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IN THE COMPETITION

Case No.: 1380/1/12/21

APPEAL
TRIBUNAL

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

Monday 1 November – Friday 19 November 2021

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BGL (Holdings) Limited

Applicant

v

Competition & Markets Authority

Respondent

A P P E A R A N C E S

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

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Wednesday, 17 November 2021

(10.31 am)

THE PRESIDENT: Good morning, Mr Beard.

MR BEARD: Sir, good morning, Ms Lucas, Professor Ulph.

I think housekeeping, we probably know where we are overall. I think I should start with the standard Blaise Pascal apology. If we had had more time it would have been shorter, and we are sorry to have lumbered you with such length.

THE PRESIDENT: You have both done very well, let me say that at the outset. We are very grateful for what you have done and we have read it all with as much care and attention as we could provide. I think we have probably only got through each of them about one and a half times, so that is the state of play.

Closing submissions by MR BEARD

MR BEARD: Well, with a stunning lack of imagination on my part, with that in mind, in these oral closings, I was broadly going to work through the different parts, not quite in the order that they are there, but so I pick stuff up from our closing submissions.

In doing so, I am also grateful for the questions that the Tribunal sent through. Obviously, when they arrived, we were not in a position to monkey with the closings and put answers in and so on, so what I am

1 intending to do is, broadly speaking, try and pick them
2 up as I go along but I think that is going to be quite
3 hard in places, so what I will do is I will do a topic
4 and then I will try and do a sweep-up on your questions,
5 so my substantive starting point will be market
6 definition, so I will do the market definition stuff,
7 see if I can pick one or two up along the way, but then
8 do a sweep-up of your questions 1 to 12 at the end of
9 that session, if that is acceptable, and then I will try
10 and roll through as best I can with the remainder and
11 pick anything else up.

12 THE PRESIDENT: Absolutely. Thank you, that will be great.

13 MR BEARD: So that is how I am going to deal with it.

14 Before I turn to the substantive issues, it probably
15 comes as no surprise to the Tribunal that there are
16 a few evidential points that I would like to just
17 emphasise.

18 Now obviously we have picked these up in our closing
19 submissions, and we are conscious of course that there
20 is an awful lot of paper and documentation in this case
21 and a very long decision that we are dealing with, but
22 for all of that volume, what becomes evident as you look
23 at the details of the materials is that there is
24 a remarkable degree of incompleteness or ambiguity about
25 much of what the CMA refer to as the qualitative

1 evidence, and in relation to that what we see is a lack
2 of attempt by the CMA notwithstanding series of
3 statutory requests for information under Section 26 not
4 to clarify those key loose ends.

5 So somewhat ironically, amongst this vast ocean of
6 material actually what we see is the CMA clutching at
7 bits and pieces to try and shore up an evidential
8 finding where it could have asked clear questions. We
9 see that, for example, in relation to much of the SSNIP
10 analysis where, as was canvassed with Dr Walker, the
11 sort of questions where you say, look, what would you
12 have done if all of the PCWs had moved their commissions
13 up for example, rather than just asking generally about
14 what you do in reaction to a commission change. Those
15 questions were not asked.

16 When it comes to indirect network effects, which are
17 of course an identifier of the nature of the market that
18 we are dealing with, we do not find questions being
19 asked about how these things worked, and when we come to
20 the CMA's analysis of indirect network effects, we see
21 them clutching at paragraphs in an unrelated discussion
22 with Confused and then looking back at some old data
23 from the DCT survey, not actually focusing on key
24 issues.

25 Of course, that is also true of other key matters

1 like spillover questions which loomed so large in
2 Professor Baker's account of how things worked,
3 obviously an account that is predicated on him not
4 having looked at underlying material, and it is also
5 a point that we will come back to in relation to, to
6 give an example, the questioning in relation to
7 promotional deals where we saw those differences in
8 approach through the Section 26 notices, and indeed it
9 goes right back to ambiguities about actually what do
10 the clauses prohibit or not.

11 All of those issues -- I am just touching on a few
12 of them, but I am focusing on key points because they
13 matter here.

14 What we say is, yes, numerous documents, some of
15 them heavily relied on by the CMA, but obvious
16 ambiguities and not sufficient clarification.

17 Of course, that matters for two reasons here,
18 because of course we are dealing with an allegation of
19 actual effects and we are dealing with a situation where
20 of course the burden lies on the Commission, on the CMA,
21 which is accepted, and the benefit of any doubt in
22 relation to the interpretation of any document or any
23 material must go to the appellant.

24 If I just think about the factual evidence for
25 a moment here, the incompleteness of this material and

1 the ambiguities and the lack of clarification creates
2 a particularly significant problem when, as here, we do
3 not have witnesses to test these issues on. No one at
4 all from the key HIPs.

5 We have had one PCW witness, Ms Glasgow, but she in
6 a way illustrated the point. I will come back to her
7 evidence that the CMA quotes at length primarily from
8 her witness statement, but of course her witness
9 statement has to be qualified by what she said in
10 cross-examination, and what she said in
11 cross-examination was actually of real assistance both
12 in relation to understanding what MSM were thinking and
13 doing in relation to different aspects of their strategy
14 at different times, which puts a very different colour
15 on the CMA's analysis, but it also clarified issues to
16 do with the directness of competition between PCWs and
17 direct channels where she was pretty emphatic, again
18 I will be coming back to that.

19 It also was helpful in clarifying the limitations of
20 the material she had referred to and had in mind and
21 that MSM had referred to and had in mind when it was
22 responding to Section 26 notices because of course as we
23 saw with Ms Glasgow she highlighted three emails. It
24 turned out the person involved in the direct discussions
25 did not remember any of those and considered those

1 matters to be exceptional, out of the ordinary, and
2 furthermore it transpired that there were other
3 documents relating to the very HIPs which the three
4 emails provided by MSM concerned, and of course when we
5 went to those other emails what we saw was a much
6 different picture. Again I will come back to that.
7 I am not being coy, I am just talking about Legal &
8 General here.

9 With those illustrations in mind, can I just pick up
10 in our submissions at paragraph 128 -- I am going to
11 refer to paragraph numbers because I am slightly
12 concerned that there might be different page numbers in
13 different versions that have been provided. I am very
14 grateful to those that have provided the updated
15 versions, but just in case the page numbers differ
16 {B/64/44}.

17 I am just going to trot through fairly briefly the
18 case law. I do not think I necessarily need to go to
19 each of the cases, but we saw in opening the Durkan
20 case, in particular at paragraphs 109 to 110, {G/111/38}
21 and you have the bundle reference there, making clear
22 the importance of the then OFT putting forward
23 witnesses, and that was true even in relation to
24 interview transcripts, which in many ways one might see
25 as the most direct comparator to a witness statement.

1 THE PRESIDENT: Those were all cases where there was some
2 kind of co-operation agreement which made it easier to
3 have witnesses in court because the organisations were
4 obliged to cooperate in every which way including the
5 provision of witnesses. Does that represent
6 a distinguishing feature in this case?

7 MR BEARD: No, it does not. I think, first of all, in not
8 all of those cases were we dealing with co-operation
9 agreements because obviously what you saw in those cases
10 was -- I cannot remember whether it was 24 appeals, but
11 there was essentially a repetition of the concerns being
12 articulated about witness evidence that were articulated
13 in particular in Durkan and then in AH Willis {G/113/30}
14 that we provided the reference to, and not all of those
15 I think were cooperating parties in any event. There
16 were leniency agreements in relation to some of them,
17 but I think the important issue -- and this in a way
18 touches on your question 15(6). In Durkan and Willis
19 what you were asking was, can we clarify ambiguities,
20 and the point we have here is we have ambiguities, we
21 need to be able to test and clarify them.

22 Now, if people are not willing or showing some sort
23 of opposition to being turned up as a witness here, then
24 obviously there are subpoena powers and indeed there
25 have been pieces of litigation where the OFT as it then

1 was and the CMA subsequently have used subpoena powers
2 in the sort of friendly subpoena method that is
3 sometimes used in commercial litigation. In other
4 words, someone does not want to look like they are
5 volunteering, but there is a discussion that a subpoena
6 will be issued, and then gist statements are provided by
7 the witness in those circumstances which can then be
8 referred to.

9 So even if you have that sort of concern, there are
10 methods that can be undertaken to ensure that you do
11 have relevant testimony.

12 Also, one needs to go a very long way, you are
13 talking about a lot of HIPs here, and the idea that in
14 these circumstances you could not get anyone to turn up
15 and talk about these issues, including from some of the
16 largest companies operating in the financial services
17 industry in the UK, seems a bold proposition, but there
18 is also a further issue here that you did have the
19 operation of statutory powers to clarify matters.

20 So in addition to the witness issues, failing to
21 chase down loose ends, failing to clarify ambiguities,
22 starts at an earlier point in the process. Those tools
23 could undoubtedly have been used, they were being used
24 by the CMA, and in relation to the clarification by way
25 of witness testimony, of course this is an issue that

1 arises in all litigation: have you got reluctant
2 witnesses? But we have a system of adversarial
3 procedure and appellate procedure in these circumstances
4 where still weight is placed on the importance of
5 witness testimony. I will come on to the Gestmin case
6 in a moment, but of course there you are just talking
7 about ordinary commercial litigation where you have
8 those dynamics of difficulty in any event.

9 So that is the reason we say no, you do not modify
10 anything here, because the danger is of course that if
11 you were modifying the need to clarify ambiguities by
12 enabling testing by witnesses, you effectively erode the
13 way in which the burden of proof and the presumption of
14 innocence operates, because it enables the CMA to try
15 and draw on material taking presumptions which cannot
16 then be tested properly.

17 THE PRESIDENT: Mr Beard, if I can sort of just articulate
18 the propositions I think you are making so that you can
19 correct me when I get it wrong, we have obviously had
20 exercise of the statutory powers under Section 26
21 amongst others to obtain evidence.

22 MR BEARD: Yes.

23 THE PRESIDENT: One of the points you are making is that
24 that exercise could have been done better.

25 MR BEARD: Yes.

1 THE PRESIDENT: But that I think is not, if I may say so,
2 the real nub of the point you are making now.

3 MR BEARD: No.

4 THE PRESIDENT: Even if it had been done in the best way it
5 could possibly be done, it was an exercise in
6 perfection, you would still be saying that if you are
7 putting forward these materials as material to be relied
8 upon, the process that we operate in this jurisdiction
9 obliges the CMA to present some sort of witness to speak
10 to that evidence, and if that witness is not willing or
11 reluctant to attend, there are powers of compulsion
12 which should be exercised before the appeal is heard so
13 that the witnesses are present in court.

14 MR BEARD: Not quite, I think, sir. First of all, yes,
15 statutory powers to clarify, accepted that does not
16 answer the question of witnesses, but we are not saying
17 the CMA is obliged to call witnesses. It is open to the
18 CMA to seek to rely on documentary material because the
19 documentary material is admissible, and of course if
20 there is not ambiguity in any of the documentary
21 material, then the CMA might quite legitimately say,
22 "I do not really need a witness to speak to it, I have
23 the material, I have followed up and I have the whole
24 chain of related correspondence, we can see what is
25 going on here", they may well have done an interview

1 where they say, "Okay, the interview is sufficient here,
2 we do not need a witness statement." That is entirely
3 open to the CMA and I can understand why the Tribunal
4 faced with that sort of level of certainty in relation
5 to interpretation says, well, it would be just a waste
6 of time, it is just sort of solipsistic barristerial
7 theatre to be demanding witnesses turn up in these
8 circumstances because it is not necessary. So I do take
9 issue with the "obliged" point.

10 The reason the witness issue becomes significant is
11 because of the nature, extent and importance of the
12 ambiguities in the documentary record, and that is why
13 we say in those circumstances you should have put
14 forward witnesses. You do not have evidence before you
15 from the CMA why they did not put forward witnesses.
16 There was a point where Ms Demetriou was talking about
17 waiving privilege which has come to nothing in relation
18 to these issues. If you do not have evidence in
19 relation to those matters, it would be wholly unfair to
20 say, ah, well, there are just inherently difficulties
21 here, but in any event there is the fallback position
22 that you can pray in aid the powers of the Tribunal in
23 relation to these matters, and, as I say, in practice
24 what happens is not necessarily that this is a sort of
25 subpoena issued as if it is by a bailiff dragging you to

1 court. It can be a much more co-operative process, but
2 it is not in fact voluntary.

3 Those matters apply just as much here as they do in,
4 as I say, other litigation, but in particular in
5 relation to the sort of litigation that the Tribunal has
6 referred to previously, and it would be a very odd
7 situation if, because someone had come forward as
8 a leniency applicant, there was a greater burden on the
9 CMA to put forward witnesses in circumstances where one
10 would have thought the leniency applicant could have
11 clarified things much more fully, but if the evidence is
12 more contentious, somebody has not come forward as
13 a leniency applicant and in fact there is not a degree
14 of co-operation and there is some to and fro about what
15 the evidence means, that in those circumstances although
16 it is more ambiguous, there is less of a need for
17 witnesses to be available to clarify, you would end up
18 with a somewhat perverse situation I would suggest.

19 So I am sorry to take issue with the "obliges the
20 CMA", but I do not think that would quite capture what
21 we are talking about. I think that takes us back,
22 though, to your question 15(6) which is, no, we do not
23 accept that just because leniency was involved in those
24 cases you can then say, well, we cannot read those
25 issues across into the broader range of situations that

1 we are dealing with here.

2 I am sorry that was a slightly lengthy digression
3 into 15(6). We were looking briefly at Durkan and AH
4 Willis in 128 {B/64/44}.

5 I think it is worth bearing in mind that the same
6 concerns have been raised in relation to Section 26
7 notices as well in the course of cases like Tesco and
8 consideration in Flynn Pharma.

9 We have included the quotes there at paragraph 129
10 and 130 {B/64/44} and {B/64/45}.

11 Really the essence of the point is the point at the
12 end of the Tesco quote that if you end up with
13 a situation where, for whatever reason, there are
14 ambiguities, they cannot be tested, those ambiguities
15 must be read to the benefit -- must be resolved in
16 favour of, as it is put in Tesco, of the appellants, and
17 that is an issue that is absolutely fundamental to the
18 way in which these sorts of adversarial processes work.

19 I should say in saying this, we are not turning up
20 saying, well, you must draw adverse inferences against
21 the CMA for not calling witnesses, we do not actually
22 need to go that far. What we are saying is there are
23 ambiguities that have not been clarified, that are on
24 the face of the documents, and we cannot test them with
25 anyone, and, therefore, because those exist, the benefit

1 of the doubt must come to us in relation to them.

2 We leave it to the Tribunal whether having regard to
3 the cases on drawing adverse inferences the Tribunal
4 wishes to go that far. It is obviously open to the
5 Tribunal to do so having heard these matters, but as
6 I say for the purpose of what we are talking about, it
7 is not clear that it actually takes matters further
8 forward to actively be drawing inferences. What we are
9 talking about is ambiguities in our favour.

10 THE PRESIDENT: Just anticipating a point I suspect
11 Ms Demetriou will make regarding the point you made
12 earlier about burden of proof, I do not have the
13 transcript in front of me, but you said something along
14 the lines of you are entitled to the benefit of the
15 doubt in each and every case.

16 MR BEARD: Yes.

17 THE PRESIDENT: I wonder how far that is a question that one
18 would ask viewing the evidence much more as a whole. In
19 other words, let us suppose one had 30 Section 26
20 statements which all had the same ambiguity in them, and
21 the CMA adduced evidence from five of those 30 to speak
22 to that ambiguity and in court it was dealt with and the
23 ambiguity was nailed properly and clearly. It would be
24 a slightly odd application of sort of the burden of
25 proof approach to say, well, the ambiguity was still

1 alive in those other 25.

2 MR BEARD: No.

3 THE PRESIDENT: I am pretty certain you were not saying
4 that, but I think it is worth getting it on the record.

5 MR BEARD: To be absolutely clear we are not saying that.

6 There are two points to clarify. One, we entirely
7 accept you consider evidence in the round. Indeed one
8 of the things I will be coming back to when we talk
9 about econometrics is that is part of the evidence they
10 really should have been considering in the round, but
11 that obviously applies in relation to factual material
12 as well. We completely accept that, and we completely
13 accept also that when you are looking at a particular
14 Section 26 response or email or whatever it may be, you
15 look at that in context. So you do not just focus with
16 blinkers on it.

17 So there are various ways in which you need to
18 consider evidence in the round. It is the particular
19 piece of evidence you need to consider in its context
20 and also one can look at the broad body of evidence to
21 see if you can learn something from different strands of
22 evidence. That is perfectly appropriate, and in
23 a situation, sir, you posit where you have 32 people
24 that give an ambiguous answer but then a number of them
25 clarify it, then it may well be a perfectly legitimate

1 inference to say, well, it is perfectly sound to say for
2 the threshold of balance of probabilities that actually
3 that ambiguity was resolved by all 32 of them. If we
4 were in criminal proceedings it might be different, but
5 we are not, we understand that.

6 Sir, we accept that. What we are concerned about
7 is, in particular, the repeated use by the CMA of the
8 idea that you consider evidence in the round as if by
9 looking at all sorts of parts the evidence becomes
10 inherently more substantial. What we say is you have to
11 look at the particular parts of the evidence to see if
12 it is substantial and then you accumulate it.

13 As I say, in deciding whether it is substantial, you
14 can have reference to other bits of the evidence in
15 doing that process. We completely accept that. We are
16 not trying to get away from it. So I think that deals
17 with it.

18 Sir, that is why it is important that we do not have
19 anyone here to test any of this with. We do not have an
20 exemplar we can test these issues with, and indeed as I
21 will come on to deal with in a moment, of course we have
22 problems that we do not have someone from the CMA that
23 we can test in relation to how they were looking at
24 underlying evidence, because of course their witnesses
25 had not looked at the underlying material.

1 I have dealt with Durkan, AH Willis, Tesco. If
2 I may I will just go to Gestmin which I think in many
3 ways was the high point of Ms Demetriou's submissions on
4 this issue in opening and we say submissions that were
5 with respect misconceived.

6 It is at {G/116} if we could. That is the wrong
7 reference. {G/116.1}, I am most grateful. Thank you
8 very much.

9 You have the background in that section. If we can
10 go on then to paragraph 15 which is on page {G/116.1/7},
11 please, you will see in paragraph 15 and through 16 what
12 the judge talks about here is the fallibility of human
13 memory. I should say it is no part of CTM's case that
14 human memory is infallible. We do recognise that these
15 observations are absolutely sound in relation to
16 concerns about witness memory, but what none of this
17 does is suggest that you should not need to have
18 witnesses to deal with issues relating to documentary
19 material.

20 If we go on to 22 which I think was the paragraph,
21 sir, that you actually highlighted with Ms Demetriou
22 {G/116.1/8}:

23 "In the light of these considerations, the best
24 approach for a judge to adopt in the trial of
25 a commercial case is, in my view, to place little if any

1 reliance at all on witnesses' recollections of what was
2 said in meetings and conversations ..."

3 This is where in particular there are notes.

4 "... and to base factual findings on inferences
5 drawn from documentary evidence and known or probable
6 facts."

7 Well, we completely understand that.

8 "This does not mean that oral testimony serves no
9 useful purpose -- though its utility is often
10 disproportionate to its length."

11 Well, that cannot be something that this case is
12 accused of.

13 "But its value lies largely, as I see it, in the
14 opportunity which cross-examination affords to subject
15 the documentary record to critical scrutiny and [also]
16 to gauge the personality, motivations and working
17 practices of a witness, rather than in testimony of what
18 the witness recalls of particular conversations and
19 events."

20 So what he is saying there is there is always this
21 danger, particularly in the litigation process, that
22 people effectively start reconstructing for themselves
23 in a favourable manner what they said at particular
24 points and places, but that is a very different issue
25 that is being criticised and a proper caveat being

1 placed from the question whether, if you have
2 ambiguities in documentary material, that there is
3 a better way of testing those than enabling witnesses
4 who are around at the time to be questioned about them.

5 So in those circumstances we do not see that Gestmin
6 is in any way helping in relation to these issues, and
7 I should say -- helping the CMA in relation to these
8 issues, and Ms Demetriou's attempts to say, well, there
9 are different types of cases, which is the point we
10 raised at 135 {B/64/46} in our closing, so you might
11 have documentary evidence which on its face calls for an
12 explanation and is inconsistent with other
13 contemporaneous documents and contextualisation from
14 a witness might be helpful, and then she says, and those
15 cases where there are contemporaneous documents where
16 there is no conflict on its face with other documents.

17 Well, you do not have to be identifying conflicts
18 with other documents. That may be one way in which
19 ambiguity in a document arises, but a document may just
20 be inherently ambiguous, or it may be ambiguous when
21 read in context. It does not actually have to conflict
22 with anything else in order to be problematic.

23 I also --

24 PROF ULPH: Mr Beard.

25 MR BEARD: Of course, sir.

1 PROF ULPH: I just want to ask a question of clarification.

2 One issue that is in play in this case is the issue of
3 counterfactuals.

4 MR BEARD: Yes.

5 PROF ULPH: In particular the role of narrow MFNs.

6 MR BEARD: Yes.

7 PROF ULPH: Would you include under your heading of
8 unreliability or ambiguity the possibility that if
9 a witness says in their view it was a wide MFN that
10 generated a particular effect, it may be quite hard to
11 understand to what extent they were factoring in the
12 presence of narrow MFNs in making that statement?

13 MR BEARD: Absolutely. Absolutely we do.

14 PROF ULPH: That is one of the ambiguities, okay, thank you.

15 MR BEARD: It is more than that because we get examples in
16 some of the documentary material where people actually
17 refer to narrow MFNs, and what there is is a complete
18 lack of clarity because of the way the CMA asks
19 questions of whether they were talking about the
20 incremental effect of a wide MFN or whether they were
21 talking about wide MFNs working alongside narrow MFNs
22 and therefore that can create ambiguities. It is
23 because, as I say, of the ambiguity in what was being
24 asked about -- now, obviously those questions were
25 focused on wide MFNs but because they do not delineate

1 clearly and because you are dealing with this issue
2 about how the incremental effect of wide MFNs occurred,
3 you do see a problem with interpreting the evidence, and
4 that would be a line of testing one would want to embark
5 on with any witness that was speaking to Section 26
6 responses or had given a witness statement or was
7 talking about documentary material, sir, yes.

8 PROF ULPH: Thank you.

9 MR BEARD: The other hierarchical structure that
10 Ms Demetriou suggested was, well, contemporaneous
11 documents are of greater value than subsequent
12 documents. I think there are a number of concerns about
13 that.

14 One is that is not something that is a recognised
15 legal hierarchy to start with. Second of all, to be
16 saying, well, we have these statutory powers to ask for
17 material under Section 26 but we should systematically
18 relegate those as compared to contemporaneous documents
19 is a very dangerous situation when contemporaneous
20 documents may themselves need contextualisation, you are
21 dealing with commercial relationships which may involve
22 all sorts of negotiation and game playing in a way that
23 points are put, and, therefore, in those circumstances,
24 one needs to be extremely cautious about the suggestion
25 that contemporaneous documents have some sort of

1 primacy, but there is also something of an irony in that
2 submission because although in opening Ms Demetriou took
3 you to various contemporaneous documents, if one goes
4 through the Decision I have not done a count but I am
5 guessing that the vast majority of citations are
6 actually from Section 26 responses.

7 In those circumstances, that sort of hierarchical
8 structure is not of assistance.

9 That is a set of submissions I think setting out our
10 concerns in relation to factual evidence and evidence
11 gathering on facts generally and the role of witnesses,
12 but I do also before I move on to the substance want to
13 talk a little bit about the expert evidence here.

14 In relation to this, if we could pick it up in our
15 submissions at paragraph 17. I think that will be
16 page 5 in our closing submissions. {B/64/6}.

17 There are two issues that I want to pick up here.
18 It is really coming back to somewhat a question that,
19 sir, you asked at the outset about market definition,
20 extent of discretion and the role of the Tribunal.

21 I think in your question you rolled the two issues
22 together, but I think we have to recognise there are two
23 separate issues: degree of discretion in relation to
24 market definition and the way in which the Tribunal
25 deals with these things.

1 We have looked at some of these issues. Just so
2 that you have it for your notes, if we could have
3 {G/136/42}, this is the Flynn Pharma case in the
4 Court of Appeal, Lord Justice Green. You will see there
5 at paragraph -- I have 135, but I think it may be 136.
6 No, I am sorry, it is 135. In 135, this was criticism
7 of the CMA in that case wrongly eliding those two
8 different issues of the degree of discretion in relation
9 to what was there an excessive pricing test and then the
10 jurisdictional scope of the Tribunal in relation to
11 those matters.

12 What Lord Justice Green of course obviously
13 emphasises there is the importance of the nature and
14 role of the Tribunal in scrutinising these issues,
15 including in relation to the excessive pricing test,
16 which I think we would want to emphasise was a much,
17 much broader brush open textured test than the market
18 definition exercise with which we are dealing.

19 I am not going to go into a compare and contrast
20 between the United Brands test that was at issue there,
21 but it was clearly a very broad notion, and there was
22 a great deal of uncertainty about what the components of
23 that test were and how they worked.

24 So the CMA was praying in aid a very broad
25 discretion in relation to how you go about this.

1 In contrast with market definition, we have a very,
2 very different situation. We have an awful lot of
3 developed guidance going back to the US material, EU
4 material that I will come on to, domestic material in
5 terms of guidance, we have lots of cases where this has
6 been dealt with.

7 Now, I accept that in relation to two-sided markets
8 or two-sided platforms -- I will not say markets at this
9 stage -- two-sided platforms, we are moving that
10 analysis forward, albeit we do have things like the EU
11 study that I will come back to, but the point we have in
12 relation to market definition is we know what it is
13 broadly there to do, which is to try and identify what
14 the competitive constraints on the platform are, and we
15 have a series of well-established techniques that are
16 used in relation to that. There is a question how they
17 should be used in this circumstance, but that is really
18 a question of what does the market definition test that
19 has been developed do here, and what we say is that you
20 do not have as the CMA lots of discretion in relation to
21 doing the test wrongly effectively. If you are going to
22 do the market definition test, you have to do it right
23 in relation to a two-sided platform and we say the
24 approach they adopted there was wrong.

25 That is not to say there is no discretion for the

1 CMA in various elements of how they carry it out.
2 Obviously in relation to what numbers they use, what
3 data is used, how you assess the critical loss analysis,
4 for example, there are obviously going to be debates
5 there and there are obviously going to be issues of
6 discretion, but fundamentally it is a different beast
7 from excessive pricing that was being dealt with, and so
8 we say actually there is a much more limited discretion
9 element in relation to how you do the market definition
10 test here than there is in relation to an excessive
11 pricing case, but to some extent, that does not matter
12 because of course what we do have is a very clear steer
13 that this Tribunal with the full merits jurisdiction
14 does not defer to whatever discretion the CMA has. It
15 takes into account that a regulator has undertaken an
16 exercise, it does not ignore that, but it does analyse
17 these things critically.

18 If we could just move on in the judgment down to
19 page {G/136/45}, we there see -- I think I referred to
20 it in opening -- Lord Justice Green at paragraph 145
21 talking about the sorts of errors that the Tribunal
22 might be looking for in relation to these issues, and
23 you are seeing there that there is reference to
24 KME Germany and the sorts of issues that will constitute
25 an error: failing to take account of relevant evidence;

1 taking into account irrelevant evidence; failing
2 properly to construe significant documents or evidence;
3 drawing inferences of fact from evidence about relevant
4 matters which are illogical or just unjustified; failing
5 adequately or sufficiently to investigate an issue that
6 the Tribunal considered to be relevant or potentially
7 relevant to the analysis.

8 So we say that taxonomy, as we work our way through
9 these various grounds, we would say that the CMA has
10 failed in relation to the various grounds we have put
11 forward in relation to all of those points, but the
12 additional point that I wanted to raise in relation to
13 KME was that in KME itself there is also a discussion of
14 the case of Tetra Laval. We have Tetra Laval now in the
15 bundle at {F/736}. I am not going to worry. We have
16 the quote in the skeleton at paragraph 22. Can I just
17 refer to that.

18 THE PRESIDENT: Of course.

19 MR BEARD: Thank you very much, it is paragraph 39

20 {F/736/14}. I will just take it from my closings if
21 I may, {B/64/9}:

22 "Whilst the Court recognises that the Commission
23 [the European Commission] has a margin of discretion
24 with regard to economic matters, that does not mean that
25 the Community Courts must refrain from reviewing the

1 Commission's interpretation ..."

2 Thank you very much. I think that may be the
3 advocate general. Do not worry, I will just take it
4 from here, that is very kind of you.

5 "... that does not mean that the Community Courts
6 must refrain from reviewing the Commission's
7 interpretation of information of an economic nature.
8 Not only must the Community Courts, *inter alia*,
9 establish that the evidence relied on is factually
10 accurate, reliable and consistent [so reliable is
11 important here] but also whether that evidence contains
12 all the information that must be taken into account in
13 order to assess a complex situation and whether it is
14 capable of substantiating the conclusions drawn from it.
15 Such a review is all the more necessary in a case of
16 prospective analysis."

17 That is because this was to do with a merger and
18 what was being said was we are always looking at the
19 future in relation to a merger. The basic proposition
20 that in relation to economic matters and economic
21 evidence it is important that the Tribunal is able to
22 assess those matters is of particular primacy.

23 The reason I emphasise that here is not only to
24 remind the Tribunal of what is already familiar no doubt
25 in relation to its role but also to put in context what

1 we actually saw by way of evidence from the CMA in
2 relation to economic matters because Dr Walker was of
3 course the chief economist but had been put forward only
4 to give evidence in relation to market definition
5 issues, and he also made clear he had not reviewed any
6 of the underlying material.

7 Of course, the difficulty we then encountered was
8 that the witness who was put forward in relation to
9 non-market definition issues, Professor Baker, equally
10 suffered from the problem that he had not looked at any
11 of the underlying material either, and therefore no
12 questions could sensibly be asked of him in relation to
13 how underlying material fed into any economic analysis.

14 In fact, as we heard in relation to Professor Baker,
15 he took that ordinance of not looking at underlying
16 material that he had understood from his instructions so
17 far as to ignore points, key points, that Ms Ralston
18 raised in relation to patently relevant issues which
19 I will be coming back to in particular in relation to
20 the DCT enquiry.

21 But it was not just that. Of course, he did not
22 understand the nature of the terms of what the CMA was
23 saying was a promotional deal or would be prohibited by
24 the particular clauses, and yet he came before the
25 Tribunal, for all his pleasantness and demeanour,

1 offering what was quite frankly a quite extreme view
2 that econometrics was meaningfully impossible here, and
3 he did so having not looked at all at that DCT analysis.

4 Now, we will be coming back to that in a great deal
5 more detail in a moment. The CMA, right at the back of
6 their closing submissions, dismissed our references to
7 the DCT econometrics as a jury point that can obviously
8 be dealt with. I will explain why it is very far from
9 a jury point, but at this stage what is important is
10 that we are dealing with a situation where we could not
11 put in relation to economic matters anything involving
12 an interaction with any factual material to any witness.

13 Our ability to test there was limited, and
14 I obviously refer to in passing, since I am mentioning
15 the DCT, that it was not just the witnesses that lived
16 in denial about DCT econometrics notwithstanding almost
17 800 pages. There is not one reference in that Decision
18 to appendix 2 to the DCT paper E study.

19 I have touched on a number of issues to do with fact
20 evidence, expert evidence, but in a way one ends up
21 cashing those points out to some extent in relation to
22 the substantive analysis. On that I am going to start
23 with market definition, if I may.

24 We have looked very briefly at the US merger -- 1992
25 US merger guidelines and I will come back to those to

1 deal with some points Dr Walker dealt with in relation
2 to them, but it might just be worth picking up the EU
3 guidelines which are at {F/702/1}.

4 I am only going to deal with those very briefly
5 because the Tribunal will be well familiar with them.
6 In many ways, a number of the points are simply
7 uncontroversial in relation to these issues.

8 If we pick it up at paragraph 2:

9 "Market definition is a tool to identify and define
10 the boundaries of competition between firms."

11 So we are looking at trying to identify the boundary
12 of competition between firms.

13 "It serves to establish the framework within which
14 competition policy is applied by the Commission. The
15 main purpose of market definition is to identify in
16 a systematic way the competitive constraints that the
17 undertakings involved face."

18 Then it looks -- it talks about products and
19 geographic dimensions, and it is identifying actual
20 competitors of the undertakings and also considering
21 other competitive pressures and potential competitors,
22 a systematic way of looking at competitive constraints,
23 just to anticipate what I am going to say in relation to
24 market definition, there are constraints on two sides of
25 this platform, and that is what it was necessary for the

1 CMA properly to look at, and we will explain how an
2 indirect SSNIP so-called is nothing of the sort and does
3 not properly deal with the constraints on the consumer
4 side.

5 Looking at the framing -- if we go down to
6 paragraph 15, I think it is on the next page {F/702/3}:

7 "The assessment of demand substitution [which is
8 part of the exercise] entails a determination of the
9 range of products which are viewed as substitutes by the
10 consumer. One way of making this determination can be
11 viewed as a speculative experiment, postulating
12 a hypothetical small, lasting change in relative prices
13 and evaluating the likely reactions of customers to that
14 increase. The exercise of market definition focuses on
15 prices for operational and practical purposes, and more
16 precisely on demand substitution arising from small,
17 permanent changes in relative prices. This concept can
18 provide clear indications as to the evidence that is
19 relevant in defining markets."

20 You probably anticipate some of the words I will
21 emphasise here. "Relative prices". When we come on to
22 deal with the narrow MFNs point, relative prices, just
23 as with the US merger guidelines, are the critical issue
24 here, maintaining a difference in pricing between the
25 focal products and the adjacent products is critical to

1 this thought experiment.

2 It is also worth noting that the Commission here is
3 saying one way of making this determination, one way of
4 making this determination.

5 Now, we accept over time -- these are 1997
6 guidelines -- market definition has tended towards the
7 use of a hypothetical monopolist test more generally and
8 that in those circumstances it is effectively the
9 default mechanism that one would use in relation to the
10 assessment of market definition but the reason
11 I emphasise one way is of course there is this total
12 dismissal of things like the Google AdWords information
13 and the other organic search information and the
14 evidence from the likes of Ms Glasgow and indeed others
15 about the importance of that and indeed we will come
16 back to the levels of expenditure on those sorts of
17 issues. That is all ignored effectively by the CMA in
18 relation to this.

19 The reason I emphasise one way is because we say no,
20 no, no, you really should not be ignoring that direct
21 material at all.

22 The other thing I am going to emphasise here just in
23 passing, it is the range of products which are viewed as
24 substitutes by the consumer. I am only touching on that
25 because it will be relevant to issues on the points on

1 supply side where essentially the dispute is about
2 whether you are monopolising firms or products in this
3 hypothesis.

4 With that in mind, I think the next sensible topic
5 to move on to is the one that starts at paragraph 26
6 {B/64/10}, in our closing submissions, the CMA has not
7 properly tested those competitive constraints on both
8 sides of what both the CMA and ComparetheMarket accept
9 is a two-sided platform.

10 In our closings, particularly at paragraph 29
11 {B/64/11} onwards, we pick up references in the study
12 that has been published recently by the Commission which
13 touch on these issues.

14 If we could go to that at 722, picking it up at
15 page 43, I hope I have the right reference here
16 {F/722/43}.

17 You will recall I took Dr Walker to this and the
18 Tribunal may already have noted it. When we are looking
19 at defining "multi-sided markets" or defining "relevant
20 markets for multi-sided markets" there are essentially
21 two different dimensions that are important in
22 identifying the multi-sidedness of the market.

23 The first is the existence of direct or indirect
24 network effects because it creates the interdependence
25 between the different sides of the market which is

1 critical to the definition. I think this is familiar.

2 But then if we go over the page {F/722/44}, bottom
3 of page 44, the way in which pricing is set, it is set
4 on both sides in relation to these issues.

5 Then if we could just go to the conclusion of this
6 section on page {F/722/55} you will see in box 1:

7 "Single versus separate sides of the market -- main
8 findings."

9 Then at (i) there is the consideration of platform
10 typology being insufficient. You will recall that is
11 the debate about transaction or non-transaction
12 platforms.

13 If we just go over the page {F/722/56}:

14 "(ii) It is appropriate to look at both market sides
15 regardless of whether a single market or multi-market
16 approach is chosen."

17 The point here, and it goes back to questions that,
18 sir, you and the Tribunal set out in relation to your
19 many questions, what is being said is to some extent it
20 does not matter whether you are concluding there is
21 a single two-sided platform market or there are two
22 separate markets one could consider in relation to
23 a two-sided platform.

24 It is critical you consider the constraints on both
25 sides, and in this context when we have identified an

1 accepted test for consideration of constraints which is
2 the hypothetical monopolist test, to say I am only doing
3 it on one side is failing properly to assess all of the
4 relevant competitive constraints.

5 Now, of course we know what the CMA did. It did
6 what has been referred to on occasions as the indirect
7 SSNIP test, but I am going to cavil slightly at that
8 terminology because it is really not a SSNIP test
9 at all.

10 Now, there are a number of reasons for that.

11 First of all, it does not apply any of the proper
12 criteria for a SSNIP test, it does not look at the
13 consumer side and say what happens if you have a price
14 rise or, as I will come on to, an alternative to a price
15 rise that is small but significant, non-transitory, what
16 would the consumers do. That is not what it is doing.

17 What instead it is doing is imposing that price rise
18 on the insurer's side on commissions and then asking
19 about the effect of a pass through. We are all familiar
20 with that, but I think there is an important issue to
21 raise in relation to your question 15(1) here. It is
22 not agreed what the level of that pass through would be.
23 That is not common ground between the parties, and
24 indeed to be fair to the CMA, in its Decision it does
25 not find that there would be 100% pass through. That is

1 not what it says in the Decision. I will just take you
2 to it if I may, one of the references to it, {A/1/83}.
3 This is at 5.27.

4 This is marked as confidential. I struggle to see
5 why this is confidential, but if one just reads the
6 first sentence.

7 THE PRESIDENT: Yes, I will read it.

8 MR BEARD: If I just leave the Tribunal to read the
9 paragraph. (Pause)

10 THE PRESIDENT: Yes, thank you.

11 MR BEARD: The point to be made here is there is not
12 a finding by the CMA that it would be 100% pass through.
13 They say it may not be as high as. We have real issues
14 as to whether or not it would be anywhere close to as
15 high as that, and of course Ms Ralston provided
16 references to evidence in her report about how in fact
17 if you drop commissions in certain circumstances in fact
18 you do not see prices on PCWs either changing to the
19 full extent of commission, sometimes you even see them
20 going up. You get all sorts of strange effects.

21 So there is no assumption that in fact there is 100%
22 pass on. So it is not even the CMA's case that that is
23 so. It is certainly not our case that it is so, but
24 what was done here was the CMA say, well, we will take
25 a conservative approach and assume it is all passed

1 through and then see what the impacts on consumers are,
2 but effectively this notionally conservative approach is
3 actually inuring to the CMA's benefit in terms of the
4 way in which it can now say, oh, well, we have tested on
5 the consumer side because we are assuming the maximum
6 pass through of the commission price rise.

7 Now, we say that is not a sound assumption, and the
8 reason I mention it of course is (a) because in your
9 question it suggested that this would be common ground
10 and it really is not, it is not even the CMA's case, but
11 it is important here because if one thinks about what
12 the CMA is saying, if in fact pass through is much
13 lower, say it is 50% or 20% or on average none, then
14 what you would end up with this notional indirect SSNIP
15 doing is testing less than 1.5% notional increase in
16 prices, 0.5% notional increase in prices. It is all
17 dependent on the pass-through of an input cost, and that
18 is not what a SSNIP involves, but one can see as soon as
19 you start conditioning what assumption you make there,
20 which is no part of an orthodox SSNIP test, then in
21 those circumstances you are really not testing
22 constraints on the consumer side at all.

23 THE PRESIDENT: Is there also relatedly any significance in
24 the fact that the SSNIP, indirect SSNIP as I should not
25 call it, appears in a singularly untransparent way to

1 the purchasers or the seekers of home insurance policies
2 in that you do not actually see an increase in price,
3 what you see is an increase in the various policies
4 quoted through the price comparison website?

5 MR BEARD: One can see that that may matter. On the other
6 hand, that can work both ways because one of the things
7 I was going to come on to was if you are doing a proper
8 SSNIP, as was discussed in various exchanges, there
9 would be ways of actually doing pricing SSNIP in
10 relation to consumer side. Now, one way that was mooted
11 was small but significant in this circumstance, it does
12 not just have to be 5 to 10%, it could just be an
13 absolute amount on the price.

14 Now, there it would become more transparent, I can
15 see that, but we also talked about -- and indeed BGL
16 gave evidence that it would be possible to have a sort
17 of premium on the premium as it were. There was
18 a commission being paid by consumers in relation to the
19 service they were effectively getting of purchasing the
20 insurance policy, and BGL explained how that could be
21 done relatively quickly.

22 You could therefore hypothesise a small but
23 significant percentage increase in the total commission
24 that was added. Now, that again would probably be
25 transparent and that might affect the way in which

1 consumers think about it, I completely see that, but one
2 can also see that one might have that where it was sort
3 of rolled together as a total price, and one might want
4 to think about that mechanism.

5 So I am not trying to pitch for any particular
6 mechanism or emphasise whether or not transparency or
7 non-transparency is critical here. To some extent those
8 are more refined questions which follow on from the
9 central point which is you should have done something on
10 that side.

11 THE PRESIDENT: Really the reason we are having this debate
12 is because I sense that there is either a lack of
13 clarity or perhaps more accurately a dispute as to the
14 function of the SSNIP, and my sense is that what you are
15 saying is that it is a tool that requires adjustment
16 depending on the nature of the market in order to
17 provide a prop or a help in understanding how price
18 sensitive the consumers in a given market are to an
19 adverse change for them in product price or if you go on
20 quality, quality.

21 So in a sense if the increase is hidden away, the
22 utility of the test might be said to be less because you
23 would just get people who are not considering price,
24 they just carry on.

25 MR BEARD: That might be right.

1 THE PRESIDENT: But it may be important to factoring that as
2 the way the market functions. That is why these things
3 are difficult.

4 MR BEARD: I can see, sir, your point. I think one needs to
5 be a little cautious about what transparency means in
6 these circumstances because obviously what would be
7 transparent is that the overall cost of your retail
8 price for insurance would be going up by 5 to 10% if you
9 were to apply that SSNIP. So what we are talking about
10 is how that is displayed effectively.

11 I think we are talking about sort of quite refined
12 issues of transparency here. For the purposes of
13 a pricing SSNIP test on the consumer side what you are
14 really asking is, either do you put a flat fee on or do
15 you put some increment on, and could consumers
16 reasonably answer questions then about, well, how
17 would you react if all of the PCWs pushed up all of the
18 retail prices for your home insurance by 5 to 10% or
19 stuck a 50p charge on, or whatever it is? But of course
20 what you do there is you ask consumers how it is they
21 would react to that sort of impact, and then you get
22 a sense of, well, do I get a stampede of people away, do
23 I get a dribble of, you know, particularly price
24 sensitive and concerned consumers, or is it somewhere in
25 between.

1 But that is what you need to look at. Of course,
2 what we have is nothing, no questions being asked about
3 this. Because the CMA decided that is not the way that
4 we are going to do it, they did not ask about these
5 issues at all. So we do not see that in any Section 26
6 notices, and of course we do not see any consumer
7 survey. So whereas in DCT and in other enquiries there
8 have been consumer surveys, we do not see the equivalent
9 of that here at all.

10 So this is why when putting points to Dr Walker we
11 were asking whether or not he had been involved in any
12 designing of questions and the structure of questioning
13 that was being put forward because to us it seems
14 obvious. You see this as being a two-sided platform,
15 you are asking yourself where do the constraints lie,
16 you should be really clear about the questions you are
17 asking the insurers, not just, "What do you do if the
18 commission goes up", but, "What do you do if all the
19 commissions go up", you should do that on the insurer's
20 side because otherwise you are going to get much more
21 confusing answers, and you have to do something on the
22 consumer side and you did not do that.

23 That is why we say you are just not properly using
24 the hypothetical monopolist test to capture the dynamics
25 of the constraints here.

1 PROF ULPH: Mr Beard, could I just ask a question? I just
2 want to be clear, you are not saying that the kind of
3 test they did on the consumer side is not a legitimate
4 part of their test on the HIP side?

5 MR BEARD: No.

6 PROF ULPH: I just wanted to be clear about that, okay, all
7 the caveats you have.

8 MR BEARD: I probably was not clear enough. What they did
9 on the insurer side which should have taken into account
10 the indirect effect, not network effect, but indirect
11 effect on consumers, which might generate an indirect
12 network effect, I can see that --

13 PROF ULPH: Yes.

14 MR BEARD: -- that has to be taken into account on the
15 insurer side, but that is not the same as considering
16 the constraint on the consumer side. So, no, sorry,
17 I was simplifying for exposition.

18 PROF ULPH: I just wanted to be clear. Thank you.

19 MR BEARD: I will come back to SSNDQs in a moment if I may,
20 because whilst I know there is a sense that they might
21 feel a little slippery, I think was a term that was
22 used, they are not so slippery, these are not bars of
23 soap or eels, they are pretty tractable and they have
24 been used by people in numerous circumstances. Indeed,
25 recently, as I will come on to, we have included it in

1 the bundle, in the Google Android analysis by the
2 Commission they did precisely an SSNDQ because they were
3 concerned that, well, maybe we should not just be using
4 these pricing metrics because we are dealing with free,
5 let us think about SSNDQs as well. So we say they are
6 very tractable and we will come on to those in a moment.

7 I will just move on in my closings if I may. The
8 next point I wanted to come to was really this idea that
9 had been posited about how you gear the market
10 definition exercise round your theory of harm, and we
11 just say that is just the wrong way of doing things.

12 I can take you back to Sainsbury's v MasterCard
13 paragraph 105, but I think the Tribunal, since it put
14 it, is pretty familiar with that structure.

15 THE PRESIDENT: Yes, we are. It is obviously from

16 a judgment that I am tolerably familiar with but --

17 MR BEARD: Yes, should we call it up?

18 THE PRESIDENT: There is no pride in authorship in a sense.

19 What we want is each party to nail their colours to the
20 particular test that they want to apply.

21 MR BEARD: Let us call it up just for the sake of clarity.

22 {G/119/81}. We have quoted it:

23 "The manner in which it is determined whether
24 a given provision constitutes a restriction ... 'by
25 effect' is -- in general terms -- well-understood.

1 Extensive analysis of an agreement in its market context
2 is required."

3 So we do not demur on any of that:

4 "In order to do this:

5 "(1) Having identified the relevant agreement or
6 provision said to constitute a restriction on
7 competition [and it was an uncontroversial issue in this
8 case] it is necessary to identify the market in which
9 the effect of that agreement or provision is to be
10 gauged."

11 Then one goes on {G/119/82}:

12 "(2) Once that has been done a theory of harm must
13 be articulated. In a regulatory case, that is done by
14 the competition authority; in a private action, it is
15 the claimant ..."

16 Then (3):

17 "The allegedly harmful effect is then assessed by
18 reference to what the position would have been in the
19 absence of the allegedly infringing agreement or
20 provision", the counterfactual.

21 We just agree with all of that. We think that is
22 the right way of doing things, and the critical point is
23 you identify the conduct you are concerned about first.
24 Here -- in MasterCard it was an agreement. Here it is
25 also an agreement. So it is pretty plain what you are

1 identifying. You are identifying that part of the
2 agreement with the 32 HIPs which constitutes the
3 allegedly unlawful wide most-favoured-nation clause.

4 It is in this case equally unambiguous as compared
5 with MasterCard we would say. So you then do it that
6 way. You have a concern about some conduct. You do not
7 need to have a fully articulated theory of harm, you
8 just need to have a concern about the conduct.

9 Now, of course, when you are identifying whether
10 there is a concern about conduct, you might think,
11 I wonder if prices have gone up, or, I wonder if
12 commissions have gone up. You know, you might well be
13 thinking about complaints that you have had, not in this
14 case, but you might be thinking about complaints you
15 have had or issues that have been raised, but you do not
16 have to articulate a theory of harm about the conduct in
17 order to start the process of identifying the market
18 context for that conduct.

19 Indeed, your theory of harm in relation to
20 a particular type of conduct might well develop over
21 time because you begin an initial investigation when you
22 are thinking about these issues and then you frame your
23 market definition and you make enquiry as to how you
24 frame the market definition, and actually how you think
25 there might be problems because of the conduct in

1 question might change over time. So it would be
2 particularly odd if it were the theory of harm that can
3 obviously be modified over time, as you are thinking
4 about it, not after you have set it down in a Decision
5 of course, but as you are going through an investigation
6 and keeping an open mind, it would be bizarre if the
7 theory of harm was the thing that was necessary to have
8 been delineated at the outset before you do your market
9 definition exercise.

10 So there is an illogicality about it as well as
11 anything else. So we say that is the right way forward,
12 and we have obviously noted the importance of the
13 approach to market definition being an objective one,
14 which is emphasised in the US 1992 merger guidelines.

15 If you use a theory of harm approach of course you
16 are bringing in descriptive subjectivity in relation to
17 these things. Whereas with conduct you can say it is
18 that conduct I am concerned about, I can define it, with
19 theory of harm -- I can specify it, it is out there,
20 with theory of harm it is how you describe the problem,
21 and the idea that how you describe the problem should
22 dictate how you do your market definition is again
23 contrary to what you are thinking about doing and what
24 the guidance is talking about.

25 I should just mention that in relation to their own

1 closing submissions, there is a reference by the CMA to
2 the Paroxetine litigation and quotations about that from
3 Professor Carl Shapiro. This is in their closings at
4 paragraph 209 which is page 101 {B/65/103}.

5 THE PRESIDENT: Paragraph 205?

6 MR BEARD: Paragraph 209, I am so sorry. {B/65/103}

7 What is said here is, there is a quote from
8 Professor Shapiro. Now, you will recall that in
9 Paroxetine what was being discussed, this was actually
10 I think in relation predominantly to dominance although
11 the same issues can arise in dominance or 101 cases,
12 that we have to accept, but it is a sort of pay for do
13 not enter deal, so you are the holder of a brand or
14 a patent in relation to a drug, you build a brand, the
15 patent is about to drop off, you are about to face
16 a wave of generic competition, one way of dealing with
17 that is you to deals with generics, so they do not
18 enter, you pay them a bunch of money, they stay out, pay
19 for delay.

20 I will come back to that in a moment in relation to
21 narrow MFNs, but let us leave that for the moment.

22 What is said here is that somehow Professor Shapiro
23 was suggesting you needed a theory of harm to be
24 specified before you could do market definition, and the
25 quote is:

1 "Before genericisation ..."

2 So this is before the patent ends and generic entry
3 is possible.

4 "... in Professor Shapiro's view the question of
5 what constitutes the relevant market cannot be answered
6 without considering what is the conduct under scrutiny,
7 and the answer therefore may not be the same in all
8 cases."

9 We do not have any issue with that. Of course it
10 depends on what the conduct under scrutiny is, and the
11 conduct under scrutiny before genericisation might be
12 very different from the conduct under scrutiny after
13 genericisation, and so the Tribunal goes on to say:

14 "Thus, if the impugned conduct was a product
15 tie ..."

16 Like occurred in the Genzyme case -- this was where
17 you had a drug that was under patent and therefore
18 effectively had a sort of monopoly effectively, I am
19 oversimplifying, but what the monopolist did was it
20 bundled the drug with the home delivery service, and
21 what was being said there was that the bundling of the
22 two products, as it were, together was itself
23 problematic, because you are effectively leveraging your
24 monopoly and the drug into another market for home
25 delivery services.

1 So what he says there is:

2 "Thus, if the impugned conduct was a product tie,
3 supply of a drug only bundled together with the
4 provision of home care services, Professor Shapiro
5 accepted that the approach of GSK may be correct and the
6 relevant product market would comprise all SSRIs."

7 So this was a different product market that would be
8 applied in relation to that.

9 Well, we just do not take any issue with any of
10 that. What Professor Shapiro is not saying is, well,
11 when I try and look at pay for delay issues, I decide
12 how to do market definition, depending on what I think
13 the theory of harm is in relation to pay for delay. He
14 is saying conduct. That was what he was talking about.

15 There is a further irony in relation to these
16 submissions that it is all proceeding on something of
17 a false basis. The theory of harm put forward by the
18 CMA in this case is not just purely a commissions theory
19 of harm because that is essentially the predicate to
20 their position that you only need to look at
21 commissions. Their theory of harm is all built round
22 commissions, therefore you only need to look at the
23 insurer side in commissions, but if you actually look at
24 the theories of harm that they have articulated that is
25 not how it is put, and it is hardly surprising that they

1 do not put it just on commissions because of course the
2 WMFNS they are accusing of being restrictions on retail
3 pricing in the principal impact, and then it is an
4 indirect impact on commissions.

5 Now, we went through this with Dr Walker, but I just
6 pick up the relevant document. {D/19/1}.

7 This was the March 2021 CMA's Indicative Theory of
8 Harm, and you will recall I cross-examined Dr Walker in
9 relation to paragraph 3 where at the bottom the CMA had
10 set out:

11 "Such strategies include entering into promotional
12 deals with rival PCWs ..." where it was accepted that
13 some promotional deals might be on the basis of reduced
14 commissions, some might not.

15 "... differentiating prices across ..."

16 If we could just flip over, thank you.

17 "... PCWs to reflect, for example, differences in
18 commission fees ..."

19 Now, that would be the mechanism that he is talking
20 about.

21 "... or higher conversion rates ..."

22 Which is not to do with commissions.

23 Now, as I said in cross-examination of Dr Walker,
24 there are then further articulations of these theories
25 of harm, but the key point is this is all proceeding on

1 a somewhat fallacious basis. The way the CMA has put
2 their case is not just that there is a single theory of
3 harm relating to commissions. There are actually
4 different theories of harm relating to the impact on
5 retail pricing. A key mechanism -- we are not denying
6 that -- and the one that Dr Walker was particularly
7 concerned about is the reduction of commissions being
8 fed through to prices, but that is not the only part of
9 the theory of harm.

10 So it is particularly odd to be saying, well, we
11 have these different dimensions to our theory of harm,
12 one of which is reduction in commissions, and,
13 therefore, you should only look at a SSNIP on the
14 commissions.

15 So we say that there are just a whole range of
16 reasons why the approach adopted by the CMA here is
17 quite wrong.

18 If I could just go on to deal with -- if I may just
19 skip over -- I will come back to narrow MFNs in
20 a moment, but just dealing with one or two of the points
21 that have been raised about consumer testing being
22 unfeasible. I think we have probably dealt with these
23 and the SSNDQ approach, but if we are asking ourselves
24 how can we do a test on the consumer side, well, we have
25 discussed flat fees, percentage uplifts, the sort of

1 Trainline approaches, and I think even Dr Walker
2 accepted that the reasons given for rejecting the
3 possibility of switching over to a commission mark-up
4 that are given in footnote 247 in the Decision were
5 wrong, so that is just for your notes at {A/1/81}.

6 So those would all be feasible, but the SSNDQ we say
7 just is not that slippery. The Google reference is
8 {F/741/65}.

9 Here you will see at 263, this is the Commission
10 saying we are not required to carry out a SSNIP test, so
11 Google were saying something different:

12 "In the first place, the SSNIP test is not the only
13 method available to the Commission when defining the
14 relevant product market.

15 "In the second place, the Commission is required to
16 make an overall assessment of all the evidence and
17 [here] there is no hierarchy between the [different]
18 types of evidence that the Commission can rely upon."

19 So rather different from the approach that the CMA
20 is taking in ignoring all the Google AdWords material.

21 "In the third place, a SSNIP test would not have
22 produced a different outcome in this case because OEMs
23 cannot switch to non-licensable smart mobile OSs,"
24 operating systems.

25 That is what was going on here.

1 "In the fourth place, notwithstanding the fact that
2 SSNIP test may prove unsuitable, when assessing the
3 indirect constraint exercised by non-licensable smart
4 mobile OSs on Android ..."

5 Just to decode that, what it actually means is Apple
6 effectively.

7 "... the Commission has analysed the extent of
8 switching of users (see [various sections]) and
9 developers ..."

10 So it is looking at both sides: developers who put
11 stuff on the operating system and consumers who use the
12 operating system, because of course operating systems in
13 and of themselves are not so interesting, only
14 interesting when you have applications, so you have
15 a two-sided platform again.

16 "... and developers ... in the event of a small but
17 significant, non-transitory quality degradation of the
18 licensable smart mobile OS."

19 So whether it is diminution, degradation, decrease,
20 whatever it may be, the D is a qualitative test that is
21 used there, and that of course is precisely what you
22 could do here, particularly in relation to issues to do
23 with, say, marketing, which is what Ms Ralston in
24 particular put forward given that we know the importance
25 of particularly online marketing to the PCWs, because of

1 course the CMA slightly missed all of this because in
2 the Decision it focuses on the number of customers
3 coming through to the PCW website due to online what it
4 calls generic search ads being a low number.

5 I think that is not confidential. I think the 20%
6 is not confidential. But as we showed in fact that
7 number is far, far far higher, it is a vast majority of
8 the customers actually coming through come through not
9 just from generic search advertising but branded online
10 advertising, in the case of ComparetheMarket, meerkat,
11 but also through the search optimisation mechanism, so
12 that what you have is a situation where if you do not
13 invest in AdWords and search optimisation, the
14 likelihood is you are going to drop down that top
15 ranking on the screen in the ads box and the screen in
16 the search optimisation organic results and in those
17 circumstances your visibility, your fight for eyeballs
18 and clicks will be damaged.

19 Now, ironically, the CMA did do a sort of SSNDQ in
20 appendix H. I think I took you to that in
21 cross-examination. They just got it wrong in the way
22 they did it. If you want the reference it is {A/1/480}
23 I think is the relevant reference. The key points are
24 in H.31 and H.32. (Pause)

25 What you see there is of course them attempting an

1 SSNDQ but using precisely the wrong set of figures as
2 the key drivers for it.

3 So it is not slippery. In fact in this instance it
4 is very far from slippery, it is very tractable. The
5 CMA did contemplate grabbing hold of it. It just
6 grabbed hold of the wrong thing, but that does not mean
7 it is not grab holdable of.

8 MS LUCAS: Mr Beard, can I ask you a question about the
9 Google case?

10 MR BEARD: Yes, please.

11 MS LUCAS: In this case we have actually had discussions
12 about whether or not you could impose a price rise on
13 the consumer side whether it is through a booking fee or
14 through a fee through using the PCW services, so there
15 are avenues open and of course the commission notice on
16 the definition of relevant market you took us to focuses
17 on price.

18 MR BEARD: Yes.

19 MS LUCAS: Can you explain for my benefit what the issue was
20 in adopting any analysis of the price in the Google case
21 whether that was a realistic possibility or --

22 MR BEARD: I think this is one that has been subject to
23 a hearing on appeal about six weeks ago, and I think
24 there was what might euphemistically be put as
25 a difference of view between the Commission and Google

1 in relation to it, I will have to go back and check, but
2 my understanding is that Google says, yes, you could
3 have SSNIPed on price, you could have done a proper
4 analysis here. The Commission says, no, no, because of
5 the particular features of the nature of an Android
6 operating system, because of the way that it comes with
7 phones and so on that would not be sensible, which was
8 the point I was just taking you to, and then they said,
9 but actually what we can do is an SSNDQ in relation to
10 these issues, and I think in the court hearing there
11 was, as I understand it, quite a debate about how you do
12 SSNDQs, how SSNIPs work and so on, but I would have to
13 just go away and confirm in detail. I think that might
14 be an unduly glib answer to your question, but I think
15 that is broadly the --

16 MS LUCAS: So a similar debate, really, to --

17 MR BEARD: I think there is something of a similar debate
18 going on. I think, as I fairly said I hope earlier, in
19 relation to two-sided markets and how you do SSNIPs,
20 I think there are debates going on about how you do
21 these things, but I think the important thing from the
22 Google side is the Commission are not just saying, okay,
23 well, we give up on the consumers or the developers, we
24 do do it on both sides, and of course what was being
25 shown there was they were looking at an SSNDQ on both

1 sides there, developer side and on consumer side, so it
2 was not one where you said price on one side, something
3 else on the other. They were just using SSNDQ.

4 But I am concerned that in a Decision as long as
5 Android although I have looked at it a little while ago,
6 I do not pretend that I have fully refreshed my memory
7 of it over the weekend and I should probably place
8 a little marker, an asterisk on that answer and come
9 back to you later or tomorrow morning on that, if I may.

10 MS LUCAS: It will be my bedtime reading.

11 MR BEARD: Yes, I am not even going to comment on that.

12 PROF ULPH: Could I ask a follow-up question?

13 MR BEARD: Please.

14 PROF ULPH: You said that there was something wrong with the
15 numbers they used here when they did this.

16 MR BEARD: Yes.

17 PROF ULPH: Could you just encapsulate briefly what your
18 concern is about the numbers?

19 MR BEARD: Yes, I will have to track down the reference
20 because I went to it in cross-examination, but the
21 central problem if you look at H.31 again {A/1/480}, you
22 will see:

23 "... the CMA finds that CTM's expenditure on home
24 insurance related search terms in Google AdWords
25 auctions was a small proportion of its overall

1 expenditure on generic search advertising."

2 So what the CMA does here is it focuses only on
3 people -- the expenditure that was specifically
4 concerned with the generic terms "home insurance" or
5 "cheaper home insurance", those sorts of terms, when it
6 looked at the level of expenditure that CTM had in
7 relation to online advertising, and so it entirely
8 ignored all of the investment that CTM and indeed all of
9 the other PCWs put into general brand recognition so
10 that when you want something like home insurance you
11 might not just type in "home insurance", you might type
12 in "CTM" or you might type in "MoneySupermarket" because
13 you are interested in going to their site and then
14 exploring it for home insurance, and actually what we
15 see is that the level of expenditure on that is very,
16 very high as well, and so that is being ignored, and of
17 course that is very, very important in terms of the
18 investment that is being made, it is that brand
19 recognition allied to what you cover.

20 Of course, I should say that the brand investment is
21 not just CTM investing in making sure that when you type
22 in "ComparetheMarket" or "ComparetheMeerkat" or
23 "meerkats", you go high up the list. It can also be
24 PCWs paying that if you type in "MoneySupermarket"
25 actually you get GoCompare or Confused. There is

1 a battle going on there, and that expenditure is also
2 very important, and that is all part of the branded
3 expenditure.

4 Then in addition to that you have the expenditure on
5 optimising the website which is not just about the ads
6 auction, and that of course all matters too, because you
7 are not just looking for people that hit the ads, but
8 you are making sure you are high up the rankings for
9 organic search results. I think it is all common
10 ground, there is an awful lot of spending on that as
11 well.

12 So the problem is that when it comes to feeding in
13 its calculation and its assessment of the impact of
14 a degradation on marketing in relation to online
15 marketing, and of course we are only talking about
16 online marketing here, we are not talking about
17 marketing generally, if we went to that that would be an
18 even bigger number, but if you SSNIP those much, much
19 bigger numbers just in relation to online marketing, of
20 course you are talking about a much more substantial
21 potential degradation in the quality of what you are
22 getting back on HIPs, and that is just missed in all of
23 this because they focus only on a subset of the online
24 marketing.

25 PROF ULPH: Thank you, that is very helpful.

1 MR BEARD: That is a slightly long answer, but I hope that
2 clarifies the problem.

3 PROF ULPH: No, that is very helpful.

4 MR BEARD: I am going to skate through. I am conscious of
5 the time, if I could be given 15 minutes would that --
6 I am just talking, if I may, just to the shorthand
7 writer. I think I can probably get through a number of
8 topics relatively quickly.

9 If we pick it up in our closings at page 22,
10 paragraph 64 {B/64/23} -- sorry, just for your note, the
11 matters I have been dealing with in relation to SSNDQs
12 were dealt with at paragraphs 53 through to 63. We are
13 now at 64 on indirect network effects.

14 I think the point I am going to make here very
15 briefly is that essentially although these are of the
16 essence of the identification of a two-sided platform,
17 the two-sidedness, these are ignored by the CMA, these
18 are just ignored.

19 We saw in the Decision that essentially they ignore
20 indirect effects entirely based on two pieces of
21 evidence. One, as I said, was grabbing on to particular
22 paragraphs in a Confused interview and Confused I use
23 capitalised and not in that context, because it was very
24 far from clear what was going on, and the other is some
25 consumer survey material from the DCT study.

1 This is at the very essence of how you should
2 analyse this platform, and yet on the basis of these two
3 pieces of evidence, the CMA say, well, we are not going
4 to think about indirect network effects here at all, and
5 we say that is just wrong as well, so it is a further
6 error in relation to their approach.

7 Then at paragraph 70 {B/64/25} we touch on the
8 debate about whether or not you should have one
9 two-sided market or two closely interlinked markets
10 which I think goes back to questions, sir, that you were
11 raising. I think the essence of the points here that
12 were explored with Dr Niels are: Dr Niels considers the
13 best way of looking at it is as a single market with two
14 sides, but to some extent that is secondary to the key
15 issue which is have you looked at both sides whether you
16 consider it two markets or one market, and that is the
17 issue that he is most concerned about, but he has
18 explained his position, and I am not going to
19 re-emphasise it, and we see a benefit in it, but the
20 Tribunal's instinct that you have to look at both sides
21 in order to get a proper, clear picture, is the emphatic
22 and important point here.

23 That then does take us on to the role of narrow
24 most-favoured-nation status clauses in the context of
25 market definition. It is a separate issue that

1 Professor Ulph has already touched on in relation to the
2 counterfactual, and just to be clear, we entirely
3 recognise that in the counterfactual you can and should
4 be thinking about the existence of narrow
5 most-favoured-nation status clauses. The question is
6 you should feed those in to effectively distort the
7 existence of price relativities in the SSNIP test.

8 I have already taken you to the authorities, US merger
9 guidelines, EU material, talking about relativities and
10 essentially the narrow MFNs approach that is adopted by
11 the CMA collapses those relativities, and I explored
12 with Dr Walker in cross-examination a series of
13 difficulties and propositions that he ends up having if
14 he is saying, well, narrow MFNs come in, because what
15 you are doing there is you are saying we should look at
16 the actual price reactions of the nearest competitors or
17 potential nearest competitors whenever we put a SSNIP in
18 place, and the problem with that is even without
19 agreements you end up with a situation where it is
20 entirely possible that the closest competing products
21 then move upwards diminishing the price differential and
22 therefore masking the extent to which consumers might
23 well switch in those circumstances.

24 So you undercount the scale of the market. But
25 actually Dr Walker's very emphatic responses were

1 relatively clear.

2 If we look at paragraph 75 {B/64/27} he recognised
3 that what he was doing was a non-standard SSNIP
4 impliedly, because I put to him what a standard SSNIP
5 would be, and he said:

6 "That is absolutely what you are doing in a standard
7 SSNIP, but [he says] it makes no sense to us ..."

8 But when we started exploring this further it became
9 clear really what Dr Walker thought about all of this.

10 Dr Walker's concern was that he was not going to be
11 able to get hold of and have a go at these wide MFNs, if
12 you allowed the narrow MFNs to result in a broader
13 market definition including direct channels, and we have
14 quoted it at 76 {B/64/28}:

15 "We are In a world of vertical restraint, which is
16 this whole sort of stricture of competition [it may be
17 structure of competition, but I do not want to correct
18 Dr Walker] but it is a vertical restraint and so we have
19 things like VABER around and actually if you widen the
20 market by assuming away competitive restraints saying,
21 'Oh [well] we will come and look at that later', I worry
22 that what happens is you widen the market, you lower
23 your market shares and then you say, 'Oh VABER comes in'
24 and we never actually get to think about that
25 competitive constraint. So it seems to me we need to

1 look at that competitive constraint at the first
2 available opportunity, which is market definition."

3 Now, with respect to Dr Walker, I can understand why
4 he has these concerns that he wants to be able to look
5 at wide MFNs, but this is just the wrong way round. You
6 do not see this as some sort of campaign for ensuring
7 you get scrutiny of wide MFNs, and that somehow there is
8 the lurking presence of VABER, the vertical agreements
9 block exemption regulation, which says, well, actually
10 if you are within the scope of the terms of that
11 regulation, there is not a problem with your clauses.
12 VABER is not some kind of monster out there. This is
13 not Dr Mike Skywalker against Darth VABER. It is not
14 that sort of situation at all.

15 What you have is a block exemption regulation which
16 has been designed to take into account circumstances
17 where it is unlikely you have problems, but we are not
18 saying here whether or not these arrangements would fall
19 within VABER, and in any event block exemption
20 regulations can be subject to withdrawal as we all know,
21 and in those circumstances essentially the policy aim of
22 ensuring you get your grips on this are driving
23 Dr Walker's approach to the analysis of the way in which
24 market definition works, and it is just the wrong way
25 round.

1 The reality is you do an orthodox market definition
2 looking at the constraints on both sides. You do it
3 without taking into account narrow MFNs or other
4 directly reactive behaviour from the adjacent products,
5 so that you maintain price relativities so you carry out
6 that hypothetical experiment.

7 You then reach a conclusion in relation to market
8 definition. If it means that you are including the
9 direct channels within it, so be it. You then go on and
10 consider the conditions of competition and whether there
11 are adverse effects and in doing so that is when you
12 take into account the narrow MFNs. That is the right
13 way round. That is the way that Dr Niels says it should
14 be done. Ironically, Dr Walker's approach just ends up
15 making a mess of the structure of analysis, and there
16 are a couple of further ironies here.

17 I mentioned the Paroxetine case. Of course it did
18 not strike us until it was cited back at us, but if you
19 think about in Paroxetine what you have, you have a drug
20 company that is entering into agreements with people not
21 to compete in the market. If Dr Walker is right, then
22 those agreements essentially mean that you do not treat
23 the generic companies as competitive constraints.

24 Now, at times, the CMA seemed to be saying, well, it
25 is only when they are lawful agreements that that can

1 operate, but of course what is at issue in Paroxetine
2 and other cases is whether or not those arrangements
3 were lawful. So you cannot assume they are unlawful.

4 Actually, and to be fair to Dr Walker -- I will just
5 give you the transcript reference -- {Day7/80:2} to
6 {Day7/80:16}, he did not worry about these legal issues.
7 He said: it does not matter whether or not the
8 agreements were lawful or not, I am just looking at the
9 facts. If people are outside the market -- people who
10 would be constrained have agreed not to compete, then
11 that is the end of it so far as I am concerned.

12 So the wonderful irony about Paroxetine is if the
13 CMA were right, it would feel like the market definition
14 in Paroxetine including the generics companies would be
15 wrong, at least the generics companies that had entered
16 into those agreements.

17 That really takes us on to the next point which of
18 course is that we are dealing with this all at
19 a conceptual level, and of course Dr Walker and the CMA
20 are keen to import narrow MFNs into everyone that is
21 a direct channel provider, but as the Tribunal has
22 repeatedly raised in questions, that assumption is not
23 actually true on the facts because we know that there
24 are lots of direct channel providers who do not have
25 narrow MFNs, indeed do not even appear on PCWs, and yet

1 they are being presumed to have effectively narrow MFNs,
2 and these are not just sort of peripheral small players.
3 We are talking about the red telephone, we are talking
4 about big brands, we are talking about Aviva's own brand
5 rather than Quote Me Happy, which is on PCWs. We are
6 talking about NFU, we are talking about Hiscox, we are
7 talking about very big players here, and Dr Walker and
8 the CMA simply do not have an answer as to why it is
9 they should just wipe across narrow MFNs as
10 a presumption in relation to all of those people. There
11 are other categories, we recognise there are also people
12 on PCWs who do not have narrow MFNs. We also recognise
13 they are smaller, but the point applies that you cannot
14 simply do that.

15 I am now conscious of the time. I do have one or
16 two further remarks in relation to market definition,
17 but if this is a convenient moment for the Tribunal.

18 THE PRESIDENT: Yes, thank you very much. We will rise
19 until 25 past, give us 15 minutes. Thank you very much.

20 (12.09 pm)

21 (A short break)

22 (12.27 pm)

23 MR BEARD: Thank you. In the closings, the next thing I was
24 going to move on to was the submissions we have and the
25 evidence from Ms Ralston relating to whether, even if

1 you do the CMA's tests, they have actually got it right.
2 There are a number of issues here, I will try and go
3 through these relatively quickly. You have obviously
4 heard the evidence from Ms Ralston in relation to it.

5 You will see picking it up at paragraph 86 on
6 page 29 of our closings {B/64/30} there is the issue
7 about how insurers might react in relation to SSNIPs and
8 this raises the question of the possibility of full or
9 partial delisting.

10 It became clear that really the consideration by
11 Dr Walker and, indeed, we say by the CMA very much
12 focused on full delisting and does not really consider
13 partial delisting. It is striking that partial
14 delisting, or quotability as the industry seems to refer
15 to it, is something that really is never explicitly
16 raised in any of the rounds of questioning. So they did
17 not ask about full or partial delisting in the context
18 of a SSNIP price. They did not specifically talk about
19 partial delisting at all, and in fact nonetheless we did
20 get evidence that (a) quotability is extremely
21 important, that was something that was emphasised by
22 Ms Glasgow in her evidence and indeed by her colleagues
23 in their interviews, but more than that even though the
24 terms "partial delisting" and "quotability" were not
25 raised at all in the questions that were put,

1 nonetheless we did get feedback from a number of
2 insurers referring to partial delisting in any event.

3 Now, the CMA say two, we say in fact it is more than
4 two. Just for your note the reference for that is
5 {A/9/21} paragraph 228 and the footnotes thereto. That
6 is, just for your reference, Ms Ralston's second report
7 which picks those issues up in a useful place.

8 In the closing, the CMA uses the somewhat ambitious
9 phraseology, and just for your -- maybe we will go to
10 it, {B/65/112} if we may.

11 You will see 234:

12 "Second: the lack of evidence from HIPs on partial
13 delisting cannot reasonably be blamed on the CMA."

14 Well, I think blaming is probably not a helpful term
15 to use, but was it due to the failure of the CMA that we
16 do not have this sort of evidence? I think the answer
17 is obviously yes, because the questions were wholly
18 unclear in relation to these matters. The phraseology
19 that is then used is:

20 "As Ms Ralston ultimately accepted, the questions
21 that CMA asked HIPs about how they had responded, or
22 considered responding, to commission fee increases were
23 apt to capture both full and partial delisting."

24 Now, I certainly did not quite hear Ms Ralston
25 suggesting that actually they were apt to capture both.

1 I had heard her saying that actually you could not rule
2 out the fact that the questions were put broadly enough
3 that if you had concerns about partial delisting it
4 would not be wrong to answer them, but apt to capture
5 suggests that effectively they were eliciting these
6 matters. They certainly were not, and if we just go to
7 transcript {Day6/11:6}, which is what the CMA cite here
8 in particular -- I wonder if my transcript reference is
9 different.

10 Ms Demetriou was asking questions -- Ms Demetriou
11 quite properly corrects me. It is Mr Lask who is asking
12 the questions at this stage -- was asking the question
13 about delisting in the sense that the CMA's questions
14 were not binary, and they were only concerned -- were
15 not only concerned with full delisting or not delisting,
16 and they did not take into consideration the possibility
17 of partial delisting:

18 "... the CMA has not ruled out partial delisting in
19 the design of its questions, has it?"

20 Then Ms Ralston says:

21 "Yes, as the [particular company] has responded they
22 could proactively refer to partial delisting. If they
23 wanted to probe further, they could have asked
24 a question which referred specifically to that matter."

25 If we just go on down the page, you will see what

1 was being asked was whether you would read these
2 questions and think that the CMA is not interested in
3 partial delisting so we will not mention it, and then
4 she talks about quotability.

5 So Ms Ralston was very fairly accepting that these
6 issues could fall within the scope of the questions, but
7 the real issue is partial delisting is a fundamentally
8 important issue here, quotability, and the CMA really
9 did not ask questions about it, and, therefore, in
10 circumstances where five insurers who were asked did
11 actually proactively, as she put it, raise it, the idea
12 that Dr Walker can say there is no evidence that
13 insurers were interested in partial delisting is really
14 not -- is not something upon which any weight can be
15 placed particularly since he had not looked at any of
16 the underlying material.

17 He said, well, look, what we have seen is commission
18 increases and we have not seen people partially
19 delisting, but let us bear in mind what his commission
20 increases actually amounted to.

21 You will recall that in his report he had a plot
22 that went up through 2017 showing an increase in
23 commissions by PCWs, but actually as we pointed out that
24 amounted to less than a 1% compound annual growth rate
25 of commissions.

1 Now, that is not a very substantial increase in
2 commissions. In those circumstances not to have
3 perceived partial delisting is neither here nor there.

4 So we say that the CMA has simply failed --

5 PROF ULPH: Sorry, Mr Beard, can I just ask a question for
6 clarification? So if those commissions had increased
7 quite sharply at one particular moment of time, could
8 that have provided more substantial evidence about what
9 the response was, subsequent response was, to delisting?

10 MR BEARD: I suppose it might have done. I feel like I am
11 in a very speculative situation here, Professor. I can
12 quite see the hypothesis that if you have a commission
13 spike you might then see that as an actual experiment to
14 see what people's reaction were, did they just say,
15 okay, I am only going to quote for the most profitable
16 risks here, I am therefore going to reduce quotability.
17 It is possible.

18 The difficulty I have is we do not have any of that,
19 and, therefore, I do not know whether one can just draw
20 from that. I can see in principle why that would be the
21 case, but I imagine that there might be other things
22 that would need to be discussed as to why the commission
23 went up and what other market circumstances there were,
24 but I am just guessing, frankly.

25 PROF ULPH: I guess my point is, I do not have the diagram

1 in front of me so I am not sure to what extent turning
2 everything into an average percentage increase each
3 year, is that an accurate reflection of what we are
4 seeing in the data, relatively steady increases, or have
5 we seen some spike in the data? I just do not have the
6 diagram in front of me.

7 MR BEARD: Well, we can go to the diagram which is in
8 Dr Walker's report, just so you have it, but you are
9 absolutely right that that is an average aggregate.
10 Dr Walker's report is at {A/8/0.1} and it is quite early
11 on in his report as I recall.

12 I am sorry, Professor, it is going to take us
13 a moment to pull this up because I have the wrong report
14 in front of me. Page {A/8/6}. Thank you very much to
15 those behind.

16 There we go. So you do see variations there,
17 particularly in the pre period. So obviously the period
18 we are talking about, 2015-2017 you are not seeing any
19 material variations, but you are absolutely right,
20 Professor, those are weighted average commission fees
21 weighted by I think numbers of risks that are being
22 quoted for so that it is not just some sort of headcount
23 average.

24 PROF ULPH: I was also averaging over time, and I think what
25 that diagram shows is on the whole -- a good

1 approximation is that they have been growing pretty well
2 steadily across the board, across all PCWs. So there is
3 not any evidence in this data of a big spike that one
4 might have been able to use to test more systematically?

5 MR BEARD: No, sorry.

6 PROF ULPH: Okay.

7 MR BEARD: The data we have there certainly does not do it,
8 and actually if I may, I am going to take to you
9 a further version of this. Could we go to {F/724/1}.
10 This is the same source but now extended out a year. The
11 reason I take you to it is just because we happen to be
12 looking at that plot and I know that your question 16
13 raises this issue.

14 I am conscious we are in open so I do not want to
15 say too much about it, but, first of all, even going
16 beyond the period we are not seeing the sort of spikes
17 that would give us the opportunity to carry out the sort
18 of natural experiment testing that, Professor, you are
19 talking about, but I will come back to the fact that the
20 idea of course in this case was that effectively the
21 level of commission that was being charged, or certainly
22 part of the case that was being put, was that the level
23 of commission that was being charged was elevated during
24 the relevant period, and one might then think that
25 subsequently you would have seen some sort of variation

1 in the trends in relation to commissions.

2 Now, I asked Dr Walker whether or not he had looked
3 at these issues and whether he had looked beyond 2017,
4 and he said he had not, and so we were not able to
5 question him in relation to this, but I think it is
6 instructive, since we are here and since the Tribunal
7 has raised it, that we do actually have this data, and
8 it is not consistent with the idea that there was some
9 sort of overall impact.

10 Now, of course, we have much more refined analysis
11 in the form of Ms Ralston's commissions regressions
12 analysis, but I thought it was worth just drawing the
13 Tribunal's attention to this data, which is CMA data
14 I should say, whilst we are --

15 PROF ULPH: Okay, thank you.

16 MR BEARD: That will save me a diversion later on.

17 So let me move on to the next topic in terms of
18 application of the CMA's methodology. I have dealt with
19 the fact that the CMA say, oh, partial delisting not
20 possible, no evidence for it. They did not gather the
21 evidence properly, and in fact you have indications to
22 the contrary.

23 The second point is CMA underestimated the potential
24 number of PCWs that can switch away, and these are just
25 a couple of data issues that are to be highlighted.

1 Now, I am not going to go through all the material,
2 but if you look in paragraph 92 {B/64/32} in our
3 closings, you will see that first of all the CMA was
4 collecting data from only 19 HIPs. I am not saying they
5 do not represent the majority. They obviously do
6 represent the majority of PCW sales, but the point is
7 you are already down on 100% as your relevant starting
8 point.

9 Then we have had the point that was discussed
10 previously that we think that all of this data
11 systematically undercounts the number of consumers we
12 are talking about, and that is the point that is raised
13 in (b), that there are in fact 19 million policies in
14 force, but the CMA data set only covers 13 million
15 users. So effectively there is a sort of shortfall in
16 the CMA data set of a third.

17 Now, Ms Ralston is not saying, well, you just
18 automatically reduce the numbers by a third. She does
19 not say anything as bold as that, but she says what you
20 are seeing is a systematic undercounting by the CMA of
21 the potential switchers that you are talking about here.

22 Then she reinforces that with her consideration of
23 DCT survey, consumer survey data, which suggests that
24 there were far more users shopping on the direct channel
25 than the CMA uses here, and of course the CMA does have

1 a tendency to pick and choose what it uses from the DCT
2 survey.

3 (d):

4 "Fourth, survey data from the ... DCT survey
5 [indicating] that [I think this is open] 87% [of] PCW
6 users already had the product and were looking to
7 update, renew or switch."

8 Now, Mr Lask during cross-examination pointed out
9 that there was a different question in the DCT survey
10 which resulted in an indication that 49% of PCW users
11 that were prompted to search for home insurance as they
12 were coming to an end of their contract and had to
13 renew, but as Ms Ralston explained, that figure probably
14 underestimate the relevant number. The 87% probably
15 overestimates it. So it is going to be somewhere in
16 between.

17 The point she is making is not some kind of refined
18 spurious degree of scientific precision point. It is
19 saying you are systematically undercounting the number
20 of potential switchers when you come to carry out your
21 SSNIP analysis and all of those comments are entirely
22 valid.

23 Then of course we move to the critical loss analysis
24 itself. I will trespass on this rather gingerly, quite
25 frankly, given in particular that Professor Ulph is more

1 than well across all the critical loss analysis matters,
2 indeed has handed everyone due homework in relation to
3 how you do the algebra and so on, and tested them, which
4 was an experience that no doubt all concerned enjoyed.

5 In any event, we have the information in relation to
6 how critical loss works. I think I will not go into the
7 formulae, but obviously one of the issues that arises is
8 which margin you use, and Professor Ulph's formula was
9 using 100% margin, which makes perfect sense on the
10 consumer side, but on the insurer side you might have
11 potentially different margin issues.

12 Of course, what we had here was a genuine exchange
13 between the experts during the course of reports where
14 Ms Ralston had initially relied on Facebook material,
15 Dr Walker had said, well, hang on a minute, Facebook is
16 a bit different, to which Ms Ralston said, okay, fair
17 enough, I will go away and look at what material I can
18 get from CTM. Obviously CTM does not hold the costs
19 information in the form that is relevant to that table,
20 so she came up with a series of attempts to identify
21 what were marginal or variable costs for these purposes.

22 It was suggested that somehow she was manipulating
23 the figures by doing that. It is a strange sort of
24 manipulation that you are engaged in when it has been
25 prompted by the other side's expert.

1 There is not actually any good criticism of the
2 range of figures that were being provided. She
3 recognises that the highest level figures are ones that
4 may not accurately reflect all variable costs. She
5 thinks the lowest level ones probably undercount the
6 level of variable costs, and she was not trying to be
7 too refined about these issues. When asked, for
8 instance, about TV advertising and other marketing, she
9 was saying, well, look this is the sort of range that we
10 are looking at here, and unless you can tell me that TV
11 advertising is all marginal, which seems highly
12 implausible, then I have to make some sort of broad
13 assessment here, which is precisely what she was doing.

14 When it came to looking at how many customers had to
15 switch in order to make the critical loss analysis work
16 or not work, of course she is in a position where she
17 does not have consumer survey data, she does not have
18 these details, she is making estimates on the basis of
19 the material she has, and she is saying, well, it seems
20 to me reasonable in all these circumstances, given the
21 likely margins, that it may well be the case that in
22 fact the critical loss analysis would result in
23 a conclusion that sufficient numbers of consumers would
24 switch away even on this indirect effect, this sub-SSNIP
25 effect, to render the commissions SSNIP unprofitable.

1 That was far from an unreasonable or unreasoned
2 conclusion, and with respect to the CMA and Dr Walker,
3 the criticisms levelled at it are ones that are frankly
4 overstated because it is clear that amongst that range
5 of figures both in relation to margins and consumers
6 there are all sorts of points where the SSNIP is no
7 longer profitable for the PCWs, and that is clearly
8 indicative.

9 I will briefly deal with the issue in relation to
10 supply-side substitution, if I may, which we deal with
11 at paragraph 109 {B/64/38}. Apparently what is said is
12 nonsense on the part of ComparetheMarket in relation to
13 this issue.

14 Essentially there is one big conceptual point which
15 really caused Dr Walker some grave concern.

16 What he says is, look, if you supply home insurance
17 and you apply the hypothetical monopolist test then you
18 as a PCW are within the hypothetical monopolist
19 analysis, you are in that market or "the" market as he
20 put it. Essentially what ComparetheMarket and indeed
21 Dr Niels say is, hang on a second, that is not actually
22 the logic of the way the SSNIP test works here, because
23 it is about products, it is not about firms and what
24 other products a firm might produce, you are asking
25 yourself what the focal products -- what a SSNIP on the

1 focal products would be if they are all within single
2 ownership or single control by a hypothetical
3 monopolist.

4 Then if we ask ourselves what about producers of
5 non-focal products, because we are asking ourselves do
6 customers or insurers switch away, but particularly
7 customers, if we ask that question, we have to ask
8 ourselves, what are the non-focal products we are
9 considering here, and obviously a non-focal product that
10 is clearly relevant is direct channel provision of
11 insurance, that is on the demand side, but on the supply
12 side, you have PCWs who are providing motor insurance
13 services.

14 Now, you have a range of them, not just the Big Four
15 but others as well, and he says, well, hang on a minute,
16 if in your hypothesis you have monopolised the products
17 that are PCW provision of home insurance, what do we say
18 about the actual products that are motor insurance, how
19 do we consider those? Well, what is said by the CMA is,
20 well, there are huge barriers to entry into the PCW home
21 insurance market, they are effectively twofold. One is
22 you need to build a roster of insurers that are offering
23 home insurance and you need to build a brand, and they
24 refer to it as a chicken and egg problem because if you
25 do not have insurers you will not have customers and you

1 will not invest in a brand and build it; if you do not
2 build a brand, insurers will not come and list on you.
3 We are not taking issue with that conceptually.

4 All we are saying is, well, who are the producers of
5 these PCW motor insurance services that are the
6 non-focal products or the potential supply side entry.
7 Sorry, I should put it that way, it is better.

8 What Dr Niels is simply saying is, well, in relation
9 to the PCW suppliers of motor insurance, those are not
10 monopolised under the hypothetical monopolist test.
11 That is all he is essentially saying, because it is
12 about products and not firms. Then you ask yourself,
13 well, if you have big firms that are offering motor
14 insurance through PCWs, they have a roster of insurers
15 who are the same insurers that offer home insurance
16 products, and they also have very big brand profile.

17 At that point, why do you ignore them? Because just
18 logically and conceptually, Dr Walker is wrong to say
19 that the motor insurance element of the Big Four
20 particularly PCWs' activity is in the market because of
21 course the market that he is defining is PCW services --
22 or testing is PCW services for home insurance. Indeed
23 to talk about it as "in the market" is effectively
24 preempting the conclusion. What he should have said is
25 it is within the focal product group, but as soon as you

1 put it that way, it is obvious that it is not.

2 So all that is being said is here, hang on, if you
3 are doing the logical approach to the SSNIP you have
4 another bit wrong here. Now, that is the way the SSNIP
5 works, we can see that there is a conceptual issue in
6 relation to it. As we say, this is a long, long, long
7 way down the series of quite fundamental errors that we
8 have identified in relation to the SSNIP test, and we
9 say you do not need to determine this conceptual point,
10 but we just note what there is.

11 The final point in relation to market definition
12 that I do want to come back to is just starting at
13 paragraph 115 {B/64/39}. It picks up what I said
14 earlier about SSNIPs being one way or even the comments
15 by the European Commission in Google about you are not
16 obliged to do a SSNIP and so on. There is other direct
17 evidence out here. There is direct evidence out here.

18 We have heard a good deal about it. We have seen
19 that essentially participants in this market see
20 themselves in direct conflict as PCWs with direct
21 channel insurers and they spend vast amounts of money
22 directly competing with them for customers.

23 I just want to take you to {F/731/1}. This is total
24 marketing spend, and these figures are confidential, in
25 all product lines, so it is not just home insurance, in

1 2017, just for the biggest four PCWs.

2 Only part of that will be online, as you can see.
3 Some of it is online and offline marketing. A lot of it
4 will be general brand marketing. Some of it will be
5 specific to particular product classes like motor
6 insurance or home insurance, but we know that that is
7 actually a much smaller proportion of the total.

8 The point I am making here is vast amounts of money
9 and increasing amounts of money -- we heard from
10 Ms Glasgow that it was £90 million on online alone by
11 MSM recently as a rough figure, which is obviously an
12 enormous amount and clearly indicates that things have
13 increased or certainly are significant. So you have
14 these PCWs investing vast amounts of money to hold these
15 positions, and of course what it also means is that the
16 direct channels are doing the same thing because the
17 direct channels do not end up there by luck. They are
18 spending vast amounts of money to meet the PCWs.

19 So you have huge expenditure --

20 PROF ULPH: Mr Beard, could I just make a point to you that
21 presumably this expenditure by PCWs is expenditure to
22 enable them both to compete with other PCWs and with the
23 direct providers. So are you saying we interpret these
24 sums of money as just what they are spending to compete
25 with the direct providers or --

1 MR BEARD: No, I am not. I could not possibly accept that.

2 It is very clear that the PCWs do compete against one
3 another and clearly they are investing in branding to
4 ensure they do compete with one another. I am not
5 remotely suggesting otherwise, Professor. That would be
6 quite wrong and you are quite right to make that caveat.

7 The point I make is we do not have figures in
8 relation to for example what direct channels spend,
9 people like Direct Line, to actually ensure that they
10 hit the top of AdWords whether in relation to a generic
11 or branded search when home insurance is at issue. We
12 do not have that comparison.

13 What we do know from people like Ms Glasgow is that
14 ensuring you are high up that ranking you are competing
15 against PCWs and against direct channels, and it is the
16 fact that you cannot distinguish between the two which
17 is really the critical issue here. It is not that you
18 have targeted direct channel marketing and targeted
19 anti-other PCW marketing. It is just all part of
20 a piece.

21 As we have quoted in the closings at 117 {B/64/40}
22 the testimony of Ms Glasgow who quite accepted that the
23 auction they were participating in was a direct
24 competition against direct channels to hit those top
25 spots and of course the same is true in terms of the

1 investment in search engine optimisation, in other words
2 playing with your site so that it comes up higher in the
3 organic results. So, no, no, no, it is all part of the
4 same picture and yes, a bunch of this expenditure is
5 obviously directed at PCWs.

6 Our point is that it is very, very significant that
7 the perception is you are investing to compete against
8 them. We have the material that we took you to in
9 relation to the Google search returns. I will provide
10 the reference after the short adjournment, which show
11 the mix of direct channels and PCWs, which is where
12 I say, look, you are seeing very significant expenditure
13 on both sides, even though we do not have details on it,
14 and furthermore we have a situation where we have
15 impression shares information that Ms Ralston has
16 produced which show that in terms of overall impression
17 shares in fact the very top of it is a direct channel
18 that does not operate in terms of its brand operating on
19 a PCW, and so again, whatever of these metrics we take
20 what we are seeing is direct conflict for eyeballs and
21 clicks. In other words, one another constraining each
22 other in terms of customer competition.

23 I am just going to refer very briefly to one example
24 where in fact the CMA has itself considered this sort of
25 Google data. If we could go to {F/725/1}, this is

1 actually a merger. I should say right at the outset,
2 the analysis I am going to take you to is not in
3 relation to market definition, it is in relation to
4 competitive pressure. So it is in the context of
5 assessing competitive effects between two merging
6 parties.

7 If we could just go to -- I think it is page
8 {F/725/107}, this is in the industry of retailers of
9 online made to measure blinds. That is what this merger
10 actually concerned. Sorry, if we could go three pages
11 to {F/725/110}. It is 8.77 I want.

12 Here we have an analysis of online presence. It
13 says:

14 "As explained above ... competition between
15 retailers of online [made to measure] blinds is likely
16 to be heavily influenced by how effective a retailer is
17 at attracting customers to its website. This in turn
18 depends on how well a retailer ranks and performs on
19 search engines (especially Google)."

20 So considering the extent to which these two merging
21 parties competed with one another, they are already held
22 to be within the market, so I completely accept this is
23 a slightly different situation, but in terms of working
24 out what the competitive dynamics between them and the
25 extent to which they exerted competitive pressure on one

1 another the CMA specifically looks at Google AdWords and
2 search returns data because it was saying, well, yes,
3 the crucible in which they compete is effectively online
4 search. That shows -- if what we see is that they are
5 coming up against one another repeatedly and investing
6 to do so, that is an indication of just how much they
7 are competitors against one another.

8 What you then get over several pages is an analysis
9 of these issues. If you go over two pages on, so that
10 will be to page {F/725/112} you will see "Ranking in
11 Google search results":

12 "As explained above ... the search behaviour of
13 customers indicates that if a website is not well
14 represented on the first page ... it is unlikely to
15 attract significant traffic and therefore be able to
16 effectively compete in the market.

17 "We therefore conducted an analysis of Google
18 rankings. This analysis, set out below, covers analysis
19 of rankings in search results, separately with respect
20 to: ..."

21 Google ads, that is the top of the page and organic
22 links, the other bit of the page, as it were, that I
23 have referred to.

24 Then we get the Google ads stuff, we got all sorts
25 of consideration of it. I will skip through, if I may,

1 to page {F/725/118}. There you see, "Conclusion on
2 Google rankings."

3 Then it says:

4 "Overall, this analysis shows that both Parties'
5 brands consistently rank highly in paid search, and
6 across a number of different metrics, indicating that
7 the Parties' brands are both highly effective at
8 competing for the top positions. They also rank highly
9 in organic search, though to a lesser extent.
10 Additionally, the analysis shows that the Parties'
11 brands tend to consistently rank the highest relative to
12 other retailers ...

13 "The results of our analysis on online presence,
14 namely that the Parties consistently appear in the
15 highest rankings relative to other retailers, with only
16 Interior Goods Direct outperforming ... closely align
17 with the market shares we found for different retailers
18 [on the measure to measure] blinds market ... They
19 further indicate that (i) the Parties together with
20 Interior Goods Direct, are the leading suppliers in this
21 market and close competitors to each other and (ii)
22 other online M2M blinds suppliers ... may be a less
23 effective constraint."

24 Then it goes on:

25 "Comparison of performance on Google Ads."

1 Then if we go on to page {F/725/122}, I think:

2 "Conclusions on online presence.

3 "On the basis of our analysis of the Parties' online
4 presence, we find the following:

5 "(a) Our analysis of Google rankings, which includes
6 all retailers present online, shows that both Parties
7 consistently rank highly, indicating that the parties
8 Parties are both highly effective at competing for the
9 top positions ..."

10 Then (b) {F/725/123}:

11 "Our analysis of Google Ads performance indicates
12 that the Parties are both effective competitors for
13 online [measure to measure] blinds.

14 "Taken together, these analyses indicate that the
15 Parties are likely to be close competitors."

16 Now, in this merger decision, there is lots of other
17 evidence considered. I am not suggesting otherwise,
18 and, as I have emphasised this is not particularly for
19 the market definition sector. The point I am making is
20 a broader one: is the direct evidence meaningful in
21 terms of working out how close a competitor direct
22 channels are to PCWs, and we say, yes, emphatically it
23 is, we have been saying that throughout, and what this
24 merger decision is saying is, well, actually, in
25 relation to an online environment business like made to

1 measure blinds, where online search is very important,
2 we did that analysis because we wanted to work out how
3 close a competitor these people are, and we say that is
4 just reinforcing what we are saying all along, and we
5 recognise that it is only one strand of evidence in
6 relation to market definition, but we do say it is
7 important, and it has been unjustifiably ignored on the
8 basis the CMA say, well, it does not indicate the extent
9 to which these people are close competitors and whether
10 people would switch away. In other words, it does not
11 tell us a formalistic SSNIP analysis. We say no, of
12 course it does not. It is direct evidence. It is not
13 there to do that. Is it relevant? Yes, highly. Was it
14 ignored wrongly? Yes, absolutely, it was.

15 Now, unless those next to me tell me there are other
16 bits I should be picking up and forgive me for skating
17 through one or two things relatively quickly, I have
18 reached the point of moving on from market definition,
19 so I was going to then briefly deal with the questions
20 if I may.

21 THE PRESIDENT: Yes, of course.

22 MR BEARD: I will try and run through them relatively
23 swiftly given the time, but it is probably sensible to
24 pick them up before the short adjournment and then if
25 there are follow-ups.

1 So question 1, I will not read them all out, you
2 have obviously them in all in front of you. The answer
3 to that, Sainsbury's v MasterCard, absolutely yes, as
4 I think I have explained.

5 So 2:

6 "To what extent ... is market definition informed by
7 the 'theory of harm'?"

8 It is conduct that matters, Paroxetine that the CMA
9 have cited does not change that.

10 "In this particular case, how important is the issue
11 of market definition ...?"

12 Would the analysis be very different?

13 Well, I do not think the CMA contend that if their
14 market definition falls the Decision can somehow stand.
15 That has never been pleaded by them and I would be
16 surprised if that was their case. The answer we have
17 is: we do not know what the outcome is if you come up
18 with a different market definition because you have to
19 frame the questions differently and do the analysis
20 differently.

21 What we do know is market definition is seen as
22 being something that needs to be undertaken unless there
23 are exceptional circumstances, and it has to be done
24 right. I will provide you with the reference, but in
25 the European Commission's 101(3) guidance at {F/7/5},

1 that is at paragraph 27, there is just a clear
2 indication that it is normally necessary to define
3 a relevant market before doing a 101 analysis,
4 particularly when you are dealing with effects. It may
5 be different in relation to object, because we have
6 those cases where it is object, you do not need to
7 define markets and then you have these arguments about
8 how you calculate penalty in those cases, but with
9 effect it is very different. We say we do not know, but
10 it definitely would be different, and this is not
11 territory where you can say, okay, it does not matter
12 whether or not the market definition is or is not the
13 same.

14 Indeed, these things would matter of course for the
15 whole coverage points that the CMA rely upon and all of
16 that, case law and so on.

17 Question 4:

18 "If, as the CMA claims, its theory of harm centres
19 on the role of wide MFNs in constraining competition on
20 commissions, then given as part of the SSNIP on
21 commissions it investigated knock-on effects should that
22 preclude any investigation of competitive constraints on
23 the consumer side ..."

24 I think our answer to that is absolutely not. In
25 order to get a proper picture of a competitive

1 constraint you need to look at both sides. We have
2 explained how the indirect sub-SSNIP analysis is flawed.

3 We should emphasise, as we have done as well, that
4 their theory of harm is not just commission related in
5 any event.

6 5:

7 "How does one define a 'two-sided' market? If as
8 appears to be common ground between the parties at least
9 there is a discretionary element in what markets one
10 looks at, is that discretionary element informed only by
11 the linkage or nexus that exists between the two 'sides'
12 ... or are there other factors in play?"

13 Well, I think here we are getting into the territory
14 of one single market, two markets. I think I have
15 explained that there are undoubtedly debates in relation
16 to these issues. It is reflected in the study. The
17 critical thing is you must look at both sides, as we
18 say, and you must look at direct and indirect network
19 effects, which are missed. So I would refer back to
20 that.

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

22 I think obviously the two criteria that are
23 particularly important are the operation of the indirect
24 network effects and the way in which pricing is set on
25 both sides simultaneously in order to maximise

1 profitability. That is without getting into the
2 technical economics and going back to papers that we do
3 not actually have in the bundle but I think there was
4 a paper by Rey and Tirole that tried to deal with these
5 things some time ago.

6 So I think we are in the territory of there being
7 quite a lot of discussion, but for this purpose I do not
8 think there is any dispute. The CMA are saying it is
9 a two-sided market. It is just that they are saying,
10 well, we did enough to test it. We are saying it is
11 a two-sided market, but you need to look at both sides.
12 The suggestion has been made, well, you should see it as
13 two markets connected in the middle. We say we
14 understand that, but it does not make any difference to
15 the practical testing.

16 But in terms of defining the market we certainly do
17 not get obsessed with whether it is a transaction market
18 or not. We can see differences with newspaper markets,
19 but we do not like the taxonomy that people have tried
20 to apply of particular categories being dealt with in
21 particular ways.

22 6:

23 "To what extent is the orthodox SSNIP test (as
24 opposed to possible variants ... [such as] SSNDQ ...)
25 ... an essential tool in defining markets? Do the tools

1 used for definition depend on the nature of the
2 market(s) being defined? If so, what (if any) factors
3 inform that choice?"

4 Well, we do not say SSNIPs are absolutely necessary
5 because we do not think that is what the guidance says,
6 and nor the economic logic, but they are pretty
7 invaluable now. There is a large body of learning and
8 consideration of these issues, so an orthodox SSNIP test
9 is the way forward, but using an SSNDQ is more and more
10 accepted in circumstances where you may have concerns
11 about how you run the pricing test, which is why we
12 suggest that that is an alternative way of dealing with
13 these issues on the consumer side, and we have touched
14 on Google and we have touched on annex H about the
15 tractability of those two alternatives.

16 7:

17 "In deciding whether HIP direct channels are
18 substitutes, or a potential substitute ... on the
19 consumer side ... is any SSNIP test (or ... SSNDQ)
20 appropriate to determine ... substitutability ...? If
21 yes, why?"

22 I think we have explained very fully why. In order
23 to get a picture of the full competitive constraints,
24 you do need to carry out that analysis on the consumer
25 side. Yes, we can see how you can run various

1 SSNIP-type analyses, but on the other hand we can also
2 see how SSNDQs, particularly on marketing, could be
3 valuable here given the online ranking issues that we
4 have been talking about, and in those circumstances our
5 main point is you have got to do that side, the CMA
6 asked no questions and carried out no analysis there, it
7 was only the indirect approach they adopted.

8 8:

9 "Does the market for provision of PCWs comprise only
10 the Big Four ... or ... other ...?"

11 We say it will be all. We do not see any reason
12 why -- we do not see a scale issue here.

13 9:

14 "If a SSNIP test on a two-sided market reveals an
15 alleged infringement which produces beneficial effects
16 on one side, and deleterious effects on another, how
17 does the synthesising of these results impact the
18 definition of the relevant market? Is the mechanical
19 application of the SSNIP test an appropriate means [of]
20 this balancing ...?"

21 I think it is worth slightly unpacking this question
22 because of course what it talks about is "beneficial
23 effects" and "deleterious effects", and of course that
24 is not quite what you are dealing with in relation to
25 a SSNIP test. What you are looking at is whether or not

1 the SSNIP tests are identifying constraints, and that is
2 the stage obviously in the Sainsbury's v MasterCard
3 approach which is well before effects.

4 So assuming here what is actually being asked about
5 is if you identify sufficient constraints on one side --
6 significant constraints on one side and not significant
7 constraints on the other, which may be what is actually
8 being asked about here, how do you carry out that
9 analysis, well, we say, well, look, just think about
10 that for a moment. Let us assume you find that in fact
11 there are very significant constraints on the consumer
12 side, you budge prices a little bit, people move away in
13 stampedes, you drop out of the top Google rankings or
14 you drop out of the organic top rankings, people just do
15 not come visit you.

16 Now, if that is the case, if you are in that
17 position, then in those circumstances you have very
18 significant constraints on how you can operate, and that
19 does need to be taken into account in how you then frame
20 your analysis of effects.

21 So you have to take that into account. The fact
22 that you might have concluded that on the insurer side,
23 well, actually, there is not such a constraint on the
24 insurer side, that is just not telling you that you
25 ignore the other constraints for the purposes of the

1 effects analysis. So it is not really a matter of
2 balancing. It is a matter of framing, which is of
3 course what the market definition exercise is intended
4 to do, the competitive constraints.

5 Balancing effects, pro-competitive and
6 anti-competitive effects is a very different issue,
7 I think, further down the analysis track, and of course
8 in this case we have not turned up saying there are
9 pro-competitive effects. We have just said there are no
10 appreciable anti-competitive effects. So I am not sure
11 if I am answering that question correctly, because I am
12 slightly taking issue with the language of it, but I am
13 very happy to revisit my answer if that is not of
14 assistance to the Tribunal and I do not know whether or
15 not that is of assistance to the Tribunal.

16 THE PRESIDENT: No, thank you.

17 MR BEARD: Most-favoured-nation status clause, this is
18 question 10:

19 "Is it right, when applying SSNIP test, to take
20 account of other market characteristics (in this case
21 narrow [MFNs]) which could act as a constraint on ...
22 price reduction ...?"

23 We have given a very full answer to this: no, that
24 is the wrong approach. You undermine the price
25 relativities. We have given a whole series of reasons

1 why that is not the right way of dealing with things.

2 There is just one point I realised I missed in
3 relation to this. Somewhere in their closings, the CMA
4 say, it is at paragraph 221 {B/65/108}, they say, "Ah,
5 but the narrow MFNs, they are terms of sale of products,
6 the relevant products", and of course in the US merger
7 guidelines it talked about maintaining relative pricing
8 and keeping all other terms of sale the same.

9 Well, with the greatest of respect to the CMA,
10 a narrow MFN clause between an insurer and a PCW is not
11 a term of sale of the insurance product to the consumer.
12 That is just wrong. So that does not take them
13 anywhere, but that is a little dongle on the side of
14 this argument, frankly. The issue is, is the wrong
15 approach to narrow MFNs.

16 "How robust is the evidence and arguments" -- I am
17 sorry, I am moving on to 11 -- "concerning the effects
18 of wide MFNs in relation to the issue of whether the
19 counterfactual is a world comprising no MFNs of any kind
20 ... in which an extensive network of narrow MFNs exists
21 between the majority of PCWs and HIPs?"

22 Now, here I think we are probably moving into the
23 counterfactual issues, and I think we have made very
24 clear you do then take into account when you are
25 thinking about the counterfactual the existence of the

1 narrow MFNs when you are talking about whether there is
2 an incremental impact of the wide MFNs.

3 If what you were getting at in this question was,
4 well, can you just make a presumption in the SSNIP world
5 that everyone has narrow MFNs even though they do not in
6 the real world, we say no, you cannot, and that is just
7 another reason why their approach is wrong. So I hope
8 I am answering that question relevantly.

9 Then 12:

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

12 The emphatic answer to that is no, but it is not
13 just the concept of effects, it is effects and they have
14 got to be not insignificant, in other words appreciable.
15 So, no, it is not about the concept of wide MFNs, and
16 indeed one of the problems with a lot of the material
17 from Professor Baker and indeed much of the material we
18 see in the Decision is it starts from the position of:
19 we have grave concerns about wide MFNs because of the
20 literature and in those circumstances we carry that
21 forward very much in the way that we interpret the
22 evidence and decide whether or not to do econometrics or
23 other matters, issues that we will come on to after the
24 short adjournment.

25 So that was a brief canter through 1 to 12 of your

1 questions. Obviously, if there are any follow-ups, I am
2 very happy to deal with them.

3 THE PRESIDENT: I am very grateful, Mr Beard, thank you very
4 much. We will resume at 2.05.

5 MR BEARD: I am grateful.

6 THE PRESIDENT: Thank you.

7 (1.16 pm)

8 (The luncheon adjournment)

9 (2.09 pm)

10 MR BEARD: Good afternoon. Unless there are other matters
11 relating to market definition, as I say, I am going to
12 move on.

13 Given the way in which the evidence was being
14 presented I went relatively light on econometrics in
15 opening because obviously we were going to hear from
16 Dr Niels but more particularly Ms Ralston, but I am
17 going to promote it, if I may, in terms of ordering, so
18 I know it takes my closing slightly out of order, and
19 effectively I am now jumping ahead to part 2B which is
20 on page 87 beginning at paragraph 263 {B/64/89}. It is
21 perhaps just worth framing what we are discussing here
22 in terms of what the CMA actually had.

23 We have set that out in summary at 266.

24 They had plenty of data, including on commission
25 rates and retail prices, and we have given references to

1 the data sets mentioned in the relevant annexes.

2 More particularly, of course, we have had the
3 situation where ComparetheMarket disapplied the wide
4 MFNs in November 2017, so we have this natural
5 experiment phenomenon, and we also have a range of
6 econometric tools that are essentially fairly well
7 recognised to be able to make enquiries into these
8 matters, particularly pertinent, one might think, when
9 one is talking about an allegation of generalised
10 effects on retail prices and on commissions so far as we
11 can see.

12 What does the CMA say about it? Well, first of all,
13 in rejecting giving any weight to the econometric
14 materials that have been put forward, the CMA says two
15 things.

16 First of all, we were "not required to demonstrate,
17 still less quantify, an actual effect on prices". Well,
18 there are two things to say about this. One is the
19 question of whether or not they were required to
20 demonstrate an actual effect on prices when their
21 allegation was that there was an effect on prices is
22 something that I think we may well come back to towards
23 the end.

24 If what is actually being said here is, well, we
25 were not required to demonstrate it by way of

1 econometrics, we understand that, but that is beside the
2 point here because the issue is here is econometric
3 evidence in relation to prices relevant, and I think the
4 obvious answer to that is clearly yes, it is, if and
5 insofar as it can be meaningful.

6 If, obviously, it cannot be in any way meaningful,
7 then the question of relevance does not really arise,
8 but it means that the first objection does not take the
9 CMA anywhere because so long as the material is
10 relevant, they should have taken it into account, even
11 if they should have given it low weight, we say not, but
12 even if they should have given it low weight, they
13 should have taken it into account and they just did not.
14 They rejected it.

15 That essentially takes us to the second argument
16 which is meaningful econometrics is not possible here,
17 and that we start dealing with at paragraph 171
18 {B/64/57} in our closings.

19 THE PRESIDENT: I think 271.

20 MR BEARD: I am so sorry, 271 {B/64/91}. My facility with
21 three digits is diminishing over time. I promise I can
22 count that high. So page {B/64/91}, I am so sorry. So
23 econometrics is not possible here. The first point
24 I wanted to start off with is not to do with the details
25 of the econometrics carried out. I do want to pick up

1 what we are being accused of making jury points about,
2 which is the DCT econometrics.

3 Could we see that for a moment? It is at {B/16/95},
4 please.

5 This is appendix 2 to paper E to the digital
6 comparison tools market study, and I went to this in
7 cross-examination, so you have seen this.

8 What this study does, it looks at the situation
9 where after the ending of wide MFNs in the motor
10 insurance market following a study where it was found
11 that over 80% of the market was covered by them and so
12 on, the CMA decided that it would carry out an
13 assessment effectively using the natural experiment
14 phenomenon because the PMI wide MFNs had been withdrawn
15 in 2015, and so they had well over a year following on
16 from the PMI withdrawal to consider whether or not they
17 were able to identify any effect, and here in particular
18 effect on commissions.

19 So they carried out this analysis, and the
20 methodology will mean more to Professor Ulph than
21 certainly it does to me so I am going to skip over that,
22 and if we could just go down, I think it is to
23 paragraph 10, {B/16/97}, you just see some of the data
24 being collected, and the only reason I highlight that is
25 because the data that was collected by the CMA and then

1 used by Ms Ralston in her econometric analysis in
2 relation to commissions, in relation to home insurance,
3 that is materially identical categories of data and
4 processing of that data.

5 Then if we go down to paragraph 21 which is on
6 page 100, {B/16/100}, you will then see another point
7 I took the witness to in cross-examination. After the
8 relevant table that sets out the econometric results --
9 sorry, can we just shrink that again just for a second?
10 Thanks. Sorry, it was my fault. You will see the
11 regression results set out in the same way that -- the
12 standard way that Ms Ralston has done, and then we see
13 "Testing for pre-removal effects". So the CMA do this
14 analysis, they come out with an outcome, and then they
15 test whether or not there might be other sorts of
16 effects distorting that outcome, affecting it in some
17 way or another, possibly over-counting, possibly
18 undercounting, then they talk about testing for
19 pre-removal effects, in other words commissions were
20 already changing prior to the removal of the wide MFNs,
21 and then if we go down to 25 {B/16/102}, paragraph 25,
22 you will then see a series of further robustness checks
23 that were being carried out.

24 So on the face of it what you have is insurance in
25 relation to cars being provided through PCWs where you

1 have PCWs, you have direct channels, you have wide MFNs,
2 you have the wide MFNs being withdrawn, you have
3 a period without the wide MFNs where you have all this
4 data, so you carry out a controlled assessment,
5 precisely what Ms Ralston sought to do in relation to
6 home insurance, and if we could then just turn up her
7 report, again you have seen this because I took
8 Professor Baker to it, {A/5/108}, paragraph 6.15 through
9 to 6.17. If the Tribunal just wants to remind itself of
10 those paragraphs. (Pause)

11 Just flip on to 6.17 {A/5/109}.

12 So Ms Ralston made this plain. Professor Baker
13 really had no good answer why he had not engaged with
14 this, given his instructions were to look at the
15 material in Ms Ralston's report, but let us leave that
16 to one side for the moment, although it is significant
17 that the one witness who should have been able to deal
18 with this could not in any way and had not engaged
19 at all.

20 We then pick up in paragraph 273 {B/64/92} of our
21 closing submissions the profound irony of what is being
22 said about motor insurance given the terms of the
23 Decision. It is a hugely amusing parlour game counting
24 the number of PMI references through the Decision.
25 There are hundreds of them.

1 Indeed, the CMA actually holds against us, and we
2 will come back to this when we come to penalty, it holds
3 against us what had gone on in relation to motor
4 insurance because it says, well, you should have known
5 what was going on because of what was happening in motor
6 insurance. In other words, this market is so similar,
7 this was the message to you.

8 We say there were real differences between what was
9 actually going on, but it makes no difference to the
10 ability to carry out the econometric analysis, and, as
11 we note in paragraph 274, remarkably, there is not
12 a single reference to appendix 2 in the whole of the
13 Decision.

14 Just taking at face value at that point this was an
15 issue that obviously demanded clear and full
16 explanation. How is it that in relation to an adjacent
17 market where you CMA are saying, look, you should have
18 drawn lessons from motor insurance, you did not even
19 refer to or consider the possibility of econometric
20 analysis in relation to either prices or in particular
21 commissions when you had done precisely that in
22 a digital comparison tools study, which was the thing
23 that actually led you, led you, to begin this
24 investigation. It cried out for explanation and none
25 was given or has been given as to why it is econometrics

1 is impossible here in the face of this.

2 There are just a couple of points I want to make
3 about the study. Given the way in which the CMA has
4 developed its case, and particularly --

5 PROF ULPH: I am sorry, Mr Beard, it is not the issue of
6 whether econometrics is possible, is the issue not about
7 meaningful econometrics?

8 MR BEARD: Yes, you are quite right. I am putting the two
9 things together. When I am referring to econometrics,
10 it is a shorthand for meaningful econometrics. I hope
11 I made that clear at the start.

12 PROF ULPH: Okay, thank you.

13 MR BEARD: The point I make here is when I talk about
14 econometrics in the DCT study, it is clearly meaningful
15 econometrics. Ms Ralston has quoted in paragraph 6.16
16 what the CMA said about its own econometric analysis,
17 that the evidence we have gathered and particularly our
18 econometric analysis shows that the prohibition of wide
19 MFNs has led to an increase in competition.

20 In other words, they particularly relied upon it,
21 and I accept this is a jury point, they presented this
22 at the International Conference on Economics for
23 Competition Economists as the piece of work that they
24 had done in the past year. Whether they were most proud
25 of it, I do not know, I am not going to make

1 a submission on that, but they clearly thought it was
2 something that warranted airing to the wider world, and
3 it warranted airing to the wider world notwithstanding
4 that there are no references to spillovers at all in
5 relation to this.

6 So this notion of spillover that Professor Baker
7 considers to be so significant and that the CMA relies
8 upon in the Decision, it does not even feature in any of
9 the considerations or any of the testing here.

10 Now, given that they were carrying out sensitivity
11 and robustness testing, you would have thought at least
12 it would have warranted a mention if it was a real
13 concern. Apparently not. Apparently not. But
14 nonetheless that is what wholly undermines, according to
15 the CMA and Professor Baker, the use of meaningful
16 econometrics here.

17 PROF ULPH: Sorry, Mr Beard, just to make another point, you
18 might take the view that spillovers are more of
19 a concern if you are using difference-in-difference
20 techniques, whereas as I understand it, this DCT study
21 did not use difference-in-difference. It just used time
22 series. Am I right?

23 MR BEARD: It is precisely the same methodology that
24 Ms Ralston used in her commission analysis.

25 PROF ULPH: So difference-in-difference?

1 MR BEARD: It was a form of difference-in-difference, yes.

2 PROF ULPH: Okay.

3 MR BEARD: That is the point here. Ms Ralston did not
4 conjure in relation to commission analysis here some
5 novel and highly creative approach. She took what had
6 actually been done in the DCT study and used the same
7 methodology effectively.

8 In relation to methodology, in a long answer to your
9 question, Professor, in relation to the methodology,
10 there is no reason to consider -- spillovers were more
11 or less important in the DCT methodology as compared to
12 here.

13 PROF ULPH: Thank you.

14 MR BEARD: The same is actually true of precision concerns.

15 There are no identified precision concerns in relation
16 to the DCT methodology. There are neither persistence
17 concerns, nor heterogeneity concerns. As I say, nothing
18 in the Decision that explains why the CMA thought here
19 there were spillover, persistence and heterogeneity
20 concerns in relation to this econometric assessment when
21 they had not identified any of those problems
22 previously.

23 Now, in addition -- sorry, I should have said in
24 relation to the Decision it was spillovers, persistence
25 and heterogeneity. The precision point is actually

1 Professor Baker's. It does not actually appear in the
2 Decision, but we deal with it anyway.

3 So the situation is that we have no account in the
4 Decision, we have a witness that cannot speak to it,
5 notwithstanding that this was put out there very clearly
6 back in February this year when we launched the appeal,
7 and so we have no answers.

8 Then let us just take this unsatisfactory position
9 and take the position as the CMA seems now to be putting
10 it, because in their closing submissions we are now
11 getting effectively evidence put in at paragraph 365 of
12 their submissions -- 385, I am sorry, of their
13 submissions, which is on page {B/65/175}:

14 "The CMA's position is that the commissions analysis
15 in the DCT Investigation was also likely to have been
16 affected by spillovers."

17 I do not accept that as a statement of evidence. It
18 is not given by a witness. The CMA produced a witness
19 who was incapable of speaking to these issues. It is
20 not appropriate for the CMA in closing to make those
21 sorts of factual assertions without the witness being
22 present to be tested on them.

23 There is no explanation of why this answer could not
24 have been given in the Decision. There is no
25 explanation of why it is that these matters were not

1 dealt with by Professor Baker. So it is further
2 unsatisfactory to seek in closing to try and suggest
3 there was a similar problem in the DCT analysis when it
4 is not mentioned at all. Zero references. So we do not
5 accept it, and we say the Tribunal cannot either.

6 Then just for the sake of argument, let us take it
7 at face value. What is the CMA actually saying here?
8 They are saying there were spillovers in the DCT
9 investigation. There were spillovers in the DCT
10 investigation, but meaningful econometrics was possible
11 there.

12 Now, we do not understand what position is now being
13 adopted. We did think there were spillovers, we went
14 ahead and did the econometric analysis anyway.

15 Now, we quite understand that the argument is that
16 spillovers can reduce the level of effect that is
17 identified through the econometric analysis, so perhaps
18 the CMA are saying, well, look, we came out with
19 a positive answer in the DCT analysis, and so it was
20 possible to do something meaningful there even though
21 there were spillovers, because all it does is
22 underestimate the analysis. But that is a wholly
23 unsatisfactory answer because you do not start off
24 econometric analysis, if you are doing it properly,
25 pretending you know what the answer is. The whole

1 essence of doing econometric analysis is you start off
2 trying to use objective economic tools on a wealth of
3 data in order to be able to test whether there is an
4 effect.

5 In other words, if you thought there were
6 spillovers, that is something that you would have wanted
7 to consider at the outset of deciding whether or not to
8 carry out an econometric analysis, and it is a matter
9 you would have identified in the course of considering
10 your econometric analysis, and the expectation would be
11 if you thought there were spillovers, you would have
12 conditioned your answer to say, well, we are concerned
13 about spillovers, and, therefore, we think this estimate
14 is an underestimate because of our expectation of
15 spillovers. Do we see any of that in the DCT material?

16 We do not. Not a reference.

17 PROF ULPH: Mr Beard, can I just make another point at this
18 stage?

19 MR BEARD: Yes.

20 PROF ULPH: I think there are two rather separate questions
21 that we need to think about in relation to spillovers.
22 One is, how does it change the value of the estimated
23 coefficient? The second is, what does it do to the
24 significance of that coefficient? So it is quite
25 possible that spillovers could increase the size of the

1 coefficient. You could take a coefficient that seemed
2 to be significant ignoring the spillovers and became
3 insignificant when you took spillover seriously.

4 The converse is true. Ms Ralston has results that
5 say there is an estimated coefficient that is positive
6 but statistically insignificant. Even if it were the
7 case that spillovers would raise that coefficient, it
8 does not guarantee that a higher coefficient is
9 statistically significant.

10 MR BEARD: That is true.

11 PROF ULPH: I think one has to sort out what is the impact
12 both on the value of the coefficient and what is the
13 impact on the degree of significance of the coefficient.

14 MR BEARD: I entirely see your point, Professor. I want to
15 take it in stages, if I may.

16 I want to look at the overall scale of the alleged
17 effect because I think that is what is important, and
18 I think it is what the CMA have fundamentally missed in
19 their critique here.

20 It was crying out for an explanation, none has been
21 given, that is wholly unsatisfactory. Now they say
22 actually spillovers were present, they were still able
23 to do the econometrics, it becomes less clear, not more
24 clear, why it is they did not do it here.

25 So they are coming up with a new reason that they

1 have not given before, and it is not, on the face of it,
2 justified as to why econometrics is not meaningful, but
3 there is a further fundamental problem here, because, as
4 you rightly say, Professor, what has happened in the DCT
5 investigation, assuming that spillovers were present,
6 was that they determined that notwithstanding the
7 existence of spillovers, they actually get a positive
8 outcome. They get a positive effect from the
9 econometrics.

10 Now, of course, what we see in Ms Ralston's analysis
11 is an outcome from the econometrics which says,
12 "I cannot identify something statistically significant
13 different from zero and actually when I look at the
14 confidence interval what I am identifying are
15 coefficients that are at or close to zero". Now, the
16 reason that that is significant is that in the DCT
17 study, what is implicitly being found is that whatever
18 level of spillover exists on this new hypothesis that is
19 being put forward by the CMA, whatever level of
20 spillover is being identified it does not match the
21 magnitude of any adverse effect.

22 In other words, we are finding from the motor
23 insurance econometrics that whatever spillover is, it is
24 less than the adverse effect, and of course that matters
25 critically when we are talking about Ms Ralston's

1 material because the only way that this story really
2 works at least in relation to the magnitude, in relation
3 to Ms Ralston, is that the spillover effect in this
4 market equates effectively to the adverse effect that
5 would otherwise be identified under the econometric
6 analysis because that is how you end up with something
7 looking like zero or close to zero.

8 Ironically, what the DCT investigation is saying is
9 that this predicate of Professor Baker's analysis and
10 CMA's analysis, that the spillover effect wipes out any
11 finding of adverse effect, is shown to be wrong in the
12 DCT analysis and of course Ms Ralston does not just --
13 has not just left it at, well, I assume there are no
14 spillovers, she has actually gone away and tested for
15 these things, and one of the things we know is that,
16 whatever the criticisms of the CMA of those robustness
17 checks, if there were a mismatch, a material mismatch,
18 between the level of adverse effect and the spillover
19 effect, those tests and her overall econometrics would
20 have detected that and give an indication of spillovers,
21 and they do not.

22 So there is a real irony about the position that the
23 CMA has now adopted. By throwing out this piece of
24 asserted evidence without any basis, they are actually
25 showing not only can meaningful econometrics be done in

1 relation to motor insurance and giving no reason why it
2 cannot be done in relation to home insurance using the
3 same data, but they are actually showing that the
4 spillover effects that they are talking about in motor
5 insurance are significantly less than the adverse effect
6 that they identify in motor insurance which is why you
7 get a net adverse effect assuming there are these
8 spillovers.

9 If you are then drawing on that for the current
10 case, where you have econometrics that say I have no
11 indication of any adverse effect and not one that can be
12 statistically significant, then in those circumstances
13 the magnitude of the spillovers need to essentially be
14 matching that putative adverse effect and the DCT
15 analysis undercuts that. It suggests that is not right,
16 that is not the assumption you should be working on, and
17 the basis on which the CMA are proceeding is flawed.

18 We say we started off saying we do not understand
19 why you could not do it in both places, had a totally
20 unsatisfactory position in relation to witness evidence,
21 which should effectively damn the CMA in any event.
22 They then in closing try to dance round this but they
23 take a massive misstep in relation to the dance that
24 they are undertaking here, because if that is true
25 actually the DCT analysis works against them.

1 In relation to the points in relation to statistical
2 significance that you raise, could I go back to
3 paragraphs 312 and 313 {B/64/103} in our closing
4 submissions, Professor, because here Ms Ralston is cited
5 as explaining why the issues of statistical significance
6 do not make any difference to this issue.

7 It might just be sensible, rather than me reading it
8 out, if the Tribunal reads 312 and 313. If, Professor,
9 you want to call down when it moves, or whoever does,
10 that is fine. (Pause)

11 PROF ULPH: May we have the next paragraph, please.

12 {B/64/104}. (Pause) Okay, thank you.

13 MR BEARD: If we could go over the page again {B/64/105},
14 thank you. (Pause)

15 I think the key point here, Professor, is the nature
16 of the point estimates actually being zero or
17 potentially pro-competitive which is not consistent with
18 the problem in relation to statistical significance
19 arising, is my understanding of the position.

20 I am extremely trepidatious about entering into
21 further explanations about these matters without further
22 input from Ms Ralston, but if, Professor Ulph, you have
23 specific questions in relation to this, I think it may
24 well be that we have reached the end of the degree to
25 which I can assist on these matters, but I do emphasise

1 the points I have already made about the instructive
2 nature of the DCT findings in relation to what we are
3 dealing with in any event.

4 PROF ULPH: Okay. I do have an observation, something which
5 will perhaps have to feature more in our judgment than
6 in questioning today. I think you are conflating two
7 separate issues. One is the question of whether there
8 is bias in the estimates and the extent of that bias and
9 the extent to which spillovers relate to the magnitude
10 of the effect, because all you are talking about here is
11 an estimated effect, and that could be different from
12 the true effect of the wide MFNs are having on either
13 commissions or retail prices. So I think I can see what
14 you are saying and I think I understand what you are
15 saying. I might want to put the points in a different
16 way myself, and I will need to reflect on that in the
17 judgment, but at least I think I now understand the
18 points you are making, but as I said, I think it is
19 really important to be clear about what is the impact of
20 spillovers on the magnitude of the coefficients and what
21 is the impact of spillovers on the degree to which those
22 are significant.

23 So if you correct for it properly, it seemed to me
24 it is an open question as to whether -- if you correctly
25 corrected for spillovers, I think the new estimates

1 would be higher, but whether they are of statistical
2 significance I think is still an open question, and the
3 same would be true for the DCT study. If you could
4 somehow correct for spillovers and do the econometrics
5 correcting for that, the estimated coefficient could be
6 higher. At the moment it is statistically significant
7 in the DCT study, but it is an open question as to
8 whether it would remain statistically significant once
9 you corrected for this.

10 So I think you really need to sort out the impact on
11 the magnitude of the coefficient, the impact on the
12 degree of significance of the coefficient, and how that
13 relates to the size of the actual harm if you had a true
14 estimate of that harm, and I think those are three
15 rather separate issues.

16 MR BEARD: Sir, understood, and I will go away and think
17 about further the conflation issue, but I do think it is
18 important to take a step back here and ask ourselves
19 what we are seeing in terms of whether or not
20 econometrics can be meaningfully undertaken here,
21 because, sir, you may be right that there may be
22 arguments to be had about how certain matters are to be
23 interpreted. I am not disputing that in relation to
24 econometrics. I have been around enough econometricians
25 enough times to know that there are almost infinite

1 debates to be had about these issues.

2 PROF ULPH: Yes.

3 MR BEARD: But we are looking at a bigger question here,
4 which is the findings of the CMA that because of the
5 existence of spillovers no meaningful econometric
6 analysis can be carried out.

7 Now, the point we are making is they did carry out
8 econometric analysis. They are now saying they carried
9 out meaningful econometric analysis in the face of
10 spillovers. We say that in and of itself is highly
11 instructive that you can carry out meaningful
12 econometric analysis in the face of spillovers.

13 More than that, in this case, we have tested for
14 whether or not there are spillovers using a range of
15 tests and identified there are not, which I will come on
16 to, but furthermore the DCT study indicates that you
17 cannot make an assumption at least in relation to
18 magnitude, and I pause here in relation to statistical
19 significance, but at least in relation to magnitude that
20 the magnitude of the effect of spillovers is akin to the
21 adverse effect you are identifying in motor insurance,
22 and that is a key part of Professor Baker's approach
23 here.

24 He is essentially saying the magnitude of the
25 spillovers would wipe it out. He does also touch on

1 statistical significance, but what he is saying is the
2 magnitude of the spillover would wipe it out, and he has
3 just no basis for it, and actually the DCT study is
4 saying not only do you have no basis for it, you have
5 compelling evidence in the opposite direction. Those
6 are the bigger points I think that we do not want to
7 lose sight of here, and the final big point, I think it
8 is very, very important to emphasise in all of this, is
9 that it is not the exercise of Ms Ralston to try and
10 prove that there is a zero effect. What is being said
11 here is, can you meaningfully use econometrics to see
12 whether or not there is an effect.

13 Ms Ralston, for the appellant, goes away and tries
14 that and finds zero.

15 In doing so, what is being said is that casts severe
16 doubt on the analysis of other evidence that the CMA has
17 undertaken suggesting there is an appreciable adverse
18 effect, but it is not for her to prove these matters.

19 What we are saying is actually what the CMA could
20 sensibly have done is done econometrics to see whether
21 or not it showed a positive effect because given you are
22 talking about generalised effects on pricing and
23 commissions, that is what you should have done, instead
24 of saying, econometrics is not meaningfully possible
25 here, and I just do not want to lose sight of that

1 further point, Professor, in the detail of the
2 discussion.

3 PROF ULPH: I understand the point you are making.

4 Can I just put down one further point --

5 MR BEARD: Please.

6 PROF ULPH: -- which is in my opinion I do not think you can
7 ever prove that effect is zero. I think you can carry
8 out estimates and you can ask yourself the question is
9 our central estimate positive, and if it is positive, is
10 it statistically significant. If it is not
11 statistically significant, are you saying you cannot
12 reject the hypothesis that it is zero.

13 MR BEARD: Exactly.

14 PROF ULPH: But I have yet to come across a test which would
15 prove that it is actually zero. You cannot prove
16 anything with statistics. All you get are -- at best
17 you get estimates, you get an estimate of an effect.
18 Even having done the econometrics, you are still in the
19 position where you do not know what the true effect is.
20 You have an estimate of the effect, but you still do not
21 know what it is.

22 So I just do not think using statistics you can
23 prove for sure that an effect is zero, or in fact
24 anything else. You cannot prove it is 0.5 or --

25 MR BEARD: Just to be clear, Ms Ralston is not trying to

1 prove zero, that is not her position.

2 PROF ULPH: I understand that. I understand that,

3 I understand that.

4 MR BEARD: Yes. It is whether or not this is meaningful,
5 and I think our point is, yes, it is more than a little
6 meaningful. It is highly meaningful in this context,
7 and the reasons that have been given why it is not
8 meaningful to do this sort of exercise are flawed, and
9 I think that is the key point in relation to all of
10 this.

11 That deals with why DCT is very, very far from
12 merely a jury point in relation to this but provides
13 important evidence that could have been taken into
14 account, certainly should not have been ignored, and
15 should in fact have been tested in these proceedings.

16 I should just go back for completeness, if we could
17 just go back to paragraph 300 {B/64/100} in our closing
18 submissions, I would just invite the Tribunal to read
19 paragraph 300. I know you have read it before, but it
20 just deals with the precision issue again. (Pause)

21 Then if we could move on to the following page, or
22 it may be two pages on, paragraph 305 {B/64/102}, the
23 top of the page, we have lost the heading, but it is the
24 proportionality question. There is no issue of
25 proportionality. It has been phrased -- it has been

1 framed by the CMA in these terms. You had the data, you
2 had the tools. The idea that this was not possible or
3 proportionate in a case where you are imposing a penal
4 sanction when you have carried out this sort of analysis
5 in a study a couple of years ago just is not tenable.

6 Below that we then deal with spillover effects more
7 generally from paragraph 306 onwards. If we could pick
8 it up at 314 {B/64/105}, this is essentially moving away
9 from some of the econometric argument that we have just
10 been dealing with, because one of the other things I do
11 not want the Tribunal to lose sight of, is the paucity
12 of evidence that the CMA proffers that spillovers exist.
13 We go back to those evidence gathering concerns that we
14 have articulated before. Were questions asked about
15 issues to do with spillovers in terms? No. Was the
16 information that was gathered such as to give good clear
17 indications that any sort of spillovers existed? We say
18 not. Was it strong evidence in these circumstances?
19 Certainly not, in relation to what has become a critical
20 part of the CMA's account in relation to econometrics.

21 At 314 we touch again on three insurers that have
22 been relied upon by the CMA in relation to these issues.
23 I will not read out the names because they are blanked,
24 but I took you to this material in opening.

25 As you will recall the first insurer that is

1 supposed to indicate that there was a huge spillover
2 effect from the removal of the wide MFNs actually
3 thought that it had a wide MFN with carve-outs in it, so
4 it is a very strange candidate to be treated as an
5 indicator of spillovers, and spillovers being effects on
6 non-covered HIPs.

7 We recognise of course that in fact it is correctly
8 categorised as a non-covered HIP, but the point we make
9 is that the terms of its arrangements mean that relying
10 on its evidence make it not compelling.

11 Then we move on to the next two.

12 In relation to the second one, the supposed evidence
13 of spillover effect actually related to a broader change
14 in strategy where it was moving from motor insurance to
15 home insurance, nothing to do with wide MFNs in relation
16 to home insurance at all. So insofar as it started
17 engaging in more activity in relation to home insurance,
18 that was part of a broader strategic move, nothing to do
19 with wide MFNs. That is what the evidence shows.

20 Then the third one is a particularly odd choice
21 since for half of the relevant period it was subject to
22 a wide MFN, just not a wide MFN put in place by
23 ComparetheMarket, but if you are trying to draw
24 information from the position of those three, picking an
25 insurer that was subject to a wide MFN for a substantial

1 period of time is obviously not a useful comparator in
2 those circumstances, and that in essence is the core of
3 their evidence about spillovers.

4 So the story is you have these three that give us
5 factual evidence about spillovers which we say is wholly
6 tenuous, and beyond that you are into the realm of
7 speculation. You are into the realm of
8 Professor Baker's speculation that all of these
9 non-covered HIPs would react immediately, dynamically,
10 hugely, possibly in anticipation of the wide MFNs being
11 withdrawn, even though none of them had any idea when or
12 if those wide MFNs were going to be withdrawn. It is
13 total speculation. There is not a good story there
14 about spillovers when we look at the factual evidence
15 quite apart from all of the material we have dealt with
16 in relation to the assessment of spillovers on the
17 econometrics.

18 PROF ULPH: Can I just make a point at this stage that there
19 are two different stories you could tell I think about
20 spillovers. One is that the removal of wide MFNs caused
21 non-covered HIPs to change their behaviour, their
22 pricing strategy, or their business strategy. The other
23 is that if the removal of wide MFNs caused covered HIPs
24 to change either their prices or their propensity to do
25 promotional deals or up their commission rates, that

1 could cause non-covered HIPs to respond to those changes
2 in prices or to the changes in their need to do
3 promotional deals, even if they were completely unaware
4 about wide MFNs, they are just responding to, in
5 a competitive market, to the changes in the competitive
6 variables that are being chosen by the covered HIPs.

7 So how would that mechanism get covered by your
8 arguments that you have just put forward for saying that
9 there is no evidence here of spillovers or what we know
10 are likely (inaudible) to be spillovers?

11 MR BEARD: Well, if we just take them in turn, in relation
12 to the first, the idea that narrow MFNs change strategy
13 because of the withdrawal of the wide MFNs without the
14 covered HIPs doing anything different requires something
15 of a clear account of why it is that the absence of
16 those wide MFNs that did not apply to them caused them
17 to do something different in circumstances where they
18 could have done this anyway. So on the first point, you
19 would need quite clear evidence. On the second --

20 PROF ULPH: Just to be clear, I agree with you on that
21 point, I think you would need to have an account as to
22 why they would change their behaviour, I agree with you.

23 MR BEARD: I think that one is relatively clear. But then
24 in relation to wide MFNs, what you would need to see is
25 changes in conduct by the covered HIPs who are no longer

1 covered, and then a triggering effect, and you would
2 expect to -- I think it has been referred to as
3 iterative. So you would expect the changes in conduct
4 by the wide MFNs then to impact the narrow MFNs and then
5 I think, Professor, in the course of discussions you
6 talked about the possibility that then the formerly
7 covered HIPs then react and so on, and you have seen
8 changes in dynamics in the market, but in order to show
9 that you have to focus on what did the wide MFN covered
10 HIPs do when the wide MFNs were removed, and what we see
11 is a grand total over 19 months of a move from five
12 promotional deals to nine -- four promotional deals more
13 in 19 months.

14 Now, the idea that those four triggered some sort of
15 wholesale change in the way that narrow MFN,
16 ie non-covered HIPs operated is just not something that
17 is borne out in any of the evidence. Just looking at
18 that element of the evidence, you do not have any good
19 story there, and it is partly to do with the fact that
20 we are dealing with tiny numbers of promotional deals
21 being this notional increase, and that is before we get
22 into Ms Ralston having done a regression analysis and
23 saying there is actually nothing meaningful going on
24 here and you have completely decontextualised
25 promotional deals and they are a tiny part of the

1 competitive dynamic.

2 So that is why we say, the first version you need
3 a very good story and you just do not have it, it is
4 speculation. The second one, you need a good story and
5 evidence of this triggering effect. You have not
6 identified substantial triggers here because you have
7 not identified substantial changes in the covered HIPs'
8 behaviour and in those circumstances this is all
9 speculative too, and then we go back to the other
10 evidence that I have already adverted to of three
11 non-covered HIPs, so-called, one of them being partially
12 covered for the period by a different wide MFN, and we
13 say, look, this is just not amounting to anything here.

14 This story that there is a huge spillover such as to
15 wipe out any adverse effect, you just do not have it,
16 you are not even close to it. It is a bootstraps
17 argument where you assume that there are massive
18 spillovers in order to give an account for nothing
19 apparently happening, and then once you have assumed
20 massive spillovers, you then essentially try and
21 engineer a story to support them, and in essence that is
22 what the narrative given by Professor Baker was. He
23 thought there were lots and lots of spillovers, and
24 there were all sorts of problems here, notwithstanding
25 the fact that he had not looked at any of the underlying

1 evidence.

2 That is a rather long answer, Professor, to your
3 question, but I hope it deals with both planks.

4 PROF ULPH: Yes, it does, yes, thank you.

5 MS LUCAS: Mr Beard, when you gave your answer to
6 Professor Ulph, you referred to the promotional deals.
7 I think he hypothesised three elements, whether the
8 removal of WMFNS caused covered HIPs to change their
9 prices, promotional deals or commission rates.

10 MR BEARD: Yes.

11 MS LUCAS: Are you going to come back at some point to
12 commission rates?

13 MR BEARD: Commission rates, yes. In a way, the table that
14 I showed you beforehand I think it is {F/715} I think.

15 MS LUCAS: The graph of 2018 that showed the --

16 MR BEARD: Yes, you just have no indication. The problem
17 here is that is the best we have got, CMA do not do any
18 analysis of this beyond it. Indeed, Dr Walker had not
19 even looked at this one, because he did not consider
20 anything going beyond 2017.

21 If you give me one second I will get it pulled up
22 for you, Ms Lucas.

23 MS LUCAS: If it is the graph you are referring to,
24 I recall it.

25 MR BEARD: Yes, {F/724/1}. That is on commissions. In

1 relation to differential pricing, I will come back to
2 it, but you will have seen at the back of our closing
3 a decorative chart. Unfortunately yours may be portrait
4 rather than landscape which may make it slightly less
5 easy to read, but what you will see we have actually
6 done is we have looked at, in relation to each of the
7 key HIPs, just reading along the top line, so I am going
8 to ask someone for a page reference as to where that is
9 in our bundle. I think it will start after page --
10 starting on page 139, I think {B/64/140}. 140 I am
11 told.

12 Just so you have it, I will be coming back to this
13 probably tomorrow morning, but just so you have it, what
14 we have done is, in relation to the HIPs, we have looked
15 at whether or not there was any evidence of interest in
16 differential base pricing during the relevant period and
17 then afterwards, and we have done the same in relation
18 to promotional deals and we have actually identified
19 which HIPs did how many promotional deals, so you can
20 see the tiny and marginal shifts, sometimes downwards,
21 sometimes upwards, but not meaningful, but in relation
22 to differential base pricing, what you will see is some
23 people had something of an appetite for it.

24 If you turn on to I think page 147. Back one, I am
25 so sorry, my miscalculation {B/64/146}. This is just an

1 example I went to in opening because I showed you
2 a graph of how they did pricing during the relevant
3 period. I am not referring to the name. You will
4 remember there was a graph that had a spread and then
5 weirdly it actually tightened after the period of the
6 wide MFN. So that HIP clearly was perfectly happy doing
7 a form of differential pricing, and then it said
8 afterwards there was no change in its appetite for doing
9 differential pricing. Slightly ironic because actually
10 it looks like it diminished, but overall the point is
11 that it was not increasing. So you are not getting any
12 sort of dispersion effect which is what you really need
13 to have as the trigger if one is referring to what
14 Professor Ulph is hypothesising in relation to his
15 spillover effect.

16 I do not know if that helps. We have tried to do
17 that systematically in relation to each of the HIPs, so
18 that might be of assistance and I will come back to it
19 tomorrow.

20 MS LUCAS: Thank you. Sorry, I should actually possibly
21 make clear, you will have seen that some of the
22 evidential questions relate to commissions and how much
23 evidence there is about that.

24 MR BEARD: Yes.

25 MS LUCAS: That probably is part of the background to my

1 earlier query.

2 MR BEARD: Yes, no, understood, and I will be coming back to
3 commissions and I will make sure I sweep up those
4 evidential questions. I was just trying to work through
5 the chunks, but I hope that that is at least some sort
6 of response in relation to the three dimensions that you
7 are talking about, so promotional deals, pricing and --

8 MS LUCAS: Thank you.

9 MR BEARD: Yes. I was dealing with evidence in relation to
10 the spillovers and the limitations of that.

11 At paragraph 315 we simply articulate what
12 Professor Baker was saying which I think I have already
13 paraphrased {B/64/105}.

14 Then if we go down to 318, {B/64/106}, I do not want
15 to lose sight of the fact that -- we are having these
16 discussions about spillover effects and actually
17 Ms Ralston did test for them. There have been various
18 criticisms made of the tests, the leads and lags test,
19 which is dealt with at 318(a), the changes of pricing of
20 non-covered HIPs over three-month periods after the
21 post-disapplication {B/64/107}.

22 Then we have the third and fourth tests, {B/64/108}
23 where effectively what Ms Ralston does is tries to
24 effectively amplify the outcome of any test by, in the
25 first instance, retaining two of the -- only two of the

1 potentially most affected HIPs, the ones that the CMA
2 have placed great weight on.

3 Now, the CMA say, oh, yes, but lots of the other
4 HIPs, on our case, they are all affected, to which you
5 say, well, actually, that really just does not stack up
6 in any of the evidence. But really it does not matter
7 because what is being done is you are distilling out as
8 the relevant comparator for these tests those that would
9 be expected to react most and comparing them against the
10 remainder, so that you are trying to effectively amplify
11 any effect you would identify in relation to these
12 matters, and in a way test 4 is the converse of that,
13 because that is obviously dealing with the wide MFN
14 HIPs, the covered HIPs, that would be most affected, and
15 then the other way of doing the amplification is by
16 taking out the non-covered HIPs that would be likely to
17 be least affected, and that is what she is doing on the
18 other side.

19 So she is carrying out a whole series of tests, and
20 we have dealt with, in the closings, in relation to each
21 of them the way in which the criticisms of the tests are
22 frankly misplaced, but the point that Ms Ralston would
23 make is even if you have some doubt about the outcome of
24 one test alone, when you use a battery of tests what you
25 are doing is increasing your overall confidence.

1 Now, as Professor Ulph rightly says, you will never
2 absolutely prove anything with econometrics and
3 statistics, but what you can do is engender greater and
4 greater certainty by essentially applying these sorts of
5 levels of scrutiny to the data and techniques that you
6 are using.

7 You will see in relation to test 5 {B/64/109}, it is
8 highlighted there that the fifth test is used on the
9 commissions model which is following the DCT market
10 study modelling. So again, when we are thinking about
11 how we are carrying about these tests, we are not just
12 thinking about it in abstract, we are trying to use some
13 of the CMA's own techniques and then testing those in
14 the context of the results we are getting.

15 Unless the Tribunal has particular questions on
16 those tests and the accounts we have given in relation
17 to the tests, I was not going to spend further time on
18 that. I was going to move on then to the points in
19 relation to the alleged lack of precision in the
20 estimation of competitive effects, which we pick up at
21 322 {B/64/111}.

22 I am just going to make two very broad points to
23 start with.

24 The first is Ms Ralston in her approach to precision
25 and the use of confidence intervals and the way in which

1 she interprets them is just following entirely orthodox
2 means of carrying out econometric analysis.

3 It is not quite "there is nothing to see here", but
4 there is nothing controversial in the methodology. What
5 you get out of the methodology are clear indications
6 that are meaningful and valuable in considering whether
7 or not there has been an actual effect, even though
8 obviously the confidence interval by its nature means
9 that you have more than just one answer coming out
10 of it.

11 Now, the second general point that I want to make in
12 relation to the precision criticism -- so we say
13 Professor Baker messing around with moving lines to and
14 fro around the point estimate and so on is just missing
15 the point of what information you get out of this sort
16 of exercise. It is not just a matter of the precision
17 point, it is not just a matter of the bound, it is
18 giving you an indication of where the most likely
19 analysis should be focused or where the most likely
20 conclusion should be focused using this material.

21 The second criticism that is heavily levelled at her
22 is use of the CI data set.

23 In relation to that, it is very, very difficult to
24 understand what the criticism is. This is the data set
25 which has been repeatedly explained that does involve

1 apples with apples or bots with bots comparison through
2 the way in which it is operated. It is used by the
3 industry in order to check on people's prices.

4 The CMA say it has limitations. Well, I think in
5 the real world every data set has limitations, but they
6 are not meaningful limitations that undermine the
7 ability of people like Ms Ralston to carry out sensible
8 analysis or indeed the CMA to do the same.

9 One of the key points the CMA says is you cannot
10 tell from it whether the pricing variations you are
11 seeing are driven by HIPs that are covered by wide MFNs
12 deciding they are simply not complying with the wide
13 MFN, and pricing which is driven by different question
14 sets being operated, and that is true, you cannot, but
15 it is also true that we do not understand why on earth
16 it matters, because the question you are asking here is
17 do the wide MFNs affect retail prices? Now, if the
18 retail prices are varying because people are just
19 saying, "Well, I do not care about the wide MFNs", which
20 we have evidence of, fine. If, on the other hand, they
21 are varying the pricing because they can essentially
22 operate question sets that result in different prices,
23 then again you have varied pricing, and the wide MFN is
24 not constraining that pricing, at least to that extent,
25 and, therefore, to say, well, we cannot tell what is

1 causing the changes in prices is not a criticism of the
2 use of this database when what you are trying to do is
3 ask yourself whether or not the variable you are
4 concerned about, the impact of the notional wide MFN, is
5 causing some kind of change in retail prices or
6 concomitantly in relation to commissions.

7 In those circumstances, we really do not understand
8 why that criticism is levelled at the use of this
9 database for the purposes it is being put to in relation
10 to econometrics.

11 THE PRESIDENT: I suppose there is a difference to this
12 extent in that if you are thumbing your nose at the wide
13 most-favoured-nation clause there is the risk of the
14 enforcement of that clause against the person infringing
15 it, whereas if you are bringing yourself outside the
16 scope of the clause by having differential questions
17 which produce different quotes, then you have an answer
18 if anyone comes knocking to say, why are you not
19 complying with your wide most-favoured-nation clause?

20 MR BEARD: I think as we see from some evidence in the --
21 I think it is six instances of enforcement that the --
22 or notional enforcement that the CMA relies upon that
23 actually you cannot tell between those two a lot of the
24 time because what happens is people like CTM, also
25 MoneySupermarket, also Confused, also GoCompare, they

1 all look at what is going on in relation to pricing
2 elsewhere. When they think, "Hang on a minute, your
3 prices on our side do not look as good as elsewhere",
4 they start looking at what can be done about it, and
5 they go along and they have a discussion.

6 Now, on a couple of occasions, it is absolutely
7 right that we referred to the wide MFN and said, "Look,
8 you are pricing less well on us. Most of the time we
9 are really low priced and you are not pricing as well
10 here", and so part of that discussion was we think we
11 have got this wide MFN, and what then happens is they
12 say, "Well, yes, but actually we are doing X, Y and Z,
13 and this is going on and that is going on" and you just
14 end up not being able to tell, and most of the time what
15 we find in relation to this notional enforcement is
16 actually discussions running into the ground or new
17 negotiations being started which are not, "We are
18 enforcing and could potentially launch a claim form
19 against you for breach of contract" or anything like
20 that. It is very much more, "Well, we will have to see
21 how we are putting these things. Can we do anything to
22 make sure that things work better?"

23 Now, I am not saying that there are not instances
24 that I am going to come back to that the CMA have
25 highlighted where it looks like the wide MFN was trying

1 to be used for more than that, but actually what we see
2 is that there is a very limited number of instances of
3 not having a real impact overall, certainly not
4 a negative impact on pricing, and more than that, in
5 terms of what we are doing here, which is doing the
6 econometrics in relation to whether or not we are seeing
7 any adverse effect on pricing overall, these things
8 still do not matter because even if you assume that all
9 of the price differentials are subject to the Damoclean
10 sword that you are referring to, sir, or none of them
11 are, it does not make any difference to the question
12 whether or not you are getting any adverse effect, and
13 in the end that is the key question here. It is, was
14 there an effect, not what was the intention.

15 THE PRESIDENT: No, I understand that. It may be that I am
16 misstating the CMA's case, and I will be corrected
17 tomorrow if I am, but let me put this to you, that
18 I think is one of the points that the CMA is advancing,
19 which is that even if there is no effect on price or no
20 discernible effect on price, the presence and the
21 deployment even in a negotiating context of wide MFNs by
22 ComparetheMarket creates a change in behaviour in
23 relation to the counterparties that it is talking to in
24 the sense that they write emails and appear to behave in
25 a manner that might be different if the wide

1 most-favoured-nation clauses were not there at all.

2 Do you say that that is an effect and if so is it an
3 appreciable effect or is it an effect that is
4 de minimis?

5 MR BEARD: We see that there is a sort of speculation here,
6 and obviously we can see that if someone has a potential
7 threat by way of a contractual clause it can cause
8 people potentially to position themselves in
9 a particular way in the negotiation. We are not denying
10 that, but I think it is really important to pick that up
11 in the context we are discussing now, because of course
12 what we are discussing now is asking ourselves, well,
13 look, let us assume that that theory stacks up that
14 during the relevant period it could potentially have
15 affected the way in which people negotiate. What does
16 that mean?

17 Well, it might have meant that the way in which they
18 set their commissions might be different or the way in
19 which they did deals might be different or the way in
20 which they priced might be different. Why do we not go
21 and look at how prices actually operated and how
22 commissions actually operated when that Damoclean sword
23 that is being posited does not exist? What we are
24 seeing in that context is no effect, and certainly no
25 appreciable effect.

1 So in a way what we are doing is saying, okay, we
2 will take your theory, but let us actually have a look
3 at it. It is not good enough to just pick up bits of
4 anecdotal evidence and say that. Let us test it.

5 THE PRESIDENT: I think that is getting to the nub of my
6 question which is I think you are saying it is all very
7 well to analyse the qualitative evidence, the email
8 communications that we have seen and that are helpfully
9 set out in the CMA's closing and elsewhere, that is
10 fine, but you have in order to get home, CMA, got to
11 show some kind of effect in the market itself.

12 MR BEARD: Yes.

13 THE PRESIDENT: Do you say then that if that sort of effect
14 cannot be shown to an appreciable extent the CMA fails
15 even though it might be the case that you have this
16 quantitative [sic] evidence which shows that the clauses
17 were at the very least being taken into account?

18 MR BEARD: Yes, in broad terms, that is right. I think you,
19 sir -- the transcript I think it should be qualitative
20 evidence.

21 THE PRESIDENT: Oh, I am so sorry, did I say quantitative?

22 MR BEARD: Yes.

23 THE PRESIDENT: I misspoke.

24 MR BEARD: No, that is fine, the question was entirely
25 clear. Yes, absolutely, because -- let us take an

1 extreme example where you have no evidence of anything
2 happening in terms of enforcement of the wide MFN and
3 you have one instance in relation to one insurer where
4 someone within CTM decided, well, we are going to teach
5 these people a lesson and we are going to really crack
6 down on the wide MFN, and they have a real go, which is
7 not what we actually see, but let us assume that is the
8 case.

9 Okay, so that happens once. Now, I can understand
10 that the CMA looks at that and goes, "Well, I am
11 concerned about that", you know, "If that is what is
12 going on more broadly in the market, then we need to
13 have a look at these things", fine, but it needs to have
14 an appreciable effect on the market in those
15 circumstances, and it is not -- and it has to be on the
16 parameters of competition.

17 Now, in opening, Ms Demetriou talked about well, it
18 has to impact the structure of competition. Well,
19 competition is made manifest through price and quality
20 and innovation, and the structure of competition in
21 those circumstances, it is difficult to separate out.
22 If what she means is, well, if you had an effect on
23 price, quality, etc, then you might get different market
24 shares, you might get different positioning of people in
25 the market so the overall structure changes. We can see

1 that, but that is kind of the other way round. You have
2 to show that the parameters of competition are being
3 materially affected in order for it to feed back, and
4 that is part of the CMA's story. We should not forget
5 that. They are saying that because of what was done in
6 relation to wide MFNs, the scope for entry and growth of
7 PCWs was affected. There is zero evidence of that. The
8 plots that we have of the market shares in relation to
9 the PCWs do not indicate that at all, so we do not have
10 that structural effect, and it would be predicated on
11 parameters of competition being affected, we do not have
12 the evidence of parameters of competition, so even if
13 you take my very extreme example, you just do not have
14 the appreciable effect that needs to be identified.

15 THE PRESIDENT: So would this be fair -- and I stress I am
16 articulating it so that you can push back -- in order to
17 ensure that the Decision is upheld, the CMA requires
18 something more than purely qualitative evidence. In
19 other words, they need to show by some measurable degree
20 an effect in the market, and it may well that be the
21 qualitative evidence gives you helpful and clear
22 indicators as to where to look and will make, perhaps,
23 weaker econometric evidence more significant, but at the
24 end of the day you do need some form of discernible
25 effects of some sort in the market.

1 MR BEARD: You have got to be able to prove on the balance
2 of probability that there were more than discernible but
3 actually not insignificant effects on the market.

4 I am not standing here saying in no case is it
5 possible to cross that threshold just by reference to
6 qualitative information even in relation to an effects
7 case. That is not what we are saying. So we are not
8 trying to draw a bright line and say you must always do
9 this. You might have such powerful and comprehensive
10 qualitative information that you can say no, no, the
11 inference we can draw from this is that we can be so
12 confident about it there is no doubt that we have
13 crossed the balance of probabilities threshold in
14 relation to an appreciable effect on competition
15 overall, but we say it is plain here that the
16 qualitative material does not get them that far and that
17 we do say that in most cases where you have a data rich
18 industry and you can use these tools, it is highly
19 relevant what these econometric tools tell you, because
20 if they are telling you, actually, you are not showing
21 an indication in changing your prices and you are not
22 showing an indication of changes in commission, it is so
23 much harder for you then to say, well, nonetheless, we
24 inferred from the qualitative information that there is
25 nonetheless an appreciable effect, and we say, here,

1 they just ignored effectively what at the very least was
2 a sense check by means of the econometrics. We say it
3 is much more persuasive than that, but they ignored
4 that, and, therefore, by placing all their weight on the
5 qualitative, they do not have a sufficient story as to
6 proving on the balance of probabilities that there has
7 been appreciable effect in the market.

8 So I do not want to be absolutist about it, I am
9 focused much more on this case and it is the
10 circumstances of this case that matter and the evidence
11 that has been presented in this case that is so
12 important, and that is why we say the ambiguities you
13 have on the factual side are important, particularly
14 when you just ignored all this material that was looking
15 at the generalised effects on the market.

16 THE PRESIDENT: Thank you.

17 MR BEARD: I am conscious of time. I wonder if now is
18 a good moment, and then we will finish at I assume 4.30
19 today?

20 THE PRESIDENT: Could we shave it to 4.25? I have something
21 to get to afterwards.

22 MR BEARD: Of course. Might I ask, the Tribunal canvassed
23 this, we obviously did not want to start early today
24 because everyone had so much reading and digesting to
25 do, but I was speaking to Ms Demetriou earlier, and I am

1 conscious of where I am in notes, if it were possible
2 for the Tribunal to start slightly earlier tomorrow,
3 I think that would be enormously well received. I think
4 we are also both of us very conscious that no one is
5 going to want to run late on Friday, and, therefore,
6 I think everyone would rather start slightly earlier or
7 at least on this side of the court, we obviously defer
8 to the Tribunal.

9 THE PRESIDENT: No, we understand. What would assist you in
10 terms of a start time? I think the options are either
11 9.30 or 10.00.

12 MR BEARD: If we start at 9.30, is that unduly painful for
13 all concerned?

14 THE PRESIDENT: Let me look at Professor Ulph first? No.
15 With the usual thanks to our support staff, we will
16 start at 9.30 and then we will work out how we do
17 timings during the day.

18 MR BEARD: I am most grateful. Also it will not be an
19 unrelenting day of me speaking. Obviously we will
20 change over --

21 THE PRESIDENT: You will be leavened by Ms Demetriou so that
22 will be helpful.

23 MR BEARD: Absolutely.

24 THE PRESIDENT: We will rise for 10 minutes until 3.35.

25 (3.26 pm)

1 (A short break)

2 (3.44 pm)

3 THE PRESIDENT: Mr Beard.

4 MR BEARD: I am going to move through some of the other
5 issues in relation to some of the econometric material
6 relatively quickly, but please if there are issues that
7 arise where there are questions please do stop me.

8 If we could just pick it up in the section on
9 page 110 {B/64/110} of our closings. If we could just
10 go over the page {B/64/111}, thank you.

11 I was dealing with a number of the points on the
12 alleged lack of precision in the estimation of
13 competitive effects. I think I had worked my way
14 through to about 325 {B/64/112}.

15 You will see there, and I should pick it up
16 properly, the concerns that Professor Baker articulated
17 about low R-squared figures, but I think that has now
18 been clarified that Ms Ralston went away and actually
19 carried out analysis to make sure that the analysis
20 being carried out was effectively able to explain a much
21 more significant proportion of any variation, and,
22 therefore, got a high R-squared statistic.

23 In relation to statistical significance testing, we
24 explain what Ms Ralston has done and provide the
25 relevant references to her transcript. As I say, all of

1 what she is doing is conventional in this regard.

2 Then if we go over the page {B/64/113}, we get into
3 the discussions about what one can learn from a bell
4 curve. I am not going to go through this material.
5 I think it has been discussed at some length, so unless
6 there are particular questions about it we do not have
7 faith in the way in which Professor Baker wants to say,
8 well, anything within that curve is possible. It is
9 true, but as philosophers sometimes say, true but
10 uninteresting to some extent.

11 PROF ULPH: Mr Beard, I just want to make one point about
12 that curve. One of the important points about that
13 upper end point of the curve is that one claim you can
14 make is that there is a 2.5% probability that the true
15 value is higher than that number, and there is a 97.5%
16 probability that it is smaller than that number, so it
17 is 39 times more likely that the true value is below
18 that number than it is above that number.

19 So it does go to the question of why should that
20 exercise our minds quite so much.

21 MR BEARD: I am going to answer in two ways.

22 First of all, thank you. The way you have
23 articulated the point about Professor Baker's red dot is
24 a much more mathematically sound way than my just
25 raising sceptical eyebrows about picking dots at the

1 edge of confidence intervals, so I entirely agree with
2 the point, and in terms of exercising minds I would not
3 wish to suggest that I was exercising my mind
4 particularly in relation to the red dot at all because
5 it seems to me that essentially that is economic
6 extremism at its worst, because you could stick the dot
7 at the other end and say there is a 2.5% chance that it
8 is below minus 0.98, and that seems to me to be as
9 vacuous as suggesting that it is at the top end as well.

10 So I do not exercise my mind very much in relation
11 to it. The point I would emphasise, which I think is
12 the point that Ms Ralston emphasises, is the mass of
13 probability is in the middle. It is towards zero, one
14 cannot rule out zero in those circumstances and that is
15 precisely the exercise we are engaged in in carrying out
16 this kind of econometric assessment. So to criticise it
17 for lack of precision for doing precisely what it is
18 supposed to do seems to us to be something of an odd
19 criticism here.

20 We do note that the precision criticism is not one
21 that is actually levelled in the Decision so far as we
22 can see. In the Decision, it is spillovers persistence
23 which is a continuing effect for wide MFNs rather than
24 spilling over to non-covered MFNs, so spillovers
25 persistence and heterogeneity. Now heterogeneity

1 I think we dealt with in opening very briefly, but
2 involves the bizarre contention that you should not do
3 econometric because in fact people are not behaving as
4 you would expect them to do under the terms of the wide
5 MFNs. Well, hang on, since that is exactly what we are
6 suggesting is going on here, to say, well, we cannot do
7 econometrics because we do not get the purity of results
8 feels like a very odd conclusion indeed and to be fair
9 to the CMA and Ms Demetriou no one has sought to really
10 defend that proposition.

11 Persistence we deal with, I should say, at
12 paragraph 334 {B/64/115} just over the page and I will
13 not deal with that in any further detail, but there are
14 our submissions in relation to it.

15 In relation -- very briefly, if we could go on to
16 the next page, {B/64/116}, paragraph 340 onwards, in
17 relation to common trends, I did not have a chance to
18 ask the questions that I was hoping to ask about common
19 trends based on the Nobel prize winning paper where of
20 course what was being tested was the impact of minimum
21 wage between two states, and it is interesting that
22 there there was no concern about issues of common trends
23 even though that might have been expected to be
24 a significant issue in relation to that, but I make that
25 point in passing. More particularly, the point about

1 common trends on the part of both the CMA and
2 Professor Baker appear to be entirely speculative, but
3 more than that, as we have pointed out in 342, in fact
4 there are references in the Decision to a common
5 approach to matters like the introduction of insurance
6 premium tax changes.

7 Now, in those circumstances, the evidence we have
8 available and the evidence the CMA has gathered suggests
9 there is not a common trends problem here so far as we
10 could identify, and it is total speculation otherwise.
11 So in those circumstances we do not consider anything
12 relevant arises in that regard.

13 I think before I move off the econometrics and on
14 to -- in relation to commissions and retail prices and
15 absolute prices and so on, I think it is probably right
16 I just tidy up one or two remarks in relation to the
17 economic literature and in particular Johansen & Vergé.
18 We pick that up at paragraph 281. I think it is page 92
19 in this {B/64/93}.

20 Here in these paragraphs we do pick up some of the
21 points that have been highlighted by Professor Ulph in
22 relation to this paper which obviously emphasises -- the
23 consequence of this paper is obviously to emphasise the
24 importance of properly considering narrow MFNs in your
25 counterfactual because if Johansen & Vergé are right

1 that the effects of narrow MFNs in certain circumstances
2 can precisely mirror the impacts of wide MFNs, then in
3 those circumstances the allegation that there was any
4 infringement leading to an adverse effect would simply
5 not be made out.

6 The question then is, how close to the circumstances
7 that Johansen & Vergé are positing are the circumstances
8 of this market, and obviously the CMA and
9 Professor Baker have tried to suggest that they are
10 rather different, and we simply do not accept that that
11 is correct.

12 We have in many ways summarised the points under
13 paragraph 284 {B/64/95} on the following page.

14 Professor Baker was very keen to suggest, well,
15 actually the problem here was the treatment of direct
16 channel costs and the direct channel costs would be
17 problematic in the analysis.

18 Again, this was entirely speculative on the part of
19 the professor so far as we could see. It was not based
20 on any evidential analysis that he had carried out.

21 He had not analysed the costs of direct channel
22 providers or their marketing or the competitive
23 constraints on this, and, therefore, his speculations
24 are rather dangerous in an industry where of course we
25 know that there are massive players in the direct

1 channel that do engage in very substantial marketing,
2 red telephones, Aviva, all sorts of brands of that sort.

3 It is also worth noting, as we do at paragraph (b)
4 that in fact there is evidence -- and this picks up
5 a point I anticipated earlier -- of a number of insurers
6 when responding, even though they were not specifically
7 being asked about these matters, talking about the
8 problems they had and the concerns they had with narrow
9 MFNs rather than wide MFNs, and again that seems to be
10 broadly ignored in relation to it.

11 We have very quickly sought to review the comments
12 that were made in the closings produced by the CMA about
13 economic literature. They seem to be relatively
14 limited. They appear to be suggesting that various of
15 the assumptions made by Johansen & Vergé were wrong in
16 that paper or unrealistic and that they take aim at
17 three assumptions which they say the model makes.

18 The first one, just for your notes, this is
19 paragraph 179 of their closings {B/65/90}. They say it
20 is unrealistic to consider that suppliers are unwilling
21 to undercut their direct channels, secondly, this is
22 paragraph 180, {B/65/91}, that direct sales have much
23 lower costs for providers than sales through PCWs. So
24 these are the assumptions they say are unrealistic.
25 Thirdly, that there is a lot of substitution between

1 different PCWs and between PCWs and the direct channel,
2 so that if, for example, one provider HIP delisted from
3 one PCW, it could recoup sales on other PCWs and through
4 its low cost direct channel.

5 So just taking them in turn, the idea that suppliers
6 are unwilling to undercut their direct channels, it is
7 not clear why it is that the CMA says that that is an
8 implausible assumption being made in these circumstances
9 in circumstances where of course going through a PCW you
10 have to pay a commission.

11 Direct sales have much lower costs for providers
12 than sales through PCWs where they must pay
13 a commission. I have dealt with that. That seems
14 perfectly coherent.

15 The discussion of lots of substitution -- sorry,
16 I should say there is actually evidence about lack of
17 desire to undercut from various of the HIPs, but I will
18 not go through that now, but there does appear to be
19 potentially a misunderstanding by the CMA in relation to
20 Johansen & Vergé.

21 We make the point in our closings, but they may have
22 misunderstood what Johansen & Vergé are doing here
23 because they are considering the situation where
24 a supplier delists from one platform, P, and then it has
25 to ramp up its marketing to divert customers from

1 platform P to its direct channel. That seems to be the
2 position that Professor Baker and the CMA were putting
3 forward.

4 That involves a lot of money and there has to be
5 a lot of substitution between platforms and direct, but
6 the paper is actually quite clear that what matters is
7 supplier competition rather than platform competition,
8 and it says -- and I just provide the quote and the
9 reference -- it is bundle {F/565/18}. It says:

10 "When competition between suppliers is fierce ... it
11 is straightforward to see that the positive effects
12 outweigh the negative effect. By leaving platform P
13 [that is actually referred to as "i" here], a supplier
14 loses one-third of its initial sales, but those sales
15 generated an extremely limited margin. On the other
16 hand, the supplier can now profitably undercut its
17 rivals in the other two distribution channels (platform
18 h and direct sales) and substantially increase its sales
19 on those channels."

20 So it is not a matter of just investing your costs
21 in marketing for your direct channel. You will be using
22 the other PCWs as well in the Johansen & Vergé model.
23 So Professor Baker's observations about the need to
24 invest in marketing for your direct channel are (a)
25 speculative given the nature of direct channels, but (b)

1 are missing out the fact that Johansen & Vergé are
2 talking about the possibility of using other PCWs, not
3 just direct channels.

4 A couple of other brief points on the economic
5 literature in the CMA's closing.

6 They do pick up, just for your notes, in
7 footnote 298 the Wang and Wright paper that I think was
8 mentioned at one point {B/65/90}, which I think
9 Professor Baker had mentioned as demonstrating that wide
10 MFNs have worse effects than narrow MFNs. It is just
11 worth mentioning that Johansen & Vergé explain that the
12 reason for this difference is that in the Wang and
13 Wright paper -- and this is again a quote from
14 {F/265/25} -- in the Wang and Wright paper suppliers do
15 not sell directly because consumers prefer to use the
16 platforms rather than buying from the suppliers
17 directly.

18 So they are using a very different model in
19 Wang and Wright and therefore with respect to
20 Professor Baker I am not sure he fully remembered what
21 Wang and Wright actually did and how it fitted in with
22 Johansen & Vergé.

23 I think those are -- I will not go through the
24 various evidence references I have, but I think that
25 that perhaps, unless, Professor, there are other

1 matters, that in conjunction with our submissions here
2 deal with the main part of our comments on economic
3 literature, but whilst I am here I think it is worth
4 just picking up from 286 {B/64/96} that of course the
5 economic literature really does not deal with issues of
6 partial coverage which is of course what we are
7 concerned with here even on the CMA's highest case.

8 So if we close our eyes to qualitative evidence
9 about the extent to which people were actually complying
10 and we treat all of these clauses as fully enforced and
11 the heaviest possible Damoclean sword with the thinnest
12 possible horse hair hanging over people, nonetheless,
13 they are talking, even with their big numbers, about it
14 occupying 40% of sales on PCWs. That is very much
15 partial coverage and, as we will come on to, it is
16 overstated, but that means that much of the literature
17 that Professor Baker relied upon does not assist in
18 relation to these matters because it is not dealing with
19 the situation that we are considering here.

20 The other point, we have picked it up, at
21 paragraph 288 {B/64/97}, Professor Baker on Day 10
22 advanced a new argument which he considered to be more
23 important than the differentiation issue, that the
24 cartel literature relied on by Ms Ralston does not
25 capture the mechanism through which wide MFNs "lead to

1 higher commissions, and then those are passed through in
2 whole or in part to higher prices".

3 Just to be clear, we have set out how Ms Ralston
4 dealt with those issues in relation to her testimony on
5 Day 8, but I think it is also important just to step
6 back again here, Professor Baker is in grave danger,
7 indeed I think we would say he lapsed into, the fault of
8 really not taking into account the effects of
9 inter-brand competition here, because of course what we
10 are talking about is a putative constraint on
11 intra-brand competition.

12 Now, in mechanistic terms we are not saying the
13 restrictions on intra-brand competition cannot have any
14 effect in principle on inter-brand competition. We are
15 not saying anything silly like that, but what we are
16 saying is when you are thinking about what the effect of
17 intra-brand competition putative restrictions might be,
18 you really do need to think about what the bigger
19 picture, the inter-brand competition is, and that is why
20 even on the CMA's best case about coverage, partial
21 coverage is important, because you have got 60% of the
22 market not in any way bound by these notional
23 restrictions, the wide MFNs, and you have a situation
24 where they are all going to be competing vigorously, and
25 indeed even those that are subject to wide MFNs are

1 going to be competing against one another.

2 So in those circumstances it is vitally important,
3 when we are thinking about effects overall, that we do
4 not just end up obsessing about the particular dynamics
5 of intra-brand competition.

6 With that, I am going to move on to promotional
7 deals for the next 20 minutes or so, unless the Tribunal
8 has further questions on econometrics in particular.

9 THE PRESIDENT: It appears not, Mr Beard, thank you.

10 MR BEARD: If we could, could we pick it up at 345
11 {B/64/117} in our closings, please.

12 The first point it is sensible to pick up is this
13 context point. I am not sure I am quite with Lord Steyn
14 in (a) where he said in law context is everything.

15 I think there is a real danger in an overstatement
16 here, there is more to law than merely context, but
17 context does matter, and that is particularly important
18 in relation to these promotional deals, because when we
19 come on and look at the numbers which are ending up
20 looking at very, very small numbers and when we come on
21 particularly to look at the number of promotional deals
22 entered into by covered wide MFNs during and then after
23 the operation of the wide MFNs, we are talking about
24 tiny numbers, and those, going back to the discussion
25 I was having with Professor Ulph earlier, if those are

1 supposed to be the trigger for the way in which
2 competition changes here, we are talking about tiny,
3 tiny numbers of promotional deals acting as the trigger,
4 and it is, therefore, particularly important to
5 contextualise these issues.

6 Now, that is what Ms Ralston tried to do. She did
7 not try to say any one of her contextualisations was the
8 perfect metric, but she is trying to cut it in different
9 ways.

10 If we could just go to {A/5/160}, please, this was
11 Ms Ralston looking at investment in promotional deals as
12 a proportion of commissions revenue, and what this is
13 showing, as we have set out in our submissions at 346(a)
14 {B/64/117} is that PCWs only invested a tiny fraction of
15 their commission revenue in promotional deals.

16 If promotional deals were really important, you
17 would have thought the investment would have been much,
18 much larger. Now, I know Professor Baker speculated
19 about marginal returns and so on, but again it was total
20 speculation without any information, and the point here
21 is if promotional deals were seriously important tools
22 you would have expected that the HIPs would have been
23 investing very heavily in relation to this as
24 a proportion of their commissions revenue, because, if
25 they worked, that is the way you would drive much more

1 traffic.

2 PROF ULPH: Mr Beard, the other issue that we have to factor
3 in here is cost relative to effectiveness.

4 MR BEARD: Yes.

5 PROF ULPH: So supposing there were two things you could do
6 that would increase sales, each of them was equally
7 effective, one of them was much, much more expensive per
8 unit increase in sales than the other, you would see the
9 second one having far larger expenditure as in the
10 first.

11 MR BEARD: Yes.

12 PROF ULPH: Even if there were, an assumption, equally
13 effective ways of driving up sales.

14 So against that counterfactual, can you really use
15 expenditure on different forms of investment as a proper
16 way of contextualising?

17 MR BEARD: I think you can use it as a way of
18 contextualising. I think what you cannot do is say that
19 it is an absolute answer, but you can use it to
20 contextualise, particularly when you are looking at the
21 vast disparities in investments that you are talking
22 about, because if it were the case that promotional
23 deals were so much cheaper for effective outcome in
24 sales, then you might have expected the level of
25 expenditure would actually have increased substantially

1 over time in order to take advantage of this supposedly
2 very cheap and effective way of generating sales.

3 You do not see that, you see relatively limited
4 changes in these statistics across the years.

5 Second of all, the idea that somehow the expenditure
6 on promotional deals had hit a peak point and,
7 therefore, it was not worth investing more beyond this
8 point is not plausible, and so long as that is
9 implausible you would have expected more spending to
10 have shifted to promotional deals if they were so
11 efficient.

12 The third thing to bear in mind is if comparatively
13 promotional deals were so much more efficient than other
14 forms of marketing, for example, online marketing, then
15 we are in grave danger of following a speculation that
16 suggests that the PCWs are making stupid spending
17 decisions and burning money on expensive marketing when
18 they would be more efficiently spending it on
19 promotional deals.

20 In other words, I do not reject the possibility of
21 the situation that you are contemplating, but given the
22 huge disparity and given the fact that one would need to
23 explore why it was you were investing so much more in
24 marketing than you were in promotional deals such that
25 you were getting the same effective marginal return in

1 terms of sales benefit, I think that one is in a realm
2 of speculation where the natural answer is to say, well,
3 actually, promotional deals were not that effective and
4 that is why there was not so much spending in relation
5 to them, but I cannot dismiss the theory that you are
6 putting forward completely. What I can say is CMA did
7 not test that.

8 So we are saying you should contextualise it, that
9 is a sensible measure to do so with it. It is a huge
10 disparity. If you are going to say, well, actually your
11 bang for your buck in relation to promotional deals is
12 just vastly higher and actually that is the way to go,
13 you would need to carry out some sort of analysis,
14 whereas what we have actually heard in the evidence,
15 particularly from Ms Glasgow, was the imperative nature
16 of spending on marketing and advertising, particularly
17 in relation to online, so that you secured those top
18 slots, given the high number of people that come through
19 to you via marketing.

20 So insofar as we have evidence, it actually points
21 almost in the other direction, but I am not saying that
22 is conclusive at all because we just do not have the
23 picture sufficiently.

24 PROF ULPH: Okay, I agree with that. Just another point to
25 throw in here though is that it may well be that whether

1 we see neither a huge expenditure on promotional deals,
2 nor very many of them, is that in order to be effective
3 you only do promotional deals occasionally. So if you
4 have a permanent promotional deal, consumers just think,
5 well, that is just like a price cut, there is nothing
6 here in terms of a promotional deal. It is the
7 infrequency of the promotional deals that has them carry
8 weight with consumers. I am just saying there could be
9 a lot of explanations that would help you to understand
10 the data you have here.

11 MR BEARD: Look, I am not going to say that you cannot
12 potentially speculate about the fact that fewer
13 promotional deals -- you cannot do promotional deals
14 that often, although I will come on to talk about the
15 potential number of days of promotional deals that were
16 available, and we do not have evidence that consumers
17 specifically did not like promotional deals because they
18 came frequently, it is not clear that consumers look at
19 it in that way because whilst one can intuitively think
20 if I pass the shop every day and it has always got
21 a sale on, I am beginning to wonder if Trading Standards
22 should have a word about whether or not this is really
23 a sale or just my trading price. On the other hand,
24 when you are going to websites and you are only doing it
25 intermittently, it is not clear that consumers will have

1 that sort of pattern of appraisal which I think is the
2 sort of generator of cynicism, if I can put it that way,
3 that you are hypothesising here, Professor.

4 So I am not sure you can make those sorts of
5 assumptions. I mean, these are the sorts of issues, if
6 you are going to rely on them as the CMA, go and find
7 out about them. We are not saying per se it cannot
8 happen, but what we are saying is you cannot speculate
9 in circumstances where otherwise what these numbers are
10 telling you is that promotional deals are a very small
11 part of what is going on.

12 I do think it is important just to pick up in this
13 context, if I may, could we go to {A/9/82}, I want to
14 look at footnote 291. Could we go down and blow that
15 up, because this is where -- I am really sorry, I should
16 have just read the sentence before I asked to do that.
17 Could you just reverse what you did. I am sorry. Thank
18 you.

19 This is in Ms Ralston's second report. You will
20 recall there was a debate about how much uplift you got
21 in sales from promotional deals, and the CMA, or I am
22 going to suspect the CMA's counsel team who have been
23 beavering away, had found one document in relation to
24 AXA where they talked about a lot of TV investment, and
25 then them perceiving quite a high uplift or

1 a conversion, I think was what it was put as, from
2 a promotional deal, and, look, it is not referred to in
3 the Decision, but it is there, we see that, but what we
4 have seen is actually evidence from a number of HIPs
5 that actually promotional deals did not generate huge
6 uplifts in sales. This is why, when Ms Ralston did her
7 first appraisal on levels of uplift that we are coming
8 to, she actually put in in relation to the level of
9 uplift only 15% whilst the promotional deal was running.

10 If we now go down to 291, the footnote:

11 "The price promotions have not been an important
12 element of [Hastings'] home insurance business, having
13 been a minor success, typically delivering a small
14 uplift in sales."

15 You have the reference to the document there.

16 "[esure], in talking about a [promotional deal] it
17 ran, described the benefits as 'marginal'. [Qmetric
18 (Policy Expert)] describes its PDs as having achieved
19 only ['low levels of increase in volumes']."

20 As we will come back to, Qmetric (Policy Expert) had
21 tried two promotional deals and thought they were
22 a thoroughly bad thing and did not like them.

23 "British Gas actually noted [a material] decrease in
24 sales during the promotional period. [Autonet
25 (Homenet)], in reference to its PD, stated that 'the

1 scheme was assessed after an 11-day period and
2 a decision was taken to withdraw due to the reduction in
3 income versus the negligible uplift in case volume'."

4 Then:

5 "[Paragon (Thamesbank Insurance)] stated that the
6 'promotion made a marginal difference to the quote
7 position but had little impact on sales'."

8 Then:

9 "[M&S Bank/HSBC] stated that 'the exclusive deal
10 generated moderate uplift in sales over its relatively
11 short lifespan'."

12 Then finally:

13 "[Saga] stated that the impact of the promotion
14 [I will not refer to it in case it gives away who Saga
15 is] appears to have been fairly limited."

16 I am not saying this is comprehensive. The CMA had
17 fixed on one document they had not previously referred
18 to as I understand it, we will come back to it, but
19 there is a raft of material there saying, well, actually
20 not sure we are going to get much out of these PDs, and
21 that is not -- that is surprising, because of course you
22 make a profit sacrifice and if you are not building
23 volume significantly, you are just in cannibalisation
24 territory there.

25 So it needs to be really successful. So actually

1 that evidence tallies much more closely with there is
2 not some kind of great marginal benefit from PDs at all,
3 the evidence we are seeing there. Therefore, if we take
4 that and then we compare it against the metrics that we
5 are dealing with, actually what we are seeing is
6 a contextualisation which says these things just are not
7 that significant.

8 Now, I know Ms Ralston went on and tested things
9 with a much higher uplift and so on, but that does not
10 matter for this purpose. What I am pointing to is
11 a whole range of evidence from a whole range of people
12 saying, well, actually, we tried them, they were not
13 that successful.

14 Sorry, that was a slight digression, but I hope that
15 helps, Professor Ulph, because it puts in context why it
16 is that there is a real danger with speculating about
17 these things being magical.

18 PROF ULPH: No, I understand your position, thank you.

19 MR BEARD: If we could go back to {A/5/161}, here we have
20 a comparator between promotional deal activity and new
21 business sales overall. So it is another metric. So
22 Ms Ralston is not just fixing on one. Another metric
23 looking at the significance of promotional deal
24 activity. Actually, the thing that has always struck me
25 about this table, never mind the tiny percentage you get

1 out of it, it is actually absolute figures at the top
2 there, the absolute figures. The total investment by
3 PCWs and the total investment by HIPs. Overall, these
4 are very, very small numbers in this industry. If you
5 cast your mind back to those figures I was giving you
6 about marketing investment, for example, we are talking
7 about rounding errors in some ways.

8 Bear in mind that when we are talking about the
9 impact on prices, the most you can assume effectively,
10 and as we have been through, we do not accept that this
11 is actually what happens, but the passing through of
12 that in relation to prices to consumers, the most you
13 could assume, and that is a very limited overall amount
14 of money in the context of this industry, and more
15 particularly it is not signalling that these are
16 significant tools to be used, but I do just want to take
17 a step back.

18 The point that we are making here is not necessarily
19 that any one of these metrics is critical. It is that
20 the CMA, faced with proving the case that there was an
21 appreciable effect and focusing very heavily on
22 promotional deals just did not carry out any of this
23 sort of contextual analysis at all. That is the major
24 point here.

25 If we could just flip over the page to {A/5/162}, we

1 have also got just a sort of headcount table. You have
2 seen that before. We are not big fans of headcounts.
3 We do not think they are that useful, as we will come on
4 to discuss, but nonetheless you are seeing the scale
5 there just in terms of headcount.

6 The critique from Professor Baker is not to suggest
7 any sort of alternative methodology, although to be fair
8 to him I am not sure he denies that trying to
9 contextualise might be relevant, but he does not offer
10 any alternative, and instead what he does, as the CMA
11 does, is he offers this way of looking at the total
12 market shares of the HIPs participating in promotional
13 deals in a year and then aggregating them and saying
14 this is the -- implying that somehow this gives a sense
15 of the significance of these promotional deals, and it
16 is just worth bearing in mind what is going on here.

17 What is being said by Professor Baker and the CMA,
18 when they are generating those statistics, is that a HIP
19 at some point during a year engaged in at least one
20 promotional deal.

21 Now, if we think about the average length of time of
22 a promotional deal being two months and you think
23 effectively a HIP can be selling on at least all four of
24 the big PCWs and others, so effectively it has 12 months
25 of selling on each, that is a 48 month total amount of

1 selling, assuming it is selling on all of them, what is
2 being said is, if you have a promotional deal for two
3 months, we are going to take your total market share in
4 relation to all of those PCW sales across that year,
5 even though you only had two months involving the
6 promotional deal, and we are going to treat that as
7 indicative somehow of the overall impact, scale, weight
8 to be given to these promotional deals, because if that
9 is not what is being said we do not understand why these
10 statistics are being put out there.

11 What we say is that is just massively overcounting,
12 and representing as far more significant than they are,
13 the nature of these promotional deals.

14 There are a couple of criticisms levelled at
15 Ms Ralston in relation to the promotional deals
16 contextualisation. You will see that at 350,
17 {B/64/119}. It was suggested she has not included
18 above-the-line investment deals. That is the ones where
19 there was no contribution in relation to commission, but
20 there was marketing spend, particularly in relation to
21 TV and radio.

22 But the key point there is it is not clear whether
23 any of that spending is being alleged by the CMA was
24 actually incremental or was effectively a fixed cost
25 related to brand, because if it is a fixed cost related

1 to brand, the criticism is irrelevant. It is only if it
2 were incremental to the deal that that should be counted
3 in and the CMA does not have any information on that and
4 does not appear to have asked about it.

5 The second criticism is about these uplifts, and as
6 I say, there was one insurer that considered its
7 conversion rate almost tripled, albeit in relation to
8 a situation where it was involved in a very large TV
9 advertising programme, and we do not know whether or not
10 that was specific or incremental or whatever it was, but
11 otherwise I have just been through a series of examples
12 where actually even the 15% uplift that Ms Ralston used
13 might have been an overestimate and certainly her 100%
14 is miles away from what those people were seeing. So
15 those criticisms are just not valid in the
16 circumstances.

17 Now, I am about to move on to the fourth comparator
18 that Ms Ralston used which was the potential promotional
19 days comparator. I am going to want to go to that table
20 and then Professor Baker's table and make some remarks.
21 I would have to speak very fast in order to get it done
22 in the next two minutes, so I think it might be better
23 to pause now and then look forward to that early
24 tomorrow morning as I am sure we all do.

25 THE PRESIDENT: We certainly will. Thank you. We will

1 resume then at 9.30 tomorrow morning.

2 MR BEARD: I am most grateful, thank you.

3 THE PRESIDENT: Thank you all very much.

4 (4.25 pm)

5 (The hearing adjourned until 9.30 am on
6 Thursday, 18 November 2021)

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