IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1380/1/12/21

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 AN C E S

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

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Friday, 19 November 2021

(10.00 am)

Closing submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Sir, members of the Tribunal, we were on market definition yesterday, and I am going to resume on market definition, if that is okay.

I would like to take you to the merger assessment guidelines and the CMA's merger assessment guidelines which explain how the CMA goes about market definition in a merger context, but we say materially there is no difference, and it is illuminating as to the place or the function of the market definition exercise, in my respectful submission.

If we could go, please, to {F/746/1}, that is the front of the guidance, just so that we can see what we are looking at, and if we go to page {F/746/3}, again to give you some context, this is the index, and you see that what you have is it goes through the elements that have to be decided: a substantial lessening of competition, counterfactual, horizontal effects, and so on, and at the end the market in which an SLC arises. That is the last thing that is being considered.

That is not an accidental point. It is because the thrust of these guidelines is that market definition --

THE PRESIDENT: Sorry, just one moment. Professor Ulph

cannot hear us apparently. I am so sorry to interrupt, Ms Demetriou. We will summon the cavalry and hopefully ... (Pause).

It has been suggested that we rise in order to see if this can be sorted out, so we will rise for as long as necessary. Thank you.

(10.10 am)

(A short break)

(10.33 am)

MS DEMETRIOU: I am going to start again, because I am going to assume that Professor Ulph could not hear anything, but I had not got very far, so it does not matter.

I am going to take the Tribunal, please, we are on the right page, thank you very much, EPE operator {F/746/3}. This is the index of the CMA's merger assessment guidelines.

The point I was making here is that you can see at 9 that the question of market definition arises at the end of the series of steps.

Now, I am not saying that these guidelines say it has to be done last, that is not what they say, but we do say it is indicative of the function of market definition, and if we could look, please, at page {F/746/79} in this document, this is the beginning of chapter 9.

We see there at 9.1 under the heading, "The role of market definition", and we see first of all -- so in mergers of course under the Enterprise Act, there is a specific reference to "market" in the Act, so the finding of SLC has to be in a particular market, unlike for example the chapter 1 prohibition where there is no analogous reference.

But we are not seeking to draw any distinction as far as that is concerned. It is an observation.

But if we see the last sentence:

"An SLC can affect the whole or part of a market or markets. Within that context, the assessment of the relevant market is an analytical tool that forms part of the analysis of the competitive effects of the merger and should not be viewed as a separate exercise."

Then if we go to paragraph 9.2 what it says there is that:

"Market definition involves identifying the most significant competitive alternatives [in other words the constraints] available to customers ... that are the immediate determinants of the effects of the merger."

So one is thinking about the effects of the merger, and one is asking, well, what are the constraints that are relevant to those effects, and then this:

"While market definition can be an important part of

the overall merger assessment process, the CMA's experience is that in most mergers, the evidence gathered as part of the competitive assessment, which will assess the potentially significant constraints ... captures the competitive dynamics more fully than formal market definition. Consequently, while the appropriate approach will reflect the circumstances in each case, the CMA anticipates that in future, merger assessments will place more emphasis on the competitive assessment as opposed to static market definition."

And then we have at 9.3:

"Market definition can sometimes be helpful in developing certain types of evidence that may be relevant for the competitive assessment."

Then there are examples.

If we can go on to 9.4 {F/746/80}, and just to emphasise the first sentence:

"While market definition can sometimes be a useful tool, it is not an end in itself. The outcome of any market definition exercise does not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation ... or other ways in which some

constraints are more important than others. In many cases ... there is no 'bright line' that can or should be drawn. Rather, it can be more helpful to describe the constraint posed by different categories of product or supplier as sitting on a continuum ... The CMA will generally not need to come to finely balanced judgments on what is 'inside' or 'outside' the market. Not every firm 'in' a market will be equal and the CMA will assess how closely two merger firms compete."

Then we see at 9.5, consistently with that:

"There may be no need for the CMA's assessment of competitive effects to be based on a highly specific description of any particular market definition (including, for example, descriptions of the precise boundaries of the relevant markets and bright-line determinations of whether particular products or services fall within the relevant market). The CMA may take a simple approach to defining the market -- for example, by describing the market as comprising the most important constraints on the merger firms that have been identified in the CMA's assessment of competitive effects."

So, sir, I draw the Tribunal's attention to this because what it is saying is that there is not a mechanistic procedure where the CMA will define the

market first and then look at competitive effects. The two things go hand in hand, so the purpose of market definition -- and this is why we say it is not an end in itself -- is to inform the constraints that affect the competitive effects that you are looking at, so the competition concern that is being examined. I hope that is illustrative of the point we make in the present case.

So really the purpose, as these guidelines indicate, is to identify the constraints relevant to the effects being investigated. That can be done as part of market definition or it can be done as part of competitive effects. The whole thing has to go hand in hand, and they are bound up together, because otherwise market definition would become an independent exercise not tied to the competitive assessment, and that is what these guidelines deprecate.

Sir, to go back to the example that you gave me yesterday, when I said market definition is not an abstract exercise, everyone, I think, can agree about that as an abstract proposition, but one needs to drill down and say, well, what do we mean by saying it is not an abstract and not an independent exercise and not an end in itself?

Well, sir, you said to me, well, suppose we are

concerned with a competition abuse in the market for baked beans, then it would make no sense to start investigating the market for cough mixture, and of course we agree with that, but that does not capture everything we mean when we say that market definition is not an abstract exercise.

So what we mean by that is not limited to the type of distinction that you drew in that example.

You went on to say that -- so just to follow that through, not only does market definition, we say, have to relate in a broad sense to the market in question, so canned foods, for example, rather than medicines, but it has to relate to the particular competition concern that is being assessed in the case. It has to be bound up with the competitive assessments. That is what is being said here.

Sir, you then put to me the example of aspirin and paracetamol and there of course you are looking broadly at a market for drugs for pain relief, for example, and it will be relevant, as you said yesterday, to consider the proportion of buyers of aspirin that divert to paracetamol in the event that the aspirin manufacturer engages in some sort of practice or conduct, but the key question is what sort of practice or conduct, what is it we are really looking at? What are the competitive

effects we are examining? So the answer may be different in terms of diversion of customers. The answer may be different depending on what it is we are worried about, and that is really the heart of the issue here.

Sir, can I just show you one paragraph in one authority which I hope has been put into the bundle. It is the Arriva case. It may not be in the bundle. I think we have some hard copies, and I think it can be emailed to --

THE PRESIDENT: I believe it has been emailed to Professor Ulph.

MS DEMETRIOU: -- Professor Ulph.

Sir, we have not given you the whole judgment because it is really just one paragraph we want to go to, but if the Tribunal wants, of course we will load the whole judgment on to the Opus system.

This is a judgment of Mrs Justice Rose as she then was. It is paragraph 109 that I want to take you to, and this is consistent with the approach in the merger assessment guidelines. You see there:

"I agree with Dr Niels' analysis. I do not consider that it is necessary to arrive at a definite view as to the scope of the downstream market in order to decide whether the New Concession can affect competition

between providers of travel services ... It is clear from the level of profitability that was enjoyed by ATS ... that the competitive constraint imposed by rail services is not sufficient to push coach ticket prices down towards cost, even if rail services do form part of same downstream market. The constraint that rail services provide is certainly not sufficient to mean that the grant of exclusivity in the New Concession can have no distortive effect on the downstream market."

So, sir, we are relying on this in terms of the approach being consistent with what we see in the merger assessment guidelines, because what Mrs Justice Rose is saying here is, well, it does not matter really what the precise market definition is, we are looking at competitive constraints relevant to the conduct and the competition concern in question.

Coming back to the present case and transposing all of this to the present case, in defining the market here what the CMA was seeking to understand were the competitive constraints that were relevant to understanding whether the particular conduct -- whether the WMFNs that it was examining would have an adverse effect on competition. So those were the constraints it was interested in, and in this case of course it was looking at the use of wide MFNs by CompareTheMarket, and

so what it needed to do first was identify -- it was asking itself: can ComparetheMarket use these clauses to affect competition adversely? That is what it wanted to investigate.

So obviously what it needed to do is identify the service or services that were relevant that ComparetheMarket was providing that were relevant to that question it wanted to investigate.

Now, there may have been other questions it could have investigated, but this is the question it wanted to investigate, and it needed to consider in respect of those services the competitive constraint that was provided by other products, and the service of interest in this case was the service to HIPs in return for a commission fee, so that is what the CMA wanted to examine in this case, because commission fees are the mechanism through which PCWs can influence retail prices.

So conducting a SSNIP in commission rates --

THE PRESIDENT: Sorry, by influence you mean they become a cost to the HIP which is then reflected in the premiums that they charge to the insured?

MS DEMETRIOU: That is correct. You can see what the CMA is concerned about here, one of the things it is concerned about, so start with the wide MFN clauses, what they do

is they tackle retail prices, that is what they say on their face, but what the CMA is asking itself is how can -- what it is concerned about in this case is how can a PCW, how can CTM use this wide MFN to do something which might be anti-competitive, and the thing that -- the anti-competitive thing that the CMA is concerned about is essentially suppression of price competition, so a suppression of price competition.

How does the hypothetical monopolist PCW do that using the wide MFN? Well, it does not set prices directly itself, so what it cannot do is say, well, we are going to use this wide MFN to charge ourselves consumers higher retail prices because it does not do that, and actually if you stop to think about it, it would not be sensible for CTM, even if it did charge customers, simply to charge customers higher fees because those fees go back to the HIPs. So one is looking -- the only way that the price comparison website can benefit from the wide MFNs is to gain more commission. That is the income that it is deriving, that is the revenue it is deriving.

THE PRESIDENT: I understand, but how does the CMA on that approach deal with the direct channel that does not subscribe to PCWs?

MS DEMETRIOU: I am going to come to that, because the short

answer is that that direct channel -- so it is considered in very great detail that the HIPs which -- the direct channels of the HIPs that subscribe to PCWs, so --

THE PRESIDENT: No, what about Direct Line, for example?

MS DEMETRIOU: Sir, the short answer -- I am going to come to this when I look -- I am going to answer the Tribunal's question in detail on the narrow MFNs, but the short answer is that those HIPs which do not list on PCWs are a tiny proportion of the market. I think it is 4% or something, so the CMA considered that in its Decision, and Mr Beard has said several times it simply did not consider that, but it did consider that, and the answer is that it is a very, very tiny constraint. So it took it into account.

Mr Beard has talked repeatedly about Hiscox and red phone and so on, but the answer is that they are a tiny, tiny proportion of the market. So they were taken into account by the CMA, but they are a tiny proportion of the market, and so they cannot exercise by themselves a competitive constraint.

I will give the Tribunal the reference in due course to that if I may, but that is the headline answer, sir, to your point.

THE PRESIDENT: Okay. My question actually is anterior to

that, I will ask it and please answer it when you come to the appropriate point, but how do you know it is a tiny constraint if you do not ask the question? In other words, that is the point about market definition. However you choose to fit it into the process, if you do not say we are postulating an increase in the quoted rates, in a price sensitive market Direct Line the small insurer will become Direct Line the big insurer if you have a very elastic demand.

MS DEMETRIOU: Sir, the answer to your question is the CMA has considered that.

THE PRESIDENT: Well, you had better take us to those passages.

MS DEMETRIOU: Sir, I will take you, but can I just answer in principle the point. The CMA has considered all of the constraints that arise, the potential constraints that are there in relation to an increase in commission fees, so they have considered that. The complaint that is being made against us really is twofold in terms of the conceptual analysis. The complaint that is being made against us is there should have been this separate SSNIP, and what I am dealing with at the moment is, no, because that is divorced from the competition concern that the CMA is looking at, and that wide MFNs should have been assumed away. Those are the two conceptual

points.

If we are right on those points, so if the CMA was right to be focusing the SSNIP -- to be conducting the SSNIP on the commission fee because that is what relates to the competition concern, what it did do was a very full analysis then of competitive constraints on the consumer side in relation to that SSNIP on commission fees.

Let me see if I can give you the reference now. If we can go to Decision at paragraph 5.143. That is {A/1/122}. This is all in the section looking at the extent of consumer constraints, and if we look at 5.142, we see the point that is being made by BGL there, which is that two large home insurance providers do not list all their brands on PCWs, and they say that supports our view that direct sales necessarily form part of the relevant market, and they provide some evidence, and then we see at 5.143:

"The CMA does not, however, consider that BGL's observation that two large home insurance providers ... do not list all their brands on PCWs support its view that direct sales form part of the relevant period. In particular ..."

Then you have the reasons, and so you see that {A/1/123}:

"One of these providers ... said that, if its brands were no longer listed on PCWs, it 'would be extremely difficult to replace the volume of lost sales' and 'PCWs are a key source of new business volume' ...

"The other provider ... told the CMA that its brand ... was dependent on this channel ..."

And so you see the CMA's conclusion that two large home insurance providers do not list all their brands is not relevant to the present case, and we have somewhere else evidence that in fact those brands are a tiny proportion of the market, and I will give you the reference to that, I think Dr Walker certainly explained that in his evidence to the Tribunal.

So, sir --

MS LUCAS: Can I just clarify what Dr Walker's evidence was about that?

MS DEMETRIOU: Yes.

MS LUCAS: He said 5%, did he not, from your closing submissions at footnote 342. I am afraid I am working on an out-of-date paginated version. It is page 104 of the original version of submissions you provided. {B/65/104}. It was paragraph 214 it related to.

MS DEMETRIOU: Page 104 -- so it is {B/65/105}.

MS LUCAS: Thank you. So just this statistic about 5% of the market, so I was asking about how a SSNIP -- how the

hypothetical monopolist test would take into account HIPs that do not have narrow MFNs, and I think in the context of what I had originally asked it was those that do not list on PCWs at all. So the passage you have taken us to, I can understand that DLG, it would be difficult if its brands were no longer listed on PCWs, but those are not all of its brands. Some of its brands sit outside the PCW universe, and it was those that I was interested in, because they do not have narrow MFNs, and is 5% the right statistic for those insurers?

MS DEMETRIOU: I am going to come back to you. I understand the question, if I can just come back to you on that point. You have the -- I was going to deal with this separately -- if I can come back on that point.

MS LUCAS: I am sorry.

MS DEMETRIOU: Not at all, but I will come back, but can I carry on in principle with the point that I was on which is -- and I will definitely come back to the detail of this issue.

THE PRESIDENT: Okay. 5.143 {A/1123} is not actually -- I do not think it is -- dealing with the question that -- if you look at answer (a) in 5.143, what they are saying is we would be very sorry if we were not able to list on a price comparison website. Well, I understand that, because price comparison websites are

a source of business, and one can readily understand that. That is their business. But the point is not would you be sad if you were no longer listed on a PCW; the point is if the price on the PCW is higher than a direct channel, what business do you lose? And that is not answered in (a), and I am not sure it is answered in (b).

MS DEMETRIOU: Sir, with respect it is, because what the CMA is doing here is looking at the incentives of those firms which the majority of whose business is in -- so what is being asked is, would those firms then capture lots of consumers who divert away from the PCW channel, and what they are saying is that these firms do not have incentives to capture those consumers because the PCW channel is very important to them. So they are not going to step in and capture all of those consumers because the PCW channel is vital to their business. So that is what this is saying. It is about their incentives.

Sir, no appeal has been mounted in respect of this conclusion, and we have to remember that. If there were a ground of appeal which said the CMA has not taken account sufficiently of this small percentage of insurers which do not list on PCWs, then no doubt we would have some lengthy response to that, but the appeal

that I am facing is that there is conceptually a wrong approach to the SSNIP. That is the appeal that I am facing.

So in response to that, we say, no, this is a point of detail about how the SSNIP was carried out, it is not a point which goes to whether it was necessary, as they say, to do an SSNDQ on the consumer side.

MR BEARD: I am loath to intervene, but I think it has been very, very clear throughout that red telephone, which is the non-listed brand for DLG, and Aviva which is not the Quote Me Happy brand, because Quote Me Happy is the Aviva sub-brand that is on PCWs, and others like NFU and Hiscox, they are a very significant issue in relation to the error in relation to market definition. I hope that is clear, and I do not think it is fair for Ms Demetriou to suggest that we have not put those points.

MS DEMETRIOU: So they are not to be found anywhere in the notice of appeal, but in any event could we also look at --

THE PRESIDENT: Ms Demetriou, I have to say I regard this paragraph 5.143 as arising out of the market definition question that we are talking about, and you have taken us to this paragraph to say, well, we have considered market definition very carefully, but what I am troubled by is that this paragraph does not seem to be asking

what would you do if you are faced with a situation where your offering on a price comparison website becomes materially less attractive in some way, whether it is price or quality.

The fact is the question then is where do these consumers go, and the point is not answered by saying, oh, we the HIP would prefer them to continue to use the PCW. The question is what is the insured going to do, and why do they not go to Direct Line?

MS DEMETRIOU: Well, with respect, partly it is answered by that course because one has to think about what the HIP would do. So would the HIP stand back and say, well, we are welcoming all of these extra customers which are leaving the PCW, or do they in fact say, well, we have incentives to make sure these customers stay with PCWs and we will act accordingly. So of course the two things are interlinked.

Sir, could we also look at page {A/1/104} of the Decision. If we start at {A/1/103} at paragraph 5.88:

"... consumers looking to avoid any impact of a commission fee increase would be unlikely to do so by purchasing the same home insurance product on the provider's direct online channel due to narrow MFNs."

At 5.89 {A/1/104}:

"Some providers could potentially still price more

competitively on their direct channels than on PCWs in some circumstances by using different brands or selling different products ... This is because narrow MFNs only apply to the same product sold on PCWs and the direct online channel."

So they are grappling here directly with the question put by Ms Lucas which is, well, they do not all have narrow MFNs because some of them have different brands which they do not list on PCWs.

"In practice, only four home insurance providers told the CMA that they use different brands or different products on PCWs and their direct channels.

"However, these four providers also told the CMA that ..."

Can you please read the highlighted text. If you could perhaps read through to the end of paragraph 5.91.

(Pause)

THE PRESIDENT: Yes.

MS DEMETRIOU: Sir, the point is that the CMA has grappled with this very question, so it cannot be said the CMA has not grappled with the question, they have, and the point I am making about the scope of the appeal is not that the Tribunal cannot ask a question about whether the CMA has looked at this, of course it can and it has, and I am pointing to you where in the Decision it has

asked this question, but in all of the notice of appeal there is not an attack on the reasoning in these paragraphs beyond the conceptual attack about the SSNIP.

Sir, if this point is -- if despite the fact -- I am so sorry, Professor Ulph?

PROF ULPH: I have a slightly different point to you. You say that the whole issue here is about the impact of wide MFNs on the process of competition. That is the issue under investigation. The process of competition is a somewhat vague term, but in this particular market, there are many, many dimensions to competition, and again stressing the issue about the impact on commission rates, one of the effects on commission rates is they provide powerful incentives to PCWs to get customers to buy products from their PCW, and in order to do that they have to spend resources on both online and TV advertising to get the customer to come in the first place.

So an important dimension of competition that could be affected by wide MFNs, to the extent they actually keep commission rates high, is that you could intensify the role for advertising and the power of advertising and the incentive to advertise because you get paid more every time somebody buys a home insurance product through the PCW.

I want to go back to the question I asked you yesterday, which is that if that is an important dimension of competition, advertising on TV and on the internet, why would that not be an important channel for the CMA to investigate as a route through which competition might be affected and do the SSNIP on -- not a normal price SSNIP, but the SSNIP through advertising or quality deterioration.

MS DEMETRIOU: Professor, thank you. First of all, can I just say that I understand in principle, and I accept that in principle the dampening of competition on commission fees, so I accept the premise of your question, so the dampening of commissions on competition fees might have an impact on spending -- consumer-facing spending and investment. So I understand the premise of that, and that might give rise to competition concerns vis-a-vis consumers, but this is not the competition concern that the CMA chose to investigate in this case.

The CMA has a discretion of course as the regulator of how to deploy its resources and how to prioritise different effects on competition, and in this case it has not investigated, it has chosen not to investigate that possible competition concern.

What it has done is it has focused its investigation on the competition concern that is the subject of the

Decision which is an effect on commissions and an effect on retail prices to consumers through the mechanism of the wide MFN.

Now, I entirely accept that the CMA perhaps could have also investigated a competition concern along the lines that you say, and I also accept that had it decided to deploy its resources in doing that, then it may well have been relevant to have conducted a separate SSNIP, an SSNDQ for example, on the consumer side, because that would have tested constraints that would prevent that competition concern.

So I accept all of that, but the two points really are that the CMA has chosen not to do that, which is a choice it is entitled to make, it does not have to investigate every competition concern that might arise, and the other point is that had it investigated that concern and had it conducted an SSNDQ, and let us say that it had found that that competition concern would have been subject to competitive constraints, those constraints would not have shed light on the competition concern which is the focus of this investigation, and that is something Dr Niels accepted in his evidence.

That SSNDQ would have shed light on the separate competition concern that you have just posited, Professor, but what it would not have done is said,

well, those constraints can also prevent a SSNIP raising a dampening of competition in commission fees, because that has been tested separately.

So, Professor, I hope that is helpful. That is what we say in response. It is a good question, with respect, but that is what we say in response to it.

PROF ULPH: Thank you.

THE PRESIDENT: Ms Demetriou, you may be coming to it, but it is obvious from the questions we have been asking you that paragraph 5.91 is a fairly significant paragraph which we will read with some care, but I do note that there are no onwards references.

Do you know where we can find the evidence that is referred to in 5.91?

MS DEMETRIOU: Sir, what we can try and do -- and we have not done this because, as I say, nobody has challenged the reasoning in those paragraphs, and I am not taking some sort of forensic pleading point, but pleadings do matter, there is a very voluminous pleading in this case which we have responded to at length.

What we have been facing are specific complaints about market definition, conceptual complaints and then specific complaints about partial delisting and the other couple of things that Ms Ralston referred to in her evidence which I am going to come to.

There has been no attack on the CMA's reasoning on this point, no attack, and so what we have not done is gathered together in any pleading all of the references, but just on a quick look, for example, if you go to {A/1/496} --

MR BEARD: Sorry, whilst that is coming up I just would like to emphasise the passage that Ms Demetriou has taken you to is under the heading "The role of narrow MFNs", and what it is concerned about is whether or not, if you include narrow MFNs in the market, you would still see consumers shifting. It is a different issue that is being dealt with there.

THE PRESIDENT: I do see that but, first of all --

MR BEARD: Of course Ms Demetriou has made her point.

THE PRESIDENT: I understand your point. Ms Demetriou's pleading point is one, the fact is from day one, we have been extremely troubled by the narrow definition of "market" in 5.21 and my concern has been that one has not bottomed out why the direct channels -- particularly when they are independent of the narrow and wide most-favoured-nation clauses, why one does not have people flocking to them, and that question arises -- well, we will consider if it is relevant, but my understanding is it arises directly out of the point that Mr Beard has raised which is market definition. So

this is, I think, a matter that is squarely before us.

The reason I am interested in 5.91 is because albeit floating in a section dealing with the implications of narrow MFNs, it does appear to suggest that precisely the exercise that I am suggesting the CMA should have carried out has been.

MS DEMETRIOU: Sir, yes. I think the best thing for us to do --

THE PRESIDENT: Yes, I think obviously we do not want to not be referred to relevant matters, so if you want to put in a note which tells us to read the following paragraphs of this Decision which deal with the reason why a Direct Line competitor does not constitute a constraint in addition to the paragraphs you have taken us to, then please give it to us, we will be delighted.

MS DEMETRIOU: Sir, I think we had better do that. If we go for example to {A/1/496} and we look there at what is being said, we can see there some of the underlying evidence that is relevant to that question:

"The CMA's analysis finds that the average provider can only attract around 1% of customers who obtained a quote on the PCW channel."

So this is the type of detailed evidence that the CMA took into account. It is obviously relevant to the question, and so if what the Tribunal is asking for is

a list of evidence that was taken into account in that part of the analysis, then, yes, we can provide that.

Sir, I think we had better do that in the form of a note rather than me now try on my feet to scrap around and pull together all the different pieces of evidence, but I do say I understand what -- I can see Mr Beard is keen to get up again, but if he can just let me finish. I do say that really in terms of a granular attack on market definition, when you look fairly at the notice of appeal and Dr Niels' evidence, the point that is taken about narrow MFNs is very much a conceptual point about the ceteris paribus rule. That is what Dr Walker dealt with in his evidence by and large and that is what the evidence tested.

Now, I am not saying of course, well, it has come up and you cannot consider it, but we do, with respect, want to take you up on your invitation to put in a note with references.

THE PRESIDENT: Absolutely.

MS LUCAS: Ms Demetriou, if you were going to do a note, I should probably just set out some of the thoughts that I had had so that you can ensure that those are addressed.

As I understand it, the CMA's case is that PCW customers are highly price sensitive, and so if you take

the assumption that the hypothetical monopolist PCW provider increases commissions which have a knock-on effect on retail prices through the SSNIP test, we have been debating this, why is it that you should assume that some of those customers will not move to the cheaper non-PCW HIPs? The reason I say that is the whole business model of PCWs is that they offer the best prices, and so if they raise their prices and you assume that non-PCW HIPs do not raise theirs, why is it that the consumers will not move to the direct HIP?

MS DEMETRIOU: We will address that in the note.

One of the reasons -- and we have seen from the evidence of course -- is that the non-PCW HIPs are targeting less price sensitive consumers with more expensive products to start with, so that is one of the reasons. So --

MS LUCAS: But we know they can provide a price sensitive product because they do that through the PCWs. So why would they not think, well, actually, we can provide that, we can do our television advertising campaign, and we will get more people moving, and there is evidence in the Decision about multi-homing, but is it possible that more customers would multi-home so that they would say, well, actually, the PCW is not any longer offering the cheapest price and so there would be more of an

inclination to multi-home. Those are the sorts of concerns that I have in that area.

MS DEMETRIOU: That is very helpful. We will produce a note with references to the Decision that address those points. Obviously, we are not going to go beyond the reasoning in the Decision, but hopefully we can give you some of the evidence that underpins the CMA's analysis in the Decision because it did consider this issue.

MS LUCAS: Thank you.

MR BEARD: I will try to deal with these matters in reply, but obviously if a note is coming in, because obviously our position is that actually whatever is being referred to here is not the relevant question, essentially, because it was looking at it in a different context and it was not controlling for all of the commissions going up, so it does not grapple with what Ms Lucas is referring to, I will deal with that in reply. Obviously we will need to see whatever it is by way of note, but I think there is something, whilst this debate is going on, that is of concern.

The assertions now being made about the scale of non-PCW HIP activity that is not borne out by the evidence, the statistics, that Ms Demetriou has been using this morning. Now, I will come back to that in reply, but I think it is right for me just to mention

that now because I do not think -- there is certainly not common ground in relation to these things.

Dr Walker's response to which Ms Lucas has referred was in very general terms, and he has readily accepted he had not looked at underlying material. There is material on the scale of these people's activity, the non-PCW brands, so red telephone, not Churchill, Aviva not Quote Me Happy, that sort of thing.

MS DEMETRIOU: Obviously I do not want to give the Tribunal any misleading information, so we will double-check that ourselves and we will include that in our note.

THE PRESIDENT: Clearly we will deal with any post-hearing notes in the usual way in that everyone will have a right to reply to notes that are put in, and we will ensure that a fair process is undertaken, so that is natural.

What I do not want is for you to be taken out of your way or to give an answer that is half baked because you, entirely understandably, did not consider the matter to be as live as it might be.

So, absolutely, both of you will assist us in that way.

MS DEMETRIOU: Sir, thank you very much.

To go back, if I may, to the conceptual points that are in the notice of appeal that we are addressing, the

first one is the two key conceptual points that are made against us through Dr Niels' evidence of course is that a second SSNIP should have been performed, and I think I have really addressed you on that, and that the narrow MFNs should have been assumed away in defining the market.

What we say is that that would have been uninformative because of course the narrow MFNs cover a significant number, significant proportion, of the brands that we are talking about, so the direct channels that are there, and so in order to decide whether those direct channels of brands that are subject to narrow MFNs exercise a constraint, which is the purpose of this exercise of market definition, then one has to look at the real world, and if they are not in fact a constraint because of the operation of the narrow MFN, well then they are not a constraint, and, as I said by reference to the merger assessment guidelines, the purpose of this is not a sterile standalone exercise. It is precisely to examine the constraints at play in this case.

So that is why we say that it was right that the CMA took them into account in looking at the competitive constraints at play. It would have been a highly theoretical approach to have assumed them away and then carried out the market definition exercise on that basis

because the very purpose of the market definition exercise is to examine the extent of competitive constraints.

We say, moreover, that there is a sterility, a certain sterility to this debate, because everyone agrees that narrow MFNs are relevant to assessing whether there is a competitive constraint from the direct channels and of course they are highly relevant so that is common ground. So of course the CMA had to take them into account in determining the extent of competitive constraint.

Now, ultimately, whether it took them into account under market definition or in the competitive assessment does not really matter, and that is what the merger assessment guidelines are getting at. You can do it either way, but they needed to be taken into account.

The unsatisfactory nature of taking the narrow MFNs -- of failing to take them into account at the stage of market definition is that you then have a market definition exercise which is simply not helpful for the case. It ends up being a sterile and theoretical market definition exercise which is divorced from reality because what you are doing, if you assume them away, is you are identifying a constraint which is not really there, and so that is why it is not helpful

to the case. You have a market definition which does not assist you in looking at competitive effects.

Now, taking account of narrow MFNs does not mean that the CMA is somehow prejudging the outcome of the competitive assessment. Not at all, because there is no cart before the horse problem, as was put to me yesterday, because all it is doing is identifying the competitive constraints that are relevant to the competition concern.

It then needs to go on in its competitive assessment to work out whether in fact there is a competition concern, whether there is harm, competitive harm.

So it is not prejudging. By looking at competitive constraints and saying we are going to take account of these narrow MFNs because they are plainly relevant to the extent of constraints, it is not prejudging the outcome whether there are adverse effects. It is a necessary part of that process.

So, sir, turning to Sainsbury's v MasterCard because you asked me about it at the end of yesterday and if we can get up paragraph 105, so {G/119/81}.

I would like to give you, please, the CMA's reaction to paragraph 105 because you asked us specifically about this, and what we say, sir, is that we agree that the elements that have been identified by the court there in

terms of the things that one needs to look at in general terms, as indeed 105 says "in general terms", those things are correct, so one does need to be looking at the relevant agreement and its effect, looking at the market, developing theories of harm and so on.

So we agree with that. But if what is being said -- if we can go to the next page {G/119/82}, and I do not think this is what is being said here, but if what is being said is that there is a legal principle which requires the steps to be carried out in the order stated here, so if what is being said -- and I really do not think it is saying this -- but if what is being said is that there is a legal requirement that market definition is conducted before a theory of harm is articulated, then we obviously disagree with that, we say that that is not right, that is not what the CMA does in its cases, it is not consistent with the merger assessment guidelines, but, as I say, I do not think that is what paragraph 105 is getting at. It is not how we read it.

THE PRESIDENT: But if you do read it that way, then you disagree. That is very helpful.

MS DEMETRIOU: If that is what it is intended to say, that there is a legally compulsory order of events, then we disagree, and indeed the merger assessment guidelines would be in conflict with that, it is not what the CMA

does in its cases, it thinks about the theory of harm and the competitive concern and then uses market definition as a tool to analyse the competitive constraints that are relevant to that competition concern.

I think I have taken it as far as I can subject to the note on the two key conceptual points that are made, so the two-sided SSNIP or the extra SSNIP and narrow MFNs. I am going to come back to the question about narrow MFNs not only on the note, which we will provide after the hearing no doubt, but in relation to question 11 of the Tribunal's, but I will do that a little bit later if that is all right.

The third conceptual point that BGL make on the conduct of the SSNIP through Dr Niels' evidence is one in relation to supply-side substitution.

Now, we have dealt with that, it is a short conceptual point, we have dealt with it in our written closings. The point is this: that BGL submits that the CMA made an error in not considering the constraint on the hypothetical monopolist PCW by the expansion that could be presented by the expansion of the Big Four, so ComparetheMarket, MoneySupermarket, GoCompare and Confused, of their home insurance offering, of their own home insurance offering, by switching, for example, from

motor insurance or pet insurance.

So that is the point that is being made. That is the conceptual error they say that the CMA made.

The short answer, we say, is that that is obviously wrong because when you are considering constraints on the hypothetical monopolist, those constraints do not come from the hypothetical monopolist competing against itself. It would be incoherent to say that a constraint on the hypothetical monopolist comes from the hypothetical monopolist. You are looking at outside constraints, so we say it is a simple point, and BGL has pointed to no authority at all in which that rather odd approach has been taken, so I do not think I need to waste any more time on that. We have addressed it in our written closings.

I was going to turn to Ms Ralston's evidence on market definition because Ms Ralston of course does take certain granular points, if I can put it that way, as to what the CMA did or did not do. Her first point relates to partial delisting, you will recall that. The CMA of course found that providers HIPs would not delist in response to a SSNIP in commission fees, and that conclusion is not challenged by BGL, so they do not dispute the CMA's conclusion that HIPs would not completely delist.

Instead, what it does is it says that the CMA has not done enough on partial delisting, and we say that this really is an example of trying to make a silk purse out of a sow's ear because -- and we deal with it in our written closings, if we can take it from there, perhaps, at paragraphs 233 to 235. {B/65/111}. Thank you so much. The operator is ahead of me.

You can see here what we say about that, that only three -- of the 27 HIPs to which the CMA sent Section 26 notices, only three mentioned partial delisting as a possible response, and their evidence was unenthusiastic.

Then we see -- I am going to take you to what Mr Beard says about the questions, because he has a complaint about the questions the CMA asked, but the first point and the key point is that there is no evidence in this case, and Dr Walker explained why partial delisting would be unlikely in this market, but there is no evidence that partial delisting is something that is likely to have taken place.

BGL says, well, the CMA could not fairly come to that conclusion because it did not specifically ask about partial delisting in its Section 26 notices, but let us look at the questions the CMA did ask.

If we go to {F/304/8}, please, the CMA here is

asking open questions to the HIPs about their negotiation strategies when it comes to commissions. If we look at (c):

"What were the main factors affecting the outcome of the negotiations between [that HIP] and PCWs on Commissions ..."

If we go over the page, please {F/304/9}, we see at (d), did the negotiation strategy vary, and at (e):

"Please explain the extent to which [the HIP] has been able to resist the increases in Commissions by individual PCWs, and how this was varied by PCW, including an explanation of what factors affected [the HIP's] ability to resist increases in Commissions ..."

And then at (f), {F/304/10}:

"Please indicate what strategy or strategies [the HIP] has adopted (excluding delisting or where delisting was considered which are covered in Questions 7 and 8 below) to resist Commission increases and how successful each strategy was."

Then you have at 7 and 8 {F/304/11} questions on delisting.

So these are open questions all about the strategies, the negotiation strategies, that HIPs were engaging in in order to resist commission increases, and Mr Beard then took you to the transcript where Mr Lask

cross-examined Ms Ralston, but he did not take you to the relevant bit, and if I can take you to that, so transcript {Day6/12:1}. We see it starts really at line 18, {Day6/12:18}:

"Question: If we look back at [and it is the document we just looked at] ... and question 6(f):

"'Please indicate what strategy or strategies AA has adopted to resist Commission increases ..."

And then:

"If a HIP thinks of partial delisting ..."

You will recall it was not put -- the point that is being put by BGL is well, HIPs do not think of this as being delisting, they think of it as being quotability, and so the later question specifically about delisting might not have prompted them to answer. So what is being said is:

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

And then the answer:

"Yes, that is correct."

And then if we go to transcript {Day6/98:12} in the same document, Mr Beard came back to this in re-examination hoping no doubt to elicit a different

answer from Ms Ralston, but all she did was confirm what she had said. So if we look at what he said in cross-examination, so look at line 12:

"You were asked about partial delisting, and you talked about quotability ..."

And then he took Ms Ralston back to the document and question 6(f), you see that at the bottom of the page and then over the page there is a lengthy question, and then it says:

"And you [answered], 'Yes, that is correct.'"

We can see that at {Day6/99:9}. What Mr Beard is doing this is taking Ms Ralston through her answer, and then:

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

"What would you understand the 'many aspects of the relationship to negotiate the best deal we can' would encompass, perhaps not exhaustively ...?"

And then the answer:

"So that would capture reducing quotability ..."

So Ms Ralston is accepting and agreeing, despite the no doubt the invitation, the attempted invitation for her to change her evidence, is agreeing that these questions capture quotability, and of course they do, of course they do, because they are all open questions

about what negotiating tactics HIPs ask, and it is perfectly proper of the CMA to ask open questions like that.

Mr Beard also said none of this was followed up, but let us look at {F/428/4}. This is the follow-up with Tesco Bank. We see precisely a follow-up in relation to -- we see this at 14 -- tactically reducing -- how it might resist a commission increase by tactically reducing its footprint, and we say that Tesco Bank noted that it had only made small changes to its footprint and this had not been successful.

So the idea that the CMA has not sought to gather the right information or ask itself the right question we say is simply unfounded. We say that this really is a good example of a recurring theme in Mr Beard's submissions which is to raise complaints that the CMA has not drafted a question in precisely the way that BGL's lawyers would have liked and to say, well, this shows that the CMA has not asked the right questions, but of course the role of the Tribunal in this appeal, as Lord Justice Green said in Flynn, and as we have said in our closing submissions, the role of the Tribunal is not to sit on the CMA's shoulder in some way as some kind of shadow regulator and say, well, we would have liked this question to have been drafted slightly

differently to that question. The Tribunal is not there to step in if there is the slightest slip-up. It is to see whether the CMA made a material error, and here there was absolutely no error at all, let alone a material error. It is just nitpicking on BGL's part. So that is partial delisting.

The next point that BGL made was that the CMA had underestimated, it said, the percentage of PCW customers who also had a direct channel new business quote and had a renewal quote. You will recall that the figures were 16% and 36%, and this is dealt with -- you do not need to turn it up, but just for your note, it is dealt with in BGL's closing submissions at paragraphs 89 to 93 {B/64/31-33}.

We have addressed it briefly at footnote 375 of our closing submissions which I think should be on page {B/65/114}, but in any event the CMA accepts that its figures may somewhat underestimate the position, but by nowhere near the extent suggested by BGL.

For both new business and renewals, the CMA's figures are the only direct measure.

For new business, Ms Ralston produced her own estimate, and it was not very different to the CMA's, so the CMA said 16%, she says 18%, so there is nothing really in that, and for renewals you have Dr Walker's

evidence, he rejected some of Ms Ralston's reasons for arguing that the underestimate in respect of renewals was more significant, and you see, just for your note, again given time, I do not want to take -- I want to give you the references for the transcript but not necessarily go to all of these.

In Dr Walker's report at footnote 77, so that is {A/8/25}, and you will recall perhaps that Ms Ralston relied on DCT survey evidence concerning PCW users, in other words those who had obtained a quote -- who obtain a quote but do not necessarily purchase, and she used that survey evidence to produce a higher percentage, but she also accepted that the relevant cohort is PCW purchasers since it is this group that a hypothetical monopolist PCW would be at risk of losing in the event of a SSNIP and that is what we deal with in the references at footnote 375 of our closing submissions.

Dr Walker explained in his report, as I say at footnote 77 {A/8/25}, why survey evidence is less than informative than evidence of actual behaviour. He said that I think orally to the Tribunal.

Of course the CMA's figures were derived from actual behaviour.

Now, in any event, if you are going to use survey evidence to test the extent to which 36% is an

underestimate, what you want to try and do is isolate the percentage of PCW users who had a renewal offer in hand, because that is really the relevant metric, but Ms Ralston accepted that her 87% figure went wider than that since it included users who were looking to update their policy.

She accepted that a more appropriate measure would be the percentage of PCW users who were prompted to search on a PCW because they needed to renew, and that was 49%.

Now, what she did say in cross-examination was 49% could be an underestimate and BGL of course rely on that, but she failed to give any good reason why it was an underestimate, and she said, well, why should we restrict ourselves to renewal customers for which renewing was the reason that first prompted them to use a PCW, and we say the answer is obvious: because we are trying to isolate the percentage of PCW users who had a renewal offer. So that is what we say in relation to that point.

Also at paragraph 265 of our closing submissions -- I do not need to take it up, because it is really the same point, I just give that for your note. So that is where we deal with it there {B/65/124}.

Finally critical loss analysis. The key point of

course in relation to Ms Ralston's critical loss analysis is that it assumes that BGL is right to say that the narrow MFNs must be assumed away, and we say, of course, that they are wrong about that, and the CMA is right, that you have to take them into account.

It really just demonstrates the lack of the -- the absence of reality in BGL's approach, because if you are conducting a critical loss analysis without taking account of the narrow MFNs, the whole process is simply unreal.

We also say in our closing submissions -- and this is paragraphs 243 to 244 for your note {B/65/116} that the methodology is flawed because what Ms Ralston did, you will recall, was use -- once she redid her test after the error, she used margins figures which she herself said were illustrative, and they were certainly, we say, very wide-ranging, and, therefore, not informative, and in any event Ms Ralston made no attempt to consider whether the identified level of switching would actually take place.

So this critical loss analysis, we say, goes nowhere for a number of key reasons.

Sir, I have one more point on market definition which is a short point, but I do want to look at the Tribunal's questions, which will take a little longer.

I wonder whether you would like to take the break now.

THE PRESIDENT: We are in your hands, Ms Demetriou. Whatever is more convenient for you.

MS DEMETRIOU: Let me deal with one point and then we will take the break and I will deal with the Tribunal's questions after that, if that is all right.

This is the point that at the end of his submissions on market definition, you will recall that Mr Beard said it was important to look at how much PCWs spend on advertising which in part is to compete against HIPs, and he likes Ms Glasgow's evidence on that because she says, well, yes, of course, to some extent we compete, or we do compete against HIPs.

Now, the CMA of course accepts that there is competition between PCWs and HIPs, of course it accepts that there is competition between them, but the question is and the relevant question here is the extent of that competitive constraint. So it is not enough in this exercise to say the HIPs are out there, they have their direct channels. It is the extent of the competitive constraint that needs to be measured, and it needs to be analysed, and in particular what needs to be analysed is whether that constraint is sufficiently large to stop the exercise of market power that we are considering in relation to the wide MFNs.

That question simply cannot be answered by broad statements and assertions about advertising spend and amounts of advertising spend. Because it cannot be answered simply by saying, oh, well, there is a lot of advertising spend, it is because of that that the SSNIP test was carried out, and, as Dr Niels said -- and we agree -- what the SSNIP test does is it provides a conceptual framework for asking the right questions which are there to get at and identify the extent of this competitive constraint.

In any event, you will recall that Mr Beard took you at some length to the CMA mergers decision in Hunter Douglas and said, look, here is the CMA looking at online presence and advertising spend, and in fact in this case the CMA did also take account of online spend, and we see that at paragraphs 151 to 152 of the Decision. Perhaps we start, if we go to {A/1/127}, or perhaps we can go back a page and one more page back, please {A/1/124}, we see here reference to the Big Four spending on marketing and advertising activities, and if we go forward a couple of pages to 151 to 152, page {A/1/127}, here is the kind of information that Mr Beard criticises the CMA for not taking account of precisely being taken account of.

Sir, this really does illustrate a problem with

these types of points being made, shooting from the hip, as it were, saying, well, the CMA has not taken account of advertising spend, because there is a vast amount of information and analysis in this Decision where the CMA -- if one looks at section 7 for example of the Decision, {A/1/161}, there is a huge amount of analysis, of price sensitivity of consumers, how pricing works in the market, and so on, all of which was taken into account by the CMA in its Decision, and then to say, well, you did not take account of spend on advertising, is simply not right. It cannot be right to say, well, we do not find this paragraph in the market definition section, therefore this Decision needs to be quashed and there is some fundamental error. That cannot be a right approach to an appeal.

So, sir, those are my, as it were, positive submissions on market definition, but I do want to answer the Tribunal's questions on market definition. Perhaps we can do that when we return from the short break.

THE PRESIDENT: Very good. Ms Demetriou, we will return at 11.55.

MS DEMETRIOU: Thank you.

THE PRESIDENT: Thank you very much.

(11.44 am)

(A short break)

(11.58 am)

MS DEMETRIOU: Sir, if I could take up the Tribunal's questions, some of them I may have answered, but can I just go through to make sure I have answered them, if that is okay.

I think I have answered the first question now about Sainsbury's v MasterCard. I think you know our answer to the second question, which is yes.

I think that the third question -- sir, I think you have our point that one has to look whether you do it in market definition or in effects at the competitive constraints as part of the analysis and that we think in this case it was right to do it as part of market definition, but if you do not do it as part of market definition, you do it as part of effects. So I hope that is an answer to that question, but if the Tribunal had something different in mind, do please interject and say.

THE PRESIDENT: Ms Demetriou, it kind of arises out of these questions, but more particularly, I think, it arises out of the paragraph 5.91 that you took us to before our short short break.

Is the position this, that what one does with market definition is it is an iterative approach, because you

do not really know what the market is until you have looked at it and looked at all the moving bits?

MS DEMETRIOU: Yes.

THE PRESIDENT: And what I have read your Decision as saying is that the market is defined as 5.21, full stop, that is it, and it may be completely my fault, I have read that as saying this is all we looked at, but I think what you are saying is, no, we have taken a much more broadbrush approach, we have looked at all of these constraints and the reason we have ended up with 5.21 is because we have looked at, let us say, the direct channel, we have done the work, we have concluded that contrary to what you might think -- this is why we have done the work. Contrary to what you might think, they are not a constraint, and so in our iterative approach, our market definition has narrowed.

MS DEMETRIOU: Sir, yes, that is exactly the position, and it may be -- the CMA has this habit, which I am going to talk to them about after this appeal -- of setting out its conclusion before then providing -- so it sets out -- it is a thing it does in relation to all of its decisions, which is it sets out its headline conclusion and then gives you the reasoning after that, and so to some extent that is what it has done here, but there is a much broader, more substantive point which is the one,

sir, that you are putting to me, which is that the CMA has looked at this in, if I can put it this way, an inclusive way and an iterative way, so its position is informed by all of the evidence it gets.

If you look at section 7 of the Decision, so if we start -- I am not going to take you through all of it; no doubt you have looked at it now several times, but if we go to {A/1/161}, this is a lengthy chapter -- I mean, it starts on page 161, and it ends on page {A/1/237}, so it is a very lengthy chapter which includes a lot of very granular information about things like price sensitivity of consumers, how multi-channelling happens, how single homing happens, all of this evidence which is relevant to the question of the constraints that you are analysing.

It is really important, and that is really the point that I was putting to the Tribunal in relation to the merger assessment guidelines, where you have seen that market definition comes at the end of what is being said there, and the guidelines say, well, the CMA may find it sometimes more convenient to analyse these constraints in the competitive assessment rather than under a head of market definition, but essentially what you are getting at, for the market definition exercise, is it is part of the assessment of competitive effects and what

you are trying to do is analyse the competitive constraints that are relevant to the competition concerned.

There is no question of jumping the gun, as it were, and saying, well, this is the market and we are working -- it is, as you say, an iterative process that takes account of the entirety of the analysis and which is aiming at testing the extent of the relevant competitive constraints, and that is why it is really important not to look at it as an isolated matter, because it is not an isolated matter, and that is very clear in the merger assessment guidelines.

THE PRESIDENT: We will obviously be re-re-re-reading the decision, but that was a very helpful answer in terms of -- it may be that we have been using the words "market definition" as actually quite ambiguous in terms of process in that it is obviously there to assess constraints, but since you do not know what the constraints are, you have to start wide, and you end up narrow, but I have to say my reading of the Decision -- and we will obviously be re-reading it -- was that you had effectively started narrow, and that was the reason I ran all these questions past Dr Niels and Dr Walker about what do you do about the other side of the market, and I think the point you are making is you have done

this, it just does not show that one has done the investigation in order to see whether the effect does exist or not.

MS DEMETRIOU: Sir, precisely that, and also that -- so as Dr Niels agrees, the HMT, the hypothetical monopolist test, is there to ask the right questions about competitive constraints, and those questions have been asked, and they have been answered by the CMA, and the points that were put to us, just to summarise and bring in our response in a nutshell to the points that you are just putting to me now, sir, the key points that were put to us via Dr Niels' evidence was, well, what you should have done in market definition is applied another SSNIP and you should have assumed away the narrow MFNs, and what we say in response, in a nutshell again, is that that is a highly theoretical approach to something which should not be a theoretical exercise, it should be a useful exercise which forms part of the assessment of competitive effects.

So I hope that is helpful, in a nutshell, to explain why we disagree with those points. What the CMA has done here is it has looked at all of the information, it has asked itself, well, what would happen to consumers, what would consumers do in the event that there were this SSNIP on commission fees, which is the price that

could be controlled, that is what we are getting at here, that is what this investigation is about. It has looked at that in a lot of detail. As I say, most of section 5, chapter 5, is dealing with consumer responses, and it has dealt with that, it has examined that, in the context of all of the evidence that it has iteratively gathered on matters like multi-homing and single homing and the prevalence of narrow MFNs and all of the rest of it, and price sensitivity, it is all there. So it has not leapt to some conclusion and then worked backwards, this is all part of the assessment of the operative constraints in relation to the competitive concern that the CMA is investigating.

So that is, in a nutshell, what we say in relation to market definition.

Sir, returning to your questions, so going to question 4, I think I have answered -- I think that does answer question 4, so I think that unless there is something else on question 4, I think I have answered question 4. I have explained why we say that a separate SSNIP on retail prices and an SSNDQ is not informative in this case, because it does not relate to the competition concern, so it is not informative.

To put it another way, even if one did find that the hypothetical monopolist could exercise market power in

the way suggested by Professor Ulph, that is not what is being investigated, so it is not directly relevant to the investigation.

Of course, the CMA has looked at the competitive constraints on the consumer side as we have just said.

Then question 5:

"How does one define a 'two-sided' market?"

Sir, we do have in mind the question you put to us at the end of yesterday and we will endeavour to be helpful and produce something, but I would just say now that what we produce is not going to look like a blueprint for defining two-sided markets because you will apprehend that our answer is you have to look at the relevant competitive constraints in that case.

Now, it is likely to be the case, as is the case here, that where you have a platform, a two-sided market comprising a platform which joins on the one hand suppliers and on the other side consumers, that when one is assessing competitive constraints one of course has to have in mind constraints on both sides, but, as I have said, that is what the CMA has done by looking at potential diversion from consumers.

Question 6, you ask about to what extent is an orthodox SSNIP test compulsory.

We say any SSNIP test is not compulsory, it is only

a tool. There is a no rule of law that says a competition authority has to use a SSNIP and in fact there are several examples of cases where competition authorities have not used a SSNIP and they have assessed the market in a different way, and we saw from the merger assessment guidelines that what that envisages is that actually market definition does not have to be through the prism of the SSNIP, so there is no compulsory use of a SSNIP, but what the experts agree in this case is that a SSNIP provides a useful conceptual framework in this case, and again there is no debate about that.

There is, of course, a debate about whether you need another SSNIP, but I have dealt with that fully in my submissions.

We then have, I think, question 7, and we say -- again, that is a related question, and we say that, yes, you do need to look -- and in fact this is -- the bulk of the CMA's analysis was precisely to assess whether the HIP direct channels were a substitute. As I say, when you return to chapter 5 you will see that is what most of chapter 5 is looking at, whether the direct channels are a substitute, and we say that that is what it did when it conducted its SSNIP, so that is our response to that question.

Then in relation to the provision of PCW services comprising only the Big Four, I think that the upshot is that -- I think that the hypothetical monopolist in principle was all PCW websites. Now, the reality of the matter is that the Big Four accounted for a huge proportion of the market, so I am not sure if the figure is confidential, but it is very close to 100% of the market. So that is the reality. So there is no practical significance to this point.

I think that the next question -- I think that was question 8.

Moving on to question 9. Question 9 asks:

"If a SSNIP ... reveals an alleged infringement which produces beneficial effects on one side, and deleterious effects on [the other], how do you go about balancing those?"

Sir, the first thing we say is the premise of the question is not quite right, with respect, because the SSNIP does not identify any infringement at all. What it does is it identifies competitive constraints. So in your competitive assessment you then look at whether or not there is harm, so it is a separate thing, so I think with respect the premise of the question is not quite right.

If what the Tribunal is asking is, well, what

happens in a case where a party is saying, well, there are these pro-competitive effects? Well, then, the law establishes that those are dealt with under Article 101(3) and the equivalent in domestic law, and that is obviously not the case that is being made in this case.

Then we have question 10:

"Is it right, when applying the SSNIP ... to take account of [the narrow MFNs]."

And of course we say yes, I have answered that. I am not sure there is anything else I can say in response, I have made my submissions.

Then 11:

"How robust is the evidence and arguments concerning the effects of wide MFNs in relation to the issue of ... the counterfactual ... world ..."

Sir, to some extent, of course, we are going to give you a note about precisely what was done, but can I just deal -- I think that the question is a slightly more general one about the use of narrow MFNs in the counterfactual, and it may be helpful if I could just explain in stages the CMA's position. This might be a convenient juncture to make some more general points, including some points in relation to the literature that have cropped up on narrow MFNs, subject of course to the

note which is coming your way, so I am not going to trespass on that territory.

The first point is that we acknowledge that if no HIP was ever willing to undercut their direct channel price then a full network of narrow MFNs would replicate the effect of wide MFNs because it would mean that no HIP would ever do differential pricing. So we acknowledge that as a starting point.

The Johansen & Vergé paper -- and this is what Professor Baker was saying in his evidence -- that paper finds that narrow MFNs and wide MFNs have the same effect because the assumptions in their model make it so that providers have a very strong disincentive to undercut their direct channels, and so that is why I say we acknowledge that if that holds true, then you would not have an incremental effect by the wide MFNs, but we say that those assumptions do not match the reality in the present case. That is really the key point, and that is the point that Professor Baker was making.

Now, he was not speculating, as Mr Beard would have it. He said, well, he has not looked at any of this, so he is just speculating. What Professor Baker was doing was relying on the information in the Decision, which he is of course entitled to do, and the evidence in the Decision -- of course there is evidence in the Decision

that HIPs were willing to undercut their direct channels, and we see that lots of HIPs engaged in some form of differential pricing which, when you have narrow MFNs in the market, that implies necessarily undercutting their direct channels.

If I can just give you some references without taking time to go to them, but if you look at Decision 7.180, which in the Opus bundle is {A/1/229}, and there is also evidence that 45 to 60% of HIPs priced more cheaply on PCWs than on their direct channels, and that is based on some Oxera analysis, and we see that in Decision footnote 340 at {A/1/110}.

So essentially our key point -- and we rely on Professor Baker for this and on the evidence in the Decision -- is that the assumptions in Johansen & Vergé just do not hold here because here we see that it is not the case that providers have a very strong disincentive to undercut their direct channels. That is not the market reality of this case, and that is the key difference.

Now, I just want to deal with a separate point that Mr Beard put, which is that he said that the CMA did not ask questions about wide MFNs as distinct from narrow MFNs, and so somehow all of this was muddied in everybody's mind.

We do not think that is fair because we say that when one looks -- and of course I cannot hope now in my oral closings to go through all of the question 26s and have a look at it, the Tribunal will have to take a view on this point, but we say that it is clear, when you look at both the questions and the responses, that the HIPs that were questioned about this had well in mind that they were being asked about wide MFNs as distinct from narrow MFNs, and if we look, for example, at {F/330/17} this relates to Aviva (Quote Me Happy). It may be that we do not need to go to it and I can just give you the reference and move on and you take my point.

The reference is {F/330/17} and it is Aviva (Quote Me Happy) expressing its concerns about wide MFNs and narrow MFNs separately and indicating that they understand the difference between the two, and of course what the CMA was asking, directly was asking, was how HIP strategies had in fact changed after ComparetheMarket disapplied its wide MFNs, and given that ComparetheMarket maintained narrow MFNs then it was clear -- and of course the HIPs almost always had narrow MFNs with the other PCWs as well -- it is clear that the question was directed at the incremental effect of the wide MFNs because that is the thing that had changed

once they had been removed. The position in relation to narrow MFNs had not been changed at all.

PROF ULPH: Ms Demetriou, I am just going to go back to that point. I think what the question was getting at was not whether respondents understood the distinction between wide and narrow MFNs. The question was getting at the point when they were answering the question about the effect of wide MFNs, were they actually asking a question about additionality of the incremental effect over and above the presence of narrow MFNs, and that I think is the issue about the qualitative evidence, to what extent can one be sure that when the respondent is saying, yes, it was a wide MFN that was causing us to behave in this way, whether they were factoring in the presence of a network of narrow MFNs in giving that answer. It was a point of additionality (inaudible) whether were they distinct from one another.

MS DEMETRIOU: Professor, yes, I understand, and of course the Tribunal is going to have to reach a view on that, but we say what the qualitative evidence shows, for example where you see a HIP saying to a rival PCW, well, we cannot enter into this promotional deal because of our wide MFN clause, well, that is directly evidence of the effect of the wide MFN as compared to the narrow MFN. That is why we say the Tribunal is going to have

to look carefully at the evidence and reach a view as to whether or not there was any confusion on the parts of HIPs responding.

As to the question of how the CMA went about considering this, of course all of chapter 6 in the Decision explains that narrow MFNs were in the counterfactual, and there is an explanation in the Decision. We see, for example, if we go to, in the Decision, {A/1/219} at 7.154, you see there what is being said is:

"Because narrow MFNs are a standard contractual obligation used by all of the Big Four PCWs, providers consider the potential impact of their PCW pricing strategies on sales made through their online direct channels. In particular, to protect sales made through its online direct channel, a provider may not want to engage in a pricing strategy that involves offering consumers a lower price on one or more PCW than it offers on its online direct channel. This means that, as a result of the narrow MFNs, some providers may have a disincentive to engage in differential pricing on PCWs because differential pricing would mean that the retail price on at least one PCW would be lower than the retail price quoted on the direct channel. Since the retail prices on the PCWs could not be higher than the retail

price on the direct channel, the only way in which to engage in differential pricing as between the PCWs would be to lower the price on one or more of the PCWs."

I am just giving that by way of example, but you can see there that the CMA is directly grappling with the effect of narrow MFNs and the fact that those may suppress price competition or are likely to suppress price competition to a certain extent, and so what the CMA has endeavoured to address its mind to is the incremental impact of the wide MFNs over and above the narrow MFNs.

Of course, we have all of the qualitative evidence in relation to CTM itself. CTM maintained its network of narrow MFNs, but when the various HIPs -- and there were quite a few of them -- sought quite strenuously to have the wide MFNs removed, CTM, which is a sophisticated business, CTM's position was no, we do not want to do that. Presumably that must be because they saw that they served an additional purpose.

Again, I am not going to take you to it, but in annex L -- I will just give you the reference, {A/1/565} -- in relation to AXA, there is a discussion in relation to that HIP which recognises that narrow MFNs are a factor in pricing strategy but then considers whether the wide MFN also had an impact in its refusal.

So we say again this is one of these points which has arisen, if I can put it that way, gained prominence, in the course of this trial.

What was not said to us in the notice of appeal is, well, we quibble with your reasoning on this point, and so we have not in our defence set out comprehensively all of the parts of the Decision and all of the evidence relied on in relation to this point, but we do say that that is the basis on which the CMA has proceeded. Clearly in chapter 6 the counterfactual was a world with narrow MFNs. It has been very alive to the fact that narrow MFNs do have a dampening effect on price competition, and what it has done is it has considered the effect of wide MFNs over and above those effects.

That is, I think, question 11.

Question 12 of the Tribunal's questions:

"Is this a case about the anti-competitive effects of wide MFNs irrespective of how many PCWs adopt them?"

No, we say it is absolutely not that. It is a case about CTM's wide MFNs and no other PCWs had them in the relevant period and that is the legal and economic context that the CMA has considered.

Question 13:

"To what extent is the perceived or alleged anti-competitive 'object' of [the] provision ...

relevant to determining whether [it] has an ... effect?"

We say of course it is relevant. What is meant by "object" of course is the purpose of the agreement. We see that, there is a long exposition of that in the Ping case in the Court of Appeal. What is meant is the purpose of the agreement.

Now, we are not saying that somehow an effects analysis can be supplanted -- if the CMA says it is doing an effects analysis, which is what it has done here, it can stop short at an object analysis. Of course it cannot do that, and that is no part of our case. We would not have been here for three weeks if that were the position. What we do say is that it is highly relevant, highly relevant, what the purpose of the agreement is, and that is something that the Tribunal will need to take account of because it is highly relevant that this is what these clauses sought to do, they sought to restrict price competition, and it is highly relevant that CTM thought they were effective in doing that, and it is highly relevant that they were contractually binding and so there was a strong incentive for compliance, so we say those are all relevant points.

Then we see 14:

"When considering ... effects, is there a rebuttable

presumption of compliance ... if there is evidence of incomplete compliance?"

I think this started off as being a sort of rabid debate during openings, but I think we may have reached some form of common ground in the sense that I think -- and Mr Beard I am sure will not hesitate to jump up if I have this wrong, but I think what we are both saying is that, yes, the case law, Delimitis and so on, does not require the competition authority at the outset to analyse every single one of the agreements in a network to make sure whether it has been complied with at all times. So a competition authority is entitled to look at a bundle of agreements.

However, if an appellant comes to the CMA and says, "Here, there is evidence to show that these agreements simply -- this category of agreements here or the agreements with this provider were not effective", of course that is something both the CMA needs to consider and the CAT needs to consider. I hope that given that Mr Beard has not jumped up, I am hoping that we are somewhere approaching common ground on that point.

MR BEARD: Certainly approaching, yes. I think there may be a burden of proof issue, but approaching, yes.

MS DEMETRIOU: We accept the burden of proof issue, so it could be complete common ground and there are enough

points in this case which are not common ground, so that may come as some relief.

Question 15:

"In terms of assessing anti-competitive effects ... does it matter that any effect (albeit cumulatively great in absolute, if not relative terms) is small ...?"

We say no, there is no hard and fast rule about that. Take a hypothetical situation of -- say that we have a cartel in baked beans, as you were exploring with us yesterday, sir. Say that Heinz and its nearest competitor, say Heinz and the supermarket's own brands, they have all got together and they have said, right, we are going to fix prices, and let us say that the effect of that is tiny, so let us say that you then have clever econometricians come and establish that in fact the effect was a 1p increase in the price of baked beans compared to what it otherwise would have been.

Well, we do not say, oh, well, it is only 1p, and, therefore, it is not appreciable, because of course there are millions of children throughout the country eating baked beans on a daily basis, so when one is looking at appreciability it would be wrong to look at it through a narrow prism of the individual effect of per item effect. One is looking at appreciability globally across the market, and so that is our answer

to that.

Moving on to --

THE PRESIDENT: Just to follow on from that, I often feel that there is a sense that cartels are seen as only affecting price, whereas their pernicious effects are different. Maybe, actually, BritNed is a good example of that because in that case contrary to all expectation I found that the increase in price caused by the cartel was actually really quite small, but that did not seem to be the purpose of the cartel at all. The purpose was less to control prices and more to control allocation of work amongst factories which did not want to be rested idle.

So the aim, as it seemed to me after hearing the evidence, was actually not to inflate tenders but to allocate them in the most efficient way for the cartelists to do their business, and so they achieved significant cost savings in that way.

Now, thinking about it overnight, that struck me as a rather good example of the point that you are making here, namely that you can have an anti-competitive effect without necessarily a discernible metric in the market, and I do not think anyone would suggest -- I mean, clearly it was not a matter before the court in BritNed -- that that was not an infringement by effect

of competition law.

Now, obviously it is a completely different question here, but I anticipate you would agree that that is something which is certainly in court here and goes to the difference you were drawing between a follow-on damages claim and an investigation into whether there has been a competition law infringement.

MS DEMETRIOU: Sir, absolutely right. We say when the Tribunal is looking at appreciability of course it is an appreciable effect on competition rather than -- that is the starting point, an appreciable effect on competition. So is the parameter of competition -- here we are talking about price competition. Is the competitive structure, is the price competition as a process, is that appreciably affected in this case, and one does not need -- so the first -- I am agreeing with your point, but the first of my two-part further clarification is to say that you do not need -- if you have that, you do not need to go on and measure as a metric what consumers -- whether they actually paid more and to what extent. So you do not need to do that as a matter of law. But secondly there is another aspect to this which is say that there were an accurate way of measuring that in this case, then the fact that, for example, it may be found that each consumer has

benefited or was made worse only by a small amount as a result of the wide MFNs does not prevent the effect being appreciable because you are not looking at it on a consumer-by-consumer basis because of course lots and lots of very tiny effects for lots of consumers lead to lots and lots of benefits for the people benefiting, for the PCW that is benefiting, or for the HIPs concerned.

So it is a two-part answer to your question, but I very much agree with what you put to me.

Now, I think the next thing that the Tribunal has asked relates to:

"... does the CMA's Decision rest on a tacit assumption that [narrow MFNs] are not anti-competitive?"

I think until something has been found to be anti-competitive it has to be assumed to be lawful, so the CMA has included narrow MFNs in its counterfactual, it has explained in other contexts that there are efficiency arguments in favour of narrow MFNs. What it has not done is investigated them in this case, and so until someone establishes, either a regulator or a Tribunal, that they are unlawful, then they have to be assumed to be lawful. So I do not think we can say that the Tribunal can proceed on the opposite basis, that they are unlawful in some sense.

THE PRESIDENT: Fair enough, but by the same logic, you

would not investigate wide most-favoured-nation clauses because you have not found, until you have reached the end of your process, them to be infringing competition law. I suppose what this question is getting at is, should you, given the inter-relationship between -- or potential inter-relationship between wide and narrow MFNs, was it a question that you ought to have asked before importing them into your counterfactual? In other words, ought you to have reached a view, which is why we say it is a tacit assumption, ought you to have reached a view about their legitimacy or illegitimacy, because that would go into the ambit of the counterfactual that you would be thinking about?

MS DEMETRIOU: Sir, I think it is important to separate that question out. I think it is potentially quite a complicated question, but I think that if it were the case that the CMA considered or somebody had found that these narrow MFN clauses were unlawful, then I can see that that would raise a question as to whether or not they should be included in the counterfactual, because one would be saying, well, they have been found to be unlawful, let us say by a court, and so in the counterfactual is it reasonable to include them, but we are not in that world, so they have not found to be unlawful.

The counterfactual question is really a factual question for the CMA, so the CMA is saying, well, what is the correct counterfactual to assess these wide MFNs against? Now, it cannot say, well, the correct counterfactual is one where we exclude narrow MFNs, for the reasons really that Professor Ulph was alluding to, which are that they themselves have a suppressive effect on price competition, and the CMA accepts that. So if you were to say, well, we are excluding narrow MFNs from the counterfactual, you are not taking account of that, so you are not -- you are starting from a position where, if I can put it this way, the CMA accepts when it is conducting its counterfactual analysis that there is already, because of the narrow MFNs, a degree of dampening of price competition in the market. It is appropriate to do that because otherwise the CMA would end up, could end up overstating the effect of the wide MFN if it simply excluded that dampening effect from the counterfactual analysis.

So that is why it is important that it did what it did as a factual point and as a question of assessment, and of course we are not in the position where the CMA or anyone else has found that these clauses are unlawful and so that might raise difficult questions as to whether or not they should be included in the

counterfactual. I hope that is of some assistance.

We then go to econometrics. I think this point we covered yesterday and so I do not want to go back over my submissions yesterday, and I think that I have also covered sub-question (4) yesterday, and (5) in fact about witnesses, I did that at the outset yesterday, and (6), and in relation to (7), so potential lacunae in the Decision.

Again, I think I have made this point, sir, but we do say that the Tribunal -- I know it will, but it is incumbent on the Tribunal to tread very carefully, because a number of quite granular pot shots have been taken by BGL, I understand why. Mr Beard is doing his job. But it is very easy for an appellant to come along and said, well, this question was not put as precisely as it could have been in a Section 26, and, you know, the CMA should have -- partial delisting is a good example in point. The evidence is not there. It was gathered and it is not a problem, and then suddenly this has been magnified in an appeal, which is what big commercial companies who can employ very clever lawyers do in these cases, but one has to be very careful with respect to ask -- and go back to Lord Justice Green's observations, which are, yes, this is a merits appeal, but what is the role of the Tribunal? It is not to sit

there and decide that this could have been done a bit better or this question could have been asked. It is: is there a material gap or a material error, really, in the reasoning of the CMA? That is an important point.

Then evidential points.

Can I come back to those because I am going to go on to deal with promotional deals now, and it may be better to come back to the evidential -- the last few questions which are on evidence.

THE PRESIDENT: It may be, and also, as we rather indicated with Mr Beard, these are points perhaps less well suited to oral submission and better suited to, as it were, lists of references.

MS DEMETRIOU: Yes, I am grateful.

THE PRESIDENT: I certainly would not want you to take up your valuable time just giving us a list of items, so we extend that invitation to both parties, and I suspect there may be more requests for, you know, where do we find certain material in the record coming on.

MS DEMETRIOU: Sir, I gratefully take you up on that invitation because it means that I can focus my closing submissions and I am a little bit conscious of time as well.

THE PRESIDENT: No, I entirely understand.

MS DEMETRIOU: You have the pleasure of Mr Lask on penalty,

and he needs some time to deal with that.

I have to deal with promotional deals which I am going to deal with now.

The first point made by Mr Beard about promotional deals was that he said, well, investment in promotional deals is small relative to other metrics such as revenue from commissions, and you will recall that that was based on an analysis conducted by Ms Ralston.

In his oral submissions yesterday, or it could have been the end of the previous day, Mr Beard emphasised that he was not saying that Ms Ralston's analysis was the only metric, but again this was another pot shot at the CMA. He said, well, the CMA has not properly contextualised promotional deals, and we just say that that is wrong.

Our written closings at -- if we go to {B/65/57}. Again, sir, I hope you will forgive me in view of the time, but I am going to sometimes just show you my written closings and leave it to the Tribunal to revisit them afterwards if that is all right.

What we do at paragraphs 130 onwards is summarise the extensive findings made by the CMA in its decision by way of context to the importance of promotional deals to both PCWs and providers. We say in the light of that evidence it cannot sensibly be denied that promotional

deals were an important form of price competition during the relevant period for two of the Big Four PCWs and for many of the HIPs.

Indeed we say that Ms Ralston accepted that in cross-examination. The reference in our closing submissions, again without turning it up, to where she said that is paragraph 135, which is {B/65/68}.

We say that the relative approach adopted by Ms Ralston in her analysis is not a meaningful measure of the importance of promotional deals as a means of competition, and, as the Decision finds -- perhaps we can turn to this -- at {A/1/223} at 7.166, what is being said here is that -- what the Decision finds is that promotional deals were used, often used as a tactical or opportunistic tool which targeted providers which, if we go across the page, {A/1/224}, targeted at providers who tended to feature in the top few positions in the rankings. So it is just simply not informative to be saying, well, look how much more PCWs earned from commissions, because that is not how they were used. They were used as a significant form of price competition by some of them and by some HIPs, and they were used tactically and sometimes opportunistically, but nonetheless important for that.

We also say that the -- we say that even within its

own terms -- and again, I am just going to give you the references -- the relative analysis performed by Ms Ralston is flawed, and again we cover this fully in our written closings at paragraphs 139 and following, which starts at {B/65/69}. I think that is all I want to say about the relative analysis orally.

The real question of course in relation to promotional deals is: was this form of competition materially restricted by the wide MFNs? In addition to the granular findings in relation to promotional deals, and by that I mean the evidence of particular HIPs and particular PCWs discussing the constraints placed on promotional deals by the wide MFNs, in addition to that evidence, the CMA considered this question by looking at overall trends in relation to promotional deals, and if we turn up {B/65/63}, we summarise the key findings in the Decision in our written closing submissions.

That is the beginning of the section, but I am just locating it. I am not going to read out the section. You have it there in our written closings.

Again, we say that -- and we have summarised this as well in our written closings at paragraph 130.1 which is on a previous page {B/65/57}, that we do have a lot of evidence of important insurers being unable to proceed with promotional deals or being enforced against for

doing promotional deals during the relevant period as a result of the wide MFNs, and the analysis of the overall trends has to be seen in that light.

The CMA did a number of different comparisons, and they all show an increase in promotional deals after removal of the wide MFNs which is consistent with the other evidence which shows, for example, that significant providers have acknowledged in terms that post-removal of the wide MFNs and as a result of removal of the wide MFNs they are now able to do promotional deals. It also shows, the evidence also shows that both providers and PCWs, and I mean the two that were not doing promotional deals before or during the relevant period, so CTM and GoCompare, are now doing them post-removal of the wide MFNs.

BGL through Ms Ralston, what they seek to do is slice and dice the numbers to call these clear trends into question, but strikingly it has never put forward any alternative, plausible alternative explanation for the very clear trends that the CMA identifies in the Decision. In any event, we say Ms Ralston's attempts to recut the data are unconvincing, and a key point that I do wish to highlight now in my submissions today is that it is very apparent that Ms Ralston's efforts focus on the covered HIPs. In other words, she focuses on

what did the covered HIPs do during the relevant period and what did they do after the relevant period, and the Tribunal will recall that the covered HIPs concluded five promotional deals during the relevant period, and that moved to nine after the relevant period which parenthetically I say BGL's revised numbers are six and 11, so they recognise a slightly larger shift and we see that at paragraph 367(c) of their written closings {B/64/124}.

But what Ms Ralston did not do in this part of her analysis is look at the whole market. She did in her econometrics, I dealt with that yesterday, but her analysis of the trends does not look at the whole market, it is really confined to the covered HIPs.

Now, what the CMA did by contrast, one of the things it did -- if we go to {A/1/328} -- is it compared the covered and non-covered HIPs, it compared what they did during the relevant period, and it shows a very striking disparity. You can see that in the table on that page of the Decision, because what we see is that during the relevant period five covered HIPs did promotional deals, five deals, and 24 providers without wide MFNs engaged in deals, and we say that that is a very striking disparity given that of course we know that the number of providers subject to wide MFNs on CTM's website was

much greater than the number without.

When Ms Ralston focused on the covered HIPs, what she did was look at duration and average daily value, so the Tribunal will recall that, and we do not accept her analysis on those things, and again we have dealt with it in much more detail in our written closings, and I am not going to take you through the points today that we made in relation to her analyses, but the point that I do wish to emphasise now is that she does not present any equivalent analysis in relation to the trends the CMA has observed across the market as a whole and in relation to non-covered HIPs specifically.

We have put into the bundle -- could we go to appendix 2 that we filed with our written closing submissions, and by the way, we have put in an amended appendix 1, so that is now on Opus. It is not there. It will be there. We have done it. I hope that we have sent it to BGL, but it will be put on Opus. I want to take you to appendix 2 which is at {B/67/1}.

THE PRESIDENT: Mr Beard is looking puzzled about the appendix.

MR BEARD: I am not sure we have had that appendix.

MS DEMETRIOU: It is in the bundle.

MR BEARD: Apparently it is in the bundle now. We will have a look at it. I was not aware it had come through.

MS DEMETRIOU: Mr Beard and I are both behind the game, as always, with these things.

{B/67/1}. If we go to the bottom of the page, this is essentially taking Ms Ralston's analysis, it is not new data, and if we go to the bottom of the page we see the heading "PCWs/All HIPs."

Does the Tribunal see that on the left-hand side?

What is being looked at here is how many -- it is analysing how many promotional deals PCWs did, in other words with all HIPs, and we say that that is obviously a highly relevant question. What you see is in numbers terms -- for some reason the numbers are confidential, but can you see the row that says "PDs" and then you have a number beginning with 2, and then that jumps, if you go across to after the relevant period, you see that that has increased, you can see the increase, can the Tribunal see that without me reading it out?

THE PRESIDENT: Yes.

MS DEMETRIOU: We say that that is a very clear increase, and that number includes the Legal & General deal that there is a dispute about, so for the avoidance of doubt, and so it errs in BGL's favour.

On that point, I am not going to get into the granular detail of that particular debate, we have dealt with it in our written closing submissions at

paragraph 158 for your note, which is {B/65/78}, but back to the table at the bottom of the page, what you can see is that in terms of the PCWs, so looking at providers now, that have concluded deals, you see that that rises, so it was -- we know who did them during the relevant period, and we know that after the relevant period ComparetheMarket and GoCompare have also started doing promotional deals.

Then in terms of promotional months and promotional days, you can similarly see the increase.

So when one is looking at the effect on the market as a whole, which is what we say is very significant, given how competitive this market is and how there will be responses by non-covered HIPs to covered HIPs, you see a very clear increase.

Now, the other way that Ms Ralston seeks to slice and dice the figures is by looking at average daily value, but again she only presents the figures for the covered HIPs during and after the relevant period.

If we just look at her report, that is {A/9/104}, that is table 4.4 in her report, and again -- so this is just covered HIPs, it is not the whole market. Even if one looks at just this table you see on CMA's longer period, which is what the CMA says is the appropriate period, there is a significant change, and if we can go

to table 4.5 in the report {A/9/105}, we see there that where she makes a -- here what she has done is made an adjustment in relation to a deal that was renewed, you will recall that, but even when that adjustment is made, again, on the CMA's time period, there is a positive impact.

Now, there are of course various disputes which are quite granular in nature as to these tables, precisely how you allocate deals to particular periods, and we have addressed those in our written closings and I am not going to repeat them now. Just for your note they are at paragraphs 162 and following, which starts at {B/65/81}.

Again the key point I want to emphasise is that all of this work by Ms Ralston focuses on the covered HIPs only, and if we go to the Decision at {A/1/719}, which is annex Q to the Decision, if we look at table Q.3, this is analysis in the Decision to what happened to the daily average value, so that is what Ms Ralston wants to look at, daily average value, of promotional deals for all providers, so not just looking at the covered providers.

These figures have not been challenged in this appeal, so Ms Ralston has not said anything about this, she stayed quiet about all providers, and, as we see,

what we see is that on the CMA's time period, there is a very significant change across the market as a whole, and even if you take the Oxera preferred period of 12 months pre and 12 months afterwards, again, there is a significant sizeable increase.

So, sir, members of the tribunal, those are the points I want to emphasise in relation to the trends.

BGL of course say that the CMA's questions in relation to promotional deals were not as precise as they would have liked, and we do not accept that, as we have said in our written closings, but ultimately Mr Beard correctly anticipated my response to it, which is that the CMA gathered the data and assessed the data, and the revised table at appendix 1, which has corrected the two deals which were cashback rather than discount, is a summary of the data set in the case for the trends analysis.

The high point of Mr Beard's submissions on this was that the CMA had wrongly included types of promotional deal that he contends were not actually restricted by the wide MFNs, so he says cashback and voucher deals were not restricted by the wide MFNs, so they should not have been included.

The first point to make of course in response to that submission is that they cover a very small

proportion of the data set, and we see that in the table.

So 61 of them are premium discounts.

Now, Mr Beards lays great emphasis on the argument that cashback and voucher deals would not have been restricted by the wide MFNs as a matter of contract. Now, you have my point about the numerical insignificance of those.

In relation to cashback, we dispute this, and again our response is set out fully in our written closing at 128.2, which is {B/65/54}. But we say further that the contractual position is rather besides the point for the purposes of this analysis, and that is for this reason, that all of the cashback deals and one of the two voucher deals were done by non-covered providers, and so what they do show us, they were done by non-covered providers which were not subject to wide MFNs anyway, but what they do show us is a competitive reaction in the market.

To gauge that competitive reaction, we say of course it is relevant to take them into account. You do not just exclude them, but then we make the further point that in any event, even if you did remove the cashback deals and the voucher deals, which is what Mr Beard would like the Tribunal to do, even if you do remove

them from the trends analyses, then that would not make any material difference to the overall trends that the CMA observed.

So in relation to all of the promotional deals in the market, so all HIPs and all PCWs, what it would mean is that there were 23 promotional deals during the 19-month pre period and 34 in the post period as compared to 26 and 38. We say it does not move the dial in any event in relation to those figures.

A further point I wish to make in relation to promotional deals concerns the FCA report which BGL rely on.

MS LUCAS: Ms Demetriou, can I just ask you one question for clarification. I am sure you said this, in which case I apologise, but when we were looking at the tables and you say "all providers", so if we go to {A/1/719}, when you were saying the average daily value of promotional deals for all providers, I just want to get clear in my mind, does that include non-PCW HIPs?

MS DEMETRIOU: No, these are deals by PCWs.

MS LUCAS: So PCWs and PCW HIPs that are either covered or not covered, but not non-PCW HIPs.

MS DEMETRIOU: Yes.

MS LUCAS: That is all right, I just wanted to get it clear.

MS DEMETRIOU: Yes, because you would not have --

MS LUCAS: The same?

MS DEMETRIOU: Exactly. So by their nature the deals are deals between PCWs and HIPs, so that is what that the data set is looking at.

MS LUCAS: Thank you.

MS DEMETRIOU: I think I can deal with the FCA very shortly before the lunchtime adjournment, and then I think I only have -- I am doing well for time, so I am not intruding too much on Mr Lask.

THE PRESIDENT: Mr Lask will not be too cross with you. We are glad to hear that.

MS DEMETRIOU: Mr Lask is still happy.

So FCA.

Of course BGL relies on the FCA report which says that -- the upshot of which is that promotional deals are banned if they are not also extended to renewal customers and BGL's point seems to be, therefore, that the wide MFNs were a good thing because they resulted in fewer promotional deals, and, therefore, they cannot be said to be bad for competition, that seems to be their argument.

Now, of course I say upfront that BGL has not run of course an Article 101(3) case, which is the appropriate way of relying on alleged pro-competitive effects.

THE PRESIDENT: Yes, but I think the way Mr Beard puts it is

he completely accepts it is not a 101(3) case, he says it is not an infringement of competition law because what -- it is really a characterisation of it as harmful or not, and he is saying it is just not a harmful effect.

MS DEMETRIOU: I understand. I am going to deal with that now.

THE PRESIDENT: Of course.

MS DEMETRIOU: We say that that argument suffers from a logical flaw, so it is conflating various things, because of course what the FCA has done, let us turn up {B/26/19}, is it has required promotional deals to be extended to renewing customers. We can see here in fact the FCA acknowledging that the use of incentives can be a part of healthy competition, do you see that under, "Our response"?

THE PRESIDENT: Yes.

MS DEMETRIOU: "However, incentives that are only available to new business customers can distort competition and lead to a difference in the effective price for new and renewal customers."

That is the advice. It is not it is a bad thing to offer incentives to customers, to offer promotional deals. The bad thing is that they are offered only to first time customers who are then trapped in a -- who

are then trapped when it comes to renewal prices into higher prices, and they are not offered, then, to renewal customers. So that is the bad thing that has been recognised.

What BGL say is, they say, well, this means that effectively those deals are going to be banned or they are effectively prohibited, because they are not cost effective for providers. So if they have to then provide them to renewal customers, it means that in consequence they just will not happen at all, but if that is so, then what you would expect to see in a competitive market is some replacement form of price competition which would obviously be a good thing.

So if it is right that the effect of the FCA action is really to ban promotional deals generally because even though they are concerned about price walking, in fact providers will not enter into them, then what we will see is a replacement of that form of price competition with another form of price competition.

By contrast, CTM's wide MFNs did not do that because they did not ban promotional deals and replace them with another form of price competition. They led to fewer promotional deals but without an increased form of alternative price competition, and so that is why they cannot be said to have somehow enhanced competition or

rather reduced the damaging effect of promotional deals because what they have done is the wide MFNs have reduced the number of promotional deals, but they have not led to some replacement form of price competition.

So that is why they are damaging and harmful for competition. That is a short answer to Mr Beard's point, and, as Dr Walker said, if the Tribunal finds that the CMA is right that it is shown on a balance of probability that price competition was restricted, including because promotional deals were restricted, there were fewer of them, then it is not right that the FCA report suddenly gives a get-out-of-jail-free card to BGL in that context. That cannot be right. That is because they suppressed competition in relation to the type of price competition that was happening then, and they did not lead, unlike the FCA action, to any form of alternative price competition that is beneficial to consumers taking its place.

That is what we say in relation to the FCA report. I think if now is convenient, I can see it is after 1.00, if we rise now, I am not going to be very long after the adjournment and then we can move to penalty and we are all in good time.

THE PRESIDENT: Very good. We would be more than happy to say 1.45 if that would assist.

MS DEMETRIOU: I do not think you need that.

THE PRESIDENT: Very good. In that case we will resume at 2.00.

(1.03 pm)

(The luncheon adjournment)

(2.02 pm)

MS DEMETRIOU: Sir, I am mindful of what the Tribunal said to me yesterday, what you, sir, said to me yesterday, about me not needing to go through the evidence in relation to the insurers, but could I just beg a 15-minute indulgence in the sense that what I would like to do is something illustrative.

We are not of course going to -- we have addressed documents in closing and I appreciate that the Tribunal in terms of the qualitative evidence is going to have to read it and reach a view. I already took you, at the outset of my submissions yesterday, to two documents in relation to Legal & General, but I just want to take the Tribunal to a handful of further documents because we say it illustrates, really, the approach that BGL has taken and the sort of conclusion that the Tribunal needs to be wary of if I can respectfully put it that way.

The first HIP that I want to take you to is Aviva (Quote Me Happy), and can we just look at BGL's closings in relation to this. So if we go to {B/26/86}.

Ah, that is a wrong reference. {B/64/86} it must be, I am hoping.

Yes, that is the one, thank you.

This is Aviva (Quote Me Happy), and if you read the second sentence, so:

"Again, the CMA has failed to acknowledge that there is no evidence that [Aviva (Quote Me Happy)'s] uniform pricing policy (which was maintained after the Relevant Period) was constrained by the [wide MFN] and [Aviva (Quote Me Happy)] also appears to have little appetite for PDs."

So that is what they are saying by way of submission, but if we go to {F/507/2}, what we see here in relation to question 4(a), this is in response to a Section 26 request:

"Please explain to what extent (if at all) [Aviva (Quote Me Happy)] considered itself bound by CTM's wide MFN even after CTM's disapplication of the wide MFN ...

" ... Whilst our strategy at the time was to price at a portfolio level, [Aviva (Quote Me Happy)] did feel bound by the wide MFN included in our contract with CTM. Following removal of the clause [Aviva (Quote Me Happy)] felt able to explore options for differentiated pricing however we did not act or agree on any financial promotions ... until mid 2018."

If we then look at the next page, so {F/507/3}, and if we look two-thirds of the way down, so in relation to question -- or rather if we look at the question at the top of the page, question (b)(ii):

"... Historically, [Aviva (Quote Me Happy)] has managed the ... home PCW book at a portfolio level which has negated the need to undertake a differential pricing approach. As per our response in 4a this has in part [been] due to the contractual MFNs covering home within the contract."

Then you see:

"Differential pricing is a consideration for all PCWs ..."

So that is what they told the CMA.

If we go to page {F/507/4}, again we see a reference to in part due to the contractual MFNs, and, if we can turn to {F/391/2}, so this is what it told the CMA, this relates to a deal with Confused in July 2017, and we see at the bottom of the page an email from Confused to this HIP:

"... we would like to run a ... co-funded offer ...

"If possible, we would like to implement this as soon as possible."

Then you see the response:

"Rather embarrassingly I have forgotten that we have

a wide MFN clause in place which is stopping this ...

"Looks like we can't do it ..."

Then if we go to page {F/391/1}, again we see a similar response in the middle of the page, so a direct reference to the clause in turning this deal down.

Then if we go to {F/392/2}, this is a different deal with MSM, and if you could just read the email at the bottom of the page because it is highlighted. (Pause)

Then you see what the response is. So they are not interested in an ancillary deal. They want a price discount deal, and that, as we see, can't happen because of the MFN.

So, sir, I give that as one example of the approach. We say that the Tribunal needs to approach what BGL submits, its submissions about these documents, with a high degree of caution.

Could we look at AXA briefly. If we go to {F/495/2}, if we look in the first paragraph, do you see the highlighted text and then the phrase with the exclamation mark, so this is said to be of high importance.

Then two-thirds of the way down the page, you see that what is being said is that the wide MFN would cut across this arrangement, and what they are considering

here, are -- so if we go to page {F/495/1}, I cannot read it out because it is highlighted, but you can see that what they are doing is they are considering a number of unpalatable options as a result of the wide MFN.

We do say that this is the type of document that the Tribunal needs to consider very carefully when considering both the CMA's conclusions in relation to the qualitative evidence and the submissions made by CTM in relation to those conclusions.

Then if we could go to {F/496/1}, if you look at the bottom of the page:

"I just wanted to make you aware of a situation with ComparetheMarket as this may end up in them escalating things to you and I want to be sure that you agree with the position we are taking."

Then if we go on to page {F/496/2}, we see there an explanation of the problem, and we see in the middle of the page:

"In May/June 2017 [the approach] by MoneySupermarket ... to participate in its ... campaign ... The working assumption was that this offer could be supported as the CTM position was not widely understood ..."

Because it was thought at that stage that CTM would

remove its clauses because of the motor insurance investigation. Indeed, this HIP had asked it to, you will see in the Decision evidence of this HIP asking it directly to remove its clause.

Then you see further on:

"... CTM refused to reconsider its position on [wide MFNs]."

Then: demanded that in order to allow this HIP to operate outside of the contract, we would have to offer at least -- we could not simply match the MSM offer but would have to offer at least three promotions.

Then it says:

"Where are we now?"

If we go -- and then here it talks about "offering at least to three promotions ... which we agreed under a level of duress ... where are we now ..."

"... both [the rival] and CTM have received promotions equivalent to a 10% discount ... for 1 month", and this is "at zero cost to CTM" and why is it at zero cost to CTM? It is at zero cost to CTM because it has not had to reduce its commission, it has relied on its WMFN.

Then if we go to {F/291/14}, this is their Section 26 response, and if we look at the top of the page, what they are saying there is that the offer that

is being referred to in 1 had to be rejected as ComparetheMarket had enforced the wide MFN, and then you see the words highlighted about disclosure, and then there is the further deal in paragraph 2, and then again it says that this HIP was unable to support the deal because of the ComparetheMarket wide MFN.

You can see the context for why they are saying this. You can see the context of this response, which is the contemporaneous evidence I showed you previously about the enforcement that CTM carried out and what that resulted in in terms of a punitive agreement to match an offer at zero cost to ComparetheMarket, but what BGL say at paragraph 207 of their closing submissions at {B/64/68}, they say at paragraph 207 that the contemporaneous evidence does not support this HIP's submission in its 2017 Section 26 notice that its reasons for rejecting were in fact related to its wide MFN with CTM at all.

We say, well, of course it does, because you have seen the contemporaneous evidence looking back at that enforcement deal and the huge consternation that that caused that HIP internally.

Again, we say this is an example of where it is very important, in our respectful submission, not -- of course we know the Tribunal will not do this -- but not

to simply take the assertions in BGL's closing submissions at face value but to interrogate the documents as the CMA has done.

Finally in relation to this matter, One Call, so Mr Beard made oral submissions in relation to One Call, and his point was that One Call had done two promotional deals in the relevant period, and of course we know that CTM enforced in respect of those two promotional deals in the relevant period, but he said, well, CTM's enforcement was of no real import, and the important thing is that they tried to do promotional deals, which shows that the wide MFNs did not have any effect.

We have addressed that in our closings, so we disagree with those submissions, but the point I want to emphasise now is that the notion that the wide MFN had no impact on One Call is flatly contradicted by what it told the CMA, and if we can look at {F/382/11}, if we go to the end of the page here, we see what is said. So what is being explained by this HIP in relation to the question at the end of the page is that removal of the wide MFN changed the manner in which it was able to respond to commission fee negotiations, so commission fee reductions by the PCW.

"If a PCW reduced our commission, this reduction would be passed on entirely to the consumer's

premium ... This would not impact the premiums on other PCWs. Prior to the removal of [the] MFN, we would not have been able to do this and the discount would have been spread across all aggregators. This has now allowed us to pass the full commission reduction on to consumers that have bought on that specific channel and advertising this on the relevant site for true clarity."

If we go to page {F/382/18} in the same document and the response to question 15, again you see that prior to removal of the wide MFNs, they are saying that they had been required to price the same across all PCWs and then they say:

"The changes have allowed us to work closely with PCWs to offer prices to our joint consumers that are reflective of the commission we pay ... this has resulted in volume uplifts and cheaper prices for our consumers."

If we go on to, on the same page, down to question 16, we see there that they explain the presence of the wide MFN restricted their ability to successfully complete any promotional deals and we do not need to turn it up.

We do not need to turn it up, but in the same document at page {F/382/16} in response to question 9, they explain why they were attracted to promotional

deals and at question 10 they say that they found them to be successful.

So we say although BGL rather strangely relies on this HIP's uniform pricing during the relevant period, because we say, well, of course, uniform pricing is consistent with the wide MFN, as this HIP explained, it was required to do this by the wide MFN, and so these statements in closing submissions really do need to be seen in the context of the evidence as a whole, and of course we know that the Tribunal is going to do that, and that is why I have not in my oral closing submissions taken you systematically through all of the documents, sir, but I hope that is helpful in terms of illustrating the type of dispute between us that arises and why we say that as the CMA did, these documents need to be looked at carefully in the round.

Sir, I have one more point which goes back to -- it is really a reference, it goes back to market definition and it may be useful and then I am going to sit down.

We have in the bundle at {G/91/1} the Commission decision in Google (Shopping), and you may have seen that the general court has recently given judgment in Google (Shopping), but I just want to go to page {G/91/55} of the Commission decision. I thought I should draw this to your attention because it has some

bearing on one of the issues in market definition.

You see at 242 the recital:

"... the Commission was not required to carry out a SSNIP test."

So in fact they did not carry out a SSNIP test in this case, and if we look at 245 we see one of the reasons why:

"... the SSNIP test would not have been appropriate in the present case because Google provides its search services for free to users."

So that is one of the bases on which they did not carry out a SSNIP in that case.

Now, just so that you have it, the footnote is to a case called Topps, we are going to put that in the bundle, I do not think it is there yet, but it will be at {G/90.1/1}. I think the reference is to paragraph 82 of that judgment, so you may just want to have a look at that. It is just so that you can trace it through.

Then also we will put the general court judgment in there, but you will see when that is uploaded, which I think will be at {G/102.1/1}, in paragraph 493 of that judgment, the court says that Google has not repeated this argument that the Commission should have done a SSNIP. So it does not get ventilated in court, but I just did want to draw that to your attention because

it is relevant to one of the arguments.

THE PRESIDENT: Thank you.

MS DEMETRIOU: Sir, unless there are any questions from the Tribunal from me, I was proposing to hand over to Mr Lask on penalty.

THE PRESIDENT: Yes, thank you very much. At some point, but not necessarily now, maybe at the end of the day, you could fill us in on progress regarding the collocation of documents chronologically and by person.

MS DEMETRIOU: I will.

THE PRESIDENT: Just so that we have a timeline in mind, but thank you.

MS DEMETRIOU: I will.

THE PRESIDENT: Yes, Mr Lask.

Closing submissions by MR LASK

MR LASK: Good afternoon. Sir, I am going to deal firstly with the submissions on intention and negligence, ground 7 of BGL's appeal, and then turn to the level of fine, ground 8.

Firstly intention and negligence. The legal test here is not in dispute, but there are a number of related principles that I would like to highlight by reference to two recent Tribunal authorities.

If we could look first at the recent Paroxetine judgment which is at {G/142/1} picking it up at page

{G/142/38}. The reason I want to highlight these principles is because they bear on some of the submissions that Mr Beard has made.

You will see there at the bottom of the page:

"Was the CMA entitled to impose a penalty?"

This is where the Tribunal is turning to deal with this jurisdictional question.

Over the page {G/142/39}, at 114, it sets out what is now the well-established test for intention and negligence. And I think it is fair to say that it is common ground that this is the test, and it is common ground, at least now, that this same test applies in both objects and effects cases. At an earlier stage there was perhaps some debate over that, but I think it is common ground in light of BGL's reply.

Then at 116 on the same page we see the well-known principle from Shenker, so the fact that an undertaking takes legal advice and incorrectly concludes from that advice that its conduct is lawful cannot exempt it from a fine, if the test is otherwise met.

Then 118, I am not sure if all of that paragraph fits on one page, but what the Tribunal is reiterating here is that there is no need for the CMA to specify whether it is intention or negligence as long as it is one or the other.

And then at 119 over the page {G/142/40}, the Tribunal records the appellants' argument that the finding of an infringement in this case was novel, and you will have heard that BGL raises a similar argument in the present case.

The Tribunal deals with this point separately as between the Chapter I prohibition and the Chapter II prohibition and at 121 it makes it point:

"It should be stressed that the question is whether the relevant undertakings knew or should have known at the time not that the Agreements infringed competition law but that they were anti-competitive in nature."

Now, we are happy to accept that in a pure effects case like the present one, one has to show that the undertaking knew or ought to have known that its conduct would have anti-competitive effects, but that does not, in my submission, mean that the nature of the conduct is irrelevant. On the contrary, the nature of an agreement or the nature of conduct may well be, we say is in this case, a very important indicator of its likely effect on competition, so it is relevant when one is asking itself what did the undertaking know and what ought the undertaking -- what should the undertaking have known.

Then 124 over the page {G/142/41}:

"The fact that several issues of law justified

a reference does not in itself mean that the infringement was not intentional or negligent: if it were otherwise, whenever a reference is made by a national court concerning an infringement decision, no penalty could be imposed."

So even where there is sufficient uncertainty, this had to be a reference to the European Court, that does not mean that the undertaking cannot still be found to have committed the infringement intentionally or negligently.

Then at 125, and this again is important in the present case:

"Nor does the fact that at the time there was no legal precedent holding that an agreement of this nature infringed competition law preclude a finding that the infringement was committed intentionally or negligently ..."

So the lack of a prior finding the conduct in question is unlawful does not preclude a finding of intention or negligence.

So that is Paroxetine.

Then if we could look very briefly at the Royal Mail case, which is at {G/133/223}, you will see the subheading, "Intentional or negligent infringement", and the Tribunal starts by summarising its rejection of

Royal Mail's contention that the infringement of Article 102 in that case was not intentional or negligent, and at 785, over the page {G/113/224}, the Tribunal observes:

"Royal Mail's claim in this respect is essentially a re-presentation of its other grounds of appeal. However, we have rejected [those]."

That is important in this case because this same error, in my submission, appears a number of times in BGL's pleadings on grounds 7 and 8, namely, well, we cannot have -- we cannot have -- you cannot establish intention or negligence because you have not established effects, and the point the Tribunal is making is that once you get this far, once you get as far as penalty, you have to assume in the regulator's favour that the finding of an infringement has been upheld.

Then 788 over the page {G/133/225}, again an argument around novelty and legal certainty:

"Royal Mail claimed that the infringement in this case was novel, mainly on the ground that there was no precedent for a finding of infringement," in this sort of case.

And in the middle of that paragraph:

"This approach is in our view wrong, for the reasons given in relation to Ground 1. We found the formulation

of the infringement by OfCom to be clear and understandable and we do not think that the essentially anti-competitive nature of Royal Mail's exclusionary conduct should be obscured by oversophisticated categorisation."

Then at the bottom of this page, the absence of guidance from OfCom:

"Royal Mail did not press its argument that OfCom ought to have provided guidance on Royal Mail's freedom to vary its prices to protect the USO and to meet the threat of competition ..."

Then over the page {G/133/226}, 792:

"We find there is no substance to Royal Mail's claim. The responsibility for complying with competition law was clearly on Royal Mail itself and could not be passed to OfCom. Royal Mail was aware that it held a dominant position and therefore had a special responsibility to stay within the law. In our view, it failed to do so. OfCom made it clear, not least at the meeting [in] 2013 ... that Royal Mail must take its own advice on compliance with competition law and not rely on guidance from OfCom, which would in any case be in relation to regulatory, rather than competition, law."

So you cannot rely on guidance from the regulator when you are facing a finding that you committed the

infringement intentionally or negligently. I emphasise this because there is an echo of that submission in this case, particularly in relation to the DCT study which I will return to, but that is all I wanted to say in relation to the authorities.

Then turning to the application of these principles, if we could have up the CMA's closing, please, at {B/65/178}, and it is paragraph 395. You will see at 395 we say that in our submission it is abundantly clear that CTM knew or ought to have known that its network would restrict or distort competition. We give three broad reasons for that. Firstly, the nature of the WMFNs and the context in which they applied were such that it was at least plainly foreseeable that they would restrict competition.

The second reason concerns CTM's objective and its conduct during the relevant period.

The third reason concerns the surrounding regulatory scrutiny, and I would just like to briefly elaborate on each of those issues.

So firstly nature and context. The point here, in my submission, is a very simple one, which is that the wide MFNs directly and explicitly targeted price which, as BGL knew full well, was a key parameter of competition. There is no dispute about that, and,

moreover, they covered a significant proportion of BGL's panel and took effect on a market in which, as BGL knew full well, it held a powerful position. Leaving aside issues of market definition, again there is no dispute about that.

It bears emphasis, in my submission, that the wide MFNs were not some intricate or highly sophisticated feature of BGL's relationship with its insurers, and nor did they affect competition in some convoluted or roundabout way.

On the contrary, they were a straightforward contractual term that prevented insurers from offering lower prices on rival PCWs. They gave BGL a legally enforceable guarantee that it would have the lowest or equally lowest prices amongst its competitors. So the mechanism by which they were liable to restrict competition was, in our submission, simple and intuitive. PCWs compete with each other to obtain the lowest prices from their insurers, and the wide MFNs restricted the ability and incentives of BGL's rivals to do so by preventing insurers from offering lower prices to those rivals than they offered to BGL.

Of course the market context is also important. It is uncontroversial that coverage and market position of the parties to an agreement are important indicators of

anti-competitive effects. BGL was obviously aware that its network covered 32 of the 45 insurers on its panel, including several large and well-known ones, and it was also fully aware of its strong market position.

I am not going to read out the figure, but I refer you to the Decision at 5.199 which is {A/1/144} where the CMA made a finding as regards BGL's market share, and the point is that that finding would, in my submission, have come as no surprise to BGL, and I will come shortly to show you some internal documents to make that point good.

The evidence in this regard is cited in full in the Decision, and if we could just go back to the CMA's closing, so rather than take you to the underlying documents I will just show you the summary we give at paragraph 398 of the closing, which is {B/65/189}, and you will see there we have highlighted three documents.

The first has an underlying reference of, we do not need to go to it, but it is {F/1/17} for your notes and that is BGL's response to the DCT study which was October 2017, which was when the response came in, so about halfway through the relevant period.

In that document BGL identifies price as one of the three key aspects of competition.

The second document at 398.2, this is BGL's SO

response, and you will see there that BGL said to the CMA:

"The effect of the [wide MFN] assuming it was effective, which it was generally not, could only be to affect the relative price between CTM and other PCWs."

So BGL knew that its wide MFNs, if effective, would affect the relative prices as between PCWs, in circumstances where it knew that competition on those prices was key.

Then the third document comes from an email exchange between BGL and one of its insurers, in April 2016, and you will see there it refers to its market share.

That is not just an empty boast that BGL is making to the insurer in an attempt to justify its high commission fees because there are also internal BGL documents in which it observes its high market share, and I do not need to take you to them, but to give you an example, for your note, {F/132/12} which is a set of CTM slides.

To sum up on this point, this is not a case, in my submission, where the potential for anti-competitive effects was obscure or dependent on a complex chain of events. It is one in which the nature of the wide MFNs, together with contextual factors that BGL was fully aware of, pointed very clearly to a restriction of

competition.

Now, yesterday Mr Beard emphasised two related points in his submissions. He said, firstly, that the CMA's finding was a novel one and secondly it was based on analysis and data that BGL did not have and could not have obtained, and there are two answers to the novelty point.

First, the CMA's Decision did not on any view come out of the blue. You have seen and you have heard it said there had in fact been widespread regulatory scrutiny of wide MFNs over a number of years together with academic commentary on the potential to cause harm, including notably the PMI decision and the German hotel bookings decision which found an infringement of Article 101.

So BGL says at paragraph 400(a) {B/64/133} of its closings that there is no precedence under Article 101. That is not right because the German regulator did find an infringement of Article 101. I will actually come back to this and show you where it is dealt with the Decision.

But the second answer on the novelty point is, in any event, as I have shown from you the authorities, the fact that the conduct in question has not already been found to infringe competition law does not preclude

a finding of intent or negligence.

Indeed, if it did, this would disincentivise self-assessment and undermine deterrence because undertakings could simply pursue anti-competitive conduct until that conduct became the subject of an infringement finding without any risk of penalty. I should say novelty may be relevant to the penalty calculation, but that is a separate point which I will come on to.

As to the argument that BGL could not have obtained the same data as the CMA or anticipated its analysis, that argument, in my submission, is based on a misinterpretation of the relevant legal test. The test, as we have seen, is whether BGL knew or ought to have known that its conduct would restrict competition. It is not whether BGL anticipated or could have foreseen the analysis and evidence gathering carried out by the CMA, and there is good reason for that, because to establish an infringement the CMA will invariably have to conduct extensive analysis and extensive evidence gathering. It has to look at the matter very carefully indeed.

So it would set an impossible threshold if in order to impose a penalty, it had to be shown that the undertaking did or ought to have anticipated the

regulator's analysis and findings.

MR BEARD: Just to be clear, that is not our case at all. We do not say that you have to anticipate all of the CMA's analysis.

MR LASK: Well, that is very helpful and that will allow me to take the point more shortly, so I am grateful for that, but of course if it was it would preclude a penalty in all but the clearest of cases.

Of course, it is also worth bearing in mind that in a case like this one, a pure effects case, the regulator is conducting a backwards looking assessment, so looking at events that have taken place in the past. So it will obviously be looking at evidence that the undertaking itself did not necessarily have.

So really the question for the CMA, and for the Tribunal, is whether the undertaking had access to sufficient information to indicate that it was aware or ought to have known that its conduct would restrict competition, and we say it clearly was, for the reasons I have given and the reasons I am going to come on to give.

For completeness, we do not accept the point made in BGL's closing submissions that the CMA's Decision is based on a long chain of causation. As I have already submitted, we say actually the mechanism here is simple

and intuitive. That was my first heading, nature and context.

My second heading is CTM's objective in maintaining the wide MFNs and its conduct during the relevant period.

BGL's objective in imposing and rigorously maintaining its wide MFNs was to give itself a competitive advantage over its rivals. It said so itself. Just to make that point good, if we go to the document at {F/572/69} we see this is BGL's response to the letter of facts and draft penalty statement, and you will be familiar I think with this quote, if not this document itself, but paragraph 364:

"As noted above, the primary objective of CTM's [wide MFNs] was to use it as one tool to seek to ensure it offered the best possible price to consumers, and hence to strengthen its competitive position vis-a-vis rivals (other PCWs and HIPs)."

So it is looking to gain a competitive advantage over its rivals by securing the best possible prices for its customers, but how do the wide MFNs secure those best possible prices? Well, they do it by establishing a contractual barrier to undercutting by other PCWs.

If we turn next to {F/124/2}. Again, I think the Tribunal is probably familiar with this document, it is

an internal BGL presentation from August 2017 reflecting on the effects of some testing that has been carried out following the PMI order, and one sees at the top of this page:

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

"CTM has chosen not to do this in the past, on the basis that we expected that it would (i) reduce profitability; (ii) we have previously relied more on [wide MFNs]; and (iii) we don't want to start a ... discounting war."

So what one sees from this -- and I will come on to deal with what Mr Beard says about, well, these documents are all PMI so you can ignore them, but what one sees from this is that BGL knows full well that wide MFNs give it a competitive advantage over its rivals by enabling it to secure best prices without having to reduce its commissions. So it is not only the objective that matters but BGL's awareness of the means by which that objective is achieved.

Now, in opening, I think it was, Mr Beard says, well, actually, this document shows that BGL believed its wide MFNs to be pro-competitive, and the chairman also commented on this in opening and said, well, is that not relevant to penalty?

Now, we have explained why we say this does not enable BGL to escape a penalty in our defence, paragraph 273.5. We do not need to turn it up, but the reference is {A/3/154}. It is also in the Decision at paragraphs P.6 to P.10, which is {A/1/660}, but I will just address the point briefly.

The starting point is we obviously do not accept that the wide MFNs were pro-competitive, and, as we have heard, that is no part of BGL's case on liability, but assume for a moment that BGL did believe them to be pro-competitive, how does that impact upon the question that we are currently grappling with?

Well, in my submission, it is trite that pro- and anti-competitive effects are not mutually exclusive. One sees that reflected of course in Article 101(3), but equally, the fact that an undertaking may perceive its conduct to be good for consumers is not incompatible with it also perceiving that its conduct restricts competition.

Just to explain that point further if I may, if we turn to the Tribunal's judgment in Ping which is at {G/130/91}, "Ground 6 -- no penalty should be imposed."

And at paragraph 218 onwards the Tribunal addresses the arguments on intention and negligence, and if we go over the page to paragraph 224 {G/130/92}, the Tribunal

here sets out Ping's five arguments.

You will see the first one:

"The Internet Policy is unconnected with any intent to restrict competition. To the contrary, it came into existence as a corollary to the longstanding Custom Fitting Policy, as a genuine attempt to preserve a system which is accepted to be beneficial to consumers."

So that was all about the custom fitting of golf clubs and whether that justified the internet sales ban.

But you will see that argument has an echo of what BGL are saying in this case, which is, well, we were just trying to secure best prices for our customers.

If we go on to paragraph 228 {G/130/94}, perhaps the Tribunal could take a moment to read that paragraph, because it is quite long. (Pause)

THE PRESIDENT: Do you want us to read the rest of the paragraph? We stop at the word -- ah yes, thank you. (Pause)

MR LASK: In my submission that is how BGL's argument in this case should be assessed. The starting point is that the CMA has to establish that BGL knew or ought to have known that its wide MFNs would restrict competition, but once it has done that, an argument that BGL believed these clauses to be good for consumers can

only assist if BGL took reasonable steps to satisfy itself that such benefits outweigh the restrictive effects on competition, because it is only in those circumstances that BGL's established awareness of the restrictive effects can be said to have been negated or outweighed.

MR BEARD: Again, it is not our case, if that helps Mr Lask.

MR LASK: It does, thank you.

Coming then on to the evidence under this heading, I have shown you the objective that BGL was pursuing through its wide MFNs. We do say that the evidence makes clear that so far as BGL was concerned the wide MFNs were effective in achieving those aims.

There are two aspects that I wish to emphasise in relation to BGL's conduct during the relevant period.

Firstly, monitoring and enforcement, and secondly resisting requests by HIPs to remove the wide MFNs.

The first point. As we have emphasised during the trial, BGL systematically monitored compliance with its wide MFNs and enforced them where necessary. It held monthly pricing parity meetings and it maintained detailed spreadsheets showing insurer compliance on an insurer by insurer basis.

The details are all in the Decision, section 8. B.3 and annex M. The key point for present purposes is that

BGL must, therefore, have known that its wide MFNs were effective because its strategy of monitoring and enforcement and the time and the resources that this entailed would otherwise have been incoherent, and it does bear emphasis that BGL has not adduced any factual evidence giving an alternative rationale for its approach to monitoring and enforcement.

So we do say that the inference that we draw from this is a reasonable one, and indeed BGL's enforcement activity allowed it to witness the wide MFNs' concrete effects firsthand.

If we look -- in fact I do not need to take you to this document because Ms Demetriou did a few moments ago, but just for your note it is {F/291/13}. This is AXA talking about the three compensatory deals it had to give or had to agree with BGL after it did a promotional deal with one of BGL's rivals. So that is very clear and concrete evidence that BGL was aware of at the time of it obtaining a competitive advantage, of it achieving what it was setting out to achieve via its wide MFNs.

The other example I wanted to draw your attention to, but again we do not need to turn it up, relates to Autonet (Homenet), I think again this is an example you have seen, but for your note it is {F/306/42}. This is the HIP that, following enforcement from BGL, terminated

a promotional deal with another PCW early and reduced its prices on CTM, and it told BGL that it had done so, and that is at {F/385/16}.

So again BGL knows that wide MFNs are doing their job and it is getting a competitive advantage. You can see the effect they are having.

As I said, the second aspect to BGL's conduct is the fact that it resisted numerous requests from insurers to remove the wide MFNs and it also made a conscious decision to retain them following the PMI ban. The details of the decision to retain are at section 8.A.II.(b) {A/1/253} of the Decision and details of the various requests it refused are at 8.A.II.(c) {A/1/258}.

BGL's refusal to give up the wide MFNs in the face of resistance from insurers in my submission is yet further evidence that it considered them to be effective. This is also significant because those requests from the insurers would have confirmed to BGL that the wide MFNs were in fact constraining their pricing behaviour. Why else would they have been so keen to get rid of them?

I will take you to one example of this if I may. It is at {F/329/5}.

This is an email exchange between BGL and AXA. If

I could ask you, please, to read the email beginning in the final third of the page.

THE PRESIDENT: Beginning "As discussed"?

MR LASK: That is right. Yes, please. (Pause)

THE PRESIDENT: Yes, do you want us to stop at the bottom?

MR LASK: It continues over the page.

THE PRESIDENT: Over the page, thank you. (Pause) Yes, thank you.

MR LASK: So this was an insurer telling BGL that its wide MFNs were restricting competition, and that does not on its own make it true, but it does make it difficult, in my submission, for BGL to plead ignorance when the CMA subsequently makes that very finding.

BGL say in their closing at 396 {B/64/132} that much of the evidence from market players remains confidential to BGL, but this does not, and it cannot sensibly be said that BGL was unaware of what the HIPs thought about the wide MFNs.

So that is the second heading.

The third heading is regulatory scrutiny, and in my submission this really is the final nail in the coffin of BGL's case under ground 7. There are three aspects to this. There is PMI, there is DCT, and there is other regulatory activity.

We know that BGL was closely involved in both PMI

and DCT and, as I will show you, we know, we have evidence that it was well aware of the wider scrutiny around wide MFNs.

So dealing first with PMI which was an investigation and a reference under the Enterprise Act, the final report was issued in September 2014, so that is a year or so before the relevant period. If we could turn up the final report at {F/591/3}, we see paragraph 9:

"We found that some of the contracts between PMI providers and price comparison websites ... contained conditions which limited price competition and innovation, and could restrict entry ... We found that these 'wide' ... (MFN) clauses, which restricted PMI providers' ability to set different prices on different sales channels, were a feature of the PCW market which limited competition, giving rise to an AEC [an adverse effect on competition]. Ultimately, this led to higher PMI premiums. We decided to remedy this ... by ... prohibiting [them] ..."

Then if we move on to page {F/591/13}, paragraphs 58 and 59, the issue is being explained in a little more detail. I will just let you read that, if I may.

(Pause)

It continues over the page when everyone is ready.

THE PRESIDENT: Yes. (Pause)

MR LASK: For anyone who has spent the last three weeks knee deep in the decision in this case, none of what we have just seen is unfamiliar. It is all of a piece with the sort of reasoning we see in the CMA's Decision in this case.

Just for your note, paragraphs 62 and 63 {F/59/14} explain the decision that has been taken off the back of this, and of course we know that the final banning order was issued in March 2015, banning wide MFNs in PMI.

This is not just a finding that wide MFNs in some distant universe have an adverse effect on competition. This is a finding they have an adverse effect on competition in a closely related market with similar products and similar contextual features, and as far as those similarities are concerned, may I just show you what the CMA says about this in the Decision at {A/1/662}. This is paragraph P.15, and this is the CMA dealing with a submission made by BGL during the investigation that, well, the PMI documents do not tell you very much in the present context. What the CMA is explaining here is, whilst there are differences between the sectors:

"... the nature of the services provided by PCWs to providers and consumers in both sectors is the same and the legal and economic context is similar in many

respects."

Then it gives a number of reasons for that:

"PCWs are important in both private motor insurance and home insurance, with the Big Four ... being the largest ... The dimensions of competition between PCWs are also similar in both ... motor ... and home insurance, with PCWs competing on price, the usefulness ... marketing and advertising.

"While some providers only operate in one sector or the other, many ... providers also operate in both ... The structure of contractual arrangements between insurers and PCWs are similar, indeed the same contracts ... usually agreed across both sectors ..."

Then over the page, please, (c):

"Evidence obtained during the DCT ... study shows that the majority of consumers using PCWs single-home ... in both sectors and that the most common reason for using a PCW in both sectors was to save money."

BGL submitted that motor insurance customers are more price sensitive and the CMA says whether or not that is right, consumers in home insurance are also price sensitive. So retail prices are an important dimension of competition.

Then finally, the terms of the wide MFNs were the

same in both sectors.

Mr Beard was emphasising yesterday PMI is different, but BGL has not challenged this reasoning. This is the CMA saying, well, it may not be precisely the same market, but there are lots of similarities, and none of these similarities would have come as news to BGL, this is all stuff that is within its knowledge.

So given these similarities, in my submission, it is simply unreal for BGL to say, oh, well, we knew the wide MFNs have an adverse effect on competition in PMI, but we could not possibly have guessed they would have a similar effect in home insurance.

PMI is not a finding. I accept that wide MFNs had an adverse effect on competition in home insurance, but in the real world, it is highly informative on that question.

So following the PMI decision, in my submission, BGL must have known that there was a very real risk that its home insurance wide MFNs would be found to restrict competition for the same reasons. It is untenable to suggest otherwise.

We know from the Decision in the present case that BGL thought quite carefully about whether to retain its wide MFNs in other sectors following PMI, and ultimately -- this is set out, sorry, at 8.A.II.(b) --

ultimately it decided that it would continue to use, enforce and introduce them in home insurance in contrast to the two other PCWs who got rid of them at that point, and there is no evidence that this decision to maintain them in home insurance was based on an assessment that there were differences between the two markets which meant that there would be no adverse effect on competition in home insurance.

The reason given to the HIPs who were seeking removal of the wide MFNs was, well, on a technical level the PMI order does not require us to get rid of them.

So this conscious decision to maintain them is yet further evidence that BGL thought they were effective in giving it a competitive advantage. Why else would it have taken the risk?

The PMI order also generated a considerable amount of internal analysis on the effects of removing the wide MFNs in PMI, and we do say that analysis is illuminating. Part of that is the set of slides that I showed you a few moments ago, and another example is at {F/129/6}, another internal document from PMI:

"Removal of wide MFNs leads to deflationary pressures including CPA discount."

On the right-hand side you see those bullet points:

"Can no longer contract for best prices.

"MSM, Confused and Google all offering up to £20 discounts for better prices.

"Gives rise to two challenges:

"Our price competitiveness," and commission deflation.

What this document and the previous set of slides we looked at, what they show is that the removal of the wide MFNs in PMI had driven competition, and so in my submission BGL must have or at least ought to have appreciated that maintaining them in home insurance would have the opposite effect.

So that is PMI. Next comes the DCT study launched in September 2016, and if we look at document {F/225/1}, we see almost immediately an awareness at a senior level within BGL of the possible implications for its retained wide MFNs in home insurance.

If we actually start on page {F/225/2}, this is a November email, 25 November, reporting on a meeting with the CMA at the beginning of the DCT study, and point 2 of that email:

"We faced tricky questions on why we still enforced wide MFNs on Home insurance, albeit the discussion was a positive one on the impact it had had in PMI, and they [the CMA] were interested in our views on at what stage a market was mature enough to warrant banning them."

Then if we scroll up, please -- in fact, sorry, firstly to the top of page {F/225/2}, this is a reply:

"... it had passed me by that best price clauses still exist on home -- do we know what this is worth and should we consider a proactive stance?"

Then up to page {F/225/1}, please, there is an explanation:

"We use ... MFNs across home, van, bike and pet. We took external advice at the time of the ban on car and were given very clear and strong advice as to why this was fine. Having revisited in light of the current climate I still think this is the case. The CMA have made clear that wide MFNs have to be taken in the context of each market (they are not automatically anti-competitive) ..."

Then the reply to that at the top:

"I'm not comfortable to accept the risk at this stage. We need to consider along with all other known areas of risk", etc, etc.

So there is a clear acknowledgement that retaining the wide MFNs is a risk, and at least someone with BGL is not comfortable with it, despite them having taken external advice, and he is right, because, as we have seen from the authorities, taking legal advice is not a get-out-of-jail-free card.

But the fact that BGL nevertheless kept hold of the wide MFNs for another year until the present investigation was opened is yet further evidence of how important they were, and again the fact that it was very clearly aware of the risk involved makes it very difficult for BGL to plead ignorance now. The alarm bells were ringing.

The alarm bells can only have got louder, in my submission, when the CMA issued its update paper in March 2017, and that is a paper that Mr Beard took you to. I do not need to go back to it, but it is where the CMA explains that it has an open mind, it is exploring some competition concerns around wide MFNs, and it flags up enforcement as a possible outcome, but BGL still hang on at that stage, they still hang on.

Now, BGL says that the DCT study helps it on this issue, and indeed it was a central plank of Mr Beard's submissions yesterday. We say that is plainly wrong. We have seen from the authorities that a finding of intention or negligence is not precluded by the fact that the conduct in question has not already been found to infringe competition law, or by the absence of legal guidance from the regulator, so the mere fact that the regulator is investigating something with an open mind cannot possibly preclude a finding of intention or

negligence.

Assume for a moment that the test is otherwise met for the reasons I have been giving, leaving aside DCT. Then you introduce DCT. You have an investigation by the regulator, obviously investigating with an open mind, and without more, that investigation cannot on its own negate the undertaking's awareness of the anti-competitive effects of its conduct. It is the undertaking's responsibility to comply with competition law and it cannot pass that responsibility on to the regulator.

Now, different issues may arise if in the course of the investigation the regulator positively leads an undertaking to believe that its conduct is lawful, and the Tribunal will probably be familiar with the European case Compagnie Générale Maritime, which is {G/35/97}. We do not need to go to it, but that was a case where declarations by the Commission had led the undertaking to believe their conduct was lawful, but there is nothing of that kind in this case. There was nothing in the CMA's conduct of the DCT study that could reasonably have led BGL to believe that its wide MFNs would not have anti-competitive effects.

BGL has not identified any statement from the CMA from which it could reasonably have drawn that

conclusion or any evidence that it did in fact draw that conclusion.

Finally on this issue, there is the other regulatory activity. If we could go to the Decision at {A/1/405}, please. I will not dwell on this because I am conscious of the time, but all the other stuff that was going on is dealt with here at 11.32 to 11.33, a number of other investigations, some of which have led to clauses being withdrawn, and in the case of the German regulator, an infringement decision in relation to hotel bookings.

Just for your reference, {F/572/72}, BGL's response to the letter of facts which we have already seen, paragraph 380 {B/64/128}, BGL accepts that it was aware of all of this activity.

Final document {F/183/1}. This is from 2013, and this is an internal BGL reaction to Amazon's agreement to drop its wide MFNs.

You will see at the bottom of the page:

"You may well have seen the news below.

"The MFNs in question are, to my knowledge, the same as the ones we operate, albeit the situation is very different given Amazon's dominance. [X] and I were already clear that the MFNs we operate would not be defensible should we have a dominant market share, albeit of course our share is a long way off dominant at

8% of sales."

Now, we do not know what the 8% is a reference to, we do not know what market is being referred to, I think the point is made in the Decision that BGL were asked what was that all about and they did not know the answer, but it is clear there that BGL had an awareness that its wide MFNs would not be defensible if it had a dominant market share, and you will recall the document I showed you I think by reference to the closing submissions where BGL comments on its market share.

To conclude on the regulatory scrutiny, the scrutiny does not establish that BGL's wide MFNs in home insurance were anti-competitive, but what it does do is make it plainly foreseeable that they would have an adverse effect on competition, and, as the authorities show, that is sufficient to satisfy the relevant test.

That was all I wanted to say on ground 7. I will move now to ground 8, level of penalty.

In our written closings we have summarised the six-step approach the CMA took in line with its penalty guidance. The relevant part of the Decision is 11.D, also dealt with in our defence to ground 8, and in my oral submissions I will address five issues raised by Mr Beard: relevant turnover, starting point, duration,

mitigation and proportionality.

Analytically, before one gets to calculating the level of penalty, there is a decision to impose a penalty in the first place, which comes sort of in between the jurisdiction point and the calculation issue, and that is addressed in the Decision at 1.C.II.

Although Mr Beard said yesterday there should be no or nominal penalty, I think it is fair to say that the arguments he relies on are essentially the same that he uses to attack the level of the penalty, so I am going to deal with them together.

THE PRESIDENT: Yes.

MR LASK: The essential approach that the Tribunal should adopt is not, I think, in dispute. Its task is to adjudicate on the specific complaints raised against the penalty, and then to consider the appropriateness of the penalty in the round, recognising that the CMA has a margin of discretion.

For completeness, I would also refer the Tribunal to section 38.8 of the Competition Act which is not in the bundle, I am afraid, but I do not think it is controversial, it says that when setting the level of penalty both the CMA and the Tribunal must have regard to the penalty guidance.

The first issue, relevant turnover.

Step 1 in the penalty assessment, according to the penalty guidance, is to apply a starting point of up to 30% to the undertaking's relevant turnover, and the CMA took BGL's relevant turnover to be the total revenue from the supply of PCW services for home insurance products, that is the Decision 11.51.

Now, BGL took issue with this in the pleadings and said that the relevant turnover should be only its turnover with those HIPs who had a wide MFN, but I think yesterday Mr Beard fairly accepted that the CMA's approach was in line with the penalty guidance and the authorities, and I say he was right to make that concession because the penalty guidance states in terms at 2.11 that the relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement.

Now, he did say, well, the problem with using this as a relevant turnover is in this case is it effectively amplifies the sense of importance of the infringement, but in my submission that misses the point because the relevant turnover is not about identifying the importance of the infringement, it is designed to reflect the scale of the undertaking's activity in the market, and that is paragraph 159 of Paroxetine at {G/142/56}. We do not need to turn it up.

So there is no valid complaint, in my submission, in relation to relevant turnover.

The second issue is the starting point that the CMA determined which was 18% of the relevant turnover, and Mr Beard made a number of complaints about the starting point, but what he did not do, in my submission, is grapple with the reasons that the CMA actually gave for selecting this starting point, because this was not a finger in the air exercise. The CMA considered the matter very carefully. If we could turn up the Decision, please, at {A/1/413}, we see at 11.54 the CMA essentially summarises the penalty guidance, explains that the starting point is intended to reflect the seriousness of the infringement and the need for general deterrence, and then the subparagraphs of 11.54 identify the three factors that are typically taken into account in identifying the starting point.

One can see from those factors that it is not an exact science. It requires the exercise of the judgment by the CMA, for example in relation to the need for deterrence.

So the margin of discretion does come into play at this stage, and in my submission, unless the Tribunal thinks the CMA has made a material error when choosing the starting point, it should not seek to vary it, and

for your note, Paroxetine paragraph 153 supports that point. That is {G/142/54}. We do not need to go to it.

Back in the Decision, 11.55 {A/1/413}, the CMA identifies the relevant bracket within the guidance, and in particular it selects the starting point between 10 and 20%, because the guidance says that that is most likely to be the relevant bracket for an effects infringement. BGL says, well, 18% is indicative of a by object mindset, but we do not accept that, because one sees plainly what the guidance says is 10 to 20% is appropriate for effects infringements, so the CMA has chosen a starting point within the correct bracket.

Yes, it has chosen a starting point at the upper end of that bracket, but that is because it thought this was a relatively serious effects infringement, for the reasons given if the following paragraphs.

So we see firstly, I am just going to skim over these, given the time, we see firstly at 11.56 to 11.58 the CMA engages with the nature of the infringement, and the only point that Mr Beard picked up on from this part of the Decision was the analogy with RPM, which one sees -- I am sorry, this is over the page now {A/1/414} -- one sees at the bottom of paragraph 11.57:

"... the CMA considers that the nature of the restrictive effects of wide MFNs are broadly similar to

the way in which RPM may soften horizontal competition between competitors."

Mr Beard says that just shows that the CMA is treating this as an object infringement.

In my submission, that is wrong. We obviously do not say that this is exactly the same as RPM, but the analogy is a good one for the purposes of assessing seriousness. Vertical agreement, tick; restricts the counterparty's pricing freedom, tick; and softens horizontal price competition, tick.

The CMA is not alone in this because the analogy is also acknowledged in the academic literature, and one sees that from the footnote here at 15 -- footnote 1528.

Then over the page {A/1/415}, 11.59, we see careful consideration being given to the case-specific factors that go to the extent and likelihood of harm, and these factors, as you will see, draw on the CMA's substantive analysis on liability.

So what the Tribunal makes of them will obviously depend on its conclusions on liability, but assuming the CMA is right in its substantive analysis, its finding that these factors justify a starting point towards the upper end of the bracket is, in my submission, unimpeachable and BGL does not say these factors are irrelevant.

Mr Beard said the CMA should not treat this as a serious infringement because it has not shown an actual impact on prices, but what the CMA is doing here is looking at the likelihood of harm, and what it has found in the Decision is that infringements were likely to have resulted in the higher retail prices.

That is section 9.C of the decision and that is entirely reasonable inference in my submission based on all the evidence.

Then 11.60 over the page {A/1/417}, the CMA deals with the need for general deterrence, and again in my submission judging the need for deterrence is something the CMA is particularly well placed to do, given its experience in enforcing competition law and its appreciation of the prevalence of certain practices, and support for this comes from the Tribunal's decision in Roland at paragraph 36. I will come on to Roland in a moment.

I have shown you, we went over it briefly, but we saw in the Decision the CMA outlining the regulatory scrutiny surrounding wide MFNs, the Commission's 2012 decision on e-books, the OFT's 2013 Amazon investigation and the German regulator's 2013 decision on hotel bookings.

Other PCWs retained their wide MFNs until the PMI

Order in 2015, and BGL retained its wide MFN until this investigation was opened in 2017, so the CMA is plainly entitled here to say that these sorts of practices have persisted in the past despite the scrutiny, perfectly entitled to say this reinforces the need for deterrence.

Mr Beard said yesterday, well, regardless of penalty, the outcome of this case will be looked at very carefully, and the suggestion seemed to be, he may tell me I am wrong about this, but the suggestion seemed to be the mere finding of infringement, if it is upheld, would be a sufficient deterrent, and if we could now look at Roland, the Roland decision, which is at {B/41/40}. It is a short point.

At the bottom of the page, paragraph 97:

"As the Tribunal noted in Napp ... concerning the size of penalties for infringements under the 1998 Act:

"'the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements.'"

So it is very difficult, in my submission, for Mr Beard to say that the need for deterrence need not be

taken into account when setting the penalty. It is relevant and once one accepts it is relevant it is for the CMA, in the first instance at least, to judge how strong the need is.

I referred a moment ago to paragraph 36 of Roland which is on page {B/41/16}.

Bottom of the page, 36:

"We consider, consistently with the authorities referred to above, that it may well be appropriate for the Tribunal to give weight to an evaluative assessment made by the CMA in relation to a matter of which the CMA has particular experience, such as the need for deterrence of a particular type of infringement because of its current prevalence or the value of the assistance provided by the appellant for leniency ..."

That is that point made good.

To wrap up on this issue, in my submission the starting point of 18% is in line with the penalty guidance and clearly within the CMA's margin of discretion.

The next issue I can deal with this briefly, that is duration. What the CMA did was having identified the starting point and applied 18% to the relevant turnover it then applied a multiplier of 2 because the duration of the infringement was two years, and that is in line

with paragraph 2.16 of the penalty guidance.

Again, whilst BGL challenged this in its pleadings, I think Mr Beard accepted yesterday that the CMA's approach was at least in line with the penalty guidance. What he said instead was that, well, there were exceptional circumstances here because the matter was unclear even as late as March 2017, and we say that is wrong for the reasons I have given, but in any event it is irrelevant at this stage of the penalty process because there is no basis in the penalty guidance or any of the authorities for saying that the duration multiplier should depend on some soft edged analysis of alleged uncertainty.

If such arguments are relevant at all, they come in at steps 3 and 4 in the penalty guidance.

Turning then to step 3, which is the mitigation discount, step 3, I have not taken you to the penalty guidance yet, sir, but if you would like to have it open, I can ask the EPE operator to have it up on the screen if that would help. It is at {B/42/1}. It is paragraph 2.19 which is at page {B/42/13}.

So step 3 of the penalty process deals with aggravating or mitigating factors. The CMA did not find any aggregating factors in this case but it granted a 5% mitigation discount to reflect the fact that BGL wrote

to the insurers at the end of November 2017, so around two months after the investigation was launched, advising that it would no longer enforce the wide MFNs. So BGL was given credit for that in the form of a 5% discount.

Now, BGL says this discount was inadequate for three reasons, and in my submission there is no merit in any of them. The first argument is that the CMA should have given a larger discount in light of DCT. I have already explained why DCT does not assist BGL. There are various reasons why BGL should have known the wide MFNs were problematic regardless of DCT, and DCT does not alter that. Maintaining the wide MFNs throughout DCT is not something that has been held against BGL for the purposes of penalty calculation, but nor is it something for which BGL deserves credit.

The second argument that Mr Beard made was to say, well, credit should have been given for the fact that a few weeks before it actually disapplied its wide MFNs BGL offered commitments to the CMA, and in my submission there is an air of unreality about this argument because an offer of commitment does not constitute mitigation within the terms of the penalty guidance.

You will see the fourth bullet point at 2.19 cites a mitigating factor as the "termination of the

infringement as soon as the CMA intervenes". That is termination of the infringement, not a conditional offer to terminate if the CMA ceases its investigation.

I think in its written closings, BGL says, well, the offer of commitments falls within the next bullet point, which is just over the page {B/42/14}, because it constitutes co-operation which enables the enforcement process to be concluded more effectively or more speedily, but in my submission it does not fall within that bullet point at all because BGL's commitments offer was not aimed at enabling the enforcement process to be concluded more effectively or speedily; it was aimed at avoiding the enforcement process altogether, which is quite a different thing.

In any event, the CMA did give BGL credit for having made the offer of commitments when it came to step 4, because at step 4 it cited this as one of the reasons for its decision not to uplift the penalty for specific deterrence.

For your note, that is paragraph 11.78 of the Decision {A/1/420}.

The third argument is that BGL cooperated with the investigation. That is the third argument it gives for saying there should have been a larger discount. We have explained in our written closings why that does not

warrant any additional discount, and if we could just please have the penalty guidance back up on the screen, it is {B/42/14}. It is footnote 35.

This is elaborating on what is meant by co-operation:

"Respecting CMA time limits specified or otherwise agreed will be a necessary but not a sufficient criterion to merit a reduction at this step, that is to say, co-operation over and above this will be expected."

The CMA found in the Decision that there had not been any co-operation over and above what one would normally expect, and that is why it did not give further credit at this stage, and BGL has not actually disputed that finding.

Just for your notes, sir, we do cite it in the written closings, but Paroxetine at paragraph 172 to 174 deals with a similar argument about co-operation and what impact it should have on mitigation, and it dismissed that argument as fundamentally misconceived.

Finally, then, proportionality, this is step 4 of the penalty calculation. The CMA considered specific deterrence and proportionality together. As I said a moment ago, it found that there were actually factors in this case that would otherwise have justified an uplift for specific deterrence, and one of those factors

was the percentage of BGL's turnover that was outside the relevant market at a high percentage, but it refrained from applying an uplift on the basis that BGL had engaged with the PMI and DCT investigations, had offered commitments in this case and voluntarily ended the infringement, and because there had been no previous finding at EU or UK level that wide MFNs were unlawful.

Then it also considered proportionality at paragraph 11.79 of the Decision. Perhaps we could have this up on the screen. This is {A/1/421}. 11.79, the CMA considers proportionality, and it finds that the penalty that it has already reached by this stage is proportionate.

I would just draw your attention to footnote 1553 where the CMA considers a range of financial indicators as part of its assessment of proportionality, and they were not addressed by Mr Beard and they have not been addressed by BGL.

So we do see that BGL was in fact given credit for a number of the things it says should have been considered, because but for these things there may well have been an uplift for specific deterrence, and that it found that the penalty overall was proportionate.

Mr Beard submitted the penalty was disproportionate because it was amongst the largest ever imposed by the

CMA. That point is also made at paragraph 406 of BGL's closing {B/64/136}, but in my submission that does not itself render the penalty disproportionate at all, since the starting point for the penalty is BGL's relevant turnover, penalty is partly a reflection of BGL's size, and also a reflection of the specific circumstances of the case.

So the fact that penalty is larger than some of the CMA's previous penalties does not tell you anything about proportionality.

Just finally -- I am almost there -- the FCA study. This is also cited in relation to penalty in BGL's written closings, and I think the way in which it has been put, the way in which Mr Beard has characterised his submissions on the FCA study is to say, well, we are not saying it is Article 101(3) but we say it goes to whether any effects on competition were actually adverse.

If we could just briefly turn back to the penalty guidance, which is {B/42/13}, you will see that one of the mitigating factors, bullet point 3:

"Adequate steps having been taken with a view to ensuring compliance ..."

So if BGL thought that the matters raised under the FCA study were such as to alter the competitive

assessment, were such as to render what would otherwise be an adverse effect on competition not an adverse effect on competition, then it was for BGL to assess that and to bring forward evidence of it, but there is no evidence of that kind.

So in my submission the FCA study is irrelevant on the question of penalty.

For all of these reasons I do submit that the penalty imposed by the CMA was entirely appropriate, in line with the penalty guidance and proportionate and that both grounds 7 and 8 should be dismissed.

Unless I can assist the Tribunal further, those are my submissions.

THE PRESIDENT: Thank you very much, Mr Lask. Professor, do you have any questions?

PROF ULPH: No.

THE PRESIDENT: Thank you very much, Mr Lask.

MR BEARD: Sir, it might be slightly unorthodox, but would it be useful for me to deal with those penalty submissions now while they are fresh in the Tribunal's mind? I know that the predicate of all our penalty submissions is there should be none, there is no infringement here, but just because otherwise I am going to do a reply through for 45 minutes and then percolate back, would that be useful if the shorthand writer --

THE TRANSCRIBER: Please could I have a break?
THE PRESIDENT: Fair enough, but do not let that stop you starting with penalties when we resume.
MR BEARD: Thank you, I will have a think about that.
THE PRESIDENT: Have a think. Very good, we will rise until 3.40, thank you.
(3.30 pm)
(A short break)
(3.42 pm)
THE PRESIDENT: Mr Beard.
MR BEARD: Members of the Tribunal, I will try to get through things quickly, but not too fast, so that it is possible to take them down.

Submissions in reply by MR BEARD

MR BEARD: I am not going to start with penalty, I am going to be much duller than that, but I am going to pick up one of the documents that Mr Lask went to. Can we have {F/225/2}, please.

This was the set of emails Mr Lask was relying on when he said, look, you know about risks and so on. I am not sure he necessarily knew who Mr Matthew Donaldson was at the top of the page, this is 28 November 2016.

Mr Donaldson was the CEO of BGL. He had been at BGL at that time for 14 years as the chief operating officer

and then CEO for three, or two at that point:

"Not sure what is meant by the white label providers in this context?

"Also, it had passed me by that best price clauses still exist on home ..."

Now, it is suggested by Mr Lask, and in a way it helps set the context here that these are very significant clauses that have had a very significant effect on the market, much more than appreciable.

This is the CEO in an internal email chain saying, "I did not even know they existed."

We say, when it comes to penalty, the idea that that indicates that we should have been aware is just no support whatsoever, but it is just a more useful contextual point.

There is a danger with the process of this investigation and the litigation that one focuses down ever more on the particular nuances of these clauses and one loses perhaps a little perspective on their overall potential significance, and indeed, as we come on to deal with in relation to matters like promotional deals, in relation to matters like econometrics, one of the things we say time after time is that context really does matter here and that having a sense of the potential importance of these clauses in the overall

market is important.

What this email shows is that these were not at the forefront of anyone's mind within CTM and that so far as strategy was concerned, an experienced CEO was not even aware of them.

But let me go back to the start of Ms Demetriou's submissions and the start of the process as we work our way through in relation to the various matters.

I am going to pick up two brief points on evidence, if I may, because they are important.

I am quite aware that the Tribunal is going to go away and look at the evidence for itself, but I think there are two points that I just do not want to lose sight of.

If we could pick it up in our closing which is {B/64/45}, paragraph 130.

It is the quote from Tesco, you have seen it before.

The important point that we have emphasised over and over again is the one at the bottom of that quote, and the quote starts:

"If, as is the case here, the Appellants contest the meaning or significance of a document relied on by the OFT, in the absence of any witness statement from the author of the document, the Tribunal has to consider the language used in the document and seek to determine what

the author meant by it. The starting point will be that the author meant what they said and said what they meant. A document is not made in a vacuum, however, and should not be construed as if it had been; we have therefore read documents against the factual background known to the parties at the time. If the Tribunal's conclusion is that a document is unclear or ambiguous, even when read in light of the prevailing circumstances and other evidence, then any doubt [inures] to the benefit of the appellants]."

I know that this is not contested by the CMA, but it is extremely important here. When Ms Demetriou stands up and says, well, it is not for us to be calling hundreds of witnesses, that would mean infringement cases do not work. If you have uncertainties in relation to a document, the context of the document, or where it is being relied on, for instance by the CMA to suggest, well, look, you have indications of concern about a promotional deal, the deal did not go ahead, one can assume some causative link, there is an enormous ambiguity and doubt about that analysis.

We went through the slightly painful analogy of Professor Ulph's visitations outside and his risks and concerns about car accidents, but in many ways it is illustrative.

Professor Ulph may have concerns about car accidents when he steps out, but there is so much more that would need to be explained before you could conclude on the balance of probabilities the reason he did not step out on a particular day or on a particular occasion was because of his fear of car crashes, and that is what we are saying.

Now, it is up to the CMA to decide how they were going to support and clarify documents and then bring it before the Tribunal, and an in terrorem submission saying, well, we would have to bring forward hundreds of witnesses, that is beside the point because if in a case there were a level of ambiguities that meant many witnesses had to be called, so be it. In practice, we are not saying that you would need to do it for every HIP, for every document. One can see that you reach a critical mass of clarified information and at that point you can make sensible inferences, but the difficulty is when you have ambiguities in relation to each one and you cannot test them, then the problem arises.

Just to go back a page to Durkan and the quote at 128 {B/64/44}, we put that in there because the Tribunal has specifically deprecated what Ms Demetriou said could be the alternative. In other words, we call all these

witnesses. That is not the position. It is for the CMA to do this.

Now, I am not going to try and answer and deal with all of Ms Demetriou's illustrations of factual matters on Aviva (Quote Me Happy), AXA, One Call or indeed Mr Lask's on Qmetric (Policy Expert). I am however going to re-emphasise this table which comes at page 140 in our closing submissions {B/64/140}. The reason I do that is because what it is doing is trying to identify what is key evidence in relation to the key point of assessment about all of these people, whether or not they change their approach to pricing, whether differential pricing or promotional deals during and then after the removal of the wide MFNs, because that is the critical issue here.

Yes, of course we see documents where the wide MFNs are referred to, but what we need is some sense of the importance of those instances, even if the CMA is right and we say a lot of this material is highly ambiguous.

The high point in many ways is the case in relation to AXA, where it said, well, CTM essentially got free promotional deals by threatening the wide MFN, but of course there is a certain perversity about that submission on the part of the CMA because at least in the short term it means that overall prices are coming

down to customers across the market.

Now, of course we see a story that says, ah, yes, but that is an indication of a threat, and that would mean in the longer term prices could be pushed upwards using the sort of mechanisms we are talking about, but that was in 2017 and in those circumstances you need to start telling a pretty compelling story as to why it is retail prices are going down in those circumstances.

Just to pick up another of the HIPs, Mr Lask said Autonet (Homenet). I think in fact he meant Qmetric (Policy Expert). Yes, he will check, but I think the reference to documents he gave were to Qmetric (Policy Expert), and Qmetric (Policy Expert) was the HIP that we discussed in opening who had done two promotional deals, was alleged to be the subject of enforcement, but, when we looked at the evidence in relation to Qmetric (Policy Expert) -- I am sorry, you probably want to take it up in the key because I am being cautious about names and so on.

MR LASK: Sorry to rise in case it assists, I did mean to refer to Qmetric (Policy Expert), apologies for that.

THE PRESIDENT: Thank you.

MR BEARD: We understood the position, thank you. I am grateful for the confirmation.

So it is Qmetric (Policy Expert), you can see it on

the table. But the information we have overall in relation to Qmetric (Policy Expert) was two promotional deals, CTM turns up and the notional enforcement is we do not like what you are doing. They then subsequently indicate very clearly in the transcript they are not interested remotely in promotional deals, and I just give you the reference. It is at {F/545/27}. The relevant senior executives from Qmetric (Policy Expert) said, well, it was down to me, I do not like promotional deals, I am not interested in them.

If you have a situation where you have two promotional deals that were being tested, we come along and say, look, we want the same sort of level of prices as you have in that other promotional deal, and then subsequently during the enquiries that insurer says, look, I just was not interested in them, that is salient evidence about the extent to which the removal or existence of the wide MFN just is not having any impact on that HIP, and of course Qmetric (Policy Expert) is also the slight oddity which is where you look at the plot in relation to its dispersed pricing that we looked at, you will recall -- I can call it up if it will be useful. It is at {F/712}, if we could just have that, just as a reminder. We have to click through to the Excel.

As soon as we see it the Tribunal will recall it, just so you have the visual prompt. (Pause) There we go.

THE PRESIDENT: Thank you.

MR BEARD: You will recall that plot. This is what might be called irony pricing. You have dispersal all the way through the period when the wide MFN is removed and then for whatever reason Qmetric (Policy Expert) decides actually it is going to tighten the differences between how it prices on different PCWs.

That is plainly showing in relation to differential-based pricing you have no basis for suggesting the wide MFNs have any effect and, as I say, the same is true in relation to promotional deals, as soon as you look at the evidence in context, even though that is supposed to be one of the candidates for enforcement.

As I say, we have provided our summaries of evidence on 41, 19, 42 and 4, but I just pick up those couple of remarks.

That is the first point: awful lot of ambiguity. As soon as you think of these things in context, actually the qualitative evidence is far, far less clear, and this is not taking pot shots, we have tried to be fair and tried to deal with all of those HIPs in the

documentary material, and we say it is a matter for the CMA to put their case, fundamental principles of fair procedure and the burden of proof mean ambiguities in our favour, question of the number of witnesses required, irrelevant for these purposes. That cannot possibly trump those fundamental principles.

Then the second point on evidence I want to make is linked to it. We do say you consider all the evidence in the round. You have to clarify ambiguities in relation to particular pieces of evidence, you cannot gloss them. If you could do that by reference to other pieces of evidence, fine, but of course that is going to be pretty difficult in this case with these specific narratives that the CMA is relying upon in relation to particular HIPs, where you actually need to understand the story to its conclusion in relation to each HIP, but what we do say should go into the pot, and we will come on to this in a moment, is of course the econometric material, because it is plainly not valueless in these circumstances.

I will come on to explain why a bit more in a moment, but just thinking about how it feeds into this consideration of the evidence as a whole, because we say when what you are doing is asking yourself have you had market-wide appreciable effects, and in saying that I am

not distinguishing between the lots and lots of small effects or one big effect in one place. I am saying it has to be market-wide, effectively, to be appreciable.

How do you best do that? Well, look at market-wide analysis. You can do that with the data, and that is what in a way underlines the perversity of refusing to engage with that econometric data and take it into account.

I use the word "ignored", I use the word "ignored" on an informed basis. I will come back to explain how we dealt with all the CMA's objections to previous work, but when it came to the assessment of the evidence, it was ignored, and it matters, because if you think about some of the contemporaneous material that we have seen, for instance from Legal & General where, yes, you have different pieces of contemporaneous evidence, Legal & General, I will just give you an opportunity to pick it up in the table, Legal & General, you have evidence saying they were interested in promotional deals even though they were under a wide MFN, then you have some contemporaneous evidence saying they had concerns about the operation of the wide MFN in relation to promotional deals, and then some suggestion that they were re-engaging in discussions subsequently, but then you have the subsequent accounts being given in interviews

and in response to the Section 26s, globally saying this most affected us at the margins, that was their language, and it did not have any impact on our pricing or our strategy.

Now, the CMA says, oh, well, we prefer the contemporaneous materials. We say, well, you are picking and choosing between them. You are wrong to ignore the broader qualitative material so-called, but if you think about feeding in the econometrics, what you are getting is a sense that actually you do not have evidence of any significant effect in the market overall, which actually tallies with and enables you to assess better the specific responses being given by Legal & General.

So you end up with a situation where you do not have a contradiction between the different strands of Legal & General's evidence. It is saying, yes, at points there were concerns raised, but overall it did not matter, and when we look at it by reference to the econometrics, overall it just is not a big thing for us, and that really matters when you are trying to appraise this overall.

That is two remarks on evidence, so the ambiguities point, and what you put in the pot, we say, it is very important you put the econometrics in the pot because it

actually helps you with the interpretation and consideration of the qualitative material.

With that, let me move to market definition.

I think I have four points on market definition.

The first is just to reiterate our position on Sainsbury's v MasterCard on the basic approach, which is you do not put the theory of harm before market definition, and the second point I am going to come to on Sainsbury's v MasterCard is that is the same for two-sided markets.

Now, it is worth just rehashing why we say it works for one-sided markets. We have said this clearly, and it is not just a legal position as Ms Demetriou was putting, it is both legal and logical, because what market definition is doing is providing a framework within which you consider competition issues.

So to the extent the CMA is saying, well, you use market definition and then you think about competitive constraints, absolutely right.

To the extent it is saying you think about market definition and then you think about competitive constraints and you are thinking about this then with questions of competitive pressure and effects, again, we do not demur. But in terms of how you approach it, you do market definition first, you identify conduct or

agreements, then you try and understand the framework within which they are operating, which is market definition, because otherwise you end up with this situation where the market definition becomes contingent, for example on whether you have a theory of harm about narrow MFNs and wide MFNs together or, as Professor Ulph put it yesterday, what if your theory of harm happens to touch on issues of, I do not know, marketing degradation as a possible concern? Well, in those circumstances, just because contingently you decided you were going to discuss that element as a theory of harm you completely changed the way you were looking at things, and that is quite wrong.

It cannot be right in these circumstances that it can be conditional, and of course that would cut across the whole purpose of the US merger guidelines, the EU merger guidelines and indeed, although Ms Demetriou did not go to them, she chose to go to the merger assessment substantive guidelines, actually the UK's own market definition guidance.

As Dr Niels has made very clear, if you are too guided by theory of harm, you do not look at the wider competitive landscape, and that is critical.

Now, I am dealing with these things in abstract, but I do want to just interpose a passing point about this

case here, because I do want to re-emphasise that this discussion that is being had is somewhat academic for this case because actually the theories of harm being put forward are not only commission related. I do not know if I need to go back to D.19, but I think you have the point that above the line and high conversion arrangements do not necessarily involve commission changes at all.

Now, those are put forward by the CMA as part of the theory of harm. How on earth, they say, well, okay, we are only going to focus on commissions, that was all we were interested in. They have told the Tribunal that is not all they are interested in. There is no basis to get away from that.

So that takes me to the second point on Sainsbury's v MasterCard. The logic of it in relation to single-sided markets or single-sided platforms or whatever it may be, although that may be an oxymoron, a single-sided platform, it applies equally in relation to two-sided markets, and it does not take some massive leap of logic or undue complexity because what you do with a platform is you identify the conduct you are concerned about, as you do with single sided, and then you engage in an exercise to try and identify the constraints on the provider of the products in question,

the person engaging in the conduct, in order to frame your analysis of theories of harm and effects.

Now, there is no magic in relation to that at all. So the only additional stage that you are actually positing is working out whether you happen to be dealing with a two-sided platform.

Now, we recognise there can be arguments about that, but of course the European study, and indeed much of the literature, makes very clear that there are a couple of things that will make it clear that you are dealing with a two-sided platform.

First of all, the platform is dealing with two sets of agents or customers simultaneously.

Secondly, there are going to be direct or indirect network effects between the two sets of agents, and there is a third point of identification that is used in the study and seems to be a matter of consensus, which is the prices being set for those two sets of customers or agents will be set simultaneously in order to optimise profits for the platform.

Now, you can have forensic arguments about whether a particular business structure fulfils those criteria, but that does not change the legal approach you follow, and then of course the question is simply how do you analyse the constraints on both sides of the platform?

We say the answer to that is obvious. If you are going to recognise that SSNIPs or SSNDQs are the way that you effectively engage in an assessment of the level of competitive constraint, you do that on both sides, because that is the only way that you capture the sense of constraints overall.

Now, there is a further question that then comes out of the literature which is the bit that is more ambiguous in the EU study which is: do you then decide that the platform is participating in two markets, or you take it altogether and say single market, but we are looking at all the wider constraints?

Now, you have heard Dr Niels say, I think you are better going for the latter, but the key point is you have got to have done those two main assessments, one on each side, and that really takes me to the inadequacy of the CMA's approach, because the CMA just did not do that. The indirect sub-SSNIP SSNIP that they carry out is just not properly using a recognised tool to assess the constraints on the consumer side. So you end up with this perverse analysis where you can hypothesise that on the consumer side you could change a parameter resulting in a stampede of consumers away from a PCW, and the CMA says, "Don't care, we just don't care", because if it is 5 to 10% and it causes a stampede,

whether it is a SSNIP by a small platform price or a commission or a degradation in marketing that means you do not come in the top rankings, we do not care. If that causes a stampede, it is irrelevant because we have tested the commission side.

That is just obviously unrealistic because it is failing to recognise that the only reason the insurers are turning up is because the consumers are there.

In other words, it is recognising those indirect network effects, and that is part of the reason why you have to do both.

Now, in her submissions today -- I should add of course this is reinforced by the fact that the sub-SSNIP that they carry out is on the basis of an assumed pass-through that is not even the CMA's assumed pass-through, and we say the pass-through would be way, way lower, and we only engaged with that because that was what was being put to us by the CMA.

Now, today Ms Demetriou has said, well, actually, if you read the Decision as whole, we started wide and got narrower and do not worry too much about the niceties in market definition.

Well, that is just not sound. We are here appealing a Decision that has 70 or 80 pages of material on market definition that the CMA uses to frame its whole

analysis. All of the discussion about the market power of CTM, all of the discussion about the coverage that arises in relation to the wide MFNs, they are all predicated on this market definition, and that feeds in throughout.

So with respect, Ms Demetriou is rather straining the way in which this is read and the way, sir, you were indicating you may have read it on the first occasion, is obviously the right way of reading the Decision. You cannot simply say it does not make any difference, and to be fair to Ms Demetriou, it is not the CMA's submission that if you got rid of market definition you would come out with the same outcome.

We recognise that issues that arise in market definition and arguments there may well be also considered in effects analysis. We do not have any issue with that, but that is a different question because you have wrongly framed your approach.

We say it is obvious and key that here you have a situation where market definition was critical and market definition was wrongly done.

Now, Ms Demetriou relied on a couple of passages in the Decision that I think it is worth just picking up again because they do not assist her in this regard at all.

The first one is paragraph 5.143 which I think the Tribunal already effectively has what we would say the answer to on. I am so sorry, I failed to put in my notes the relevant page reference. It is at {A/1/122}. If we go over the page {A/1/123}, this is the bit where Ms Demetriou was saying, well, actually, look, we had carried out the analysis in particular in relation to non-covered PCWs, but of course that is not what this is saying at all.

I think the Tribunal has the point. This is talking about -- in Direct Line terms, it is talking about Churchill, not red telephones; in Aviva terms it is talking about Quote Me Happy, not Aviva insurance, and in those circumstances it is just illustrative of the fact that that element of the market was simply ignored, so that does not help Ms Demetriou at all.

Then the next passage I think we have -- sorry, there is one point I do want to pick up. Could we just pick up document {F/443/1}, please.

This is a Mintel study of home insurance in December 2017. This was a customer survey that was carried out.

If we could go to page {F/443/33}, please, and if we could blow up the table a little bit.

This is a customer survey, so this is customers

being asked which company did you buy your home contents insurance from, and I just want to go to this because it actually goes to the question that Ms Lucas was asking.

Aviva is 11% of all those customers surveyed. Now, Quote Me Happy is a small part of Aviva's insurance business. We do not know the exact breakdown, but at least half of that 11% will be not Quote Me Happy, it may be much, much larger than that, it may be 8 or 9%.

THE PRESIDENT: Why do you say at least half with such confidence?

MR BEARD: Because there is data in the CMA data set and I checked with Ms Ralston over the short adjournment.

THE PRESIDENT: Thank you.

MR BEARD: I also checked with my clients as to their feel about these things. We can provide the references to the data. I cannot provide a manifestation of my client's feel. That would be difficult.

The point is that is a big chunk of share. But the next one is perhaps even more interesting, because there is no ambiguity about that because you can see Direct Line is at 6, and then you work your way down and Churchill is at 4, so it is clear that what is being talked about here is red telephone.

Now, the very simple point I am making is Aviva, let us say it is 6, 7%, Direct Line, 6%, you are already at

13%, you may well be above 15% of this consumer survey.

Now, I recognise that of course you can get mismatches between different data sets, but I am just picking this up because it is material in the body of the evidence that goes to some extent to the point that Ms Lucas was making or asking about, and it helps us understand what additional errors the CMA is committing by failing to carry out the SSNIP analysis because by focusing only on commissions relating to insurers that are on PCWs, of course you totally ignore what consumers might do about switching away from PCWs altogether to these people and they are not small, they are not trivial, and of course these statistics come as no surprise to anyone in this room who has ever watched television essentially and seen adverts for these big brand names, because these are enormous multibillion pound companies.

The other passage that it is just worth perhaps going to then is Ms Demetriou went to 5.91 which is at page {A/1/104}, but if we could pick it up actually at {A/1/102}, you will recall that one of the things Ms Demetriou was saying was, yes, yes, yes, we have actually thought about these things, it is just not quite in the right order or in the right place, and she referred to 5.91 because 5.91 talks about:

"The evidence submitted by providers on the implication of narrow MFNs for prices offered to consumers on their online direct channel [and that] supports the CMA's finding that around 15% ... of consumers who purchased through a PCW obtained a quote from provider's online direct channel during the Relevant Period would not have switched away from the PCW ... following a 5 to 10% increase ... by a hypothetical monopolist PCW."

So what she is saying here is we have done this sort of analysis, it is all fine, but it is very important to contextualise this, if you just go back two pages to {A/1/102}:

This is in the section "Implications of [narrow] MFNs ..."

And what is being analysed here, as can be seen:

"The CMA finds that the presence of narrow MFN clauses in contracts between PCWs ... means that potential constraint from the direct channel for new business sales is limited in practice."

Then it goes on to ask whether or not there is any impact from direct channels where you have these narrow MFN clauses, so of course the focus there is inevitably on situations where you have narrow MFNs.

If you go on, then, to 5.86, {A/1/103}, it says:

"Narrow MFNs are very common in contracts between PCWs and home insurance providers, with the vast majority ... of sales made through PCWs were by providers covered by narrow MFNs."

Again, of course, the statistics then are excluding the category that we are talking about and focused on, and then it goes on:

"This is consistent with the views put to the CMA by a number of home insurance providers ..."

Sorry, I should say:

"As a result of these clauses, any retail price increase on a PCW ... would need to be matched by a ... direct channel, unless the provider is already setting higher prices ..."

Then this is consistent with four. Then 5.88:

"Therefore, consumers looking to avoid any impact of a commission fee ... would be unlikely to do so by purchasing the same home insurance product on the provider's online channel due to narrow MFNs."

It says at 5.89 {A/1/104}:

"Some providers could potentially still price more competitively on their direct channels than on PCWs in some circumstances by using different brands ... This is because narrow MFNs only apply to the same product sold on PCWs and the direct online channel ... only

four ... insurance providers [did] that ...

"However, these four providers also told the CMA that the brands/products they list on ... targeted at more price sensitive consumers."

But of course they may well set on this basis, and I am not saying this is what Direct Line actually does, they may set Churchill as a brand priced for more price sensitive consumers, but that is not telling you how consumers would react if the likes of that went up. That is the problem you have here. Because you do not analyse the consumer side, what you do not know is what price sensitive consumers would do when they are faced with a very much higher price or degradation of quality on the PCW side, and the irony being of course if they are the price sensitive ones you might expect them to move more readily.

Then of course the 5.91 material is all about the narrow MFNs. So it is not solving the problem here that you have not tested the consumer side.

Right, I am going to have to move on rather more swiftly, but I wanted to deal with that because it was a high point of Ms Demetriou's case.

Narrow MFNs. Look, we actually saw with Dr Walker what the issue here was. They thought that if they stuck with the standard approach to market definition,

there was a problem with the vertical restraints block exemption and other considerations, and they would not get their teeth into this.

Now, he himself referred to it as the standard approach. That is obviously the right way forward. It is not a question of sterility. That is prejudging the question. You are not sterilising things. You are working out what the relevant market framework is in order then to consider the effects. It is only sterile if you have already decided that actually you have got a problem here you need to do something about, but that, quite frankly, I do not take the CMA's submission to be.

So as I say in those circumstances you have a huge amount of material that clearly is affected by the way in which these narrow MFNs are injected into the market definition, entirely contrary to the standard approach, entirely contrary to the theoretical benefit you are getting of looking at different prices and seeing where people divert, and furthermore you are running against the clear guidance from the US merger guidelines and the EU market definition guidelines that talk about maintaining price relativities.

Then I think the final point on market definition is probably just to pick up that point about direct evidence.

As we said, we recognised, SSNIP is not the only way, but we do say if you are going to use SSNIP, if you are going to do it, you have to do it right, you have to have it on both sides, and that is the error, it was accepted you did SSNIP, and then it was done wrongly.

We do say you take into account other evidence. That is perfectly legitimate, but the criticism that were levelled, for instance, at the Google AdWords analysis, or the impressions analysis that are put forward, they are not valid, and we illustrated that by reference to the Hunter Douglas case at {F/725}, we do not need to go to it, but what is being said by the CMA is you can take that material but it does not give you a sense of the competitive pressure between the two groups of products.

We are saying, no, actually, what you did in Hunter Douglas was quite right. The degree to which people are very heavily investing in this in order to win clicks and eyeballs is an indication of the closeness of competition.

Now, of course it is slightly different from using the hypothetical monopolist test, but it is a real life manifestation of that and frankly to turn around and say, no, no, no, no, it does not make any difference, it should not be considered, is just the wrong way of

looking at these things, and just to clarify, Ms Demetriou did not go to the right section in the Decision which deals with these bits.

The section in the Decision that talks about the Google AdWords sections is not 5.151, it is 5.182 to 5.183, and we say that is just wrong because what it does is it says, oh, well, you cannot tell anything about the closeness of competition from that sort of data.

So those are the main points on --

MS DEMETRIOU: Can I just clarify, when I went to the other parts of the Decision, it was to deal with Mr Beard's submission that because there is lots of expenditure on advertising, that that is -- so those were my --

MR BEARD: I am sorry, if I misremembered, I apologise.

The key bit is the relevant bits on Google AdWords are there, and when it comes to the contextualisation and advertising I will deal with that briefly in relation to promotional deals.

Now, let me zip through econometrics.

When we say it was ignored, as I say, what we are saying is it was ignored in the evidential assessment. It is not the case that we ignored annex R at all, it is not ignored at all.

Ms Ralston's first report deals with every single

criticism that is raised in annex R, so there is no living in denial about it. That is in particular at page 136, so that is {A/5/136} and {A/5/149} dealing respectively with issues on retail pricing and commissions and she deals with it throughout.

Just for your notes, paragraph R.68 that Ms Demetriou dealt with is at {A/5/263}.

MS DEMETRIOU: Sorry, just to help Mr Beard, it was not part of my submissions that Ms Ralston ignored annex R. I did not say that. I was responding to a submission that the CMA has ignored econometrics. If that helps Mr Beard.

MR BEARD: That is great. I do not need to deal with it any further.

So we have dealt with the criticisms there. Ms Ralston then puts forward the econometrics, essentially in the Decision in section R there are three points raised: spillover, persistence, heterogeneity. Heterogeneity the CMA and all involved have rapidly run away from as a justification because it is, frankly, incoherent as a criticism of econometrics. Persistence really has not been pursued, and that leaves us with spillovers.

Now, I just do want to raise one or two points on spillovers because what has been slightly lost in all of

this is what, in the CMA's term, qualitative evidence there might be about spillovers, and actually just how weak the evidence is.

We went through in opening, and I dealt with in cross-examination, the three examples of HIPs that are said to illustrate spillover problems with non-covered MFNs, and that is at paragraph R.35.A. Whilst you have your key, which I have already managed to mislay, which involves AA, esure, which was the one that changed -- the first one was the one that initially reacted saying it was a wide MFN. The second one, esure, had its own internal reasons for changing strategy, entirely unrelated to anything to do with CTM, and the third one was Lloyds who had a wide MFN at least halfway through the process.

Could we just call up {A/9/98}, as well, please. Because here this is in Ms Ralston's second report, and I would just ask the Tribunal to note paragraph 4.65 because here is a series of statements from people explaining why it is they would not bother reacting to promotional deals. (Pause)

If we flip over the page. (Pause)

So you see that.

THE PRESIDENT: Yes.

MR BEARD: If we could just now go to {F/745}, this was in

Holmesian terms the table that did not bark because I did not have the version to put up when I was doing my closings, this is a version of that potential promotional days table, and it is unashamedly focused on covered HIPs and we have reworked what the CMA did in their appendix 2 tables just on the covered HIPs.

Now, Ms Demetriou criticises us for focusing on covered HIPs, but they are the key here, because if the covered HIPs do not change their behaviour when the wide MFNs go, there is no theory of spillover in relation to narrow MFNs effectively because there is no trigger.

Now, we emphasised in closing on the CMA's own case there are only four additional promotional deals between, during and after, and we say that is trivial given all the context for promotional deals that we have gone to, but in addition to that what has been done here is in two tables just provided by Oxera what we have are the covered HIPs analysis, including the Legal & General deal which I have been through the reasons why it should be included, and what you see is it does not matter whether you include 32 HIPs as the baseline or 20 HIPs as the baseline, you get no change, no material change, in fact you get a slight drop in the number of promotional days that were actually undertaken before and after.

How is this going to trigger a spillover effect? Effectively for these purposes we will treat it as identical levels of promotional deals by covered HIPs during and after. You have no iteration because you have no trigger to start that supposed change in competition.

The third point here is it is just worth bearing in mind the first non-covered HIP PD that was actually taken after the withdrawal of the WMFNs was six months after the withdrawal, so it was a long time.

Now, on the econometrics we have grappled with the theory, Ms Ralston has explained why it is that she has undertaken a series of tests to detect various formulations of spillovers. The CMA is just wrong to suggest they are all predicated on an assumption of no spillovers. In particular her test 5 is not. All of the others are obviously sensible, proper tests that take into account leads and lags, bearing in mind the leads and lags assumption that the CMA are relying on is that effectively the spillover effect would be of equal magnitude and pretty much simultaneous month on month, and that just is not a plausible assumption at all.

Of course, part of the reason we say that is because of the evidence and the general logic of the position, but also because we have the DCT study econometrics

which shows that in relation to this parallel market that Mr Lask was emphasising how so many similarities, you do not have a situation where the spillovers are matching the level of adverse effect that was identified.

We say you have a whole range of very good reasons in relation to spillovers to say you can have real confidence in Ms Ralston's results, the analysis of spillovers was sound, the approach of the CMA was frankly perverse in the face of the DCT econometrics, and to turn round and say, well, the DCT econometrics came out with a positive number and, therefore, all it is is an underestimate really does not do the CMA proper credit.

In relation to those sorts of matters, the CMA must quite properly at the outset decide whether or not there are concerns about spillovers. It plainly did not have those concerns in relation to DCT, and in those circumstances to now say, well, you can ignore these issues is quite wrong.

Just picking up very briefly Professor Ulph's points on precision and spillovers. First of all, spillovers affect precision we submit by introducing a downward bias, but it is not suggesting they introduce noise or any sort of upward bias.

As I say, Ms Ralston's five tests find no evidence of spillovers and so no evidence of imprecision being generated by spillovers. Ms Ralston's models all have the high R-squared values which suggest a high level of explanatory potency and therefore precision, and, fourth, any uncertainty due to spillovers would be captured in the confidence interval, the bell curve, and, as discussed before, some of those ranges are actually very narrow for these purposes.

Very briefly on relative pricing, it was said that Ms Ralston's relative pricing analysis was her main assessment. That is not correct. She did a relative pricing analysis with various sensitives and she did a commissions analysis with various sensitivities and promotional deals, so it is mis-portraying the test.

MS DEMETRIOU: Sorry, all I was saying was that she calls it her main one, which she does.

MR BEARD: Yes, but the main one in contrast to her sensitivities, that is all she is saying.

Then it is suggested that the relative pricing test is not informative because it is likely that CTM would have responded to increasing competition in the market following its removal by reducing its own commissions.

We have {F/724}, if we could call that up.

We know there is no evidence to support that

assertion by the CMA, but it is more than just that simple plot. Ms Ralston went on and carried out the econometrics in relation to these issues, and she showed in her econometric analysis that you did not get some kind of tainting effect in relation to changes in commissions by CTM, and it is just worth noting, just for your references, Decision paragraph 9.18, this differential pricing approach is said to be at the very heart of the CMA's overall analysis.

Very briefly common trends. I am really sorry I mentioned the Nobel prize paper and set people off looking round for it. All we were doing was saying, look, common trends get you a Nobel prize -- putting forward a difference-in-difference approach can win you a Nobel prize and, look, they did not worry about common trends, so you have to be cautious about suggesting they overwhelm. We are not saying that other people do not deal with these issues. What we were saying was that actually you have no basis for assuming there is a breach of the common trends assumption here, and in fact we know from the Decision, in particular at paragraph 2.29, just for your notes that is at {A/1/37} that insurance premium tax increases were fed into the industry and the finding of the CMA was that in general the industry moved as a whole in relation to these

shocks. They knew about these shocks. They did not look at whether or not there were differential reactions by narrow MFN and covered HIPs or anything of that sort.

So it is a very, very strange proposition, and then Ms Demetriou said in relation to the Nobel prize, well, there was no discussion of spillovers there. Well, that is perhaps an indication of just how speculative spillover suggestions are in these sorts of studies. She said, well, no, actually, that is not the case because there was a big river.

Now, I do not know quite whether Ms Demetriou and her team have travelled round there, but the city of Philadelphia straddles that Delaware River and there are bridges. I can say that with some confidence because if you take I95 out of New York and want to head to downtown Philadelphia you cross that river on a bridge. The idea you could not have employment spillovers between the two states in those circumstances is perhaps one of the odder submissions that we have heard.

A couple of quick pick-ups on data.

The coefficients, putting numbers to the coefficients. Actually you can see that it has been agreed between the experts, and that is in proposition G.6 in the joint statement {A/12/41}. I think that probably covers the request you had.

In relation to delisting, we have dealt with these issues. It was a passing question in relation to Tesco Bank that Ms Demetriou relies upon. In order just to see the extent to which people, even though not specifically asked about partial delisting or quotability considered these issues, I provide you with the reference, that is at {A/9/21-22}. That is Ms Ralston's second report at footnote 55.

You asked, sir, about the terms of business and termination. Broadly speaking, they are standard terms. BGL has never delisted a HIP, but we will upload a version of our standard terms just so that you can see them for these purposes.

The key thing is really what commercial constraints operate here, not actually what the legal constraints are, but obviously feel free to enjoy the contract, as it were.

Underestimates on consumers, you have our submissions on that. We have explained why we think that the CMA has underestimated the number of consumers that might switch even on their model, and on the critical loss analysis we have dealt with the narrow MFNs points and the criticism of Ms Ralston for not exploring consumers switching further was again a slightly odd proposition from the CMA.

We know she cannot enquire about and gather that sort of material.

Just very, very briefly on promotional deals, I have taken you to the key chart and why it does not tell you anything even in relation to 4, it is not a material analysis that suggests some sort of huge trend. Discussing the whole market is not helpful. It is still tiny numbers. They do need contextualising. That is what has been sought to be done.

Ms Demetriou said, well, look at the difference between the PDs done by covered HIPs and non-covered HIPs. It is worth noting that Professor Baker, {Day9/190:1} said, "I do not find these numbers as useful as the analysis I did in my report", and of course the tables we have been talking about are variations on the analysis in that report.

It is worth just picking up Ms Lucas, Ms Demetriou went to the table at Q.3 in the Decision which has various sums, and Ms Demetriou said we have had no response on that. That is not true. The whole of the econometrics of promotional deals that was carried out was a response to that, essentially saying, look, just doing these kind of basic numbers is not good enough, you have actually got to control for other factors when you are talking about wide MFNs, and that is exactly

what Ms Ralston does in relation to promotional deals.

FCA, only new business deals are being covered by the FCA, so it is a key mechanism, the promotional deals in this case, that the FCA are saying should not exist. They are saying this key mechanism that CMA relies upon, it is not beneficial to effective competition, so it is important in thinking about whether or not there is an adverse effect.

Now, Ms Demetriou said, ah, yes, but if they went there would be other price competition. Ah, yes, but would it be stopped by a wide MFN? Because that is the important thing in these circumstances, because if these mechanisms that they are relying upon are actually problematic and adverse to competition, it is not good enough to speculate that there would have been something else occurred in the absence. You have got to actually been saying, well, it would have occurred and it would still have been problematic under the wide MFN. Otherwise you are not capturing the impact of the wide MFN creating a problem for price competition as Ms Demetriou says.

That takes me then to penalty. I will be super quick on penalty.

Royal Mail, analogy used by -- I am just going to deal with ground 7 first. Mr Lask said Royal Mail,

close analogy that you can rely upon to show why there was intent or negligence. Do enjoy Royal Mail. I will just direct you to paragraph 281(15) which is {G/133/89}. It was an abuse case where Royal Mail had specifically targeted the only entrant and amongst all the material was a traffic light document that essentially said: let us choose this option because that will choke off their ability to compete.

Now, one can see why you might in those circumstances suggest there might be intent or negligence. It is not a close analogy to this case, I think, is how I can put it gently.

Paragraph 398 in their submissions that Mr Lask relied upon, where he said, look, there is documentary material that shows just how problematic the position for CTM was {B/65/179}.

The first exhibit he brought forward was the fact that CTM had identified that highly competitive prices were important.

Now, with the duest of due respect, highly competitive prices, they are important, but that is no indication that somehow we knew there was a problem with wide MFNs, and, as a point we have made before, that often and indeed the evidence shows that we were lower than other people, which is suggesting the wide MFNs

were not biting and we were good to our word of being the lowest price, and I will just give you a reference to a plot in relation to Legal & General that Ms Ralston sets out in her report, {A/5/223}.

If you would not mind calling that up whilst I carry on making submissions, that would be great.

The second exhibit was something in the statement of objections where it was said that the effect of wide MFNs, assuming it was effective, which it was generally not, could only be to affect relative price between CTM and PCWs, and that was somehow held against us.

A response in the SO is not telling you whether or not we must have been aware at the relevant time. Thanks very much. The plot you can see shows that in relation to lower quartile, median and upper quartile throughout the relevant period as compared between CTM and GoCompare, it was always cheaper on CTM. You do not need to go that far if you are relying on a wide MFN.

So the fact that we understand the theory is held against us in our SO, that again does not suggest that there is an awareness of an appreciable adverse effect on competition, and then the third point was, well, in negotiations we talked about the fact that we were strong and successful. Well, if you do not do that in negotiations I think you are probably not negotiating

well.

So the idea that that again should be held against us is remarkable, but it is worth going to one table that really has not got attention here, which is {A/5/155}.

This is the market shares of PCWs. What you see, top line, CTM grew massively up through to 2014, continued to grow at a steady rate 2014 through to 2017, actually stays on broad trend, but what you do not see is any dip in relation to the position of CTM at all, and what you do not see is some kind of striking impact from the line onwards.

So, for example, in relation to MSM what you can actually see is MSM continuing upwards on a trend. You can see GoCompare was already on a falling trend across that period. What you cannot get from this is any analysis that leads to a direct impact.

Now, we recognise that is ambiguous in relation to these matters, but of course it is part of the CMA's overall case that there was an impact on growth and market share, and you simply cannot get that from that table at all.

Novelty, it not only goes to level of penalty but whether or not we must or should have been aware. The data points I have dealt with. Plainly us knowing the

effectiveness -- the impact of this conduct is something that we could not know in the circumstances.

References to enforcement and not giving up clauses we have dealt with in all of our submissions, do not advance matters.

The other regulation, heavy reliance placed on PMI by Mr Lask, but if PMI was so clear about wide MFNs, why did you need DCT? Why did you actually carry out any enquiry? Why was it that even through up to the update paper in March 2017, or longer given the conversations with other HIPs, no one was actually sure about the significance of wide MFNs. In those circumstances PMI does not assist in this regard. What it indicates was there was a debate going on. The idea that we should have been aware, should have known, is quite wrong in those circumstances.

I should stress that even suggesting that you could have a real risk of a possibility does not mean that you are aware that actually there is a problem here, and, as we have seen from the email I went to at the start, in fact what you saw on that email was the highest levels of BGL were simply not even aware that these clauses existed, and in those circumstances to reach any conclusion that we must have known is quite wrong.

When it comes to the overall levels of penalty,

I will not repeat my submissions, it is wholly disproportionate. Mr Lask again refers to likely to have an effect on retail prices, when the thrust of their case has been we do not need to show changes in relation to retail prices. It is therefore wrong to be relying on that.

It is even more wrong to be relying on Roland, quite frankly. Roland, and I just give you the reference, it is {B/41/20}, I think, paragraph 40, the finding there was a serious object infringement. That is what the RPM was said to be a serious object infringement, and so in that case we see two things. We see a bad comparison from the CMA in relation to levels, because they say Roland 19%, 18% is the starting point here, obviously unfair, but also it is reflective of the fact that RPM is seen as a serious object infringement, wide MFNs are very different, and yet the CMA is looking at this case through glasses which are tinted thinking about this as akin to RPM, and that is not fair, it is not correct, it is an effects case, it is not an object infringement, and it is certainly not a serious object infringement.

For that reason, the penalty overall was wholly disproportionate, but our central submission, as you know, is there should be no finding of infringement in the first place in this case.

I am sorry to have trespassed on the time of the Tribunal. I am most grateful for the indulgence, and thank you, unless I can assist the Tribunal further those are our reply submissions.

THE PRESIDENT: No, well, thank you very much, Mr Beard. I do not think we have any questions, no.

Ms Demetriou, if you have anything to say about the documentary delivery, then we will hear you, but --

MS DEMETRIOU: Sir, yes, I am afraid that we have not made very much progress so far. Can I just explain why that is, because there are 746 documents in bundle F, which is the underlying documents, and it is going to take some time to go through and highlight the relevant parts and strip them down.

The point is that there is a small team of people, it needs people with substantive knowledge of the case, so it is not a mechanical exercise, and there is a small team who have been fully occupied in relation to this appeal. I am assuming that what the Tribunal would like -- and I am sorry if this is wrong -- you are not asking in relation to the effects for a completely comprehensive file of documents but you are looking for the very key documents on which the CMA places reliance and you want those highlighted and cut down.

I think we can do our best to get that to you in

a couple of weeks or so, if that sounds acceptable. I am really sorry that it cannot be an immediate thing. The dual problem is that it is (a) time consuming, because it requires substantive input, and (b) the team is small and they are also dealing with, for example, the confidentiality issues on this case and they are dealing with other cases which are ongoing, and so they are not dedicated to doing this task, but we are doing what we can.

I am sorry it is not a more satisfactory answer than that, but we are trying to get this done as quickly as possible, and we do of course appreciate that it is in our interests to do it because we would like the Tribunal to read these documents which are important, so that is not something which is lost on us at all.

THE PRESIDENT: Well, you know the genesis for this which is a sense that we wanted to get what both of you are urging us to get --

MS DEMETRIOU: Yes.

THE PRESIDENT: -- which is context. That said, we do not want to impose a massive burden on the CMA, particularly when the work will be done, as it were, post hearing rather than during or pre.

It is a job that we will do anyway using the references in the Decision, and what I suppose I am

raising for discussion is ought we simply to do that and leave it to the parties to say that we have missed materials that are important, or is it an intrinsically useful exercise to do?

Oftentimes in this sort of case you have a volume of exhibits which accompany the report, and you can then, as it were, feel the colour of the Decision's money by looking at the key documents, and that is what we do not have.

So we can certainly navigate through the Decision and pick out what are the best bits for everyone, and it may be that is the approach that we ought to be taking.

MS DEMETRIOU: May I just quickly take instructions.

(Pause)

Sir, I think we would like to try and assist the Tribunal on this, so I was not with my comment trying to wriggle out of it. I do think that we could do an exercise which would be helpful in terms of cutting down the material, because there are, as I say, 746 documents which -- they are obviously not all one-page documents, so we are talking about many more pages than that -- in the F bundle which are referred to in the Decision.

Now, of course some of those are going to be relevant to things like market definition and so on which we are not going to cover in this compendium of

documents because I think that is not what you asked, but in terms of the actual effects and what we have been calling the qualitative evidence on effects, I think we can assist the Tribunal and that is what we are proposing to do, but I just wanted to manage expectations a little bit in terms of timing. That really was my point.

THE PRESIDENT: I certainly was not reading you as trying to wriggle out of things. I am simply taking or floating a concern that what I had anticipated would be a not difficult job is obviously quite time-consuming.

Is an alternative to say can you produce every Section 26 response with the accompanying documents and would that be a good proxy for the material that is key?

MS DEMETRIOU: What you have in the F bundle is all the 26 responses and the contemporaneous documents, and what we were --

THE PRESIDENT: Is that right? So the F bundle is that, is it?

MS DEMETRIOU: So you can have all of those that we rely on in the Decision. There may be others that have been on the file that BGL of course has access to, but certainly they are not referenced in the Decision, so I do not think the Tribunal needs to look at them for the purposes of this appeal.

So the ones that are relied on in the Decision are in the F bundle. What we could do, if it helps -- I still do think it would be helpful for us to do the exercise that you have canvassed. What we could also do is give you a list of the key documents by F document reference, by HIP if that would assist as well.

THE PRESIDENT: Yes, that would assist.

MS DEMETRIOU: We can certainly do that I think in much shorter order because then what we are doing is effectively providing an index by HIP with the F document references.

Of course then what you have is, if you go to -- I do not know if this is a good example, but if go to F/247 or something, I am just taking a hypothetical number, that may be a Section 26 response of sort of 15 pages, and it may be that only two of those pages are directly sort of probative, we would say, or the other side would say in this case.

So what we were anticipating doing was cutting out the surplus so that you do not have to wade through it, and that is the exercise which is going to take longer, but what we can do in much shorter order is provide you with a list of F documents by HIP so that you can see immediately where they are located, because it is quite -- the bundle, as it is compiled -- it is nobody's

fault, but the way that it is compiled at the moment, it is not done in that order so it is quite difficult to navigate round.

MR BEARD: Obviously it is a matter for the Tribunal. I am just slightly concerned. As soon as you get into selections being made then it is not something we want to engage with, but inevitably we will then have to go through and audit the selection and it all just becomes rather painful.

There is an extent to which the CMA have provided -- I do not doubt that much of their selection would be going through their closing submissions and pulling stuff out of their footnotes, but they have already done that to some extent. We have done something similar in our footnotes, in our tables. I do wonder whether we are in danger of generating quite a lot of work, not only for the CMA but for us, and it is obviously a matter for the Tribunal, but I do wonder about where we are with marginal benefits at this point.

THE PRESIDENT: The reason I am treading so warily on this is the CMA's case puts at the forefront these materials, and what troubles me is that both sides are saying the context really matters, and I think we have probably seen perhaps 20 or 30 documents and maybe 10 contemporaneous documents in the course of a three-week

trial, and that makes me uneasy when one is talking about context. That is the concern I have, but equally the exercise that I suggested as a quick and dirty is obviously not.

MR BEARD: No, that is the only reason I step up.

THE PRESIDENT: So what I think we will do is we will do this. If each side could produce the -- I must say the right word -- the qualitative -- or quantitative? Well, whichever one.

MR BEARD: The qualitative.

THE PRESIDENT: Well, the documentary material that they have referred to in their openings and closings, and just pull them out and put them in chronological order, that will just help us to whisk through them, and then if Ms Demetriou you could just provide a list of the HIP documents in the F file by HIP we can then go through those and we will, without prejudice to coming back if we do not find this particularly helpful, let you off the task, and that is no reflection on the CMA's willingness, I know you are willing to do it, but the thinking behind the request was that it was an easy thing, not a difficult thing to do, and that I think is perhaps an approach that gets 80% of what we would have wanted and I think if you are both happy we will leave it at that.

MS DEMETRIOU: Sir, that sounds like a good plan. Of course the CMA is willing to be of any further assistance. If, once you have looked at that, you think that you require more help in terms of cutting the documents down, then we are very happy to do that.

THE PRESIDENT: No, thank you very much. We will certainly be coming back to the parties for documents which appear on the electronic record for incorporation into our judgment because sometimes pulling them out of the PDFs is difficult, so there will be a string of requests for that and other things, but we will dump that particular request.

We will obviously reserve our judgment. Thank you all very much for the effort and skill which has gone into your submissions. We are really very grateful. We will try to produce a judgment as quickly as possible, and finally I would like to say thank you and an apology to the two EPE and transcription Opus personnel because we have gone long pretty much every day, and we are very, very grateful for the service that you have provided to make this work so efficiently, and I am very sorry, but thank you.

With that, we will rise and hand our judgment down in due course. Thank you.

(4.57 pm)

(The hearing adjourned)

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