial delisting in the design of its questions,
16 has it?

17 A. Yes, as the AA has responded they could proactively
18 refer to partial delisting. If they wanted to probe
19 further they could have asked a question which referred
20 specifically to that matter.

21 Q. Yes, but what the questions are asking about here is
22 what the HIPs have done or considered doing in the past,
23 and if you have a HIP reading these questions and it has
24 in fact partially delisted or considered partially
25 delisting, then it is not plausible, is it, to suggest

1 that it would read these questions and think the CMA is
2 not interested in partial delisting so we will not
3 mention it?

4 A. So I have referred to partial delisting and delisting,
5 but through the course of this investigation I have
6 learnt that that is perhaps not the term insurers would
7 have referred to. PCWs refer to quotability.
8 I wondered if that might resonate more with insurers
9 than delisting.

10 Q. You mean quotability -- reducing quotability as
11 a response to an increase in commission fees?

12 A. Yes.

13 Q. But not necessarily thinking of it as delisting?

14 A. Yes, they might think of it as reducing quotability as
15 opposed to -- as AA put it, they seem to suggest that
16 partial delisting is not a term they would normally use,
17 so I perhaps used the wrong word.

18 Q. If we look back at page {F/304/10} which I think is
19 still on the screen, and question 6(f):

20 "Please indicate what strategy or strategies AA has
21 adopted ... to resist Commission increases and how
22 successful each strategy was."

23 If a HIP thinks of partial delisting as not actually
24 a form of delisting, as simply a reduction in
25 quotability or a reduction in footprint, that would be

1 captured by that question, would it not, 6(f)?

2 A. Yes, that is correct.

3 Q. If we go then to what Tesco said which is at {F/428},
4 and this is a note of a meeting between the CMA and
5 Tesco or a follow-up to the Section 26 response, and on
6 page {F/428/4} we see paragraph 14 of the note:

7 "AR asked Tesco for more detail about how it might
8 resist a commission increase by tactically reducing its
9 footprint as indicated in Tesco's response question 10
10 of the CMA's November notice."

11 Just pausing there, another point you make in
12 paragraph 2.40 of your second report {A/9/25} is that
13 the CMA did not follow up on the Section 26 responses to
14 probe partial delisting further, but this document shows
15 that that is exactly what it did where it thought
16 necessary, does it not?

17 A. I do not have the dates in front of me of the document,
18 but it could be, if that is what you are -- if you have
19 confirmed that.

20 Q. We can go back and follow the date trail through if we
21 need to but if we look at the first sentence of
22 paragraph 14, you can see what the CMA is doing there is
23 following up on Tesco's response to question 10 of CMA's
24 November --

25 A. The reason I made that statement was the oversight of

1 the CMA for not referring -- or perhaps oversight is too
2 strong a word, but it referred only to Tesco and AA.
3 When I went to the documents I found three other quite
4 notable insurers had referred to partial delisting or
5 changing its footprint size, so that is why I wrote that
6 statement.

7 Q. All right, let us be a bit careful about the numbers.

8 You mentioned three others. I will come on to them, but
9 only one other mentioned it in the Section 26 response.
10 The other two you refer to, which I will come on to, you
11 find it mentioned in contemporaneous email exchanges
12 rather than a Section 26 response. So I just want to
13 make that clear now, but I will come on to it.

14 But dealing with the Tesco response, we see second
15 sentence onward:

16 "Tesco noted that it adjusted its footprint on a PCW
17 by adjusting the minimum and maximum premiums it would
18 quote on a PCW. By varying these across PCWs Tesco
19 would provide a quote for certain risks on certain PCWs,
20 but not others. In terms of how effective this was,
21 Tesco noted that it has only made small changes to its
22 footprint and this has not been successful. In
23 particular, the impact on PCWs is probably limited given
24 the number of other insurers quoting on PCWs. However
25 Tesco has not made severe reductions or ceased quoting

1 for a particular risk."

2 So this evidence is showing, is it not -- and
3 I would say the same applies to the AA answers we have
4 just seen -- that whilst partial delisting may be
5 considered by HIPs as a possible response to commission
6 fees, it is not a particularly attractive strategy for
7 them, is it?

8 A. So in the context of past commission increases that is
9 correct, but we need to use this information to infer
10 how they might respond to a SSNIP by a hypothetical PCW.
11 So in the context of all PCWs increasing commission fees
12 by a more notable increase than what has happened in
13 a competitive market, whilst it may not have been
14 profitable in the past in the context of those
15 competitive commission increases, it could be, this does
16 not rule out it being a profitable thing to do in the
17 context of the SSNIP.

18 Q. It does not rule it out. So in the context of a SSNIP
19 we would be considering how the HIPs might view partial
20 delisting as a response to a commission fee increase by
21 the only PCW in town; correct?

22 A. Yes.

23 Q. Would not partial delisting from the only PCW in town be
24 even less attractive a proposition than partial
25 delisting from one of four?

1 A. I do not see that.

2 Q. The third HIP that mentioned partial delisting in
3 a response to the CMA is Direct Line Group, and its
4 response is at {F/299}.

5 You refer to its answer at paragraph 6.1 which is on
6 page {F/299/5}. We see there:

7 "Changes in PCW Commission would naturally
8 contribute to DLG's cost base. If Commission inflation
9 becomes higher than premium inflation, this can
10 contribute to a reduction in potential profit ... and
11 lead to premium increases ... Whether Commission changes
12 result in premium increases will depend on trading
13 conditions ... Over time, continued pressure on profit
14 could lead to sustained premium increases or a reduction
15 in quotes footprint (i.e. areas where DLG chooses to
16 return a quote through PCW based on typical customer
17 characteristics) ..."

18 So that is the part of the response you rely on. If
19 we go back in this document to paragraph 1.4 which is on
20 page {F/299/2}, we see:

21 "If DLG brands were no longer sold through the PCWs
22 (but assuming that [its] competitors remained
23 available ...), it would be extremely difficult to
24 replace volume of lost sales, both in terms of cost and
25 time spent rebuilding other Channels."

1 Then at the end of that first bit of the paragraph:

2 "DLG envisages that to do so would require at least
3 the following changes ..."

4 It sets out the changes and then at 1.5:

5 "Both of these would be expected to reduce DLG's
6 profitability."

7 I appreciate that what DLG is talking about here is
8 full delisting, but you will recall Dr Walker's point at
9 paragraph 62 which we looked at a few moments ago where
10 he said that, well, yes, partial delisting would be less
11 costly for the HIP, but it would also be less beneficial
12 so that has to be taken into account, but the point
13 I put to you now is that even taken at its highest this
14 evidence we have looked at so far from three HIPs cannot
15 possibly establish, can it, that HIPs would be likely to
16 respond to a SSNIP on commissions in sufficiently large
17 numbers to render that SSNIP unprofitable?

- 18 A. So taking that question apart, the sufficiently large
19 numbers should not be overstated. It would be 5% of PCW
20 purchasers, those lost sales, so you would not need
21 large numbers, you need 5% of people that would have
22 sold on the PCW to delist it or partially delist it.

23 Yes, I am not going to overstate the position.

24 These statements on themselves do not prove what would
25 have happened in the context of a SSNIP. I responded to

1 Dr Walker's points about what they would likely do by
2 referring to the evidence that actually quite a lot of
3 insurers seem to cross-sell to customers that are known
4 to the brand, you may want to go on to that or I can
5 explain it now, but overall I think there is quite a bit
6 of evidence that suggests it is likely that delisting --
7 partial delisting would be sufficient to constrain the
8 hypothetical monopolist.

9 Q. Shall we look at the evidence you have just referred to.

10 I think what you are referring to --

11 PROF ULPH: I wonder if I could ask a question at this
12 point. Ms Ralston, could I ask a question?

13 A. Yes, sure.

14 PROF ULPH: You are looking at an increase of commissions of
15 5 to 10% on the HIPs side of the market, and you
16 identify two potential effects of that. One is
17 delisting or partial delisting by the HIPs themselves,
18 and the second effect is an effect on consumers.

19 For the SSNIP test to work, do you require that each
20 particular component of those two effects is itself
21 unprofitable, or is it just the combined effect of those
22 two effects that has to be unprofitable for the SSNIP
23 test on the provider's side?

24 A. Yes, it is just the total. The total lost sales to the
25 PCW would need to be sufficient to constrain the

1 hypothetical monopolist. So it could come from some
2 customers choosing to buy elsewhere or from the partial
3 delisting or selective quoting by the insurers.

4 PROF ULPH: So the fact that partial delisting in itself may
5 not be unprofitable does not lead to any immediate
6 conclusions about whether or not the SSNIP in terms of a
7 5 to 10% increase in commissions has or has not been
8 met? Am I right?

9 A. I agree, yes.

10 PROF ULPH: Thank you. Thank you.

11 MR LASK: Thank you, Professor.

12 I was just taking you, Ms Ralston, to the evidence
13 on this point to which you just referred which is in
14 your second report at paragraph 2.31 onwards, so that is
15 {A/9/22}. You will see just above that you set out
16 Dr Walker's point and then you respond to it, and you
17 respond to it by explaining that in your view partial
18 delisting is less costly than full delisting because
19 HIPs can select which types of customers they delist to,
20 and then you set out over the following paragraphs some
21 factual evidence in relation to this. This is at
22 paragraph 2.33 onwards.

23 I do not want to take you through the specifics but
24 by all means do refer to any of it that you would like
25 to, but in terms of what you draw from that factual

1 evidence it is right, is it not, that what you conclude
2 is that this evidence establishes that HIPs would be
3 able to partially delist in the selective way that you
4 describe, is that fair?

5 A. Yes, that is correct.

6 Q. What it does not show is that any of them have acted in
7 this way, or indeed would be likely to, in response to
8 a SSNIP on commissions?

9 A. So as a SSNIP on commissions has not happened, I will
10 not be able to draw on any evidence to prove that
11 insurers have responded in that way. I think taken
12 together that it does show that this is a likely
13 response. I have set out the evidence for others to
14 draw a different conclusion, but I remain of the
15 conclusion I have put in my report that this is a likely
16 response.

17 Q. I appreciate that you cannot, because there has not been
18 a hypothetical SSNIP on commissions, you cannot show
19 that they have reacted to one in this way, but my
20 question was you cannot show that they have reacted in
21 this way to any increase on commissions, this
22 selective -- customer selective delisting?

23 A. I disagree because I think some of the quotes we
24 referred to talked about in the past some insurers have
25 changed the size of their footprint. We could go back

1 to them just to confirm, but I think we just went
2 through some of the factual statements that indicate
3 they have in the past.

4 Q. So it would be Tesco, the AA and Direct Line?

5 A. Yes.

6 Q. All right. You mentioned two other HIPs which I said
7 I would take you to. It is Deeside and Admiral, and
8 these are the two others you have identified as having
9 referred to partial delisting. If we look first at what
10 Deeside said. This is in an email exchange with CTM at
11 {F/201}. This is an email exchange concerning Deeside
12 quoting higher prices on CTM. CTM have picked up on
13 this in their monitoring and they have raised it with
14 Deeside. I think the passage you rely on is at the
15 bottom of page {F/201/2}. Not quite the bottom. Sorry,
16 it is halfway.

17 A. Yes, I can see it.

18 Q. This is towards the end of the Deeside email, responding
19 to CTM's complaint saying:

20 "In saying this, what I can do is look into reducing
21 the quotability with Compare the Market if you are
22 unhappy that there maybe a few quotes whereby Gocompare
23 get a slightly better rate than Compare the Market.
24 This will reduce the number of sales."

25 This is Deeside saying if you are unhappy with

1 having more expensive quotes on CTM we can reduce the
2 number of quotes. So that is Deeside's response to CTM
3 complaining about more expensive prices. Deeside is not
4 there suggesting partial delisting as a possible
5 response to commission fee increases.

6 A. Yes, I was referring to Deeside just to show --
7 I thought the CMA at one point were saying it was
8 technically impossible or technically difficult to
9 partially delist, so part of my analysis was explaining
10 that technically this can be done and that was the CI
11 data to show that and Deeside confirms that they can
12 control what risk they show prices for.

13 Q. I see. If we then go to Admiral, it may be your answer
14 is the same. Admiral is at {F/233}.

15 This I think is an internal CTM email reporting back
16 on negotiations with Admiral. We see at the bottom of
17 this page:

18 "I am in commercial negotiation with Admiral and
19 detailed below is their counter proposal. I have had
20 a long chat with them today where they have explained
21 their rationale however, as part of those conversations
22 they mentioned they may have to reduce quotability or
23 price parity to take the hit on the CPA."

24 So is what you draw from that again the point that
25 they could do it technically?

1 A. No, I take a stronger conclusion with Admiral due to the
2 part in the middle of the email where CTM is reflecting
3 that every 10% drop in quotability by Admiral is very
4 costly to CTM, and I think they are saying that that is
5 going to constrain, they are going to take that in mind
6 when they set their CPAs.

7 Q. But we do not know that Admiral went ahead with its
8 threat, it could just have been fighting talk, is that
9 not right?

10 A. We could look at the charts. Did I look at Admiral?

11 Q. No. You did not look at Admiral or Deeside.

12 A. That would have been due to -- well, that could have
13 been due to challenges with the data. So perhaps we
14 cannot confirm that. I certainly cannot right now.

15 Q. I would like to move on from delisting if I may and deal
16 now with your critical loss analysis.

17 A. Sure.

18 Q. You have carried out what you call an illustrative
19 critical loss analysis. I may refer to it as a CLA just
20 for shorthand, CLA.

21 A. Yes, sure.

22 Q. You have carried out a CLA to test the consumer response
23 to a SSNIP on commission fees. So we have been looking
24 until now at a HIP response and we are now getting on to
25 a consumer response, and the aim of your analysis is to

1 help assess whether a sufficiently large proportion of
2 consumers would switch to the direct channel in response
3 to a commission fee increase, a SSNIP, that was passed
4 through to retail prices, a sufficiently large number to
5 render it unprofitable.

6 Now, you are of course aware, and you make reference
7 in your report to the debate between the CMA and
8 Dr Niels on whether narrow MFNs should be taken into
9 account when applying the SSNIP test and of course you
10 know the CMA's position is they should not be -- sorry,
11 that they should be, and Dr Niels' position is that they
12 should not be.

13 But I do not want to get into that debate because
14 that has been fully canvassed with Dr Niels, but
15 would you agree that the effect of the narrow MFNs is to
16 ensure that any price increase that HIPs made on the
17 PCWs in response to a SSNIP on commissions could not
18 result in prices being lower on their direct channels?

19 A. The narrow MFN contractually would prevent that.

20 Whether it prevents it in practice, it is something for
21 analysis.

22 Q. Yes, well, I would like us to assume that that is the
23 effect of a narrow MFN both as a matter of contract and
24 in practice, and on that assumption you would agree that
25 by having that effect the narrow MFN removes or at least

1 significantly reduces any price incentive the consumers
2 may have to react to a PCW price increase by switching
3 to the direct channel?

4 A. As with wide MFNs you may have insurers choosing to
5 price strictly cheaper on the PCW channel relative to
6 the direct channel, which would mean that they would
7 have an ability -- we could go to the Chair's table if
8 that were useful, but to the extent that they are
9 strictly cheaper, there is a room to increase the price
10 to remove the -- to reduce the price differential
11 between price comparison websites and the direct
12 channel.

13 Q. But not for prices to drop below the PCW price on the
14 direct channel?

15 A. That would be contrary to the narrow MFN.

16 Q. The point I am making is that really the premise on
17 which your CLA is based is one in which the Tribunal
18 agrees with Dr Niels that you have to leave narrow MFNs
19 out of account because once narrow MFNs are part of the
20 analysis, it makes a fundamental difference to the
21 likelihood of consumers switching in response to a price
22 increase. That is a fair statement, is it not?

23 A. It is a fair statement.

24 Q. If we could turn now to the substance of your CLA and
25 look first at section 4B.3 of your first report which is

1 {A/5/48}. We see the heading there, "Assessing the
2 consumer response to a SSNIP on commissions", and the
3 first point you make is at 4.22, where you say in order
4 to understand the impact of a SSNIP on the consumer
5 side, the relevant cohort is the number of PCW customers
6 who multichannel, so those who generate a quote on the
7 direct channel before purchasing via the PCW.

8 You are aware that the CMA found the size of that
9 cohort to be 16%, that is the Decision 5.78, although
10 I do not think we need to go to it now. I know you have
11 taken some points as to whether that is an underestimate
12 and we can come to that, but that is what it found, that
13 it was 16%.

14 You then explain the steps in your analysis. This
15 is over the page at page {A/5/49}.

16 First, you apply a SSNIP to commissions and assume
17 100% passthrough, that is 4.26.

18 At 4.27 you note that users -- this cohort are price
19 sensitive, so are likely to notice the increase.

20 Then the third point you make, which is now on page
21 {A/5/50}, 4.28, the third step in your analysis is you
22 calculate what proportion of customers would need to
23 switch away to make the SSNIP unprofitable, is that
24 right?

25 A. Yes, that is correct.

1 Q. This proportion that would need to switch away to make
2 it unprofitable, this is the point at which the loss of
3 profits caused by the switching would exceed the higher
4 profits earned by the hypothetical monopolist on its
5 remaining customers. Have I understood the point
6 correctly?

7 A. Yes.

8 Q. Having identified that point which I call the critical
9 loss point it is then necessary to consider whether that
10 level of switching is likely to take place; correct?

11 A. Yes, I agree.

12 Q. At 4.30 you say, having identified the critical loss
13 point in 4.29, at 4.30 you say:

14 "This indicates that, contrary to the CMA's finding,
15 a SSNIP on commissions would be unprofitable for the
16 [hypothetical monopolist], and therefore that direct
17 channels should be considered part of the relevant
18 market."

19 So you are relying on your CLA to conclude that
20 a SSNIP on commissions would be unprofitable; correct?

21 A. Yes, that is correct.

22 Q. You agree, do you not, that the critical loss
23 calculation depends on two factors. First, the
24 percentage price increase, 5% or 10%, and secondly the
25 assumed profit margin. Is that right?

- 1 A. That is correct.
- 2 Q. In your first report, which we have open in front of us,
3 we see at paragraph 4.28 that you assumed a profit
4 margin of 45% based on the CMA's assessment of
5 Facebook's profit margin in the digital market study.
- 6 Now, you were content, were you, at the time of your
7 first report that that margin represented a reasonable
8 proxy for the hypothetical monopolist's margin; is that
9 right?
- 10 A. At the time of my first report, yes.
- 11 Q. Then at 4.29 we see that your results indicated that
12 depending on the level of SSNIP, either 31% or 56% of
13 multichannellers would have to switch to render the
14 SSNIP unprofitable; yes?
- 15 A. Yes.
- 16 Q. That is around a third or a half of all multichannellers
17 depending on the level.
- 18 If we then turn to Dr Walker's report, {A/8/18}, we
19 see at paragraphs 67 to 69 he points out an error in
20 your calculation. Do you want to take a moment to
21 re-read those paragraphs of Dr Walker's report?
- 22 A. No, I am very aware I made a mistake.
- 23 Q. So the effect of the error Dr Walker says was
24 effectively equivalent to assuming that the hypothetical
25 monopolist has a 100% margin; correct?

- 1 A. I have not followed that through. Where does he say
2 100%?
- 3 Q. This is paragraph 68 where he sets out the formula, the
4 incorrect formula $\{A/8/19\}$, and says:
5 "This is effectively equivalent to assuming that the
6 hypothetical monopolist has a margin of 100% ..."
- 7 A. Yes, I can see that.
- 8 Q. The effect of the error was that you had underestimated
9 the percentage of customers that would have to switch to
10 make the SSNIP unprofitable; yes?
- 11 A. Yes, it was the case.
- 12 Q. Then we see in 69 that when the error was corrected your
13 percentages increased significantly to 63% and 114%
14 respectively, so 31 has gone up to 63 and the 56 has
15 gone up to 114?
- 16 A. That is, yes, when based on the 45% margin.
- 17 Q. Yes. Then, as Dr Walker says, the implication is that
18 in order to render a 10% SSNIP unprofitable, all PCW
19 customers who currently check the direct channel would
20 have to switch, all of them, plus some additional
21 customers who do not check that channel at present.
22 That is right, is it not?
- 23 A. I disagree. As I have made clear in my second report,
24 firstly I do not take the 16% PCW purchases as a correct
25 and upper bound of PCW users that look at the direct

1 channel. We have from the survey data 37% of PCW users
2 that state that they shop on the direct channel as well,
3 so that is quite a lot higher than the 16% we are
4 referring to here. Then whether the -- I reviewed the
5 decision of using Facebook's margin as a proxy and took
6 CTM's data as to its margins in my second report.

7 Q. I am certainly going to come on to your second report,
8 but the point I am putting to you at this stage is that
9 if you take the analysis in your first report and simply
10 correct the error, then the new figures one has are 63%
11 and 114% as Dr Walker sets out. That is not something
12 you have taken issue with in your second report subject
13 to the points you have just made.

14 A. Okay, if those points were noted, I did not need to make
15 them again.

16 Q. Then he concludes --

17 PROF ULPH: Ms Ralston, I wonder if I could ask a question
18 at this point. It relates to this whole issue of what
19 formula had been used here because when I came across
20 this debate between you and Dr Walker I was somewhat
21 puzzled by the terms of the debate, so what I did was
22 I went away and rederived the formula myself on first
23 principles. As far as I can see, the formula given by
24 Dr Walker is indeed a conventional formula for
25 calculating the critical number of consumers who,

1 following a price increase, would have to switch away in
2 order for the profits of the firm whose price has
3 increased to fall. Do you agree with that statement
4 that that is what the conventional formula is measuring?
5 So that is the formula given in paragraph 67.

6 A. Yes, I made a mistake in my first report.

7 PROF ULPH: Let me make another point before we get to the
8 mistake. I just want to go back again and say what you
9 are looking at here is the effect on the profits of the
10 firm whose price has increased. Do you agree with that?

11 A. Yes.

12 PROF ULPH: So the price that is being increased here is the
13 retail price, it is the retail price charged by HIPs, so
14 essentially as I understand it the formula that is being
15 given by Dr Walker is the critical loss of consumers for
16 a hypothetical monopoly HIP, not for a hypothetical
17 monopoly PCW.

18 So would you agree with me that the way we ought to
19 do the calculation is as follows. You make a 5 to 10%
20 increase in commissions, you work out the implications
21 of that for the retail price charged by HIPs, you work
22 out the number of consumers who would have completed
23 a purchase through a PCW who now switch away from the
24 PCW, and then you go back and you work out the loss of
25 commission revenue to the PCW that results in that

1 switching away of consumers. Would you agree that that
2 is the set of calculations one ought to make?

3 A. Thanks, Professor Ulph. So that would be the
4 profitability of the SSNIP, as we have been discussing,
5 of a PCW increasing the retail prices perhaps through
6 a commission fee, and I worked through that calculation
7 not in my reports since the discussions, and I agree
8 that that would be unprofitable, and it is quite
9 intuitive because suppose -- I think we all agree that
10 a SSNIP on commissions is about £3 in retail prices, so
11 if you think about it the PCW is losing -- for every
12 sale it loses from a customer switching away that is
13 about £45 in commission, but for every customer that
14 remains with it it is only gaining that £3 because it is
15 getting that, because it has now introduced this fee or
16 whatever. So you are only getting £3 for every one you
17 gain, but you are losing £45 for every one you lose.

18 So it could be that the formula I used originally
19 I will admit accidentally is one that calculates it as
20 Professor Ulph has described, but that is how I -- the
21 formula -- I could go away and then think through the
22 algebra again, but it could be we are on the same page
23 for the SSNIP on retail prices and how that affects PCW
24 profitability, but at the time I was just doing the
25 SSNIP on commissions and feeding it through that way.

1 PROF ULPH: Well, I have done the algebra for you,
2 Ms Ralston.

3 A. Thank you.

4 PROF ULPH: I confirm that the formula given in
5 paragraph 68, if the X there is a 5 to 10% increase in
6 commissions, is indeed the right formula.

7 A. That would make sense with what Dr Walker has said,
8 because of course what I just said was the £3 would be
9 passed straight through, which is what he says where the
10 margin is of 100%, so I think -- but he can talk to that
11 himself, but I think we are all on the same page there.

12 PROF ULPH: Yes, I will definitely put this matter to
13 Dr Walker, thank you.

14 THE PRESIDENT: Can I just ask, just pausing there, I do not
15 want things to come out of left field, less I think for
16 the experts and more for counsel, what we will do is
17 first of all we will produce for the parties to see
18 Professor Ulph's reworking of the formula and we will at
19 some point enable Ms Ralston to comment further on that
20 to the extent that she wishes. More to the point
21 I think this is a matter that the Professor will be
22 putting to Dr Walker. It may be that if we can produce
23 this calculation it is something that you would want to
24 go through with him in chief rather than have it dealt
25 with by Professor Ulph in the course of your

1 cross-examination. But we will leave that to your
2 course.

3 I think the first step will be to produce the worked
4 documents for both experts to consider in a little
5 greater care and for my part we will see what counsel
6 have to say. If that is during the course of
7 Ms Ralston's second foray into the witness box then we
8 can do it then if that is what the time process
9 requires.

10 MR BEARD: That is entirely fine from our point of view.

11 I think the only issue is, as you have already
12 anticipated, if a new formula is being put forward,
13 obviously Ms Ralston has tried to answer on the hoof,
14 but I imagine for most people, however clever, it is
15 nice to have stuff on paper in front of you.

16 THE PRESIDENT: Indeed. I think Ms Ralston you have given
17 a very helpful response, but I think you are entitled to
18 either agree with it on a more considered basis or row
19 back from it if you want to because this is not either
20 a memory test or an exercise in pulling rabbits out of
21 hats. So we will get that done and you will have the
22 opportunity to say more.

23 Thank you very much. Thank you, Professor.

24 PROF ULPH: Thank you.

25 MR LASK: I am very grateful, sir. Thank you, Professor.

1 I think the proposal sounds very sensible certainly from
2 my perspective, and I think the prudent course is for me
3 to carry on asking Ms Ralston questions based on the
4 analysis that she has carried out in her reports.

5 THE PRESIDENT: Of course, yes, Mr Lask, I certainly do not
6 want to take you out of your course, but to the extent
7 that there are additional fast balls being bowled by the
8 Tribunal then it is only fair to you to have the
9 opportunity to consider that with a little bit more time
10 than simply what you have had at this moment.

11 MR LASK: I am very grateful, sir.

12 Ms Ralston, if you could turn, then, to the way in
13 which you responded to Dr Walker's evidence on this in
14 your second report, {A/9/30}, paragraph 2.53.

15 At 2.53 you very fairly acknowledge the error, and
16 you do not take issue with Dr Walker's revised figures.
17 Indeed, they are set out in a table that we will come to
18 over the page, table 2.3. But you do say that the error
19 is "not material and does not affect my conclusions".
20 So even though the critical loss figures have
21 essentially doubled in each case, you say they do not
22 affect your conclusions.

23 Now, you do not say in your second report that
24 a SSNIP on commissions would be likely to generate
25 switching at these much higher levels identified by

- 1 Dr Walker. That is right, is it not?
- 2 A. I do not state that, no.
- 3 Q. Instead what you have done -- and you explain this in
4 some detail in this section of the report -- is you have
5 reconducted your CLA using a range of higher margins.
6 That is right, is it not?
- 7 A. That is correct.
- 8 Q. We see you explain your approach at paragraphs 2.56 to
9 2.57 on page {A/9/31}. We see going over the page to
10 page {A/9/32}, table 2.3, we see that using higher
11 margins, and the margin is set out in the second column
12 headed "Average margin", we see that using a higher
13 margin produces a lower critical loss point. That is
14 right, is it not?
- 15 A. That is correct.
- 16 Q. Yes, so in principle, all other things being equal,
17 using a higher margin, which is what you have done in
18 your reconducted CLA, gives greater support for CTM's
19 case on market definition?
- 20 A. Yes, the higher the margin the less switching away you
21 need for the SSNIP to become unprofitable.
- 22 Q. Yes. You say -- and I am sorry, there is a bit of
23 flicking back and forth between the paragraphs -- but
24 you say at paragraph 2.56 back on page {A/9/31} that
25 your new, much higher margins are reasonable but

- 1 illustrative, but you did not use them in your first
2 report, did you?
- 3 A. No, I can explain why I used Facebook's margins if that
4 is useful.
- 5 Q. Yes, of course.
- 6 A. Yes, so at the time there was a lot of publicity about
7 the very good market study by the CMA, and I wanted to
8 use a number that I felt there was benefit of using
9 a CMA number on margins to one that I had derived,
10 I thought that would be more independent, so that is why
11 I chose to use an external source.
- 12 Q. Yes, and you also thought, you have confirmed this
13 morning that you thought it was a reasonable proxy for
14 the hypothetical monopolist's margins?
- 15 A. Then at the time I did, and Dr Walker pointed out that
16 Facebook is quite a different platform, it does not have
17 a transaction, and its business model would be quite
18 different, so I thought that was a good point and went
19 to see more relevant margins.
- 20 Q. Is it not right that the reason you did not use what you
21 now call your more relevant margins in your first report
22 is because you were comfortable with the critical loss
23 figures that the Facebook margin generated until it was
24 pointed out that they were based on an error?
- 25 A. I thought that looking at CTM's margin as I said

1 required me to do further analysis which would come
2 under scrutiny, so I would prefer to take an external
3 number from the CMA. I will just highlight so that it
4 is clear those margins in table 2.3 obviously do not
5 account for fixed costs which would reduce CTM's
6 margins, you know, if you were to look at CTM's
7 profitability it would be lower than the margins in
8 table 2.3.

9 Q. Yes, and you say just above table 2.3 at the end of
10 2.57 -- and of course what we see in table 2.3 is quite
11 a broad range of margins, and that is why the critical
12 loss figures that are produced are also -- they span
13 quite a broad spectrum, and you say at the end of
14 2.57 -- I am sorry, it begins on page {A/9/31}, at the
15 end of 2.57, overall this new analysis shows that to
16 render a SSNIP on commissions unprofitable, between 32
17 and 44% of the multichannellers would have to switch in
18 response to a 5% increase and between 61 and 83% in
19 response to a 10% increase.

20 So there you are only referring to the figures
21 produced by your new margins. You are not there
22 including the figures implied by your Facebook margin.
23 That is right, is it not? You have excluded it at this
24 stage from that part of your analysis.

25 So what you have ended up here is with critical loss

1 figures that are higher than your original figures based
2 on the Facebook margin, but not as high as the corrected
3 Facebook figures. That is right, is it not?

4 A. I am sorry, what do you mean by the corrected Facebook
5 figures?

6 Q. The 63% and the 114%.

7 A. I present them in table 2.3.

8 Q. You do, but the new figures you are relying on are not
9 as high as those Facebook figures?

10 A. No.

11 Q. Albeit they are higher than your original Facebook
12 figures?

13 A. Based on CTM's margin less people would need to switch.

14 Q. These new figures are better for your client's case than
15 those that emerge from using the 45% margin correctly?

16 A. The new figures are more accurate, I would say, given
17 they are based on a PCW rather than a different business
18 model.

19 Q. If we could look at how you calculated the new margins
20 or the new figures and new margins, you explain at 2.55,
21 page {A/9/31}, that when calculating the margin it is
22 necessary to include costs that would be variable over
23 one to two years. So you mentioned a few moments ago
24 fixed costs, but in fairness to you you are making quite
25 clear in 2.55 that you are concerned with variable costs

1 over one to two years. Then you say at 2.56, again very
2 fairly, that the appropriate margin is open to some
3 interpretation.

4 You have used, as I think you have just said, CTM's
5 financial data to produce your margins, but you have not
6 suggested that any of your margins in the table reflect
7 the initial profit or variable margin that CTM actually
8 uses for its internal decision-making. That is right,
9 is it not?

10 A. That is correct, yes.

11 Q. Then looking at table 2.3 {A/9/32}, the first margin, so
12 the first row, says "Rewards only", and this gives
13 a margin of 93%, and it gives the best results as far as
14 your clients are concerned because it produces the
15 lowest critical loss figures; yes?

16 A. This is my report. This is not BGL's report.

17 Q. Yes, and this margin assumes that the only variable
18 costs incurred by the hypothetical monopolist are costs
19 relating to rewards, so these are things like meerkat
20 toys and cinema tickets; yes?

21 A. Yes.

22 Q. But that is not a reasonable assumption, is it?

23 A. I think it is a reasonable assumption.

24 Q. To assume that a hypothetical monopolist's only variable
25 costs would be meerkat toys and cinema tickets?

1 A. On a very incremental sale, that would be the -- given
2 the insurer does the processing of the transaction,
3 I thought rewards would be quite a notable cost, so to
4 account for them, and the IT and operating costs and
5 staff were very opaque lines. Within that it was quite
6 a jump, so I thought it was a useful row to include,
7 a useful scenario to include.

8 Q. You mentioned IT costs and you also include online
9 marketing costs. Just taking online marketing costs,
10 they are excluded from this margin, from the "Rewards
11 only" margin, but you do explain, we saw at
12 paragraph 2.55, that you are looking at costs that can
13 be varied over a period of one to two years. Online
14 marketing costs can be varied over that sort of period,
15 can they not?

16 A. They can. I would want to look at that precise line.
17 I have written a detailed footnote I am just reading
18 which we could probably all read. So I am referring to
19 generic branded search, direct, which would be
20 programmatic display, and I think, yes, organic search
21 costs, that is the SEO, so that is in-house costs,
22 Ms Glasgow explained how PCWs will try and optimise
23 their website to be at the top of the screen. So some
24 of those costs would be more longer-term than others.

25 The challenge of getting exactly the right gross

1 margin is why I thought it would be simpler to -- why
2 I did not go down this route in my first report, and
3 I have tried to deal with that by presenting a range and
4 explain as much as possible about the margins I have
5 used.

6 Q. Yes, and it opens up a can of worms, does it not,
7 because it triggers this sort of debate we are having
8 about what is reasonable to include or exclude?

9 THE PRESIDENT: Well, just so that I understand the debate,
10 is the point that in the long run all fixed costs are
11 variable in the sense that if you look at a short
12 timeframe, what are your variable costs will be one
13 thing, and if you look at a longer timeframe, even major
14 capital changes will become essentially variable?

15 A. It is similar to that, but it is agreed that we should
16 look at costs over a one to two time year, but what I am
17 facing with is companies do not report their costs that
18 way, they do not say these are the costs I can change in
19 one to two years. So I have tried to set out costs
20 which I think are short-term and where the lines are,
21 but what I am saying is some of those buckets will
22 include longer-term costs which I think is your point
23 too.

24 THE PRESIDENT: Yes.

25 A. In terms of the can of worms, Mr Lask, I would say that,

1 yes, when you look at it as a proportion of 16%
2 multichannelling purchasers, sort of by definition when
3 we are dividing anything by a small number, 16, there is
4 some sensitivity in the numbers. I do not think we
5 should forget the numbers in I would say absolute terms,
6 ie the number of PCW purchasers that would need to
7 switch away, which are in the first and second columns,
8 which range from 5 to 7% on CTMs or 5 to 10 even on
9 Facebooks. Or for the 10% SSNIP at 10 to 13%. That is
10 not a radically different change. It is just when we
11 rely on the CMA's 16%, that 16% becomes very critical
12 that we have estimated that absolutely correctly, which
13 is why I raised some points about whether that is
14 potentially an underestimate.

15 MR LASK: Yes, if we can take it in stages, I think you
16 agree, and indeed you set it out in your first report,
17 we went to the paragraph 4.22, that the relevant cohort
18 here are that proportion of PCW customers that
19 multichannel, that also get a quote on the direct
20 channel. So I am going to come on to your point about
21 16%, but I think you have accepted that that is the
22 relevant group for the purposes of this analysis?

23 A. For the purposes of the SSNIP test I agree we should
24 look at purchases and I think that was a question the
25 Chair asked early on in the process. I do think that

1 the other proportions that the CMA have said are
2 irrelevant because they only show the asymmetry of --
3 they only show competitive constraint in the other
4 direction, are still relevant. So the proportion of
5 what I call it PCW users that leak from the PCW world
6 and end up buying direct.

7 Q. We do not have figures, do we, for the proportion that
8 leak in the PCW world?

9 A. We have information, yes. From the survey there is 46%
10 of PCW users for home insurance did not buy on the
11 platform of which 23% went on to buy direct. I think
12 the quote data is 31% of PCW quotas did not buy direct,
13 I think that is in the decision at Annex I. I actually
14 do not have the decision in front of me. It would be
15 useful if you could provide one.

16 So I find those statistics really informative
17 because although they are not telling us what would
18 happen in the context of a SSNIP, they are saying that
19 people shop around and the services are sufficiently
20 similar that quite a high proportion leave or go and buy
21 elsewhere.

22 MR BEARD: Before we go on, I thought there was a copy of
23 the Decision in those hard copy bundles.

24 A. No, I did ask, thank you. (Handed).

25 MR BEARD: I am most grateful. I had understood it had been

1 arranged. Would it be sensible to give Ms Ralston just
2 a moment to dig out in case she can find the reference
3 quickly, or if not --

4 THE PRESIDENT: I think that would be sensible.

5 Mr Lask, looking at the time, would this be
6 a sensible point to rise for ten minutes to enable
7 Ms Ralston --

8 MR LASK: It is not the most natural point, sir, and to be
9 fair to Ms Ralston the figures that she is referring to
10 are figures I am intending to come on to later on in my
11 questions.

12 THE PRESIDENT: In which case you are happy to continue.
13 Very good.

14 MR LASK: What you have been saying about the proportion of
15 PCW users is it raises a different set of issues between
16 yourself and the CMA. What I would like to do for
17 present purposes is focus on the SSNIP analysis which
18 I think we are agreed that the relevant cohort is what
19 I would call the 16%, although I appreciate you have
20 some concerns with that figure. Your concerns are set
21 out at paragraphs 2.59 onwards {A/9/32}.

22 You make the first point at 2.59 that in response to
23 a SSNIP on commissions multichannelling would be
24 expected to increase. Then at 2.62 on page {A/9/33} you
25 provide an illustration of how much it might increase,

1 and you get to 18% on that basis, and you set out the
2 critical loss figures based on the 18% in the final two
3 columns of your table, table 2.3.

4 Then you refer at 2.60 {A/9/32-33} to a concern
5 related to matching, the way in which this data is
6 gathered, and you are aware that Dr Walker disagrees
7 with you that that is a significant issue. That is
8 footnote 77 of his report {A/8/25}.

9 Another concern you raise is that the data relied on
10 by the CMA is based on only 80% of sales, and you refer
11 to this at footnote 95 on page {A/9/33}, but 80% is by
12 definition the vast majority of sales, so that ought to
13 capture the majority of multichannelling, no?

14 A. No, because that is 80% of PCW sales, so that says that
15 20% of PCW sales are not captured. So what we are
16 trying to do is map PCW sales on to direct sales, and
17 just because we are only missing 20% of the PCW sales
18 does not mean we are only omitting 20% of the direct
19 channel sales. We would actually want to know what of
20 the universe of direct sales have we covered. We can
21 try and estimate that, actually. So Annex I says of the
22 CMA's data set there were 13 million unique customers
23 identified, and the ABI data is that there are
24 19 million home insurance policies in force. So we have
25 6 million policies that are missing. I calculated that,

1 I think, to be 31% of the data is missing, but someone
2 can easily do the maths and confirm. So that is the
3 proportion of the -- so 6 million policies we do not
4 know about.

5 Q. What I am not quite clear on is whether you have
6 produced a revised figure that you wish to discuss or
7 not. I was not aware that there was a revised figure in
8 your report.

9 A. I made the point that the proportion does not capture
10 many and it could underestimate the point. I cannot be
11 precise, no, as to what proportion of direct
12 channelling. I think I pointed to the CMA survey which
13 I have just referred to that actually 37% of PCW users
14 for home insurers said they shopped direct as well.
15 Dr Walker says that survey evidence may not be as
16 reliable, but I disagree in this context because we are
17 asking quite a factual question: did you shop direct or
18 not. This is not subject to -- you know, you should
19 able to recall that. It is not subject to what would
20 you do, a hypothetical question. So I think I have made
21 the point quite clearly in my report.

22 Q. You have, absolutely, but what we end up with is
23 a disagreement between yourself and Dr Walker as to
24 whether there is an underestimate or indeed the extent
25 of the underestimate if there is one, and we have two

1 figures before us. We have the 16% and your revised 18%
2 which I put to you is not a huge difference, but those
3 are the only two figures we have.

4 A. Yes, I wanted to be very conservative in my adjustment.

5 Q. All right, that is fair. Looking back at your table
6 {A/9/32}, your fourth margin down, "Rewards + staff + IT
7 [operation costs] + online marketing", this is the most
8 conservative of your new margins, and it includes online
9 marketing but not offline marketing, so no TV
10 advertising, for example; yes?

11 A. That is correct.

12 Q. We do not have to go to it, we can if you want, but in
13 your first report at 2.41 you refer to CTM's expenditure
14 on TV advertising being around 40 million. Do you
15 recall that or would you like to have a look at it?

16 A. I do not recall that, so please could we pull it up?

17 Q. Yes, it is paragraph 2.41 of your first report,
18 {A/5/24}. Do you see that highlighted in blue?

19 A. Thank you, yes.

20 Q. So when you were presenting your revised margins in your
21 revised critical loss figures in your second report,
22 would it not have been reasonable and illustrative to
23 present the figures for a margin that included these
24 costs as well?

25 A. On the basis that these could be varied within one to

- 1 two years so should be relevant.
- 2 Q. Yes.
- 3 A. Well, I have already included other longer term costs in
4 the rows such as staff costs that could not be varied
5 or -- yes, could not not be varied in the short time
6 period, so I have already deducted more costs in some
7 senses than necessary.
- 8 Q. But would not including these costs be just as
9 reasonable as a margin that excludes all costs other
10 than soft toys and cinema tickets?
- 11 A. I think the rewards line is quite informative, I think
12 it is quite -- many people would first think of a price
13 comparison website as hardly having any incremental
14 costs, as a fixed costs business, so I think that line
15 is quite useful to know, what are the direct costs
16 attributed to each sale for a PCW. When I think we
17 start talking about TV advertising and these campaigns
18 are more lumpy in nature, and I have already as I said
19 taken out some longer-term staff costs and IT and
20 operational costs, so I think the range I give is very
21 informative.
- 22 Q. If you had included for costs it would have brought down
23 the margin and thereby increased your critical loss
24 point, would it not?
- 25 A. Yes, of course.

1 Q. So what you have done here, really, Ms Ralston, is you
2 have bent over backwards to help your client by
3 reconducting your CLA to produce a set of figures that
4 are better for your client's case than the corrected
5 Facebook figure?

6 A. I disagree with that.

7 Q. When you say that the appropriate margin is open to some
8 interpretation the reality is that your margin figures
9 are unsubstantiated, random and all over the place?

10 A. That can hardly be correct.

11 Q. Identifying the critical loss point is not the end of
12 the analysis, is it, because one then needs to consider
13 whether switching is likely to take place at the level
14 you have identified or indeed within a range of levels
15 you have identified?

16 A. Yes.

17 Q. I have already put to you that your analysis is based on
18 the premise that Dr Niels is right about ignoring the
19 narrow MFNs, but let us assume for a moment that he is
20 right and that one does leave the narrow MFNs, what we
21 have with your figures is the level of switching that
22 you say would render a SSNIP unprofitable based on these
23 higher profit margins; correct?

24 A. The question was these are the proportions we would need
25 to see switch?

- 1 Q. Yes.
- 2 A. Yes, that is correct.
- 3 Q. But you have not sought to quantify the level of
4 switching that is in your view likely to occur, have
5 you?
- 6 A. No, I have not quantified, but as I say I have drawn on
7 the factual evidence as to what customers currently do,
8 this leakage I just referred to, to infer whether it
9 would be likely that more PCW users would switch away
10 should the prices on the PCW become less competitive.
- 11 Q. What you say in your second report at 2.47 on page
12 {A/5/28}, at the end of that paragraph, is that at least
13 some of the 16% of PCW purchasers that multichannel
14 would be likely to switch, but once you have gone to the
15 trouble of conducting a critical loss analysis, is not
16 the key question well how many is the level of likely
17 switching equivalent to the critical loss points I have
18 identified?
- 19 A. It is important to know -- it is important to estimate
20 how many would switch away to finally -- but it is
21 a hypothetical question, and I could not be precise
22 based on the factual evidence how many exactly would in
23 that hypothetical situation.
- 24 Q. The upshot of this all is that your analysis here is
25 half baked because it provides no basis for concluding

1 that a SSNIP on commissions would be unprofitable.

2 Illustrative perhaps, but it lacks any practical
3 utility.

4 A. I would say it is far more than half baked, almost fully
5 cooked, but if we want to ...

6 MR LASK: Sir, if that is a convenient moment for you, it is
7 for me.

8 THE PRESIDENT: Yes, thank you.

9 MS LUCAS: I actually had a couple of questions for
10 clarification, because in the questioning and in your
11 report I see quite a lot of mention, in the context of
12 switching, to switching to the direct channel, and
13 I just wanted to ask you whether switching to the direct
14 channel is a direct channel related to the PCW HIP, if
15 I can put it that way. So it is a HIP that uses PCWs.
16 I wondered how much your analysis had gone into
17 switching to non-PCW HIPs. So we frequently refer to
18 Direct Line and I know Direct Line has a brand on a PCW,
19 but I am not talking about that, so I just wondered how
20 that factored into your analysis.

21 A. So the CMA's data set does capture Direct Line and
22 Aviva's direct channel, so it would capture that. So
23 the direct channel in that sense we are referring to not
24 just insurers -- not just the Churchill equivalent
25 direct, but the Direct Line which is not on the PCW

1 direct. So, yes, I think all direct sales by insurers
2 are important and competitive constraint in my opinion
3 on the PCW.

4 MS LUCAS: So the list that you have used captures some of
5 that, Direct Line, Aviva, who are obviously substantial
6 players, but not all of it.

7 A. Not all of it. It does not capture all of it, but I saw
8 that they did ask those two providers to make sure they
9 had included those brands which might have otherwise
10 been omitted, so ...

11 MS LUCAS: Thank you.

12 THE PRESIDENT: Just following on from that, to be clear,
13 the extent to which you are looking at alternative
14 constraints to the option of going through the PCW, we
15 have already discussed previously that you have not
16 taken into account what I call real life brokers, that
17 is a data set you have not been able to access, so we
18 know that, but things like whether renewals will be more
19 attractive, is that something that you factored into
20 your thinking?

21 A. Yes. Yes, I have looked at that and I have assessed the
22 evidence on renewals in my reports.

23 THE PRESIDENT: Thank you.

24 A. We can talk about it or you can read about it.

25 THE PRESIDENT: No, thank you very much. Yes, Mr Lask,

1 anything out of that?

2 MR LASK: No.

3 THE PRESIDENT: Otherwise we will rise. Ten minutes. That
4 means I think we resume at 12.05. Thank you very much.
5 (11.55 am)

6 (A short break)

7 (12.15 pm)

8 THE PRESIDENT: Mr Lask, before you go on, I am going to ask
9 what I hope is not a too stupid question of Ms Ralston,
10 but I just want to understand exactly how you are
11 modelling these movements of insureds.

12 What I am going to do is I am going to give you an
13 example, and I am sure this is covered in your report
14 but I would like it in your own words. Let us suppose
15 we have a person who is already insured, so they are
16 going to get a renewal notice, and many, I am sure, will
17 simply renew automatically and they are likely to be
18 subject to the price walking that Mr Beard has mentioned
19 on a number of occasions, where the price goes up and up
20 and because it is not outrageously large, they stick
21 with it because that is more convenient.

22 But let us take the slightly more diligent insured
23 who has a renewal notice and thinks, well, let us just
24 check how unreasonable this price is, and so instead of
25 automatically renewing, they pop into the market,

1 whether it is a direct channel or a PCW matters
2 obviously for purposes of the question I am asking now,
3 but they do their own research, and my question really
4 is this: are you in your thinking assuming that such
5 a renewing insured, but who is a new customer for
6 purposes of the PCW, are you assuming that they are the
7 subject of price walking and therefore that the offering
8 on the market is always going to be better than the
9 renewal and so they are not going to renew? Is that the
10 thinking behind your consideration of movements of
11 proposed insureds between channels?

12 A. So not all insurers will price walk. To the extent
13 someone price walks based on the propensity to pay,
14 there may be a counteracting effect of the fact that the
15 insurer knows that customer for another year and perhaps
16 they have not claimed might reduce the risk, so the
17 price could be comparable.

18 So am I factoring in the fact that some customers
19 approaching renewal might have seen quite a high price
20 and think -- and that might prompt them to search? That
21 is a possibility. I have tried not to speculate too
22 much but look at what the data says as to, for example,
23 the comparability of new business and renewal price and
24 also the data we do have on how people have behaved, but
25 that is in my mind that some customers approaching

1 renewal might think they might be able to get a better
2 price on a PCW, yes.

3 THE PRESIDENT: Moving one on from that, some people will
4 simply take the best price in the market and then ring
5 up their renewing insurer and say, "I have been offered
6 X, what do you say?" Again, this is something which you
7 have taken a view on and built into your figures for
8 migrating insureds.

9 A. Yes, I found that evidence quite important, so that was
10 the 23% -- so 46% of PCW users for home insurance in the
11 survey stated -- well, stated they did not buy from the
12 PCW, and I have actually just checked that is consistent
13 in terms of the 48% in terms of the quoting behaviour,
14 48% of home insurance quotas did not buy from the PCW.

15 Now, some of those go on to negotiate directly with
16 their existing insurer or with another insurer or they
17 do nothing and auto renew, or they do nothing, perhaps
18 they were new to the market, and they actually think oh,
19 I do not want home insurance, so we have breakdowns of
20 all those categories, and, yes, I have taken that into
21 account.

22 So I have taken into account the proportion that
23 I say leak in terms of -- in terms of the competitive
24 constraint, I think it is relevant what proportion of
25 PCW users ended up buying direct, either direct new or

1 from a new insurer and then they would be a new direct
2 channel, or renew, in which case it would be a renewal.

3 THE PRESIDENT: I do not think it matters for purposes of
4 your analysis because you do not consider that narrow
5 most-favoured-nation clauses should be taken into
6 account in terms of the counterfactual we are talking
7 about, but if you were to accept their applicability and
8 to assume that there was not evasion on the part of
9 those who were bound by them, of course the renewal
10 business would not be subject to narrow
11 most-favoured-nation clauses anyway.

12 A. That is correct.

13 Q. Again, is that something you have -- well, you probably
14 have not considered in your analysis because you do not
15 want to apply narrow most-favoured-nation clauses at
16 all, but is that a material factor that ought to affect
17 the analysis if you are applying narrow
18 most-favoured-nation clauses to PCW and to the direct
19 channels?

20 A. Yes, it is correct that narrow MFNs do not apply to
21 renewals, so there is no issue of dispute between the
22 CMA and Oxera on that, and an insurer would be free to
23 either offer a price discount or, you know, maybe it
24 would be someone like Tesco that offers Tesco points or
25 something like that instead because they might find it

1 more -- they can offer a better discount when it is not
2 coming into cash terms that is sufficient to entice the
3 customer to stay. For direct I might just add it is not
4 just evasion of the narrow MFN, ie breaking it, flouting
5 it, but this point that I also make about wide MFNs, the
6 insurers price strictly below the constraint and in that
7 case you have that headroom to adjust prices.

8 THE PRESIDENT: I see, thank you very much.

9 I am so sorry, Mr Lask. Over to you.

10 MR LASK: Thank you, sir.

11 Ms Ralston, I would like to turn now to your
12 comparability and correlation analysis which you first
13 set out in your first report, section 4B.4, which is
14 tab 5, page 51 {A/5/51}.

15 What you do firstly in this section is you apply
16 a thought experiment positing a SSNIP equivalent on
17 retail prices. As you are aware, there has been debate
18 already during the hearing on whether that is an
19 appropriate form of analysis, and the CMA's view, as you
20 are aware, is that it is not appropriate to apply
21 a SSNIP directly to retail prices, but leaving that to
22 one side for present purposes, you make the point at
23 paragraph 4.34 that -- and I am paraphrasing -- but that
24 since the 2 to 4% increase in retail prices would in
25 your view be unprofitable, it stands to reason that a 5

1 to 10% increase would trigger an even stronger consumer
2 response. So it is a sort of logical extension of what
3 you have been saying about a SSNIP on commissions. Is
4 that fair?

5 A. Yes, that is correct.

6 Q. Then a new bit comes afterwards, and this is your
7 comparability and correlation analysis, this is at 4.35
8 onwards {A/5/52}. An analysis of this kind looks at the
9 prices of two products, you explain that here, the focal
10 product and an outside product, to see whether the
11 prices are comparable and correlated; yes?

12 A. Yes.

13 Q. The logic is that if there is a high comparability and
14 correlation this can support the proposition that the
15 two products are in the same market; yes?

16 A. Yes.

17 Q. On this page at footnote 116, you acknowledge that
18 prices may be correlated for reasons other than the
19 products being in the same market, for example changes
20 in common costs; yes?

21 A. Yes, I agree.

22 Q. So you also acknowledge it is important to consider
23 whether there are other potential explanations for an
24 observed correlation; yes?

25 A. I agree, yes.

1 Q. In the third Oxera report -- and this is explained in
2 your footnote 117 -- you took or Oxera took 34 brands
3 and compared the HIPs prices on its direct channel with
4 the HIPs prices on a PCW; yes?

5 A. That is correct.

6 Q. You observed what I think you thought was a high degree
7 of correlation and comparability, but the CMA in the
8 Decision pointed out that narrow MFNs were an obvious
9 possible explanation for what you had observed; yes?

10 A. That is a correct summary.

11 Q. So what you do in your report is you have narrowed the
12 scope of your enquiry and looked at five HIPs that did
13 not have narrow MFNs with all of the PCWs?

14 A. Yes, I think I do that in my second report.

15 Q. I am looking at 4.38 on page {A/5/53}.

16 A. You are correct, yes. That is in my first report.

17 Q. So for each of these five brands you have compared the
18 HIP's prices on its direct channel with the HIP's prices
19 on the PCW with whom it did not have a narrow MFN?

20 A. That is correct.

21 Q. For four of them, you find a high level of correlation?

22 A. Yes, I report them all in the table.

23 Q. Yes, and it is fair to say, is it not, that you are now
24 looking at a relatively small sample size compared to
25 the one you were looking at in the third Oxera report?

1 A. Yes, this reflects the sample that do not have narrow
2 MFNs, and there is data, sufficient data, to do this
3 analysis.

4 Q. Yes. If we turn to Dr Walker's report, {A/8/21},
5 paragraph 76. Perhaps in fairness, please look at
6 paragraph 75 which is on the previous page. Sorry, it
7 is {A/8/20}, apologies.

8 Here Dr Walker addresses your analysis, and his
9 first point, again I am paraphrasing, is that even if
10 you are looking at a HIP that does not have a narrow MFN
11 with all the PCWs, the narrow MFNs it has with some of
12 them may still be influencing its pricing. I appreciate
13 you disagree with that. I am just flagging up what it
14 is he says.

15 Then over the page at {A/8/21} at 76, he makes his
16 second and more fundamental point, which is that what
17 you are doing is you are comparing how a HIP sets its
18 prices on the direct channel with how it sets its prices
19 on a PCW. So the price correlations you are looking at
20 are prices set by each individual HIP across two
21 different channels. Do you agree that that is the point
22 he is making?

23 A. Yes, that is the point.

24 Q. So it is right, is it not, that what you are doing here
25 is you are comparing apples and apples when you should

- 1 be comparing apples and pears?
- 2 A. If we take the apple analogy, I think it is informative
3 to know what price people are selling apples in the two
4 distribution channels, and that is what I am doing here.
5 I am not disputing that it is the same insurance
6 product. In fact, the fact it is the same insurance
7 product is why I think we should not dismiss the direct
8 channel. If you want to buy a Churchill insurance
9 product you know you can get it from a PCW or the same
10 product from Churchill direct.
- 11 Q. If you are comparing a price HIP A sets in its direct
12 channel with the price HIP A sets on a PCW, that is not
13 actually shedding any light, is it, on the constraints
14 on PCWs from the direct channels?
- 15 A. So if I were to have looked at the prices and found that
16 Churchill direct was £50 more expensive than the
17 Churchill on the PCW, I would have thought, okay, that
18 does not look like they are in the same market, but when
19 I see the prices are comparable on the two channels, as
20 part of a bigger picture it helps support the conclusion
21 that they are in the same market.
- 22 Q. You say -- we saw at footnote 116 of your first report
23 that it is important to consider other possible reasons
24 for an observed correlation, and you note that one
25 obvious cause, I think Dr Walker makes this point as

1 well, is changes in common costs, but you have not
2 analysed, have you, whether the correlations you have
3 observed may be attributable to changes in common costs?

4 A. As you say, I have made the point that that could be
5 a reason, so I have not analysed -- gone to that level
6 of detail, no, but I am not overly relying on the
7 comparability. I have put less emphasis on it as my
8 reports go on.

9 Q. The four brands for which you find a high correlation
10 are as we have said brands that did not have a narrow
11 MFN with at least one PCW, and Dr Walker, his first
12 point that we saw at paragraph 75, was, well, they could
13 still be affected by the narrow MFNs with the other
14 PCWs, and in your second report on page 35, tab 9
15 {A/9/35} you deal with that and give some reasons why
16 you disagree. This is paragraph 2.71 onwards.

17 But thinking back to the wider cohort that was being
18 looked at in the third Oxera report, I think you
19 highlighted some gaps in the data in relation to those
20 HIPs, but subject to those gaps I think it is accepted,
21 is it not, that most if not all of those HIPs did have
22 a narrow MFN with all of the PCWs?

23 A. Yes.

24 Q. So the analysis you have done, the narrow analysis you
25 have done in your first report, cannot exclude the

1 possibility that any correlation observed in relation to
2 those HIPs may be attributable to the narrow MFNs?

3 A. This is, yes, specific to these five insurers.

4 Q. Yes. I would like to turn now to your analysis of
5 a SSNIP equivalent on marketing, and this is back in
6 your first report, 4B.5 at {A/5/54}. This is referred
7 to in the subheading 4B.5 as:

8 "Assessing the consumer response to a SSNIP on
9 online marketing."

10 I think it is sometimes also referred to as an
11 SSNDQ.

12 Here you set out to assess the consumer response to
13 a 5 to 10% reduction in online marketing spend; yes?

14 A. Yes, that is --

15 Q. Again this is something that as you are aware the CMA
16 did not consider it necessary to conduct. This is
17 a form of analysis that it did not consider it necessary
18 to conduct, but, again, I leave that to one side for
19 present purposes.

20 What you do here is you consider ad spend on Google
21 search terms, and you rely particularly on evidence of
22 impression shares at table 4.2. That is page {A/5/57}.

23 This shows how often a PCW or HIPs branded advert
24 appears in the sponsored search results when users
25 search for terms such as "home insurance" on Google;

- 1 yes?
- 2 A. Yes, that is correct.
- 3 Q. It shows that some HIPs have a high impression share
4 although only one has a higher impression share than
5 ComparetheMarket, MoneySupermarket and Gocompare. The
6 conclusion you draw from this is set out at 4.44 on page
7 {A/5/55} and you say here that given the reduction in
8 traffic that a reduction in ad spend would generate, it
9 is likely to be unprofitable, and you go on to say at
10 4.50 on page {A/5/58} that the reduction in traffic
11 would also reduce the attractiveness of the hypothetical
12 monopolist PCW to HIPs?
- 13 A. Yes, that is correct.
- 14 Q. Then if we go look back at Dr Walker's report, {A/8/21},
15 he makes the point at paragraphs 78 to 79 that the
16 evidence you refer to is not very informative in the
17 context of a SSNIP on marketing, and it is fair to say,
18 is it not, that you have not analysed the reduction in
19 traffic that would be generated by a 5 to 10% reduction
20 in ad spend?
- 21 A. I have not forecast that reduction in traffic.
- 22 Q. No, or, it follows, or calculated whether such
23 a reduction would be unprofitable?
- 24 A. So based on the sophisticated advertising that these
25 insurers and PCWs use, I would not expect them to be

1 overspending on pay per click such that I would expect
2 that if they were to reduce their Google advertising
3 spend they would lose traffic, and given the prevalence
4 of the insurers in the impression shares, I deduce that
5 many of that traffic would instead go to the insurers
6 that are often high up in the list.

7 Q. As I understand it this is your profit optimal point
8 which I wanted to come on to ask you about.

9 A. Okay.

10 Q. We may as well go to it now. It is in your second
11 report, {A/9/39}. I think the point you have just made
12 is reflected at paragraph 2.83 and 2.84.

13 A. Yes.

14 Q. Where you say, and I am summarising, you say that
15 a hypothetical monopolist would adopt a profit-optimal
16 ad spend strategy and therefore any reduction in ad
17 spend from that level would almost by definition be
18 unprofitable. Is that right?

19 A. Yes, that is the point I have just made.

20 Q. But with a SSNIP test or with a SSNIP equivalent test,
21 do you not have to apply -- in this case we are talking
22 about a reduction in ad spend rather than an increase in
23 price, but do you not have to apply the ad spend
24 reduction to the competitive level, the
25 pre-monopolisation competitive level rather than the

- 1 profit optimal level?
- 2 A. Profit optimal in a competitive environment would be the
3 competitive level.
- 4 Q. But as I read it what you are saying here is that you
5 are assuming that the ad spend reduction would start
6 from the hypothetical monopolist's profit optimal level
7 and so by definition any reduction is going to be
8 unprofitable?
- 9 A. Indeed, so you are saying in the present world they are
10 constrained, more so than the hypothetical PCW would be,
11 so if we put ourselves in the hypothetical world they
12 would be spending so much more on pay per click that it
13 could be that if they reduced that pay per click they do
14 not lose traffic. Is that the point you are making?
- 15 Q. Well, my understanding is that in the non-competitive
16 world, the hypothetical monopolist would need to spend
17 less on advertising rather than more.
- 18 A. Yes, sometimes it is helpful to write these things down.
19 Spend less ... So if they are spending less -- so why
20 would we infer that they would -- less traffic would
21 divert if they are spending less?
- 22 Q. I have not got to that point in the analysis yet. What
23 I am trying to establish is, in very simple terms, what
24 is the appropriate start point for applying your 5 to
25 10% reduction in ad spend. What I think you are doing

1 here is you are saying the appropriate start point is
2 the level of ad spend that would be profit optimal for
3 the hypothetical monopolist?

4 A. That is taking it wrong, sorry for the confusion there.
5 So you take the competitive level, that is established
6 in market definition, you do not take the monopoly
7 price. All I am saying here is these insurers have
8 sophisticated -- sorry, these PCWs, unlike the insurers,
9 have sophisticated bidding strategies, so in the
10 competitive environment, if they were to reduce their
11 Google advertising, they would receive less traffic.

12 So I am not suggesting we are in -- we are starting
13 from the profit -- the monopoly level of advertising.
14 We are starting from the competitive level.

15 Q. I see. If one assumes that that is right that they
16 would receive less traffic, do you agree that that is
17 not the end of the story, one still has to think about
18 how much less traffic they would receive in order to
19 work out whether it would be unprofitable?

20 A. Yes, to conclude, Dr Walker did criticise my comment,
21 I will just share that. He was saying that they might
22 find it unprofitable in the current world, but that is
23 because they are competing with each other, MSM and
24 Gocompare and CTM, rather than just insurers. So just
25 because they find it unprofitable in the present world

1 does not mean the hypothetical monopolist would find it
2 unprofitable. But my answer to that is well go to look
3 at the impression shares where insurers are very
4 prevalent. So it is not just MSM, CTM, Gocompare
5 bidding each other up, but it is the insurers bidding up
6 the price too, and, therefore, who I expect to be
7 recipients of some of that traffic.

8 Q. Yes.

9 A. I just wanted to be complete to --

10 Q. I think you have agreed that it is not your case or it
11 is not your argument that any reduction in traffic would
12 render it unprofitable. It depends on the level of
13 reduction?

14 A. Yes.

15 Q. When looking at this issue you note -- this is
16 paragraph 4.44 of your first report, {A/5/55}, you note
17 at the beginning of paragraph 4.44 that over 20% of home
18 insurance quotes generated by CTM in 2018 were by
19 customers who arrived there following a generic search
20 term, and it is fair to say, is it not, you have not
21 considered how the remaining 80% who arrive at CTM via
22 other acquisition channels might respond to a 5 to 10%
23 reduction in ad spend?

24 A. No. So 20% of quotes is a lot of customers, so if many
25 of them switch away that would be a competitive

1 constraint, so I did not consider it necessary to look
2 at the 80% as well.

3 Q. Moving on then to renewals and I would like to ask you
4 some questions about your evidence on this issue. What
5 your evidence does on renewals is it assesses whether
6 renewals, and I think in particular first year renewals,
7 would impose sufficient constraint on PCWs to be
8 included in the relevant market; yes?

9 A. Can I just clarify that up front and if that is not
10 clear, I apologise. So the first year is -- as I said,
11 renewals are a broad church and I am trying to identify
12 the proportion that would be contestable as I call it,
13 and I used first year renewals based on an FCA analysis
14 and looking at the proportion of renewals first year
15 renewals account for. At least in one of my reports,
16 maybe my second, I also used a different proportion, but
17 I am not -- I did not start with the premise that it is
18 only those approaching first year renewal. Sorry for
19 the distraction, but it was not my premise that only
20 first year renewals will be contestable. I was saying
21 this is a good approximation of the contestable size of
22 the renewal market.

23 Q. All right, that is perfectly fair. Looking at your
24 first report, {A/5/60}, you firstly address the HIP
25 responses. So you are looking at a similar set of

1 issues but now in the context of renewals rather than
2 new business, and the first issue you look at, as you
3 did with new business, is the HIP response to a SSNIP on
4 commissions, and you mention here at paragraph 4.60
5 partial delisting, and your argument about partial
6 delisting is similar to, I think, your argument in
7 relation to partial delisting under the previous
8 heading. Is that right?

9 A. Yes.

10 Q. Which we have discussed already. So I would then like
11 to turn to what you say about the likely reaction of
12 consumers in the context of renewals. If we go to your
13 second report at {A/9/49}, we see at paragraph 2.112 you
14 refer to Dr Walker's evidence, and I take it from this
15 that you and Dr Walker agree that in assessing the
16 constraints imposed by renewals it is relevant to look
17 at the percentage of consumers who currently switch
18 through a PCW but also obtain a renewal quote from their
19 existing HIP before doing so?

20 A. Yes.

21 Q. Because it is those consumers that the hypothetical
22 monopolist may be at risk of losing if there is a SSNIP
23 on commissions.

24 A. Yes.

25 Q. You make the point -- I am sorry, we can go back to it

1 if you need to, it is at 2.47 of this report -- you make
2 the point that multichannelling PCW users are
3 particularly price sensitive. Do you recall that?

4 A. Yes.

5 Q. The CMA found that this cohort that we are concerned
6 with -- and you refer to it at paragraph 2.112 -- this
7 cohort is 36%, so it is 36% of PCW purchasers first
8 obtained a renewal quote from their existing HIP, and
9 you suggest at 2.114 that that may be an underestimate.
10 I think your reasons are the same as the reasons we
11 discussed earlier, namely only 80% of sales covered and
12 your point about matching in the CMA data; yes?

13 A. This one I am -- this one the the over...underestimation
14 I mean, is much stronger because we know for a fact
15 there are 19 million insurance policies out there, and
16 we know for a fact how many are new and switched. So
17 the 13 million unique customers in the CMA's data set
18 and then there is the 19 million policies in force, so
19 those 6 million missing must be renewal customers, they
20 must have renewal notice.

21 Q. But the 36% figure the CMA produced is the only direct
22 measure we have of the size of this group, is it not?
23 You have not produced a revised estimate.

24 A. We do have data from the survey as to how many customers
25 have reported having a renewal quote. I think it is

1 57%, but I would -- no, I think it is much higher. 87%
2 of people said -- yes, 87% of PCW users used the home
3 insurance PCW to either update -- yes, so I would want
4 to not misdirect people, but they implied they already
5 had an insurance policy.

6 Q. Yes, I am coming on to that point now in fact. So you
7 deal with this at paragraph 2.115 {A/9/50}. Having set
8 out your concerns with the CMA's figure you say:

9 "In comparison, the ... DCT ... survey finds that
10 87% of PCW home insurance users already had the product
11 and were looking to update, renewal or switch."

12 Now, that is users rather than customers, yes?
13 These are not necessarily people that have purchased
14 through the PCW, but they are people who have gone and
15 got a quote from it; yes?

16 A. Yes, that is why I compare it to the 35% of users.

17 Q. But you do say here, do you not, 87% is not directly
18 comparable to the 36% referred to above, as it is
19 a proportion of users, not those who went on to
20 purchase?

21 A. So that 87% is directly comparable to the 35% in that
22 paragraph which, at the bottom, is about the CMA's
23 estimate of PCW users that had a renewal offer. So my
24 point here is saying if that 35%, that is comparable to
25 87%, well, the 36% of PCW purchasers, it could well in

1 reality be close to 87%, higher than 87%, could be much
2 higher.

3 Q. Well, let us look at footnote 161 where you make a point
4 of detail in relation to the 87%, and you say:

5 "... some of [them] ... may be looking to update,
6 and therefore might not have a renewal offer in hand."

7 Yes, do you see that?

8 A. I think that is a mistake, sorry. They may be looking
9 to update, so I am implying they do have a renewal
10 offer. That is a typo, it should not say "might not".
11 Apologies.

12 Q. So you are suggesting that all of the 80% -- all of the
13 87% have a renewal offer in hand? You have set out the
14 question in the previous footnote if that helps, 160.

15 A. So the question as it states above, I already had this
16 and I was looking to update, renew or switch. So
17 I would say they could all be people with renewals. The
18 switch is actually the difference, because then they
19 might not -- they would have a renewal offer but perhaps
20 they have a change in -- apologies, I am getting
21 confused, because I was thinking to myself 87% seems
22 high, and I was trying to think about what I thought was
23 the issue.

24 What I think the issue is the update, because update
25 might mean that they want to update their policy and,

1 therefore, while they have a renewal quote in hand it
2 might not be fit for what they want next year.

3 Q. Well, in case it helps, I was not disagreeing with what
4 you had said in 161. CMA agrees that not all of the 87%
5 would have a renewal offer in hand.

6 A. Yes, but I want to correct that typo, that should not
7 say "not", but I am equally not saying, as it might have
8 implied, that all 87% would be renewals, so I am
9 explaining why, and that actually for a different reason
10 my footnote sounds like we are on the same page, but
11 I just wanted to be clear there.

12 Q. Could I ask you to look at the Decision, please, which
13 is {A/1} and the page is {A/1/501}. This is Annex I
14 which you have referred to this morning.

15 One sees below the figure paragraphs I.51 and I.52,
16 and I.51 the CMA identifies the 36% figure that it
17 relies on but then goes on to say at I.52:

18 "The CMA notes, however, that its analysis [so the
19 36%] finds a lower proportion of consumers who used the
20 PCW channel and received a renewal offer from an
21 existing provider than found in the DCTs Survey [the
22 DCTs Survey is what you are referring to]. In contrast
23 to the CMA's analysis of consumers' actual behaviour,
24 the DCTs Survey found that 49% of respondents who
25 searched for home insurance using a PCW said that they

1 {A/1/502} were prompted to do so as they were coming to
2 the end of their current contract and needed to renew."

3 If you look at the footnote, 1735, it refers to
4 question M3 which I think is the next question in the
5 survey from the one that you footnoted at the footnote
6 we were just looking at.

7 A. This is a different question, I did not realise they
8 were consecutive.

9 Q. I think they are consecutive.

10 A. I can read this.

11 Q. It does not matter.

12 A. Okay.

13 Q. But it is a different question, yes. I think you were
14 looking at question M2; this is question M3. So that
15 shows that 49% of PCW users, if we are looking at users
16 as opposed to PCW purchasers, were prompted to search on
17 a PCW because they needed to renew, and I do not think
18 you refer to that figure in your reports, but you should
19 tell me if I have missed it.

20 A. In that paragraph I do not, but it could be in one of my
21 previous reports, yes.

22 Q. All right, if it is there I am sure someone will dig it
23 out. I could not find it. It is perhaps not the most
24 important point. The most important point is that if
25 one is going to refer to the DCT survey, which as you

1 know the CMA says you should not for this purpose
2 because it is better to look at actual behaviour rather
3 than responses, but if one is going to refer to the DCT
4 survey, it is this measure, is it not, that is more
5 closely comparable to the cohort we are concerned with,
6 the one we are interested in, than your 87%, because it
7 isolates the PCW users who were specifically looking to
8 renew?

9 A. I think this question has -- is not perfect either for
10 this because it says what first prompted you. Why
11 should we restrict ourselves to renewal customers for
12 which renewing was the reason that first prompted them
13 to use a PCW?

14 Q. Well, it may not be a perfectly phrased question, but
15 the point I am putting to you is that if we are looking
16 to scrutinise the CMA's 36% figure by reference to the
17 DCT survey, then the 49% figure is a better tool with
18 which to scrutinise the CMA's 36% figure than your 87%
19 figure, because, as we have seen or at least as I have
20 put it to you, the 87% figure includes consumers who did
21 not have the renewal offer in hand?

22 A. So the 49% could underestimate the proportion, and the
23 87%, as I am very transparent, I say could overestimate,
24 so I do not think one is better than the other, and they
25 both make the same point, do they not, that the 36% is

1 an underestimate.

2 Q. All right, you agree that it is also relevant to
3 consider the comparability of prices available to
4 a consumer at the point of renewal?

5 A. Yes.

6 Q. This involves comparing the renewal price on offer from
7 the customer's existing HIP with the new business prices
8 available on the hypothetical monopolist PCW; yes?

9 A. Yes.

10 Q. It is right that the CMA found -- sorry, perhaps it
11 makes sense to have the Decision open if we still have
12 the Decision up. This is {A/1/112}, paragraph 5.113.

13 The CMA found that on average renewal prices were
14 15% higher; yes?

15 A. Yes.

16 Q. It compares that gap to the price increase of 1.8 to
17 3.5% that would follow a SSNIP on commissions. I do not
18 think the point is made in this paragraph, but Dr Walker
19 makes the point, you will have seen it, that on that
20 basis, even following a 10% SSNIP on commissions,
21 renewal prices would still be 11.5% more expensive; yes?

22 A. Yes, he makes that point.

23 Q. Then if we turn to your first report, {A/5/63}, we see
24 at paragraph 4.69 you point out that for some HIPs the
25 gap between their first year renewal price and their PCW

1 price is smaller than the average identified by the CMA.

2 That is to be expected, is it not, because the CMA's

3 figure is an average; yes?

4 A. Yes.

5 Q. Then at 4.70 you identify three additional HIPs for whom

6 you have compared renewal prices and their PCW prices,

7 and have you recalculated the average, so have you

8 applied those to the CMA's 15% and produced a revised

9 average?

10 A. No, my conclusion -- no, my -- I do not think I have.

11 My conclusion in the next statement is to just say that

12 there are several large insurers where their average

13 difference is less than 10%. It is on the following

14 page.

15 Q. So some insurers price below the average and some no

16 doubt have gaps above the average. It is just the

17 nature of things, is it not?

18 A. So, sorry, but the point here is saying that these three

19 insurers were not included in the CMA's average, so it

20 is not just that I have pointed to three insurers they

21 have not included in their analysis because obviously as

22 you have just said, some will be above, some will be

23 below. What I am saying is actually should we have

24 included them into the CMA's calculation the average

25 would have come down.

1 Q. It would, and that is why I asked you if you
2 recalculated it and I do not want to spring figures on
3 you, but I jotted down some figures and I got 11% when
4 I added those ones in. I do not expect you to agree or
5 disagree with that now; if you want to come back to it
6 later, that is absolutely fine, but that is where I had
7 got to. In other words, there was still a double figure
8 average difference between the renewal price and the PCW
9 price.

10 If we could look then at Dr Walker's report --

11 A. Sorry to interject on that, but I am trying to be clear
12 that I am not saying all renewals for all insurers are
13 in this relevant market. I am trying to say, look,
14 Qmetric, these examples are that their insurance prices
15 at renewal are not much higher than their new business
16 price, and then perhaps you will turn to it but as
17 accepted by Dr Walker you might accept, you might
18 tolerate a price increase because you have familiarity
19 with that insurer. I do not want to -- you know, if you
20 are going to go there I can cut myself short, but my
21 point here is just saying, it is quite a modest point,
22 that the renewal prices are not always that far away
23 from the PCW prices, so we should not assume that they
24 are just outside the relevant market for that reason.

25 Q. All right. I did want to take you to Dr Walker's

1 report, so if we go to that now, {A/8/24-25}, he makes
2 the point at paragraphs 90 to 91 that there are factors
3 pulling in the opposite direction and that the figures
4 that both you and the CMA have been looking at, the
5 differentials, are liable to underestimate the price
6 saving that a consumer can make by switching via the PCW
7 because what you and the CMA have been looking at is the
8 difference between HIP A's renewal price and HIP A's PCW
9 price, whereas unless by coincidence that HIP's PCW
10 price is the cheapest price on the PCW, the difference
11 is even bigger, so the difference between the price that
12 is in front of the customer at renewal and the price
13 that they may be able to obtain on a PCW is even bigger
14 than the differentials that you and the CMA have been
15 looking at?

16 A. Yes, and there are other reasons why it might
17 overestimate. For example if the renewal book of an
18 insurer was of higher risk or higher quality as some
19 insurers have explained, I think some insurers were
20 wanting to explain why their renewal prices might be
21 higher than their new business and they explained that
22 some of the customers in their back book as they called
23 it were on premium products, so that might -- that were
24 not directly comparable to the PCW product, so therefore
25 you would overestimate the gap because you would be

1 comparing a higher product, higher premium product, with
2 a cheaper PCW product.

3 Q. So we have the CMA's 15% average and we have identified
4 some factors that may suggest a smaller differential and
5 some factors that may suggest a bigger differential;
6 yes?

7 A. Yes.

8 Q. Then if we look at Dr Walker's conclusion on this issue
9 at paragraph 93 which is on page {A/8/25}, here he
10 agrees with you that in principle this cohort of
11 consumers may impose a constraint, but in practice he
12 finds it implausible that the number of these marginal
13 customers would be so large as to make a SSNIP
14 unprofitable, and in particular he says at the very end
15 of this paragraph {A/8/26}:

16 "It seems highly unlikely that a full half of PCW
17 customers with renewal offers would be willing to switch
18 to using a PCW in order to make a 15% saving but would
19 prefer to accept their renewal offer if that saving fell
20 to 11.5%."

21 So that is the 3.5% fall as a result of the SSNIP.
22 He is right about that, isn't he; it is implausible that
23 a sufficient proportion would switch?

24 A. No, I disagree. Given we know many PCW users have
25 a renewal quote and then go on to renew, and the PCW

1 users are double in size of PCW customers because only
2 about half of them go on to buy, when you think about
3 the numbers in absolute terms it is quite plausible that
4 those -- the PCW purchasers could switch away.

5 Q. Is this your point, that there is a proportion of these
6 consumers who take their PCW quotes and then seek to
7 negotiate a reduction on their renewal quote?

8 A. Yes.

9 Q. Can I ask you to look at the Decision, please, so we are
10 back in {A/1/114}. You will see at 5.121, the bottom of
11 the page, it is referring to:

12 "The DCTs Survey ... 31% of consumers who had
13 recently used a comparison site may have used the quotes
14 ... to negotiate a better renewal price ..."

15 Then over the page {A/1/115}, 5.122 and 5.123, CMA
16 makes two points on the evidence, saying firstly only
17 a small proportion of consumers contact their HIPs to
18 discuss their renewal offer, and perhaps even more
19 significantly, 5.123, those who do are unlikely to be
20 able to negotiate a reduction in their retail price that
21 would match the price of a new policy purchased through
22 the PCW channel.

23 Is that not the answer to your point?

24 A. I disagree. I have read those URNs in that footnote,
25 and I think that is a very strict and inappropriate

1 interpretation of what those insurers said. Those
2 insurers said they might not match the price in some
3 instances, but instead they would give something else.
4 As I mentioned before, Tesco were quite willing to give
5 Tesco points instead to an equivalent value, and others
6 such as Swinton said they have a policy not to fully
7 match, but my take of what they said was that where they
8 felt pushed to, they would give discounts.

9 So I would suggest we either pull up those URNs and
10 go through them, because I cannot remember it all
11 perfectly, but I would suggest that some of those would
12 not be consistent with what you are getting in 5.123 of
13 the Decision.

14 Q. If we go back to your second report, please, {A/9/48},
15 you deal here with the conclusion of Dr Walker that we
16 just looked at, and you refer at 2.110 to switching
17 costs. You say that switching costs £20 on average and
18 therefore as long as the price differential between the
19 renewal price and the price available on a PCW is below
20 £20, then this would imply that the average renewal
21 consumer would prefer to stay with their existing HIP
22 rather than switch; yes?

23 A. Yes.

24 Q. These switching costs are time and effort costs rather
25 than financial costs; yes?

1 A. Also reassurance. You might pay a premium to stay with
2 someone you know and you have experienced before, so it
3 is a non-monetary cost.

4 Q. Yes. The £20 figure comes from an FCA survey in
5 relation to the general insurance study that it carried
6 out; yes?

7 A. Yes, they put a lot of weight on it in their analysis
8 for the price walking case.

9 Q. But it is reasonable to assume that in calculating this
10 switching cost it was looking at a range of customer
11 types, not just PCW customers who multichannel; yes?

12 A. That could be the case, yes.

13 Q. You say in paragraph 2.110 that the average renewal
14 customer would prefer to stay with their existing HIP if
15 the price saving was less than £20. But the average
16 renewal customer does not even look for an alternative
17 quote, do they?

18 A. Yes, that is overstating the point there, that average.

19 Q. We know that, as we have discussed, PCW multichannellers
20 are particularly price sensitive; yes?

21 A. Yes.

22 Q. So is it not reasonable to assume that for the group we
23 are concerned with here switching costs would be lower
24 than the average or, if not, at the very least this
25 group would be less likely to be put off by those sorts

1 of switching costs if there is a price saving to be had?

2 A. I would like to incorporate the -- or I think you should
3 incorporate the non-price discounts that the insurers
4 appear willing to offer to retain customers, so you
5 cannot just rely on the price -- the comparison of
6 prices on PCW and renewals. I think in the round, if
7 you take all the evidence in the round, it is still very
8 much the case that it is quite plausible a proportion,
9 a sufficient proportion of PCW purchasers would choose
10 to renew should PCW prices become less competitive in
11 the future, in response to a SSNIP.

12 Q. The point I was making was a more simple one, I think,
13 which was simply that the cohort we are concerned with,
14 that the price sensitive multichannellers may not be as
15 put off by the switching costs that you identify here as
16 the average renewal cost customer would be?

17 A. I agree that average renewals should be, say, average of
18 the contestable renewals is what I should have said.

19 MR LASK: Sir, I am conscious of the time. I have one quite
20 short issue to deal with which I ought to be able to do
21 in about five minutes, if you are willing to indulge me
22 for another five minutes.

23 THE PRESIDENT: Ms Ralston, are you up for another five
24 minutes?

25 A. That is fine.

1 THE PRESIDENT: Very good. We will proceed.

2 MR LASK: Thank you.

3 Ms Ralston, if you turn to look, please, at your
4 first report section 4C.7. This is {A/5/68}. You are
5 dealing here with evidence from market participants, and
6 in particular you are considering retention strategies,
7 HIP retention strategies and non-resolicitation clauses.

8 What you say, I am paraphrasing, is that HIPs have
9 developed retention strategies in respect of existing
10 customers, and these are things such as a strong and
11 trusted brand, quality customer service and improving
12 the customer experience. Do you see that at 4.91
13 {A/5/69}?

14 A. On the next page?

15 Q. Yes, I am sorry, that is the next page, page {A/5/69}.

16 A. I was distracted by my footnote which was quite useful
17 on our previous discussion, 158, where I state that 9%
18 of Tesco customers received some form of adjustment to
19 their renewal offer, but, yes, I will focus on 4.91.
20 Sorry, if you could ask the question again?

21 Q. To be fair, I had not asked the question yet. I was
22 just summarising the evidence you were giving here which
23 was, in my summary, that insurers, HIPs, have these
24 levers they can pull in an effort to retain customers
25 and to strengthen the incentive to stay; yes?

- 1 A. Yes.
- 2 Q. The point I put to you is I hope an uncontroversial one,
3 which is simply that these sorts of points that you are
4 making here have to be considered alongside all of the
5 other evidence we have been looking at such as the price
6 differential between renewal and what is available on
7 the PCW; yes?
- 8 A. Yes.
- 9 Q. What has to be shown ultimately is that a sufficient
10 proportion of these PCW multichannellers would switch in
11 order to render a SSNIP unprofitable?
- 12 A. Whether you need to show and prove that they would
13 switch with -- establish that -- I think I have
14 presented a lot of evidence that it is quite likely that
15 that -- it is likely that that would be the case, but
16 I agree that the point is how many would switch.
- 17 Q. We saw that Dr Walker, at the end of his section dealing
18 with renewals, firmly disagreed that it was plausible;
19 yes?
- 20 A. He does.
- 21 Q. Also these efforts that you refer to by HIPs at 4.91,
22 these are indicative, are they not, of the competitive
23 constraint imposed on the HIPs by the PCWs rather than
24 a competitive constraint in the other direction?
- 25 A. No, I see -- I was thinking about another way to

1 describe the market, if you indulge me for a minute, is
2 you have new customers and new risks, but you have
3 existing customers and new risks, and those existing
4 customers you might put them in that new business, so
5 they are renters perhaps that have moved house, so they
6 are coming to the market but new but they know
7 Legal & General from their previous home, or they are
8 someone who is looking to update, so these customers
9 have an affinity -- may well have an affinity to
10 a particular insurer, and that is why I see the
11 constraint work in two ways. You may think it is a new
12 customer, they are going to jump on a PCW and they are
13 not going to know anyone, but what I am saying is these
14 insurers are well known to these people, and maybe it is
15 not because they have home insurance with another home
16 before, but it is because they have car insurance or
17 they have travel insurance.

18 So these levers work in both directions. They show
19 that insurers, as you say, have to be agile and respond
20 to the competitive pressure of PCWs, but similarly PCWs
21 have to compete with insurers that are well known to the
22 customer and have already built that relationship.

23 Q. At 4.93 {A/5/70} you refer to non-resolicitation clauses
24 and you say that HIPs frequently sought these clauses in
25 their contracts with PCWs and you explain here that

1 these clauses require the PCWs not to contact for
2 a period of time customers who have bought the HIPs
3 product through that PCW; yes?

4 A. Yes.

5 Q. Again that is evidence that HIPs see PCWs as
6 a competitive constraint, not the other way round.

7 A. In terms of this shows the bargaining power that the
8 insurers have with PCWs which is relevant when we are
9 thinking about how insurers might respond to
10 a hypothetical SSNIP on commissions, if they are able to
11 impose such clauses they are able to push on the
12 commission increase and constrain the PCW.

13 Q. It is also right, isn't it, that this sort of clause
14 does not stop a consumer from shopping around on PCWs,
15 so proactively responding to adverts or other marketing
16 efforts. All that it prevents is the particular PCW
17 actively contacting that customer in order to try to
18 encourage it to come back and switch again; yes?

19 A. Yes, that is correct.

20 MR LASK: Thank you. Sir, those are all my questions.

21 THE PRESIDENT: Thank you very much, Mr Lask. We will
22 consider over the short adjournment whether we have any
23 other questions for Ms Ralston and then of course we
24 will have Mr Beard's re-examination, but we will resume
25 at 2.15. Thank you very much.

1 (1.15 pm)

2 (The luncheon adjournment)

3 (2.19 pm)

4 THE PRESIDENT: Mr Beard, before you begin your
5 re-examination, we have translated into a shortish note
6 the point that Professor Ulph made this morning about
7 his recalculation of the two formulae. We will hand
8 that around now, but I am not expecting this to be dealt
9 with now because neither of you have had a chance to
10 consider it.

11 What I am minded to do is to allow this witness to
12 deal with it when she comes back to give evidence again
13 later on and for Dr Walker to consider it -- we can
14 either rise to give him time to think about it between
15 witnesses or we can see if he runs overnight and give
16 him a chance to look at it overnight.

17 MR BEARD: I do not know how long the Tribunal will be with
18 Dr Walker. I have definitely an hour -- well over an
19 hour or so of stuff. I think the chances of us
20 finishing today are vanishingly small and, therefore, it
21 is entirely up to the Tribunal because if it is a set of
22 questions that would actually come more naturally more
23 early, then if you want to rise and provide Dr Walker --
24 and if he says, "No, no, actually I would like some more
25 time", we are absolutely fine with that of course.

1 THE PRESIDENT: I am going to hold you, contrary to the
2 usual position, to overrunning into tomorrow because on
3 that basis it I think makes that decision a little bit
4 easier. So we will keep flexibility in mind, but
5 I think that is probably the best course, because it
6 also enables the CMA to consider the same point in
7 a reasonable timeframe.

8 MR BEARD: I am grateful.

9 THE PRESIDENT: So we will do that. We will park
10 questioning of this point until at the earliest tomorrow
11 morning when Dr Walker will deal with it first. Thank
12 you.

13 I promised that we would come back also on delivery
14 of closing submissions, and it seems to me it is
15 a choice between some point on Monday when they are
16 delivered.

17 Now, we are anxious to give the parties as much time
18 as possible, and we are also keen not to set things like
19 artificial page limits because I do not think
20 particularly in this context they help.

21 If we were to say 4.00 on the Monday, we would then
22 have overnight and the morning of Tuesday to read, and
23 we are prepared to offer that because we would like to
24 give the parties as much time as possible in the
25 timeframe to do that, but we would ask the parties to

1 just bear in mind that there is a limit to how much one
2 can sensibly read in the course of just over half a day.

3 MR BEARD: Well understood.

4 THE PRESIDENT: Of course if either party wants to get
5 something to us sooner we would be delighted to read it,
6 but I anticipate that is a somewhat unreal aspiration.

7 Ms Demetriou, is that --

8 MS DEMETRIOU: We are very grateful to you. That would be
9 very helpful, thank you.

10 THE PRESIDENT: I am making a mental note for the future
11 that I think in cases such as this we need to discuss
12 with the parties earlier whether there is not a full gap
13 between the close of the evidence and the opening
14 submissions. I know it is inconvenient for everyone to
15 see the trial as several blocks, but frankly it is
16 putting an awful lot of pressure on you to produce
17 something coherent in a case of this complexity -- but
18 they all are complex -- when you have two and a half
19 days plus the weekend.

20 MS DEMETRIOU: Sir, thank you, but we are conscious as well
21 that 4.00 on Monday is placing the burden on the
22 Tribunal too, so thank you very much, we are grateful to
23 you for allowing us time to put in the written
24 submissions.

25 THE PRESIDENT: No, it is a pleasure because I know the

1 parties will use the time as effectively as they have so
2 far. So with that, Mr Beard, I will hand back. We have
3 no questions, I think, for Dr Ralston. I am just
4 checking with Professor Ulph.

5 PROF ULPH: I would actually like to ask one question.

6 THE PRESIDENT: Please do.

7 PROF ULPH: If I may.

8 Questions by THE TRIBUNAL

9 PROF ULPH: Ms Ralston, it is a follow-up to the question
10 I asked you this morning where you are conducting a
11 two-part test on the HIP side and I asked whether the
12 correct course of action would be to simply derive the
13 profitability from each of the two steps, add that
14 together and then come to a conclusion as to whether or
15 not that had been profitable in total, and in your
16 answer you said you thought that was the case.

17 I would just like to push that a bit further.
18 Supposing now we are thinking of doing SSNIP tests on
19 both sides of the market, so we do them on the HIP side,
20 we do them on the consumer side, and we can potentially
21 draw conclusions about the profitability on each of
22 these two sides, whether the profits go up or whether
23 the profits go down. Now, in his report, Dr Niels would
24 say, well, you might have a problem then because one of
25 these answers might be positive, the other one is

1 negative, so how do you decide?

2 I come back to the same point. Why do you not
3 simply derive the profitability on each side, add that
4 all together and then draw a conclusion on the basis of
5 the total profitability, and then coming back to the
6 discussion you were having with Mr Lask this morning
7 about renewals, transfer all the renewals calculations
8 in as well. So rather than being SSNIP test after SSNIP
9 test after SSNIP test, do all the calculations of
10 profitability, add them all up together, and then just
11 do the final sales to the basis of that aggregate
12 number, would that be what you think would be a more
13 sensible way of proceeding or would you accept that that
14 was a way of proceeding?

15 A. I think maybe there are three questions or points there.

16 The first we discussed this morning about when you
17 look at the SSNIP on the commissions, on the insurer
18 side, I gave the view that -- which I still agree with,
19 that you could add up the way in which the insurers and
20 the consumers might switch away and if enough of them,
21 consumers and insurers, switch away to make the SSNIP
22 profitable, you should take the cumulative effect, but
23 that is still testing the competitive constraint on the
24 insurer side separately.

25 I think the second point is -- a second point is do

1 you test the SSNIP on the consumer and the -- well, the
2 consumer side as well as the insurer side, and maybe it
3 is two rather than three, do you balance an unprofitable
4 SSNIP on one side with a profitable SSNIP on another.
5 I follow Dr Niels' approach of you would take -- you
6 would look at the three scenarios he has set out where
7 you might have a scenario where -- two scenarios where
8 there is no problem because either it is unprofitable on
9 both sides or profitable on both sides, but then there
10 is this difficult situation where it is profitable on
11 one side and unprofitable on the other.

12 So it is not been clearly established what one
13 should do in that situation. I do not think there is
14 many cases such as that, and I agree with Dr Niels'
15 approach, which is -- it depends on the problem you are
16 facing and if, as in this case, where the conduct
17 affects both sides, you would want to think about the
18 competitive constraints on both sides. So you would
19 look at the broader market in that you would not want to
20 forget the competitive constraints in that broader
21 market.

22 I think the third point you were maybe referring to
23 was the chain of -- no, it is not chain of substitution,
24 that is something else, but the direct channels are
25 competitive constraint on PCWs and then there is the

1 renewals that are another competitive constraint, and so
2 my view is that the direct channels are a stronger
3 competitive constraint a closer substitute to the PCWs
4 than renewals.

5 As in normal market definition, if you start with
6 your product A and then you test whether B is
7 a competitive constraint you would bring that into the
8 envelope of the market, and then you would consider
9 whether 3 is a further constraint as well and whether C
10 needs to be brought into your relevant market.

11 I think we should take the same approach here.
12 I just set out the competitive constraints or the
13 evidence as to whether the direct channel was
14 a competitive constraint and then the renewals. I did
15 not do that sequence of movements.

16 Did that answer your points?

17 PROF ULPH: I understand your position. That is very
18 helpful, thank you.

19 A. Thank you.

20 THE PRESIDENT: Mr Lask, is there anything out of that that
21 you would like to ask about?

22 MR LASK: No thank you.

23 THE PRESIDENT: We have no further questions for you.

24 Mr Beard, over to you.

25 Re-examination by MR BEARD

1 MR BEARD: I just have one or two, Ms Ralston.

2 I will try and take them in vaguely the order in
3 which matters were dealt with in the transcript.

4 So going back to earlier on today, you were asked
5 some questions about the Section 26 notices which were
6 served by the CMA and about issues to do with delisting.
7 It is clear that you looked at them, these Section 26
8 notices, in some detail.

9 So far as you are aware, were any of the questions
10 asked asking about what home insurers would do if all of
11 the PCWs raised their commissions at once?

12 A. Not as far as I am aware.

13 Q. You were asked about partial delisting, and you talked
14 about quotability and then you were taken to document
15 {F/304/10}. Could we perhaps just get to that? You
16 will recall that. We are still in closed session, sir,
17 I think. It is the AA document.

18 A. Yes.

19 Q. If I may, I am just going to read part of the transcript
20 out rather than getting it pulled up.

21 This is Mr Lask:

22 "If we look back at page {F/304/10} [which is the
23 one we are looking at] which I think is still on the
24 screen [it is very pertinent], and question 6(f) ..."

25 He quoted:

1 "Please indicate what strategy or strategies AA has
2 adopted ... to resist Commission increases and how
3 successful each strategy was."

4 Then he said:

5 "If a HIP thinks of partial delisting as not
6 actually a form of delisting, as simply a reduction in
7 quotability or a reduction in footprint, that would be
8 captured by the question, would it not, 6(f)?"

9 You said:

10 "Yes, that is correct."

11 Can we just look at the answer given to the question
12 6(f) by AA:

13 "As stated under 6(c) we use many aspects of the
14 relationship to negotiate the best deal we can."

15 What would you understand the "many aspects of the
16 relationship to negotiate the best deal we can" would
17 encompass, perhaps not exhaustively but given what you
18 have --

19 A. So that could capture reducing quotability, reducing
20 footprint.

21 Q. Just in relation to this, are you aware whether or not
22 the CMA raised any further questions in relation to this
23 answer with this HIP so far as you have seen?

24 A. I am not aware.

25 Q. No. Could we go to document {F/233}, please. This was

1 another document you were taken to by Mr Lask. He
2 quoted you the bottom of that document or referred you
3 to, I am so sorry:

4 "I am in commercial negotiation with Admiral and
5 detailed below is their counter proposal. I have had
6 a long chat with them today where they have explained
7 their rationale however, as part of those conversations
8 they mentioned they may have to reduce quotability or
9 price parity to take the hit on the CPA."

10 Then you referred to the text higher up in the
11 middle of the page, and I think the Tribunal has already
12 read this.

13 If we could then have the [draft] transcript at
14 page 22, today's transcript, is that possible? Sorry,
15 I have not tested this. Starting at 13 {Day6/22:13}:

16 "I see. If we then go to Admiral, it may be your
17 answer is the same ...

18 "... this is an internal CTM email ... we see at the
19 bottom of this page ..."

20 Then there is a quote. Then:

21 "So is what you draw from that again the point that
22 they could do it technically?"

23 If we just move down, thank you:

24 "No, I take a stronger conclusion with Admiral due
25 to the part in the middle of the email [which I have

1 already referred to] ... reflecting that every 10% drop
2 in quotability by Admiral is very costly to CTM, and
3 I think they are saying that this is going to constrain,
4 they are going to take that in mind when they set their
5 CPAs."

6 Then Mr Lask said:

7 "... we do not know that Admiral went ahead with its
8 threat, it could just have been fighting talk, is that
9 not right?"

10 You are asked whether you looked at Admiral in your
11 charts and you said no. Are you aware whether the CMA
12 followed up or asked any further questions of Admiral
13 about this issue?

14 A. I am not aware.

15 Q. If we could go to [draft] transcript page 48
16 {Day6/48:1}. I am not going to read it out, but just so
17 that we have it, you were asked various questions about
18 your table 2.3 which is in your second report at
19 page 32. That does not need to come up. It is to do
20 with the margins, you probably recall --

21 A. Yes.

22 Q. -- and the critical loss table. There was a discussion
23 about TV advertising, and you referred back to
24 paragraph 2.41 of your first report, and 2.41 of your
25 first report referred to investment in advertising in

1 relation to Coronation Street. Do you recall that?

2 A. Yes, I recall that.

3 Q. Do you know whether that advertising by ComparetheMarket
4 was home insurance specific or not?

5 A. No, I am not aware.

6 Q. Thank you. If we could go to [draft] transcript
7 page 63, please. You were being asked here about the
8 insurers that did not have a narrow MFN with at least
9 one PCW, and Mr Lask asked you the question between
10 lines 6 and 18, you might just want to cast an eye over
11 that. He says {Day6/63:17}:

12 "But thinking back to the wider cohort that was
13 being looked at ... I think you highlighted some gaps in
14 the data in relation to those HIPs, but subject to those
15 gaps I think it is accepted, is it not, that most if not
16 all of those HIPs did have a narrow MFN with all of the
17 PCWs?

18 "Answer: Yes.

19 "Question: So the analysis you have done, the
20 narrow analysis you have done in your first report,
21 cannot exclude the possibility that any correlation
22 observed in relation to those HIPs may be attributable
23 to the narrow MFNs?

24 "Answer: This is, yes, specific to these five
25 insurers."

1 When you said "specific to" what did you mean there?

2 A. So I was meaning that the analysis, the correlation
3 coefficients in the second report related to those five
4 insurers. I was not admitting that the narrow MFN was
5 the conclusion of the correlation coefficients in my
6 first report, I was agreeing that the second report
7 related to those five insurers.

8 Q. Thank you. You made various references during the
9 course of your evidence to impression shares, I think it
10 was mainly in the discussion about Google. Could you
11 just briefly explain what impression shares are, please.

12 A. Yes. Every time someone does a Google search, that
13 is -- that creates an impression in terms of the
14 advertising you can see. So Google creates -- that
15 would be the denominator, all the searches, and then
16 they are giving you the proportion that those insurers
17 or -- or which adverts come up most prevalent in those
18 Google searches in terms of the paid for ads. I would
19 have provided a more precise definition in my report if
20 we want to turn to that. It might not be so clear.

21 Q. Have you provided any data in relation to impression
22 shares?

23 A. I have the table in my report, yes.

24 Q. This I am going to lead on if I may because quizzing the
25 witness as to the number of the table I think would be

1 a particular cruelty. I think you are referring to
2 a table 4.2 which says "Impression share of home
3 insurance search terms during Relevant Period"?

4 A. Yes.

5 Q. Could we pull that up? That is on {A/5/57}, I think.
6 Is that the table you were referring to?

7 A. Yes, and the note is the definition I gave verbally to
8 the same effect.

9 Q. Just very briefly, could you just explain what we are
10 seeing with the numbers and names there?

11 A. That would mean that Direct Line is at the top with an
12 impression share of 91, so that is saying --
13 I appreciate the numbers do not add up to 100, and these
14 are the numbers that Google provide. I understand that
15 advertisers such as BGL receive this data for -- Google
16 give this information back to those that pay and compete
17 in their auctions, and this is saying that Direct Line
18 was the most prevalent, and on its unit of count is 91,
19 so 12 units higher than ComparetheMarket.

20 MR BEARD: Sir, you looked troubled by --

21 THE PRESIDENT: No, I was just reading the definition of
22 "impression share" on the table.

23 MR BEARD: Page 79 of the [draft] transcript starting at
24 line 1 {Day6/79:1} if we may, there was a discussion
25 about averages in relation to the difference between new

1 business price and renewal prices. Do you recall?

2 A. Yes.

3 Q. Do you know whether the averages used by the CMA were
4 just simple headcount averages or weighted averages or
5 some other measure?

6 A. I cannot remember.

7 Q. Thank you. I will not take that further. That is one
8 we will deal with separately.

9 Page 87{Day6/87/1}. Just move down the page if we
10 could. Mr Lask is asking you about the SSNIP analysis
11 and SSNDQ analyses that you have dealt with. As you can
12 see on the page, he goes on {Day6/88:19}:

13 "What has to be shown ultimately is that
14 a sufficient proportion of these PCW multichannellers
15 would switch in order to render a SSNIP unprofitable?"

16 You can read your own answer there.

17 Is it only multichannellers we should be concerned
18 about when we are thinking about SSNIP or SSNDQ?

19 A. These -- we need to think about PCW purchasers that
20 would switch away and multichannellers is one -- is
21 certainly -- would capture some PCW purchasers.

22 MR BEARD: Thank you. I do not have any further questions
23 for the witness.

24 THE PRESIDENT: I will just check. Professor, any further
25 questions?

1 PROF ULPH: Not from me, no.

2 THE PRESIDENT: Ms Ralston, thank you very much. I do not
3 have any either. You are obviously free to leave the
4 witness box. You are not released as a witness because
5 you are coming back.

6 A. Yes.

7 THE PRESIDENT: But to be clear, you are released from the
8 undertaking you gave not to talk about your evidence.
9 Because we have reached as it were a staging point in
10 that evidence you are free to discuss matters as you
11 wish and I will take a further undertaking from you when
12 you come back.

13 A. Thank you.

14 MS DEMETRIOU: I think we can now go back into public
15 session.

16 THE PRESIDENT: Splendid. Would it assist if we rose to
17 enable that to happen?

18 MS DEMETRIOU: I do not know because I am not dealing with
19 the mechanics of it.

20 THE PRESIDENT: Are there hoards of people wanting to come
21 back in?

22 MR BEARD: I am not sure I would put it as "hoards". It may
23 be three or four.

24 THE PRESIDENT: We will rise for five minutes just to enable
25 the technology to be sorted out and for whoever wants to

1 to come back in, hoards or not, thank you.

2 (2.44 pm)

3 (A short break)

4 (2.48 pm)

5 Open session

6 MS DEMETRIOU: We have taken the liberty of asking Dr Walker

7 to come up.

8 THE PRESIDENT: No, quite right.

9 DR MIKE WALKER (affirmed)

10 THE PRESIDENT: Dr Walker, sit down, make yourself

11 comfortable. I hope you have a fresh glass of water

12 there. You also have various bundles in front of you

13 and you will see the EPE screen which will bring the

14 documents up as and when.

15 If you need anything more, whether it is in paper

16 form or whether you want to scroll back and forwards on

17 the EPE screen, because you do not have the control to

18 do that, just ask and it will be done. Anything you do

19 not understand or any of the questions, let us know.

20 Otherwise I will hand over to Ms Demetriou.

21 Examination-in-chief by MS DEMETRIOU

22 MS DEMETRIOU: Dr Walker, you should have a file in front of

23 you with your report behind tab 8. Can you see if you

24 can find that? This is bundle {A/8}.

25 A. Yes, I have that.

1 Q. Do you see, is that the first page of your report that
2 you can see there?

3 A. Yes.

4 Q. If you could please turn to page {A/8/27} is that your
5 signature at the bottom of the page?

6 A. Yes.

7 Q. Is this report true to the best of your knowledge and
8 belief?

9 A. Yes.

10 MS DEMETRIOU: Sir, I am going to ask one question in chief
11 if I may. It is really a question that Ms Lucas put to
12 me and I said I would come back to it and I thought it
13 was more satisfactory to come back to it by way of
14 evidence rather than submission, so I am going to ask
15 Dr Walker if he can address the point.

16 Dr Walker, the question that Ms Lucas put was what
17 does the CMA make of insurers who are not listed on
18 price comparison websites and so do not have narrow
19 MFNs, so in what sense might they present a competitive
20 constraint. Is that something you might be able to
21 comment on now?

22 A. Sure, yes. So we cover that in the Decision, 5.90,
23 I think.

24 Those who are not on PCWs do not have a -- do not
25 impose a competitive constraint on prices on PCWs for

1 three reasons, I think. One, there are very few of
2 them, we are talking less than 5% of the market. Two,
3 if you are in a world in which prices have risen as
4 a result of a hypothetical monopolist raising commission
5 charges, prices have risen on PCWs, so all your
6 competitive prices on PCWs have risen and you are not in
7 that position, you are likely to follow that price up.
8 That would seem to me the profit maximising thing to do.

9 Thirdly, and perhaps most importantly, and this is
10 in our -- in the Decision, actually when we talk to
11 those insurers who are not quoted, and there are four
12 insurers, what they actually say is the brands that they
13 do not have on PCWs they are aiming at less price
14 sensitive consumers.

15 So it is unlikely that brands aimed at less price
16 sensitive consumers are going to be imposing
17 a constraint on those brands aimed at more price
18 sensitive consumers and are on PCWs.

19 MS DEMETRIOU: Thank you, Dr Walker.

20 Sir, the other point is one I just wish to flag, and
21 it emerges from the further analysis that Professor Ulph
22 circulated. We have put a copy of that in front of
23 Dr Walker. I have not had the chance to speak to him
24 about it, but I do understand that he would be happy to
25 explore it with Professor Ulph if that is a satisfactory

1 way for the Tribunal to proceed. So he has had a chance
2 to look at it. I am just flagging that. It may be that
3 Professor Ulph wants to put some questions to him, in
4 which case Dr Walker will do his best to answer them.

5 THE PRESIDENT: That is very helpful, Ms Demetriou.

6 The question is when is that best done. Do we want
7 to get it out of the way now? Professor, do you want to
8 explore this with Dr Walker now or should we wait until
9 it arises as it may in the course of cross-examination?

10 I do not know, Professor, if you have a view?

11 PROF ULPH: Well, I do have some other issues I want to
12 explore with Dr Walker as well as the one that is
13 contained in the note, so I kind of had in mind given
14 the discussion we had earlier on about carrying on the
15 discussion tomorrow morning with Dr Walker that I would
16 be doing my questioning at the end, but I am in your
17 hands. I am happy to proceed now.

18 THE PRESIDENT: No, my instinct is that we should raise
19 these things either when they arise in the course of
20 cross-examination or at the end if they are not dealt
21 with in cross-examination and that will give both of you
22 of course an ability to come back if necessary.

23 So we will see how it arises, but if it does not
24 arise, Professor Ulph will take it up at the end, but
25 thank you for that indication.

1 MS DEMETRIOU: Sir, thank you. I was assuming in terms of
2 process that you would engage with Dr Walker on the
3 questions on which you engaged with Dr Niels.

4 THE PRESIDENT: Yes.

5 MS DEMETRIOU: But if that is incorrect, then please --

6 THE PRESIDENT: No, that is entirely right. It is fair to
7 say that subject to what Dr Walker has to say it is
8 going to be a somewhat more attenuated process.

9 MS DEMETRIOU: I understand.

10 THE PRESIDENT: Because speaking entirely for myself it has
11 been a nicely steep learning curve over the last few
12 days, but there are still some points on which I would
13 invite Dr Walker's views, so we will do what we did with
14 Dr Niels. I will ask my questions, I will hand back to
15 you and you may ask whatever you wish and if you wish
16 lead, and then we will go over to the traditional
17 cross-examination. So thank you very much.

18 Questions by THE TRIBUNAL

19 THE PRESIDENT: Good afternoon, Dr Walker. Have you had the
20 opportunity -- I cannot recall seeing you in court when
21 Dr Niels was giving evidence, but have you seen the
22 transcript if you were not in court?

23 A. I saw some of his evidence and read the transcript for
24 the rest.

25 THE PRESIDENT: I am grateful.

1 What I am going to do is I am going to ask you
2 questions along the same lines as I asked Dr Niels but,
3 as I indicated to counsel, in a slightly more attenuated
4 way, but what I will do is give you the opportunity to
5 fill in any blanks or areas where you have points to
6 make at the end of my questions so that you have the
7 opportunity to address anything that I have not raised,
8 but I hope although more quickly we will be covering the
9 same ground.

10 Can we bring up on to the EPE {G/119/81}.

11 Just to explain what this document is, this is
12 a part of the Decision that the Tribunal handed down in
13 Sainsbury's v MasterCard, and the reason I have plucked
14 it out is because there is a statement there of what
15 needs to be assessed when considering a by effect
16 restriction of competition.

17 Now, there are many ways in which this can be put,
18 but I wonder if you would not mind just reading 105 and
19 tell me when you have finished that page and we will
20 flip you over on to the next page.

21 A. (Pause) Yes, I have read that. {G/119/82}. Okay.

22 THE PRESIDENT: Thank you. Going back to page 73 of the
23 judgment and {G119/81} of the bundle reference, you see
24 the starting point is to identify the relevant agreement
25 or provision said to constitute the restriction on

1 competition, and in this case it is the wide
2 most-favoured-nation clauses that we are talking about.

3 Obviously when you are in the position of the CMA as
4 a regulator the clause under investigation is something
5 of an iterative process, I anticipate?

6 A. I do not think so, no. I mean, the fact that a wide
7 most-favoured-nation clause is potentially
8 anti-competitive was not an iterative process, I mean
9 only to the extent of course it came up in private motor
10 insurance and the Competition Commission banned them in
11 private motor insurance.

12 THE PRESIDENT: So it was not a question in your mind that
13 there might be other related provisions like a narrow
14 MFN that could be pernicious, you simply accepted or
15 proceeded on the basis that this was the only provision
16 under consideration?

17 A. There is a debate about narrow most-favoured-nation
18 clauses, but I think it was -- there is a genuine
19 efficiency rationale for narrow most-favoured-nation
20 clauses, unlike wide ones, and a number of competition
21 authorities have decided that they are fine, whereas
22 that is not true of wide most-favoured-nation clauses.

23 THE PRESIDENT: Thank you.

24 PROF ULPH: Could I just ask a question on that point?

25 THE PRESIDENT: Yes, of course.

1 PROF ULPH: There are, I think, two distinct questions here.

2 One is a question of whether narrow MFNs are themselves
3 harmful, and, as you said, there are reasons why
4 competition authorities regard them not to be.

5 The second question, which is, if we are considering
6 the harm done by all the anti-competitive effects
7 generated by wide MFNs, does the presence of narrow MFNs
8 affect our understanding and conclusions about the harm
9 being done by the wide MFN, would you agree that that is
10 a separate question, distinct from the question whether
11 narrow MFNs in themselves are harmful?

12 A. Well, I think you can only look at whether narrow MFNs
13 on any agreement are harmful in the context of looking
14 at the counterfactual and the counterfactual in this
15 case has narrow MFNs in place. Clearly, narrow MFNs are
16 highly relevant to the effect of wide ones, because of
17 the effect they have on the constraints between PCWs and
18 direct sales.

19 PROF ULPH: Thank you, that was the point I was trying to
20 establish.

21 THE PRESIDENT: Yes, I do not think it is a question of
22 dispute that they are relevant, but in terms of how they
23 are relevant they are relevant as, amongst other things,
24 an intrinsic part of the counterfactual that you
25 hypothesise when considering the effect of wide

1 most-favoured-nation clauses?

2 A. Yes, we are measuring the effect of most-favoured-nation
3 clauses against the counterfactual in which there are no
4 wide most-favoured-nation clauses but still narrow
5 most-favoured-nation clauses.

6 THE PRESIDENT: We see, looking at paragraphs -- I wonder if
7 we could get back {G/119/81}. We assess the agreement
8 or provision in question in the context of the market in
9 which that agreement or provision needs to be gauged,
10 and that is trite?

11 A. Yes.

12 THE PRESIDENT: But just to be clear, though, do you see the
13 role of market definition as informed by the theory of
14 harm that is articulated in the subparagraph at the top
15 of page 74?

16 A. Yes, yes, I mean, we do not define the level of the
17 markets because it is a fun thing to do, we define them
18 only because they allow us to gauge the competitive
19 constraints that are acting on the parties whose conduct
20 we are concerned about. So absolutely market definition
21 is dealt with in the context of what is the theory of
22 harm that we are concerned about. It is only a theory
23 of harm, I mean, it is a theory, you know, you go
24 through the market definition exercise relevant to that
25 theory and then you go through the effects analysis, and

1 you come to a conclusion.

2 THE PRESIDENT: Again, I do not think anyone is disputing
3 that market definition is an important component of the
4 exercise. My question, I think, was -- and I think you
5 have answered it, but I will just say it again to check,
6 I think you are saying that what is the definition of
7 the market is informed by the theory of harm that you
8 adopt?

9 A. Yes, because you want to -- you want your market
10 definition to inform you about the competitive
11 constraints that are relevant to that theory of harm,
12 so, yes.

13 THE PRESIDENT: To what extent do you think it is wise to
14 undertake exercises in market definition which you might
15 think given your theory of harm are irrelevant, but
16 because you do not know what you are going to find it is
17 nevertheless important to consider them?

18 A. Well, if they are not relevant to your theory of harm,
19 then I am not sure why you would pursue them.

20 THE PRESIDENT: Well, my point is are you assuming the
21 question of relevance or irrelevance without
22 investigation?

23 A. No, no, your theory of harm will tell you where the
24 market power is that you are concerned about, so if you
25 have a theory of harm relating to wide MFNs and the

1 ability of PCWs to use wide MFNs to increase commission
2 charges, and therefore to increase retail prices, then
3 you need to think about what is -- are the constraints
4 on PCWs in being able to raise commission charges. So
5 that is your focal product, it is the PCWs, and the
6 focal product is the insurance services they sell for
7 which they charge a commission, and then you need to see
8 what are the constraints on that.

9 Now, at that point you are agnostic as to -- you do
10 not know what the answer is going to be. So it might
11 be, yes, you look at that, and actually, yes, you do
12 need to look at a load of other stuff, or equally it
13 might be you do your hypothetical monopolist-type
14 thinking and actually find, no, no, it is quite a narrow
15 market in which they can exercise market power. At that
16 point, you have done market definition, you move on.

17 THE PRESIDENT: Just to be clear about theory of harm,
18 I think it arises out of the answer you have just given
19 but again I want to be clear, you are saying it is not
20 merely the question of the anti-competitive effects of
21 wide most-favoured-nation clauses that constitutes your
22 theory of harm; it is the fact that they had an effect
23 on the commissions charged in the market, would that be
24 right?

25 A. Well, yes, the way why most-favoured-nation clauses

1 could have anti-competitive effects is by affecting
2 commission charges and therefore affecting retail
3 prices.

4 THE PRESIDENT: When you are talking about the theory of
5 harm, is what you are talking about?

6 A. Yes.

7 THE PRESIDENT: You are not talking about any other possible
8 effects of wide most-favoured-nation clauses?

9 A. Well, I think we have got three or four different ways
10 in which we think wide most-favoured-nation clauses
11 could be harmful, although they all relate to commission
12 charges. You know, we think that they can relax the
13 constraint on a firm in setting commission charges
14 because they know that if that commission charge leads
15 to higher retail prices then all the other PCWs will
16 also have to raise their retail prices, so we know that
17 it relaxes the constraint there.

18 We know it means that you cannot as a PCW enter or
19 expand by saying to an insurer, okay I will offer you
20 a low commission rate if you price low on my PCW because
21 the insurers cannot do that because of the wide MFNs.

22 But these theories of harm they are all related to
23 commission charges and the ability or the presence or
24 absence of market power around commission charges, and
25 of course it might be that we were in a different world

1 in which we had done this analysis and we had found no,
2 PCWs do not have any market power over commission
3 charges for a variety of reasons, fine, then we would
4 not be here.

5 THE PRESIDENT: Can we bring up {A/1/79}. I am sure you do
6 not need telling, but this is an extract, page 79, of
7 the Decision itself.

8 What you are describing here, what the CMA are
9 describing here, are the market definition approach that
10 is taken in the case of what we call two-sided platforms
11 or two-sided markets. I am sure you are very familiar
12 with 5.15, 5.16 and following, but you may want to cast
13 your eye over it again just to refresh your memory.

14 A. Yes, fine.

15 THE PRESIDENT: Then just pop on to the next page, {A/1/80}.
16 You there have the question of determining which
17 alternative is appropriate, and again I will invite you
18 to cast your eye over that. (Pause) Thank you.

19 Dr Walker, it sounds like a simple question, but
20 what do you understand by a market?

21 A. Okay, well, we are talking about relevant markets here,
22 so this is a -- within --

23 THE PRESIDENT: Well, no, let us just start with what
24 a market is. We can go into relevance after that, but
25 what is a market?

1 A. Okay, a market in a general sense presumably is where
2 you have buyers and sellers meeting together to engage
3 in a transaction of some form.

4 THE PRESIDENT: Right. So you essentially have as you say
5 buyers and sellers in some way intermediated by some
6 form of interface?

7 A. Yes.

8 THE PRESIDENT: Thank you. What you say here is that the
9 market definition in the case of two-sided markets or
10 two-sided platforms involves an exercise of judgment as
11 to whether you are talking about two markets rather than
12 one. Is that fair?

13 A. Well, judgment based on an analysis of the evidence.

14 THE PRESIDENT: Of course. I was not implying that you
15 flipped a coin.

16 A. Okay.

17 THE PRESIDENT: No. What I am saying is that you do not
18 automatically say it is two markets, you do not
19 automatically say it is one market. You exercise your
20 judgment based upon the evidence, and you take a view,
21 which is what is said here, but I am inviting your
22 agreement so that we can explore that a little further.

23 A. Okay.

24 THE PRESIDENT: What is it that determines, in general
25 terms, the decision to analyse the market as a single

1 market or as two markets when one has a two-sided
2 platform or two-sided market? Again, in general terms
3 rather than the specific. We will come to the specific.

4 A. So you are going to be looking at whether the constraint
5 on your focal product comes only from, you know, one
6 side of the market or whether it comes from both sides
7 of the market. If it only comes from one side of the
8 market, then you are probably in a situation of having
9 separate markets because the other side is a different
10 market. If there are constraints that come from both
11 sides of the market, then you would be in a world where
12 you have, you know, a market definition encapsulating
13 both sides of that market, so one market.

14 THE PRESIDENT: Here -- and I would be grateful if you could
15 pull up {F/718/2} -- you will be familiar with this and
16 you have it in hard copy in front of you, and you will
17 be familiar with this because I spent some time with
18 Dr Niels discussing this.

19 Now, first of all what I have sought to do, but I am
20 asking the question to invite your comment or agreement
21 or disagreement, is within the market for the buying and
22 selling of home insurance policies, I have sought to
23 articulate the market that the CMA has defined in
24 paragraph 5.2 of the Decision, and you will see that one
25 market I have sought to identify as the buyers of price

1 comparison services from sellers of price comparison
2 services, that is to say the PCWs, and then on the other
3 side the PCWs sell customer introduction services to the
4 buyers of those services, namely the HIPs.

5 A. Okay.

6 THE PRESIDENT: Are you happy with that description of
7 what --

8 A. As a description of what happens, yes. As a definition
9 of the market, therefore of two markets, no.

10 THE PRESIDENT: Would you like to expand on that just so
11 I understand where you are coming from.

12 A. Yes, because the question is trying to understand what
13 the constraints are on our hypothetical monopoly PCW
14 when they are setting commission charges, and absolutely
15 there are constraints on that from both sides of the
16 market, there are constraints on the HIP side, because
17 if prices go up HIPs could just delist in theory. There
18 are constraints on the consumer side, prices go up on
19 PCWs, consumers could go elsewhere. There are
20 constraints, therefore, on commissions charged by PCWs
21 from both sides of the market, but it is a single
22 market. The hypothetical monopolist test is all around
23 that ability of the hypothetical monopolist to raise
24 commission charges.

25 THE PRESIDENT: So just so that I understand the extent of

1 the application of the SSNIP, the approach of the CMA
2 was to apply a SSNIP to the single side of the market
3 that is green, that is to say the commission charged to
4 HIPs, and to consider the implications of that rather
5 than to consider a SSNIP applied to the yellow side of
6 the market, namely the cost or price to buyers of price
7 comparison services of those services?

8 A. So we only apply the SSNIP to the commission which is
9 directly paid by HIPs, but we looked at the effect of
10 that also on the consumer side. So whenever someone is
11 saying, you know, you have one market, you have missed
12 out the consumer side of the market, that is just not
13 right. You know, we have absolutely looked at the
14 consumer side of the market, because that is what you do
15 when you look at commission goes up 10% let us say, that
16 leads to retail prices going up about 3.6%, whatever,
17 what is the effect of that, and would that lead to so
18 many sales being lost by PCWs that the commission charge
19 would not be profitable.

20 THE PRESIDENT: Yes, I mean, what you are articulating there
21 is what has been called, and it may be inaccurately
22 called, an indirect SSNIP. What you are saying is that
23 the two markets as I call them, or the one market you
24 call them, are linked in this way. If you hypothesise
25 a SSNIP to the commission that is charged to HIPs, that

1 commission is obviously a cost that they have to bear.
2 As with all companies that want to stay in business,
3 those costs have to be recovered from that which they
4 sell, which in this case are the home insurance
5 products, and so that hypothetical increase in price is
6 factored into the quotations that are produced in the
7 yellow side of the market to the buyers of price
8 comparison services, and what you will find is that you
9 will have quotations produced by the PCWs which are
10 higher albeit not by the 5 to 10% higher that you are
11 hypothesising in the green side of the market?

12 A. Yes, there are quotations by HIPs on the PCWs.

13 THE PRESIDENT: Indeed.

14 A. But, yes, they will be higher and we have hypothesised
15 full passthrough. That is quite an aggressive
16 assumption, but it has the effect of tending to widen
17 the market, so it tends to make us -- you know, we are
18 being -- I hate to talk about conservative, you always
19 wonder what direction that means. But we have set it up
20 so we were more likely to find a wide market than not,
21 if actually there was evidence of significant
22 substitution on the consumer side.

23 THE PRESIDENT: Yes, and so what you are doing in effect is
24 albeit in an indirect way you are asking what is the
25 reaction of the buyer of price comparison services to an

1 alteration in the prices quoted by HIPs on PCWs?
2 A. Yes, because that has a direct implication for market
3 power in the potential market of concern, which is,
4 you know, the potential market we are exploring. It is
5 how wide that potential market is. So I am not wild
6 about talking about it being an indirect constraint.
7 I see what you are saying, Chairman, but it is a direct
8 effect of the increase in the commissions is the
9 potential loss of sales from PCWs.

10 THE PRESIDENT: No, I understand that terminology is always
11 a problem, and so you are quite right to indicate
12 unhappiness with it and whether I carry on using it is
13 a matter that we will no doubt debate in due course, but
14 all I am getting at is that what you are doing is you
15 are in effect conducting a market definition of the
16 yellow side of the market at the end of the process
17 rather than the beginning because if I can just complete
18 that thought and invite your comments, if one had done
19 what I discussed with Dr Niels and increased the price
20 not of the insurance policies quoted but the cost of the
21 quotation itself, one would that way have got a good
22 understanding of the substitutability of the various
23 other channels for purchasing home insurance which are
24 articulated in the middle of the table below the box
25 coloured yellow/green.

1 A. Can I make sure I understand that statement? So what
2 you are saying is had instead we looked -- we just
3 counted --

4 THE PRESIDENT: Not instead; in addition.

5 A. -- a 10% price increase of policy prices on PCWs?

6 THE PRESIDENT: No, not policy prices. What I am
7 hypothesising is that you actually hypothesise a charge
8 of the price comparison service. In other words, that
9 which is free to the buyer of price comparison services
10 receives a hypothetical but not short-term increase. So
11 from zero to whatever.

12 A. Okay, so you are raising the possibility of PCWs
13 directly charging consumers for using the PCW?

14 THE PRESIDENT: That is exactly what I am doing, yes.

15 A. Well, okay, I mean, it is a question you can ask. I am
16 not sure how it sheds any light, however, on the
17 question of interest for this case which is around the
18 ability for PCWs to raise commission charges. So it may
19 well be profitable or unprofitable, I guess it would be
20 unprofitable for them to do it since they do not
21 currently do it and if it is profitable they would
22 probably do it, it does not make it relevant.

23 THE PRESIDENT: Well, I quite understand the point about
24 relevance because I think you would agree with me this
25 is an exercise not carried out in the Decision?

1 A. Yes, that is right.

2 THE PRESIDENT: The reason I am wondering why as an
3 additional test it might have been carried out is not
4 because it goes to the profitability or otherwise of the
5 hypothetical monopolist doing it, because I quite take
6 your point that in a market where you are selling what
7 you are selling for nothing, even a tiny increase in
8 price could have massive effect, because the whole point
9 about business or about two-sided markets is that one
10 has the revenue streams on both sides informing the
11 pricing on both sides. So I understand why you say
12 that. The reason I am asking why you did not undertake
13 the exercise is simply whether as a matter of
14 understanding how the choices of buyers of price
15 comparison services between the various ways in which
16 one can acquire home insurance products would be
17 informed by conducting that exercise.

18 In other words, you would understand just how much
19 the provider of price comparison services to consumers
20 would lose if, say, you charged 50 pence per quote.

21 A. Okay, I mean, you would, if you started charging 50
22 pence per quote, you would find out how many sales you
23 would therefore lose. I still do not see why that is
24 relevant to the case that we are dealing with, because
25 that is not the charging structure in the real world

1 that we see, and so, you know, we are looking at what
2 the charging structure was that was in place, back when
3 this behaviour was taking place, and trying to
4 understand the constraints on that charging structure
5 then.

6 THE PRESIDENT: Of course I understand that, but the reason
7 I am wondering why you were not interested is because
8 it, I would think, sheds some light on how differences
9 in price of whatever sort would encourage or cause the
10 buyers of price comparison services to shift to
11 alternative channels.

12 A. Of course that is something we looked at, we looked at
13 what would be the effect of an increase in premium
14 prices as a result of this SSNIP in commissions, so what
15 would be the effect of an increase of, you know, 1.8,
16 3.6%, what would be the effect of that on demand from
17 customers for buying insurance on PCWs. So we did look
18 precisely at that question, but we did it within the
19 context of the charging system as it existed at that
20 point.

21 THE PRESIDENT: You did not see any significance in the fact
22 that the increase in price might be very differently
23 manifested depending on what you hypothesised?

24 A. Well, no. We did not think about that because we were
25 trying to understand the competitive strength on the

1 companies at that time with the charging structure they
2 used, not on a hypothetical charging structure that was
3 not in place.

4 So, for instance --

5 THE PRESIDENT: Yes, of course -- I am so sorry,
6 I interrupted.

7 A. So for instance, I do not know because you correctly
8 said we have not looked at this, but I do not know if
9 consumers will react differently to an increase in their
10 premium of £2 compared to no increase in their premium
11 but they have to pay a separate £2 charge. Rationally,
12 one would think, the behaviour should be the same. We
13 know that is not the case. We know consumers are not
14 rational. So we did not look at that alternative, we
15 looked at actually the choices that consumers faced and
16 how they then reacted.

17 THE PRESIDENT: It may come, I am not sure, it may come to
18 no more than this. A great difficulty that courts have
19 with counterfactuals in competition law is that one is
20 dealing in varying degrees with non-facts. One is
21 dealing with hypotheses, and you said a moment ago,
22 well, the price we hypothesised was not the price that
23 we thought was consistent with the market we were
24 considering.

25 A. No, I do not think that is right. I mean, we -- there

1 is a hypothetical price increase, but there is nothing
2 hypothetical about how that price increase would have
3 been exacted by the PCWs, and of course, you know, we
4 have seen over the years they have been increasing those
5 commission charges, they have not changed that charging
6 structure, they have not gone to an alternative charging
7 structure, so it seems reasonable to focus on the
8 charging structure that they themselves have used.

9 THE PRESIDENT: At risk of introducing a further qualifying
10 descriptive SSNIP, the reason I am interested in this --
11 and it may be entirely wrongly -- is that the increase
12 in the quotation price is overt, whereas of course the
13 increase in the quoted price of the insurance policy
14 that the proposed insured is being invited to buy is to
15 an extent covert, and if one is trying to gauge the
16 question of substitutability which is in a sense at the
17 heart of the question that is being considered here, if
18 only as a cross-check, why not ask just how sensitive
19 will the same consumer market be to a price that is
20 differently articulated on my hypothesis compared to
21 yours?

22 I am not for a moment saying that the question that
23 you have asked is not a question you should ask. What
24 I am really getting at is why not seek to inform
25 yourself about the operation of the market in this

1 hypothesis as well as the hypothesis that you say is
2 more consistent with the way charging worked?

3 A. Okay, and my answer to that is because it does not add
4 any information to help us with trying to understand the
5 ability of our hypothetical monopolist to raise
6 commission charges. You know, what we have is direct
7 evidence on that which is what the effect of premium
8 price increases is on consumer demand, we have direct
9 evidence of that, and that is a relevant question. We
10 do not have evidence on this alternative of suppose they
11 started to charge separately consumers because that just
12 is not a market fact. That is not how the market
13 operated. That is not how PCW operators worked.

14 So you can say in one sense the price increases is
15 covert and in another sense it is overt. Okay, but in
16 terms of actually understanding the profitability of the
17 commission charge is actually it is that covert, as you
18 put it, price increases that matters, because that
19 was -- the question is did consumers switch away because
20 of that covert, in your words, price increase? So that
21 is why I do not think looking at a different charging
22 structure adds the relevant information to the question.

23 THE PRESIDENT: Of course if you went down that route, you
24 would not be able to deploy the narrow
25 most-favoured-nation clauses in the counterfactual?

1 A. Well, okay, I mean if PCWs started charging consumers
2 for using it, it is not clear to me why they could
3 not -- why that necessarily means that narrow MFNs would
4 cease to exist, but --

5 THE PRESIDENT: No, they would cease to be relevant is what
6 I said.

7 A. Okay, well, then, that seems to me to be another reason
8 why going down this route is not a great idea, because
9 narrow MFNs are a, you know, central aspect of this
10 market.

11 THE PRESIDENT: Yes, indeed, and I am not going to trespass
12 on what I am sure will be part of the cross-examination
13 of Mr Beard, but your analysis, going to the way you did
14 analyse the SSNIP, was to say that first of all the
15 increase in price as manifested through the quotations
16 on the price comparison websites of the HIPs being 1.8
17 to 3%, I think that was the range you had, that would
18 not necessarily trigger the sort of move away from price
19 comparison websites that certainly the increase that
20 I am hypothesising to price quotations would, but
21 secondly -- and this is where the SSNIPs do come in --
22 sorry, the narrow most-favoured-nation clauses do come
23 in -- you say that for a large number of those
24 quotations there would not be an increase -- well, no,
25 there would not be a difference between the direct

1 channel price and the quoted price on the price
2 comparison website?

3 A. Yes, that is right.

4 THE PRESIDENT: Thank you. Well, that is very clear,
5 Dr Walker. I have taken what I ran through Dr Niels at
6 a far brisker pace which I am sure will be a relief to
7 all, but it is only fair for me to say that if you have
8 any points that you want to say in response to my
9 questions and Dr Niels' answers to those questions, or
10 more generally on the paper you have in front of me,
11 I think it is only fair that I invite you to say
12 whatever you wish, if there is anything.

13 A. It may well be that I am going to be cross-examined on
14 the issue of narrow MFNs, but I do not know that is the
15 case, and I do think it is important, therefore, to
16 articulate the reason why you have to take narrow MFNs
17 into account when you are thinking about this market
18 definition exercise, and I will come back in a moment to
19 the whole -- the SSNIP idea you do not change any
20 prices, I will deal with that in a moment, but suppose
21 you are concerned about whether PCWs had the ability to
22 raise commission rates, as we are, and so you carry out
23 the hypothetical monopolist test of PCWs raising
24 commission rates, and suppose you assumed away there
25 were no -- there weren't narrow MFNs, okay, and suppose,

1 in this world, you decided that actually, no, the PCWs
2 could not raise commission rates profitably because what
3 would happen is retail prices would go in PCWs,
4 everybody would go to the direct line, okay? Then you
5 might decide oh, okay, so the PCWs do not have any power
6 over commission charges, and, therefore, there could not
7 be any adverse effects from the wide MFNs. But of
8 course that is exactly the wrong result because actually
9 we know that there are narrow MFNs in place, we know,
10 therefore, that removed that constraint from the direct
11 and, you know, we provide evidence that actually the
12 commission charge is profitable.

13 So you will get exactly the wrong result if you
14 ignore narrow MFNs, and there is a point that is made in
15 Dr Niels' reports, and possibly also Dr Ralston's, that
16 the SSNIP test -- what you do is you change one price
17 and you leave everything else the same. You cannot do
18 that in a world of narrow MFNs. You have got to change
19 something, because either you say you raise -- the
20 hypothetical monopolist raises its price, are we going
21 to leave all other prices the same, well, you have
22 changed something, you have just removed narrow MFNs
23 from the marketplace, or you say no, no, we are going to
24 keep narrow MFNs in place, in which case you have to
25 accept the other prices will rise.

1 There is no alternative in which we say we just
2 raise the hypothetical monopolist price here and do not
3 change anything else, that is just not a possibility.

4 Actually, if you really want to go -- you know, we
5 all seem to be happy that you can -- when you raise the
6 commission rate, we should then think about what happens
7 to the price on the other side, you know, the retail
8 price, but in the formal sense in which, you know,
9 Dr Niels talks about it, well, I think even that he
10 should not be allowing, because he has raised one price,
11 commission charge, and then he has allowed another price
12 to raise, which is the right thing to do, but I think on
13 his narrow approach he should not really be doing that.

14 So I think the inclusion of narrow MFNs in the
15 market definition exercise is absolutely crucial, and if
16 you do not do that you get a genuinely nonsensical
17 answer.

18 THE PRESIDENT: I am not going to ask too much about that
19 because I am fairly confident that Mr Beard will be, and
20 I do not want to cross his line of questioning, but
21 I just make two points and invite your comments briefly.

22 First of all, as we started out, that analysis
23 obviously proceeds on the basis that narrow MFNs are not
24 anti-competitive but proper?

25 A. We have assumed that they are not, yes.

1 THE PRESIDENT: Yes. Secondly -- and I wonder if you could
2 turn up diagram 3 in my little clip {F/718/3}. It is
3 something that I invited Dr Niels to look at and he
4 rather thought that he would not make any comments on
5 it, but I will ask you nonetheless.

6 The question I have is depending on all the
7 circumstances, that is to say the number of HIPs
8 subscribing to common price comparison websites, and
9 depending upon the number of narrow MFN clauses which
10 are present in those agreements between the HIPs and the
11 PCWs, can one get to a situation where the prevalence of
12 narrow MFNs actually proxies for the existence of wide
13 MFNs?

14 A. I mean, I think that is a really interesting question
15 which is the subject of some debate, and you could
16 absolutely imagine a world in which that was the case,
17 you know, but I think -- I mean, you can imagine that
18 world, because effectively what you have is narrow MFNs
19 proxying for wide MFNs, so what that is telling you is
20 wide MFNs are a problem and here we have a way of
21 proxying it. I do not think that means oh well narrow
22 MFNs in a sense in themselves are -- you can assume they
23 are anti-competitive because they do have an efficiency
24 rationale. You know, the free riding argument is
25 a reasonable argument to make with narrow MFNs, but as

1 soon as we get to wide MFNs there is no efficiency
2 defence offered.

3 So I think narrow MFNs are much more likely benign
4 in themselves than wide MFNs.

5 THE PRESIDENT: It is probably somewhere in the Decision,
6 and it may be that counsel can assist rather than you
7 because this is not a memory test and the Decision is
8 a long one, but is this something that you looked into
9 in the Decision?

10 A. We did not analyse the effect of narrow MFNs in terms of
11 this sense that you have talked about them, proxy and
12 wide MFNs, no. We are aware of that debate, but we took
13 the decision that the more egregious concern is wide
14 MFNs, and that is what we would look at.

15 THE PRESIDENT: Just help me on this: it would actually be
16 quite difficult to carry out the sort of analysis that
17 has been carried out in diagram 3 when you are
18 hypothesising a monopolist that is the PCWs?

19 A. No, I mean, so this is the world in which you are
20 worried about narrow MFNs?

21 THE PRESIDENT: No, it is simply where I am, like you,
22 worried about wide MFNs but concerned to exclude from
23 consideration the risk that narrow MFNs will proxy wide
24 MFNs in their effect depending on their distribution
25 across the market.

1 In other words I am talking about the true
2 counterfactual situation. It does seem to me that -- do
3 correct me if I am wrong because there is a high chance
4 of that -- it does seem to me that the way in which one
5 carries out that exercise rather depends on how many
6 price comparison websites one is hypothesising. Here,
7 in diagram 3, I have hypothesised three, but of course
8 in carrying out your SSNIP you only hypothesise a single
9 one which will affect the way in which one conducts this
10 particular exercise if one conducts it?

11 A. No, I am sorry, Chair, can you say that again slowly,
12 please?

13 THE PRESIDENT: Yes, of course.

14 If you look at the diagram here, I am hypothesising
15 three price comparison websites. I am hypothesising
16 a market of ten home insurers subscribing to PCW
17 websites. Of those ten, number 10 coloured red is
18 a direct line going it alone and not participating on
19 a PCW at all, but the other nine all sign up to all
20 three on the price comparison websites A, B and C.

21 However, not all of them have narrow
22 most-favoured-nation clauses in their agreements with
23 each price comparison website. What happens in the
24 boxes below the description of the HIPs is we identify
25 which is subscribing to which PCW in terms of having in

1 their agreement a narrow most-favoured-nation.

2 So if you look at the position of insurer 1, insurer
3 1 is a subscriber to all three price comparison
4 websites, A, B and C, but only has a narrow
5 most-favoured-nation clause in respect of PCW A and so
6 if one has the price quoted on the insurer website of 10
7 as we do here, the permissible price, the maximum
8 permissible price on PCW A is less than or equal to 10.

9 A. Yes.

10 THE PRESIDENT: But it is not the case as regards B or C
11 where I have hypothesised increasing prices, but I mean
12 it does not have to be 11 or 12, it can be 15 or 16, it
13 does not matter.

14 However, if one gets to a situation where there are
15 narrow MFNs in all three of the agreements with price
16 comparison website A, one gets all three permissible
17 prices being 10 or less, which is the position in the
18 case of insurer 3.

19 So what I am saying is that one gets, as one has
20 increasingly prevalent narrow MFNs, a trend such that
21 all of the prices move to the same level, that is to say
22 the price quoted on insurer website at 10.

23 A. Okay, so, if it is a wide MFN they would all move to the
24 same price. Here there is still pricing freedom in one
25 direction. You know, they could -- could you have a --

1 you said less than or equal to 10.

2 THE PRESIDENT: Yes.

3 A. Yes. But they could still vary across the PCWs. You
4 could have, you know, 7, 8, 9 or less than 10 on
5 different PCWs, which of course you cannot have with
6 wide. With wide, they are all 9 or they are all 8 or
7 they are all 7.

8 THE PRESIDENT: Yes, so you are placing quite rightly
9 considerable stress on the less than or equal to?

10 A. Yes.

11 THE PRESIDENT: Yes, well, thank you very much, Dr Walker,
12 I am not going to trouble you further on this because
13 I think you will be troubled -- I am sure that is not
14 the right word. I am sure you will be asked by Mr Beard
15 about this, but if you are not, then I am quite sure
16 that Professor Ulph and I will be back, but with that,
17 Ms Demetriou, I am going to hand back to you, if you
18 have any questions.

19 MS DEMETRIOU: I do not have any questions, thank you.

20 THE PRESIDENT: I am so sorry, Professor, do you have any
21 further questions?

22 PROF ULPH: Yes, I would like to just go back --

23 THE PRESIDENT: Sorry, Ms Demetriou. Yes, do go on,
24 Professor.

25 PROF ULPH: I would like to go back on some of the points

1 you just covered with Dr Walker.

2 We are right back to the Sainsbury's v MasterCard.
3 The argument there was the way in which you carry out an
4 investigation is you first of all identify the fact that
5 it was causing concern or the agreements are causing
6 concern.

7 You then define the market, and then you articulate
8 and investigate a theory of harm, and you did articulate
9 the way in which your theory of harm might shape your
10 view about thinking about what is the appropriate
11 market.

12 Just listening to the evidence you have given, you
13 seem to be taking a somewhat stronger position than
14 that, if I understand you. So you were saying that if
15 we have a case where we have a two-sided market,
16 supposing it were the case that consumers were actually
17 paying some charge on their side of the market, so for
18 example if I go on Trainline to buy a train ticket I pay
19 a booking fee over and above the cost of the tickets
20 themselves, so some PCWs do charge booking fees, so
21 supposing there was a booking fee, you are saying that
22 even if that was the case because your theory of harm is
23 that everything is driven by commissions, you would not
24 investigate the question of raising a booking fee as
25 part of your exercise of defining the market. Have

1 I understood your point correctly?

2 A. Well, if I did say that, I mis-spoke. If it was the
3 case during this period that PCWs had had a separate
4 charge that they made to consumers, and that was a way
5 in which -- and then we would have to understand exactly
6 how that was working, you know, that would be a relevant
7 fact. But they did not, so we are looking at the
8 charging system they had in place at the time and trying
9 to understand whether that was a charging system through
10 which they exercised market power.

11 PROF ULPH: Okay. The other point on this is it has been
12 suggested in some of the evidence from BGL that in the
13 absence of that charge that PCW makes to consumers you
14 could test the restraint on PCW on the consumer side by
15 varying other dimensions of competition that the CMA
16 identified as being relevant. So it is your position
17 that that is an exercise that you do not have to do
18 because of the theory of harm that you have?

19 A. No. So the question is do the PCW -- would they
20 collectively have market power? One way in which they
21 could exercise that market power is through increasing
22 commission rates and we look at whether that would be
23 profitable for a hypothetical monopolist and we decide
24 it is, we have defined the market. We do not need to do
25 anything else. It may well be that the PCWs

1 collectively could actually choose to worsen the quality
2 in the other side of the market, yes, that might well be
3 true. We do not need to go there because we have our --
4 we have already shown that they can exercise market
5 power in the commission charges so that we have shown
6 that collectively they pass a hypothetical monopolist
7 test, so that gives us a frame of reference for now
8 thinking about, okay, do they have market power in this
9 market, and how -- does the conduct we are concerned
10 about allow them to exercise that market power to the
11 detriment of consumers?

12 So I am not denying that collectively the PCWs might
13 be able to worsen the consumer experience on the
14 consumer side. We just do not need to go there because
15 we have already got our narrow market, and I think, as
16 I read the evidence on Friday, I think Dr Niels agreed
17 with us that that is the case.

18 PROF ULPH: That will be something for our Decision, our
19 judgment. So your position is even if there had been
20 some kind of element of charge on the consumer side, you
21 would not have conducted a SSNIP test on that in order
22 to define the market?

23 A. Well, once we found that the commission charges is
24 a profitable thing to do, unless you were in a world in
25 which what you were going to hypothesise was, okay, they

1 increased the commission charges on one side but they
2 lower this other charge on the other side, okay, but
3 that is not the -- the problem with this exercise is
4 that we are talking about a charging structure and what
5 that charging structure might have led to that did not
6 exist, and we are looking backwards at behaviour in the
7 past, and so we need to look at the facts in the market
8 as they were then, I think.

9 PROF ULPH: I think the point is a somewhat different one.

10 I think the point relates to the question whether the
11 definition of the market in some complete way precedes
12 the theory of harm whenever you conduct that exercise
13 without completely tying your hands by the theory of
14 harm.

15 So I am not saying that because we think the whole
16 issue is about raising commission fees therefore you do
17 not need to do the test. I am asking you the question
18 if you are only interested in defining the market, you
19 do agree that these are market two-sided platforms, your
20 argument as to why you do not do it on the consumer side
21 is you have already done it on the HIP side, the answer
22 is unequivocally, yes, they can profitably raise
23 commissions, therefore we do not need to do any other
24 test whatsoever on the consumer side. It is not because
25 of the theory of harm, it is because you have already

1 passed it on the consumer side.

2 A. I may be misunderstanding you, but first of all I do
3 just want to emphasise that we actually did look at the
4 consumer side, we absolutely looked at what would the
5 effect be of commissions increase being passed through
6 to consumers and therefore what would happen to consumer
7 demand, so it is really important because a number of
8 times in the last few days people have said, you know,
9 the CMA, they only half did the SSNIP, they only looked
10 at one side of the market. That is not true, we looked
11 at competitive constraints on both sides of the market
12 and how they affected the focal product.

13 If your question is about does the theory of harm
14 drive the market definition, well, the theory of harm
15 drives where you are worried about the ability to
16 exercise market power and so that is where you look, and
17 market definition, it is just about looking at
18 competitive constraints. So once you have a theory of
19 harm, that does not say, oh, therefore the market is
20 this. Once you have a theory of harm, it tells you this
21 is where we need to start -- to look for whether there
22 is market power, you know, and then on the evidence, we
23 might find there is, as we do in this case, or in
24 a different world we might find, no, there was not any
25 market power because there were lots of binding

1 constraints acting on commission charges.

2 PROF ULPH: I think I understand your position now, thank
3 you. That has been helpful.

4 THE PRESIDENT: I have no further questions arising out of
5 that. Ms Demetriou, I will just double-check that you
6 have none?

7 MS DEMETRIOU: No, thank you very much.

8 THE PRESIDENT: Looking at the time, Mr Beard, would now be
9 an appropriate moment?

10 MR BEARD: Yes. Are we going to finish at 4.30 today?

11 THE PRESIDENT: 4.30, unless anyone wants an earlier start,
12 but we will stop, we would not want to go beyond 4.30,
13 but you have until 4.30.

14 MR BEARD: That is fine. I think now is the only sensible
15 time. There is not a lot of room left. The guess that
16 I might run on to tomorrow is a fair one.

17 THE PRESIDENT: I was just doing my best to make sure you
18 were right, Mr Beard.

19 MR BEARD: But I am most grateful for the Tribunal's
20 selflessness.

21 THE PRESIDENT: We will resume at 4.00.

22 Dr Walker, you will have heard me say this to
23 everyone: do not talk about your evidence to anyone.

24 A. Yes.

25 THE PRESIDENT: Thank you.

1 (3.52 pm)

2 (A short break)

3 (4.02 pm)

4 Cross-examination by MR BEARD

5 MR BEARD: Sir, thank you.

6 Dr Walker, good afternoon. I realise you have
7 already talked about market definition, but I am going
8 to deal with a couple of preliminary issues before I get
9 into that.

10 At paragraph 3 {A/8/2} you talk about you were the
11 chief economist at the CMA since 2013, is that right?

12 A. Yes.

13 Q. So you were involved -- you have already mentioned it --
14 in the PMI market study and the DCT study?

15 A. I was not involved in the PMI study, that was
16 a Competition Commission case. I was involved in DCT.

17 Q. So you supervised the economic analysis in that and in
18 this case?

19 A. Yes.

20 Q. I just want to ask you one or two questions about what
21 you did and what you looked at in this case, if I may.

22 You say in paragraph 5 of your statement that you
23 carried out high level supervision and review of
24 economic analysis carried out by the CMA in this case.
25 That is right?

- 1 A. Yes.
- 2 Q. So just thinking about what you actually looked at when
3 you did that, did you take a draft of the decision and
4 read it and pass your comments, or did you look at
5 underlying material when you were carrying out that
6 review?
- 7 A. So, I mean, I was part of the discussions, particularly
8 around market definition, over however many years this
9 case has been going on for, so that means I have been
10 involved with X number of meetings where we were
11 discussing issues in this case, I have been involved
12 with lots of staff meetings discussing particularly
13 market definition, we have had iterations of various
14 reports from Oxera, so throughout that I would be -- we
15 have been discussing the markets, what is the evidence
16 of this, so talk about that. Did I review the final
17 draft of the Decision, you know the market definition
18 chapter, for instance? Absolutely.
- 19 Q. More generally in relation to the economic analysis in
20 this decision, you say you were responsible for high
21 level supervision and review of economic analysis?
- 22 A. Yes, but I am only here on the market definition.
- 23 Q. Well, you have only produced a report in relation to
24 market definition.
- 25 A. Yes.

1 Q. Did you look at any of the underlying material like the
2 Section 26 notices or the responses to them?

3 A. No, I relied on staff notes, decisions, whatever.

4 Q. Did you have any input into the questions that were
5 being posed in the Section 26 notices?

6 A. I mean, I would have had input in the sense of what is
7 the information that would be useful for us to get out
8 of PCWs or out of HIPs. Did I have any input into the
9 precise questions that were asked or that whole process
10 or then reading all the responses and analysing them,
11 no.

12 Q. You know that there were Section 26 notices issued in
13 2017, there were some more in 2018 and a further round
14 in 2019?

15 A. I know there were several rounds.

16 Q. You also know that in none of them did you ask any
17 questions of the HIPs about how they would react if all
18 of the PCWs raised their commissions?

19 A. Yes, I am aware of that, we discussed it this morning.

20 Q. Do you not think that that was a significant failing in
21 relation to evidence gathering in relation to market
22 definition?

23 A. No, no, I do not. Let me explain why.

24 So, first of all, we actually have evidence of what
25 HIPs have done in response to sustained commission rises

1 which is they have not delisted. They have not been
2 able to -- they have not decided to use PCWs less.
3 Indeed, over the period that we are talking about, the
4 use of PCWs went from 40% of new business to 60%, so we
5 do not need at this point to talk about hypothetical
6 monopolists, we have that evidence of what consumers or
7 HIPs actually did.

8 In relation for instance to that question this
9 morning about, okay, so you have -- you, CMA, have asked
10 what would happen -- so CMA have asked the HIP what
11 would you do if the commission charge for a PCW went up,
12 would you delist, and there is that whole discussion of
13 well you did not ask the question of what would you the
14 HIP do if all PCWs raised their commission.

15 Okay, I gather that is true, but in a sense we do
16 not need to. If they did not change -- delist in
17 response to one HIP raising their price, when you could
18 delist on that HIP but still go elsewhere, where prices
19 had not been raised, still sell elsewhere, you are
20 certainly not going to delist when they all raise their
21 prices, because you do not have those alternatives.

22 Q. Does that not depend on what the price rises were in
23 those circumstances?

24 A. Well, if we ask a question of, you know, would you
25 switch if a HIP raised commission by 10%, and the answer

1 is no -- would you delist, sorry -- the answer is no,
2 then you are not going to delist from that PCW if all
3 the PCWs raise prices because you had the option of
4 delisting when you could still use those other three
5 PCWs.

6 Now you do not even have that option. So, if it was
7 not worth you delisting from one but still having access
8 to the others, you are not delisting from all four.

9 Q. How do you know that, Dr Walker, if you did not ask any
10 of the HIPs?

11 A. Because it is a lessened choice set. You know, when
12 only one HIP raises its price and I am thinking am
13 I going to delist, I am thinking, well, if I delist from
14 that HIP, I am going to lose some business there.

15 Q. Do you mean HIP or PCW?

16 A. Sorry, quite right, thank you. If I delist from that
17 PCW, I will lose some business, and then I have to
18 think, okay, but I am still on the other three PCWs,
19 still got business there, and can I replace that
20 business through a direct source and use the other three
21 PCWs, and the evidence is none of the HIPs thought the
22 answer was yes, it is worth me delisting.

23 Now you are asking me a question of, well, hang
24 about, suppose they all raised the prices, so you are
25 now asking me would I delist -- would the HIP delist

1 from all of those PCWs, I am now having to replace the
2 business from all those four PCWs just in my direct
3 business, when I have already shown that I did not think
4 I could do that from one PCW.

5 So, yes, I think we know the answer to that
6 question.

7 Q. But if a HIP thought that actually the price change in
8 relation to one PCW was not significant because it was
9 listed elsewhere, was not facing higher prices in
10 relation to all of those others and thought that it
11 would actually win business on those other PCWs, it
12 might not be bothered to delist, it might not be
13 bothered to invest in its own direct channel or take
14 other steps. That is correct, is it not?

15 A. Well, it is not clear to me what set of incentives would
16 lead it to decide it is not worth delisting from one
17 because I do not want to lose that business, but
18 actually I am happy to lose the business from all four.
19 So is it hypothetically a possible thing a HIP might do?
20 Of course it is. HIPs might do. Is it, on the basis of
21 evidence we have on what HIPs did in response to price
22 rises from individual PCWs, is it plausible or likely
23 that you would see that happening? No.

24 Q. But you did not think it was worth checking by actually
25 asking the question in your three rounds of Section 26

1 notices?

2 A. We have established that question was not asked.

3 Q. That was not the question I asked you, Dr Walker.

4 A. Okay, you will have to ask me the question again, then.

5 Q. I said: but you did not think it was worth checking by
6 actually asking the question in any of the three rounds
7 of Section 26 notices, did you?

8 A. Okay, well, I personally, as you said, was not involved
9 in the specifics of the question, but did the CMA not
10 think it worthwhile? Well, we did not ask that
11 question. You can say we did not think it was
12 worthwhile or it was an omission. I do not know, I was
13 not part of that sort of detailed process.

14 However, if the question is do we nonetheless know
15 the answer to that question through the questions we did
16 ask, then, yes, we know the answer to that question.

17 Q. We will be coming back to delisting Dr Walker in due
18 course, so you can make your assertions about the
19 factual material and I will give you an opportunity to
20 comment on it. I am asking you about the question sets
21 that you put forward. You are saying because of the
22 theory in relation to delisting it was not worthwhile or
23 it was an omission on the part of the CMA not to ask
24 that question in relation to any of the Section 26
25 notices when you have asked those questions before, have

1 you not, in other cases?

2 A. Yes, you asked those hypothetical questions.

3 I genuinely, Mr Beard, cannot answer your question as to
4 whether, you know, the CMA -- we sat down and thought,
5 well, we could ask this question but we do not need to,
6 or whether we did not think to ask that question,
7 I cannot answer that. All I can tell you is what is the
8 implication of that omission, and the answer is there is
9 no implication.

10 THE PRESIDENT: Dr Walker, perhaps we can put the question
11 slightly differently because I am conscious that this
12 was an enormous undertaking and you had staff working
13 underneath. Looking at the matter now, do you think
14 that was a question worth asking?

15 A. Well, in hindsight, no, because the evidence we would
16 have got from that we have got from asking, you know,
17 direct HIPs. If, however, individual HIPs had come back
18 and said to us, "Yes, I would delist because I can go
19 and still sell through the other ones", then at that
20 point, or if that was the answer, then yes it would be
21 really useful to have known, to have asked that other
22 question. Happily we are not in that world.

23 THE PRESIDENT: Thank you. Sorry, Mr Beard.

24 MR BEARD: We will deal with the level of your happiness
25 probably tomorrow in relation to delisting. I am going

1 to go on to something different but also definitional to
2 some extent.

3 Could we have {F/709/7}, please. Again, this is
4 about the questions that were posed, you may not be able
5 to assist me in relation to this.

6 Did you look at -- you said you had not looked at
7 the Section 26 notices, so presumably you did not
8 scrutinise the definitions that were being put to HIPs
9 when you were considering what sort of evidence should
10 be sought?

11 A. You are right, I did not.

12 Q. So you cannot assist me on the meaning of "exclusive
13 deal", as it was asked in those circumstances?

14 A. No, I was not a part of that exercise.

15 Q. It makes it easy. I am going to assume on that basis
16 that you cannot assist me if we go to the 2019
17 Section 26 notice page {F/710/6} --

18 A. Sorry, when I say, you know -- actually, I am not quite
19 sure what you mean by cannot assist. Was I part of the
20 precise definitions in the Section 26s? No. Do I know
21 what an exclusive deal is? Yes.

22 Q. Okay.

23 A. But I do not think that was your question.

24 Q. Well, let us see what you know. I am interested. Let
25 us go back to {F/709/7}.

1 So exclusive deals. Sorry, please do feel free to
2 read. (Pause)

3 A. Yes.

4 Q. So so far as you are concerned, does an exclusive deal
5 cover a relationship between a HIP and a PCW for a soft
6 toy to be given in relation to a contract of insurance?

7 A. I do not have a view. So does an -- could an exclusive
8 deal just be about a soft toy? Probably.

9 Q. Looking at that definition, could it be, Dr Walker?

10 A. No, well, that definition talks about a reduction in
11 commission, and that seems to me, you know, the most
12 important aspect of exclusive deals, because that is the
13 main source of -- the main source of revenue for the
14 PCWs.

15 Q. Right. It actually talks about lower premiums, because
16 it is not going to be in relation to reduction of the
17 commission, but soft toys --

18 A. Hang on, offers a short-term reduction in commission?

19 Q. Yes, in return for a lower premium. My understanding is
20 the way that these deals work is you do not tend to give
21 soft toys to the PCWs, so it is going to be part of the
22 deal that the PCW gives it alongside the contract.

23 A. Sure.

24 Q. Yes.

25 A. I am still struggling to think that a soft toy is as

1 competitively relevant as the premium or commission
2 charge.

3 Q. What about cinema or meal ticket vouchers?

4 A. What about them? What is the question?

5 Q. Are they covered by an exclusive deal definition here?

6 A. Well, they are not covered by that exclusive deal
7 definition.

8 Q. What about cashback offers?

9 A. Well, I guess it would depends how you wanted to define
10 your premium, but, again, on a straight reading of that,
11 no, that is not covered by that definition.

12 Q. Could we go on then to 2019, {F/710/6}. I think it will
13 actually be at page 8 -- no that is great, that is
14 perfect, thank you very much.

15 So if we could just go down to the bottom,
16 "Promotional Deal", do you want to just read that.

17 (Pause)

18 A. Okay.

19 Q. Now, it is obviously a virtue, I am not asking you these
20 questions as a lawyer in these situations, but reading
21 that, it is clear that the term "promotional deal" does
22 not cover reductions in retail prices or premiums; it
23 covers ancillary offers like legal cover or cashback or
24 vouchers. That is correct, is it not, on the face of
25 it?

- 1 A. Yes, so the HIP agrees either to lower prices or to
2 offer some ancillary products, yes.
- 3 Q. So when you asked questions the first time round in
4 relation to the first set of Section 26 notices you were
5 asking questions about a much narrower category of
6 promotional deals and whether or not people engaged with
7 them, how they worked and so forth. That is what
8 exclusive deals, the terminology, covered. But here
9 when you get to this definition in 2019, you are
10 covering a whole range of arrangements that you are
11 asking questions about, are you not?
- 12 A. Okay, promotional -- this definition is different to the
13 exclusive deal definition that you put up earlier.
- 14 Q. Yes.
- 15 A. So what is the order of these, out of interest?
- 16 Q. So this is 2019, the earlier one was 2017. There was
17 some stuff in 2018 as well, but I am just taking the two
18 ends.
- 19 A. Okay.
- 20 Q. So what you have is the CMA asking about different
21 things at different times, you can see that in relation
22 to the Section 26 definitions that we are talking about.
- 23 A. Yes.
- 24 Q. You also accept that within that category of promotional
25 deals that we are referring to are arrangements that are

1 not covered by the wide MFN. You would agree with that
2 too, would you not?

3 A. Well -- no, sorry, say that question again.

4 Q. I can make it more particular. It is no part of the
5 CMA's case that adding an ancillary product like free
6 legal cover is prohibited by the wide MFNs that you say
7 are an unlawfully restrictive arrangement put in place
8 by ComparetheMarket?

9 A. Because the wide MFNs refer to your retail -- your
10 pricing of insured premium, yes.

11 Q. Sorry, just to be clear, did you actually ever look at
12 any of the specific clauses?

13 A. Of promotional --

14 Q. Wide MFNs.

15 A. What, me personally?

16 Q. Yes.

17 A. No.

18 Q. The point I am raising here is your Section 26 notices
19 are going out asking for evidence in relation to
20 a category of promotional deals that includes stuff that
21 is captured within the wide MFN but also not captured by
22 the wide MFN as soon as you refer to promotional deals
23 in any question, you would accept that, would you not?

24 A. Yes.

25 Q. That is plainly bad evidence-gathering practice, is it

1 not, for the purposes of what you are trying to identify
2 here, because you are going to confuse the respondents,
3 are you not?

4 A. No, sorry, I mean, you have not got me here to talk
5 about bad evidence gathering techniques, but I am not
6 quite sure what your question is, but if your question
7 is that -- your point is that there are some aspects to
8 that that will be captured by a wide MFN and some that
9 are not, absolutely true, you then say that is clearly
10 bad evidence gathering, I am not sure why -- where you
11 get that jump from, that is a bit of a non sequitur,
12 you know, we are asking for a range of evidence which we
13 then assess. So I do not see why you think asking
14 a different question in different years or having a two
15 part question is in itself bad evidence gathering.

16 Q. Neither proposition is one I am going to put to you,
17 because I do not have any problem in asking different
18 questions in different years or asking multipart
19 questions. The point I am putting to you here is that
20 when you ask about promotional deals, when you ask the
21 HIPs about whether or not they are interested in
22 entering into promotional deals or would or would not
23 enter into promotional deals or what the significance of
24 promotional deals are, what you are saying to them is
25 answer both in relation to conduct that was captured by

1 the wide MFN and conduct that is not captured by the
2 wide MFN, and they cannot necessarily distinguish
3 between the two when they answer, can they?

4 A. Okay, it is not clear to me why they cannot distinguish
5 between the two or why they cannot give the detail of
6 the deals, but as I said I have not seen the responses,
7 I have not analysed those specific responses, so I think
8 you may be talking to the wrong person here. But, in
9 itself --

10 Q. I have only got you here, so ...

11 A. In itself, that seems to me a reasonable question. If
12 you are concerned that HIPs misinterpreted the question
13 or we misinterpreted the answer, I am sure you can make
14 that point.

15 Q. I am sure I will. I am interested in how a supervision
16 of evidence gathering worked in relation to material
17 that you are relying upon as evidence of adverse effects
18 in this case. You are involved in high level
19 supervision. You are the person here that I can ask
20 questions about these matters on. You have been
21 perfectly candid that you did not look at these things.
22 I understand you did not look at the clauses, and
23 I understand you did not look at the detail of these
24 provisions, but we do have concerns that in these
25 circumstances what you are doing is asking questions of

1 people where they can respond saying we did fewer
2 promotional deals, for example, or we did more
3 promotional deals during and after, and they could be
4 referring to promotional deals that are not promotional
5 deals covered by the wide MFN.

6 Now, if they respond in that way and they simply use
7 the term "promotional deals", then of course you have
8 unreliable evidence in relation to the impact of the
9 wide MFN in relation to promotional deals, do you not?

10 A. Well, there is a number of ifs and I presume that will
11 be explored when we talk about effects.

12 THE PRESIDENT: Just pausing there, I think the point you
13 are making, Dr Walker, is that the responses to these
14 Section 26 questionnaires would be considered by the
15 persons to whom they were put, and you would get careful
16 responses back.

17 A. Well, we will get responses back that we will then
18 analyse, yes.

19 THE PRESIDENT: Well, yes but you would expect -- I think
20 this is what you said to Mr Beard -- that the person
21 answering the request would look at what promotional
22 deal means in the request and answer accordingly?

23 A. That does not strike me as a difficult question to
24 answer. It seems to be quite clear, but this is not
25 really my area of expertise in exactly what goes on in

1 people's minds answering this particular question. It
2 does not seem to be an economic question, it does not
3 seem to me to do with market definition. So it seems
4 a reasonable question for me, Mr Beard does not like it.
5 I am sure we will hear more about that.

6 THE PRESIDENT: Well, yes, you will from me at the moment.
7 The question I am asking is not so much the care with
8 which these questionnaires are or are not answered but
9 whether given, as you have said, there is a difference
10 in the meaning promotional deal between the 2017 and
11 other Section 26 questions, whether that difference is
12 something which factored into the evaluation of that
13 evidence by the CMA in the work leading up to the
14 Decision.

15 A. So we asked questions, we got answers back, we would
16 have analysed them. I was not part of that particular
17 analysis, but, again, you know, I would imagine we
18 understand the difference between the two definitions
19 that Mr Beard has shown, but, as I say again, you know,
20 I do not think you are talking to the right person here.

21 MR BEARD: Just to clarify one point, I was not entirely
22 clear, do you or do you not consider the cashback
23 arrangements are precluded by the wide MFNs?

24 A. I cannot answer the question specifically. I mean,
25 I also -- I do not know whether the answer is yes, no,

1 or it depends on the particular contracts.

2 Q. Let us go to something that you have talked a lot about
3 which is theories of harm.

4 There is something slightly odd about theory of harm
5 that you keep articulating. This is a very limited
6 point, but in the main body of the Decision the term
7 "theory of harm" is not actually used at all. It is
8 used in a couple of footnotes, but in the main body of
9 the decision there is not something called the theory of
10 harm.

11 I just want to check whether we are essentially
12 talking about the same thing here because you have
13 emphasised an awful lot this notion of the theory of
14 harm and how it should inform the way in which you do
15 market definition.

16 Let me be absolutely clear, I am not implicitly
17 accepting anything you have said about how you do market
18 definition by reference to theory of harm, but leave
19 that to one side for a moment. I think what you are
20 referring to is probably paragraph 9.4 of the Decision
21 which will be pulled up and you can then have a look at
22 it, which actually replicates I think paragraph 1.12.
23 9.4 is {A/1/321}, if we could.

24 I just want to pick up the first part of that. So
25 it is five subparagraphs, but let us pick up the first

1 one:

2 "The 32 insurers were unable to quote lower prices
3 on rival PCWs."

4 Then we move on to "prevented from gaining
5 a competitive price advantage" in (b) {A/1/322}.

6 "... CTM relied primarily on its network of wide
7 MFNs to ensure it had the lowest prices ...

8 "... CTM's rival PCWs were restricted ..."

9 Because they competed less strongly on price, there
10 was an adverse effect.

11 That is the theory of harm in the Decision, is it
12 not, so far as you are concerned?

13 A. Well, I am going to articulate the theory of harm --

14 Q. No, no, Dr Walker, I do not want you to articulate the
15 theory of harm. I want you to answer the question,
16 because we are here to challenge this Decision, not your
17 theory of this Decision. Is this your theory of harm in
18 the Decision?

19 A. Okay, in which case I will have to read it again more
20 slowly to check it is complete. (Pause)

21 Yes, that is a pretty complete list of the potential
22 problems.

23 Q. Right, excellent, thank you, Dr Walker. So we will take
24 9.4. It is not called the theory of harm, but we will
25 treat it as the theory of harm. So let us start with

1 (a). This is the starting point {A/1/321}:

2 "The 32 insurers were unable to quote lower prices
3 on rival PCWs."

4 Just to be clear, that is retail prices you are
5 referring to there, is it not?

6 A. Yes.

7 Q. "If the relevant insurers reduced their prices on a
8 rival PCW below the prices offered on CTM, they had to
9 fund an equivalent price reduction on CTM."

10 Again, that is all retail prices; correct?

11 A. Yes.

12 Q. "This reduced the insurers' incentives to lower their
13 prices."

14 A. Yes.

15 Q. Retail prices.

16 "Accordingly, several insurers refused to enter into
17 promotional deals with CTM's rivals or adjusted their
18 prices following enforcement action ... By contrast,
19 absent CTM's network of wide MFNs, the 32 insurers would
20 have had a greater ability and increased incentives to
21 compete on price by quoting different prices across
22 PCWs."

23 So all of this so far has just been about retail
24 prices; correct?

25 A. Yes.

1 Q. Then it says:

2 "For example, they would have been able to reflect
3 another PCW's lower {A/1/322} commission fees in their
4 prices on that PCW and to freely target price reductions
5 on CTM's rival PCWs."

6 Now, when I read that first part of your theory of
7 harm, it seems to me that it is articulating
8 a restriction in relation to retail prices that might
9 have certain knock-on effects, for example in relation
10 to commissions. Is that a fair reading of it?

11 A. No, no, it is not.

12 Q. I see.

13 A. What the wide MFN does, by imposing that restriction on
14 retail prices, it directly impacts on commission
15 charges. So in a world in which I am a PCW and I --
16 sorry, I am a HIP and I -- actually, I am a PCW, and
17 I want to compete against the other PCWs, I can say
18 to -- with no wide MFNs, I can say to a HIP, "Okay,
19 I will offer you a lower commission if you will set
20 a lower price for your insurance premium on my product",
21 okay? That would then cause other PCWs to respond, and
22 you get competition in commission charges.

23 In a world with wide MFNs, I as the PCW can go to
24 the HIP and say "I will offer you a lower commission
25 rate" but the HIP cannot say to me "Okay I will lower my

1 price on your website". That is not allowed.

2 So the restriction of competition actually is on
3 commission rate competition between the PCWs.

4 Q. Well, that is what you are saying, but it says that is
5 just for example, is it not; that is what is captured in
6 that last sentence, is it not?

7 A. Well, okay, but I mean I am not sure what the problem --
8 that is a way in which competition commission would be
9 reduced by the wide MFN.

10 Q. A way, understood, a way. Just go back to what you just
11 said in the transcript. When you say the wide MFNs
12 directly impact on commissions, you have accepted that
13 you did not actually look at the clauses, but those
14 clauses do not talk about commissions, do they? They
15 are not to do with commissions; they are to do with
16 retail prices and premiums, are they not?

17 A. Yes, but what is the effect of that on commission
18 charges? Of course let us think about the firm that is
19 imposing the wide MFNs does not itself set retail
20 prices. It only sets the commission rate. So it is
21 thinking about the effect of the wide MFN on commission
22 rate competition.

23 Q. We will come back to pricing in more general terms. The
24 point I am making is a simple one. It is not correct,
25 is it, to say that the wide MFNs directly impact on

1 commissions; they directly impact on retail prices, do
2 they not?

3 A. Okay, so we can have an argument here about the
4 semantics, okay, about what we mean by the word
5 "directly", so if you do not like the word "directly",
6 that is fine. I will say the effect of the wide MFNs is
7 to put upward pressure on commission rates.

8 Q. But, Dr Walker, the point I am making is in the
9 submissions you have made already, and we will be coming
10 to when it comes to SSNIP, one of the things you have
11 heavily emphasised this afternoon is that because the
12 theory of harm is just all about commissions, you focus
13 only on the HIP side in relation to commissions. What
14 I am putting to you here is that actually the theory of
15 harm that is identified here starts with retail prices
16 which are on the consumer side, does it not?

17 A. No, I am very sorry but you have misunderstood our
18 theory of harm. So first of all you said there you only
19 look at the commissions on the PCW side. To which the
20 answer is, yes, because they charge the commissions.
21 Does the theory of harm start with retail prices? No,
22 the theory of harm is all about using the restriction
23 from the wide MFN, that horizontal restriction, to
24 reduce competition between PCWs, which has the effect
25 of, we argue, leading to higher commission rates. That

1 is the standard concern about wide MFNs. There is
2 nothing special about that.

3 You know, the fact that the way in which that works
4 is because you put -- the wide MFNs have that effect on
5 retail prices that stops competition between PCWs does
6 not mean that the focus is not on the effect on
7 competition between PCWs and therefore on commission
8 rates.

9 Q. It does not mean that, but that is not what the theory
10 of harm says. We will come to deal with how this
11 impacts on the SSNIP. The simple point I wanted to deal
12 with was your articulation of the theory of harm today
13 which does not marry up with the terms and language that
14 you have here. You emphasise commissions; this
15 emphasises retail prices. You talk about a direct
16 effect on commissions; actually, this is talking about
17 an indirect effect on commissions, is it not?

18 A. Okay, well, I can only repeat what I have already said,
19 Mr Beard, I am very sorry, but, you know, that is a very
20 significant misunderstanding of the theory of harm that
21 has just been articulated there by -- the theory of harm
22 is all about how you can -- using wide MFNs you can
23 reduce competition between PCWs which will have an
24 upward effect on commission rates. How you can make it
25 harder for other PCWs to enter with a low commission

1 rate model, which is also there.

2 It is clearly about the competition between PCWs
3 and, therefore, about what they can do to commission
4 rates. You know, it is absolutely not a fair
5 characterisation to say, no, no, your theory of harm is
6 all about retail prices.

7 Q. Just to be clear, it is not our case that the theory of
8 harm is all about retail prices.

9 THE PRESIDENT: No, we are just seeking to be clear, which
10 is always a good thing. I take it, then, Dr Walker,
11 that really instead of the word "direct", you perhaps
12 would say "inevitable". Would that be a --

13 A. Yes, if Mr Beard does not like the word "direct", yes,
14 inevitable, or -- inevitable, yes.

15 THE PRESIDENT: I am just trying to be precise about what
16 you are saying, because "direct" implies one thing
17 immediately happens after another, and it is not
18 necessarily the only meaning. I am just seeking to
19 understand how, because I think we are all agreed that
20 wide MFNs are referencing retail prices, so in a sense
21 the control that you articulate over commissions is not
22 mediated through the prices which is why I think you are
23 being picked up on the word "direct", so I am just
24 trying to understand exactly what you are saying.

25 A. Okay, I do not want to have a word about semantics with

1 two lawyers because I am going to lose that, so I am
2 happy to say "inevitable" if you want, but I think the
3 sense of what I am saying is clear.

4 THE PRESIDENT: Very good. I am not going to give evidence,
5 I am just listening to your evidence, so it is my word,
6 I am not going to foist it on you.

7 A. Okay.

8 MR BEARD: I am just conscious of the time, sir.

9 THE PRESIDENT: Yes.

10 MR BEARD: I am very happy to carry on, but equally --

11 THE PRESIDENT: No. I think we have all had a long day, and
12 we will resume tomorrow.

13 I will ask my usual question about time. If you
14 want an earlier start, Mr Beard, because I do not want
15 anyone to feel that they have not been able to ask
16 a question or particularly have not been able to answer
17 the question, and I see that you are having a very
18 productive debate, I would not want that to be cut off
19 by a concern about timing.

20 MR BEARD: I am perfectly content to start at 10.30. We may
21 well be most of the morning with Dr Walker.

22 THE PRESIDENT: Of course.

23 MR BEARD: But I do not think that hugely disrupts the
24 timetable. We are slightly behind, but I think that is
25 just the end product of the way that things have gone so

1 far.
2 THE PRESIDENT: Indeed. I just want to ensure that no one
3 is discombobulated by the timetable.

4 MR BEARD: No, I think if we are going to do catching up,
5 I think maybe later in the week might be a good time,
6 because it may be that things flex.

7 THE PRESIDENT: I am grateful.

8 Dr Walker, the only other question I have for you:
9 have you got this printout of the question that
10 Professor Ulph -- you have?

11 A. Yes, I will steal this one.

12 THE PRESIDENT: Very good. Feel free to steal it.

13 A. Thank you.

14 THE PRESIDENT: I do not think there is any need for you to
15 ask for assistance on a mechanistic front regarding
16 this, but should there be then to that limited extent do
17 please speak to Ms Demetriou and she has to that limited
18 extent permission to deal with. I do not think it will
19 arise on this, but just in case. I would not want you
20 sitting here thinking, "Oh, I need to look at X, and
21 I do not have X. Can someone provide it"?

22 A. Okay.

23 THE PRESIDENT: Just so you are clear, it is confined to
24 mechanical questions regarding this document.

25 Otherwise, I wish you good evening, Dr Walker. 10.30

1 tomorrow morning.

2 (4.39 pm)

3 (The hearing adjourned until 10.30 am on

4 Tuesday, 9 November 2021)

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17

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19

20

21

22

23

24

25

INDEX

PAGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In private.....1

Housekeeping1

MS HELEN RALSTON (continued)3

 Cross-examination by MR LASK (continued).....3

 Questions by THE TRIBUNAL94

 Re-examination by MR BEARD97

Open session107

DR MIKE WALKER (affirmed)107

 Examination-in-chief by MS DEMETRIOU107

 Questions by THE TRIBUNAL111

 Cross-examination by MR BEARD147