IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1407/1/12/21, 1411/1/12/21-1414/1/12/21:

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 25th January 2023

Before:
The Honourable Mr Justice Marcus Smith
Professor Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Hydrocortisone Decision

Appellants

(1) ALLERGAN PLC ("Allergan")

(2) ADVANZ PHARMA CORP. LIMITED & O'RS ("Advanz")

(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & O'Rs ("Cinven") (4)

(4) AUDEN McKENZIE (PHARMA DIVISION) LIMITED ("Auden/Actavis")

(5) INTAS PHARMACEUTICALS LIMITED & O'RS ("Intas")

Respondents

COMPETITION AND MARKETS AUTHORITY ("The CMA")

A P P E A R AN C E S

Mark Brealey KC (On behalf of Advanz)

Daniel Jowell KC & Tim Johnston (On behalf of Allergan PLC)

Sarah Ford KC & Charlotte Thomas (On behalf of Auden/Actavis)

Robert O'Donoghue KC & Emma Mockford (On behalf of Cinven)

Robert Palmer KC, Laura Elizabeth John & Jack Williams (On behalf of Intas)

Marie Demetriou KC, Josh Holmes KC, Tristan Jones, Nikolaus Grubeck, Michael Armitage, Professor David Bailey & Daisy Mackersie (On behalf of the CMA)

Wednesday, 25 January 2023

(9.30 am)

Housekeeping

THE PRESIDENT: Mr Holmes, good morning.

MR HOLMES: Good morning, sir. May I begin by thanking the Tribunal again for finding space for the additional sitting days in the diary. I am sure I speak for all of the parties when I say we are extremely grateful.

There is a small housekeeping point which has arisen about timing. I understand that Allergan is keen, if it can, to start its submissions today. Rather than argue about that now when the point may not arise, depending on what progress we make, I propose that we see how we go and take stock at lunchtime, if that pleases the tribunal.

THE PRESIDENT: Yes, I think that is sensible. Just so that you all know where we are coming from, we are confident that, rail strikes notwithstanding, we will have a 9.30 start on the 3rd as well. So if that was a worry, I do not think it was.

MR HOLMES: That was I think part of the concern and it may well break the logjam, sir. We are again grateful for that.

THE PRESIDENT: You can proceed on that basis. There are uncertainties and we are trying to deal with it, but you

can take it that we will make 9.30 on the 3rd happen.

Closing submissions by MR HOLMES

MR HOLMES: Thank you, sir.

So, as you will recall, sir, there were two topics that remained outstanding when we broke at the end of last year.

The first is an issue relating to the CMA's dominance assessment during the post-entry period. It is the challenge against the CMA's finding that Actavis enjoyed an assured customer base of pharmacies. Those are the large multiples like Boots, who, as the CMA found, considered that they could not purchase skinny label tablets in place of Actavis's full label product to dispense against adult prescriptions. In the same basket as that, there is Intas's related claim that the pharmacies who continued to buy from Actavis had sufficient buyer power to remove its dominance. That is really the flip side of the assured customer base coin. Intas alleges that far from being assured, those customers in fact held the whip hand and could constrain Actavis effectively by threatening to take their business elsewhere. So that is the first topic, did Actavis's customers amount to an assured customer base or conversely did they hold buyer power over Actavis?

The second topic is then the CMA's finding that Auden/Actavis's pricing practices gave rise to an abuse. You will recall, sir, the mountain figure with which I began my submissions showing the very significant price increases over a number of years that Auden/Actavis applied so prices rose from under £5 to over £70, and I took you through some theoretically possible explanations of the mountain and explained why, in our submission, those explanations did not apply on the facts, the price increases did not reflect changes in supply or the demand as with the COVID price spikes, nor were they the product of changes in cost or innovation, and as the CMA sees matters, they can only credibly be explained by an exercise of Auden/Actavis market power. You will also recall how following Actavis' -- or following entry -- following independent entry, Actavis's pricing remained above its competitors, and the question for the tribunal is whether the CMA made any material error in finding that Auden/Actavis's prices during the infringement period were excessive and unfair, within the meaning of the *United Brands* case law.

That is challenged on various grounds. There is no contest to the conclusion that the prices were excessive, or to the price cost comparison. But the

appellants do claim that they were not unfair, and they rely in particular on the two comparators Plenadren and Hydrocortistab and on the alleged economic value of hydrocortisone tablets, and those challenges are the second topic for today, and I propose to take the two points in turn, beginning with dominance.

Now, just to situate this issue, perhaps we could just return to the mountain figure again. It is at {IR-A/12.1/22}. That is IRA -- thank you.

So the tribunal will recall that on this assured customer base issue we are concerned with the downward assent. There is no issue as to an assured customer base on the way up the mountain during that period Auden/Actavis was the monopolist supplier, and it supplied the overwhelming majority of patients. Demand was inelastic to price and Auden/Actavis pushed prices up very substantially, earning very large profits.

During the upward assent, the only real challenge that is advanced to the dominance finding is an allegation that Auden/Actavis's prices were effectively constrained by regulation or the threat of regulation, and you have my submissions about that. One only needs to look at the path of prices to see that there was no effective constraint during that period, and the alleged means of regulatory constraint were on

examination, we say, not realistic. The policy at the time was to rely on competition to constrain price, which generally worked well, but in some cases operators like Auden found lucrative opportunities to exploit pockets of enduring market power, pushing prices very high and earning substantial fortunes at the expense of the NHS.

Now, in the post-entry period, the position requires more careful analysis as the CMA recognised in the Decision, and it carefully and separately considered the constraints that arose during that period, and it looked at the standard market indicators that are used for this purpose, and we looked at those before the break, market shares by volume and value, comparative pricing data, and profitability levels, and I showed you the findings in the Decision about those. Actavis enjoyed a very significant share of the market, it was able to sustain prices well above those of its competitors, and it was extremely profitable, and those are all classic hallmarks of dominance.

The CMA also considered the structural features of the market to understand what was driving those outcomes, and that brings us to the outstanding topic on dominance. The CMA found that Actavis was able to sustain high market shares and to price at a substantial

premium because there were a significant number of pharmacies accounting for 50% of the volume dispensed in the market, who would purchase all or most of their requirements in the form of full label tablets, and the reason, as the CMA found, was that they considered it necessary to do so based on their understanding of the regulatory position. Specifically, they considered that they should not dispense off label and that meant for adult adrenal insufficiency patients, representing perhaps around 90% of demand, they took the view that only full label tablets could be dispensed.

In the case of 10mg tablets, which amounted for 96% of all hydrocortisone tablets dispensed in the UK, that left Actavis as the only available source, and as the price data showed, Intas was able to use this structural advantage to charge its assured customer base prices that were significantly above skinny label competitors.

Now, the CMA's conclusions as to the existence of an assured customer base have come under sustained challenge, in particular from Intas, and in addressing Intas's objections, I propose to proceed as follows.

Firstly, I will consider what the quantitative evidence shows about the purchasing patterns of particular pharmacies in the post-entry period. So that is the period from entry in the latter part of 2015

until the end of the period for which the CMA found an infringement, which in the case of 10mg tablets was mid-2018.

So the question here is: what were the pharmacies in fact doing in terms of their purchasing?

Then, secondly, I will consider the quantitative evidence about the extent of the pharmacies' commitment to full label over skinny label tablets. How much more did they pay by reason of that commitment and what did that involve in terms of the money they were prepared to leave on the table? A question that you, sir, raised with the parties before Christmas. By that I mean the profits that they were prepared to forego by sticking with the full label product rather than switching to skinny label. That is a good basis for understanding the strength of their commitment to full label.

Thirdly, I will consider what the evidence shows us about the reasons for the unwillingness on the part of the pharmacies to purchase from skinny label suppliers. My overall submission will be that the CMA was right to conclude that there was an assured customer base for Actavis. There was a solid block of customers, whose behaviour showed that they were firmly committed to purchasing its product rather than skinny label products. The behaviour of these customers, the large

multiples, was consistent across the period. They either bought full label tablets for all of their requirements, or they bought them for the large majority of their requirements. Intas's criticisms of the CMA's quantitative assessment do not withstand scrutiny whether considered on an annualised or a monthly basis.

The products were to that extent differentiated, and for the purposes of the dominance assessment, I should say now that the reasons for that commitment really do not matter. In economic terms, product differentiation means no more than that the supplier of a differentiated product enjoys some degree of market power by reasons of the limits on demand side substitutability. Where demand for a particular product is particularly inelastic, that market power can be sufficient to give rise to dominance.

In this case it is clear that the pharmacies in question had a particularly strong commitment to purchasing Actavis's product over rival products. The evidence showed that they paid very substantially more and that is sufficient to sustain a finding of dominance.

Nor does it matter whether the pharmacies' price insensitivity was absolute or whether it was subject to some theoretical limits. Dr Valletti indicated that he

was sceptical as an economist of the idea that demand was ever completely inelastic, and one can readily see the reasons for his caution. Experience in everyday life tells us that everything has its limits. But what is clear from the quantitative evidence that I shall show to you is that the demand of the multiple pharmacy chains for full label tablets was really very price-insensitive indeed. Professor Valletti emphasised as much in the course of his oral evidence, and we need not go there, but for your note on Day 10, page 83, lines 24 to 25 {Day10/83:24} he refers to some segments of the market which are very sizeable, which have very inelastic demand, and again we say, for the purposes of dominance, that is sufficient.

The reasons for the commitment by the pharmacies in question to Actavis's full label tablets do not matter to the dominance assessment. But, in my submission, the available evidence in any event supports the CMA's conclusion that the reason for the relevant pharmacies' commitment to full label was due to their regulatory concerns. That explains why they were willing to leave very substantial sums of money on the table, and it also explains why, insofar as they were prepared to purchase skinny label at all, it was only in relation to a small proportion of their overall needs consistent with

dispensing for paediatric use, meeting closed scripts and catering for particular patients' desire for a particular supplier's tablets, all situations in which regulatory concerns did not arise.

The alternative explanation, that they were showing themselves to be price-sensitive, really does not withstand scrutiny. If they were buying the skinny label tablets because those tablets were cheaper, why would they confine their substitution to a small element of their overall needs? We will see that Intas's expert economist Mr Bishop agreed with this when it was put to him in cross-examination.

So that is the overall submission. The evidence sustains the CMA's conclusion that Actavis enjoyed an assured customer base who would buy only or predominantly from it and that explains why it was able to price at a premium. No other coherent explanation has been presented.

Intas is, therefore, wrong to deny the existence of an assured customer base. I will show you that Intas is also wrong to contend that uncertainty over the continued loyalty of customers constrained its conduct. Its pricing practices show otherwise.

What the evidence shows is that, as one would expect of a rational economic operator, Actavis tested the

water. It chanced its arm by keeping its prices above those of its competitors, found that it was able to maintain those prices at a substantial premium, and it did maintain them at a substantial premium throughout the period for which dominance was found by the CMA.

In pricing at a substantial premium it found that it continued to supply very high volumes. So the uncertainties which Intas's counsel prayed in aid do not supply an answer to the CMA's case on dominance in the post-entry period.

So if I could now develop that submission by considering, first, what the quantitative data shows about the pharmacies' purchasing patterns, what the figures demonstrate. If we could start in the Decision at {IR-A/12/104}. So sorry, that is 104. (Pause).

104, sorry. (Pause).

IR-A/12/104. If there is a lag it my be more convenient to work from the downloaded version of the Decision. (Pause).

IR-A/12/104. (Pause).

That is the one.

NEW SPEAKER: That is not the right page.

MR HOLMES: That is right. I know we found when there were problems with a lag before Christmas that it was possible to download a version of the Decision and just

work through that. Would that be a solution? I will be referring to the Decision on a number of occasions. (Pause).

If we could ... (Pause).

We did seem to be close there. (Pause).

PROFESSOR MASON: Put 104 in the page box and hit return. I see. (Pause).

MR HOLMES: Are we in the hearing bundle, as opposed to the ...

PROFESSOR MASON: Yes.

THE EPE OPERATOR: We are, yes.

MR HOLMES: The documents referred bundle. If we could just go up, perhaps go up on the left-hand side to see which bundle we are in? Do you see you are in Day 19, so you are in transcript references from Day 19 I think as opposed to the hearing bundle.

That is it, yes, exactly. Perfect. Then the top bundle and then number 12. Great. Then 104 within that document. Perfect. Lovely. Thank you. "Vorsprung durch Technik".

THE PRESIDENT: I would like the next break to be used by Opus to ensure we do not have this. I am grateful because we cannot afford five minutes to get to the reference.

MR HOLMES: I am grateful.

So at paragraph 3.214 identifies the largest -- sorry, here we are, yes. You see in paragraph 3.214 it is explained that in 2016 to 2017 there were 11,699 community pharmacies, that is retail pharmacies, and of those 4,434 were independent, and at footnote 284 you see that the independents are community pharmacy contractors with five or less pharmacies. So they are either single stores or very small multiples.

Paragraph 3.214 then identifies the largest pharmacy groups, Boots, Lloyds, Rowlands, Superdrug and Well. In 2015 they held around 44% of the retail pharmacy market as explained in that paragraph.

If we could turn on then to page 135 of the same document {IR-A/12/135} this is table 3.8 of the Decision which sets out the pharmacies' purchases of skinny label hydrocortisone tablets in the period from March 2016 to November 2017. The first two columns set out total hydrocortisone tablet purchases for the pharmacies identified on the left for both 2016 and 2017. The bottom row is the independent pharmacies, the individual very small chains of up to five, and you see the figures given for the purchases made by the independent pharmacies from the main wholesalers 271,000 in 2016.

Above them, there are a number of larger pharmacy groups. The big ones we saw identified earlier and some

other smaller chains, and if you were to add up the total purchases by the pharmacy chains in 2016 you would get around 450,000. That is approaching twice as many as the combined total shown for the independents in this table.

Looking over the list, it is clear that Boots and Lloyds are by far the largest individual purchasers. Boots bought 151,000 packs in 2016, and Lloyds bought 139,000 packs, and after those two, Rowlands and Well are the next largest.

Looking to the right of the table you see what proportion of total purchases skinny label products represented for each of the pharmacies and you see in the final row that the independents overwhelmingly bought skinny label. Looking up the table and starting with the biggest pharmacies, you see that Boots overwhelmingly purchased full label, only around 1% of its purchases were skinny label. Similarly, Lloyds overwhelmingly bought full label.

Now, it is true that in 2017 Lloyds volumes of skinny label tablets increased but the annual average remained at 4%. We will see from the monthly table that the monthly purchasing never went above the low teens.

Then looking at Roland and Well, the next largest chains, Rowlands bought virtually no skinny label, 0.6%

in 2016 and 0.7% in 2017. Similarly, Well bought almost literally zero skinny label tablets.

So for all four of the largest pharmacy chains, the quantitative evidence in this table is extremely clear. The big multiples like Boots, Lloyds, Rowlands and Well overwhelmingly purchased full label tablets. For 10mg tablets, representing 96% of all hydrocortisone tablets, Auden/Actavis was the only supplier that could meet the demand.

The picture that emerges was not uniform for some multiples. You can see that some multiples were prepared to buy mainly skinny label, and one sees that from the data for Tesco and for Day Lewis.

There were also some multiples who were prepared to buy a modest proportion of their overall volumes from skinny label. Asda is an example of that. You see with Lloyds also the uptick in 2017, and I will come to the likely reasons for that.

Then there were some pharmacy chains who began buying skinny but they then reached the conclusion that they should not and they ceased to do so, and Superdrug is an example of that.

But looking above the detail, the overall picture is really very clear. It shows that the largest pharmacy chains bought full label for all or most of their

requirements and they maintained that pattern of purchasing consistently across time.

Now, in Intas's written closing submissions at paragraph 68, there is a hint of a criticism that table 3.8 only covers 2016 and 2017. Now, with respect, that is not a fair criticism. If there were any material change in purchasing patterns by the likes of Boots or Lloyds in the first half of 2018, Auden and Intas would no doubt have put it forward during the investigation or in these appeals, and it would also be visible in the overall market share figures, which the CMA has, which run until April 2021, but they do not show any drop in volumes. We can, therefore, safely proceed on the basis that these data are representative of the entire post-entry period.

Intas in its oral submissions also suggested that the monthly rather than the annual data are more informative and tell a materially different story. Those data are set out in the spreadsheet at {IR-N/27}. If we could turn that up, please, so we can see what that shows about the largest pharmacy chains. That is IR-N, for November, 27.

In my submission, these monthly data do not cast any real doubt on the conclusion that there were a number of large multiples who bought only or mainly full label

tablets. If we could enlarge that, please, and again.

I am sorry, it is hard to read but that is -- if we could look first at the largest chain, Boots, it is in the second row, and if you look along the 10mg row, if you can see at the first row under the Boots row, the monthly figures vary between 0.09% in May 2016 and 1.65% in November 2016. So fully consistent with very low volumes throughout.

If we could then look at the very largest, Lloyds, you see that for most of the period it is also at very low levels of between 0 and 2%, but from August 2017 there is a change and the procurement patterns shift to around 10 to 13% per month of skinny and you remember that this was reflected in the uptick in table 3.8, with the increase in purchases for 2017.

This suggests that Lloyds moved from the no purchasing camp to the modest purchasing camp, but in the last few months the overwhelming majority of Lloyds' purchases were still of full label tablets, 85 to 90%, and I will return to the reason for that purchasing pattern subsequently.

Then looking down the page at the next largest purchasers, Rowlands and Well, Rowlands is fifth from the bottom. The variation is between 0% in some months and a maximum of 1.2% in May 2017.

Finally, look at Well at the bottom of the page. The 10mg line, I should say, is empty simply because Well literally purchased no skinny label 10mg hydrocortisone tablets as shown in the data supplied to the CMA, and Intas accepts that Well made virtually no purchases in its annex.

So for the biggest retailers the monthly data confirms the picture which emerges from the annualised data.

In the course of the appeal, Intas has made a series of comments in relation to the smaller multiples.

First, it has noted that Asda made substantial skinny label purchases in some months. If you look along the Asda row, you will see that there were big volumes purchased -- percentage volumes purchased in June 2016 and July 2016, and then more modest but, you know, low teen purchases from May 2017 through November 2017.

It is important to keep this particular player in perspective. So if we could go, please, to {IR-A/12/135} just on a page, please. (Pause).

Thank you. You see that Asda's total volumes are 25,000 and 18,500 for 2016 and 2017 respectively. That is only around a sixth of Boots' volumes or of Lloyds' volumes and around half of Well or Rowlands. It really

is a comparative minnow in the retail pharmacy sector, and once one averages out across months, the picture which emerges is in any event of a customer for whom full label tablets still make up the large majority of its purchases.

Secondly, Intas objected to the identification of Sainsbury's as a purchaser of full label tablets, and it pointed out that Sainsbury's left the market in September 2016, but if you look at the volumes shown in table 3.8 for Sainsbury's, they are minuscule. They do not affect the overall picture at all.

The third point made is that the data regarding Morrisons, shown in table 3.8, conceal a change in purchasing practice on Morrison's part which the monthly data brings to light. That is correct, but it is important to note that the switch was away from skinny. The Morrison's example, therefore, reinforces the scale of Actavis's assured customer base in the later period.

If we go back to {IR-N/27/1}. That was the last document we considered.

Is there a lag on the system? Yes.

THE PRESIDENT: Mr Holmes, while we are waiting for this to come up and just to anticipate possible problems with timing in the future --

MR HOLMES: Yes.

THE PRESIDENT: -- I would not normally say this, but this is something you can take relatively quickly, on the basis that we will obviously be looking at the significance of the granular figures.

MR HOLMES: Yes.

THE PRESIDENT: I think you can safely take it if you make the general point --

MR HOLMES: We do not need to go and look at the total. I am grateful for that and I will --

THE PRESIDENT: It may assist in future matters.

MR JOHNSTON: Yes.

THE PRESIDENT: I would not normally say this because you are entitled to put your case as you wish.

MR HOLMES: Yes.

THE PRESIDENT: But given people are going to want more rather than less time generally this is an area where diminishing returns set in. It is not a criticism at all, it is just a steer as to what we find helpful and what we do not.

MR HOLMES: I am grateful for that. That is extremely helpful.

Just to finish the point, though, sir, on Morrisons, now that we have the document up, on Morrisons you see that there is a brief window when Morrisons was content to buy skinny from November 2016 to March 2017, but it

then switches to very low volumes of skinny, and we will see that the reason for this was that the switch was instructed by Morrison's chief pharmacist for regulatory reasons.

So Morrisons is another example in the same camp as Superdrug, a supplier that stopped buying skinny label in any significant quantities because of regulatory concerns. Morrisons and Superdrug are pharmacies that switched to full label on regulatory grounds and then stuck with that position throughout the remainder of the Intas period. In my submission, far from undermining the position as set out in the Decision, the monthly data are, therefore, consistent with it. They show a picture of large pharmacy chains buying full label tablets for all or most of their needs.

Now, before I leave the question of purchasing patterns, I should briefly address the position of the wholesalers and on this I can be very brief.

It is, I hope, common ground that the wholesalers' demand is for the most part derived demand. In other words, what they buy depends on the demand of the retail pharmacies they supply. That was accepted by Mr Bishop in the course of cross-examination. For your note the reference is Day 7, page 44, lines 4 to 11 {Day7/44:4}.

So the wholesalers' demand patterns are primarily of

interest for the light they shed on the demand of the customers they supply. The Decision addresses wholesaler purchasing decisions starting at {IR-A/12/141}. At paragraph 3.286 you see the point that pharmacies either purchased directly from a wholesaler or from a supplier, or through a wholesaler, and where they purchased through a wholesaler pharmacy demand, therefore, determines wholesaler demands, so that is the derived demand point.

Consistent with demand being derived, at paragraph 3.288, the CMA explains how differences in the purchasing patterns of the wholesalers are explained by the pharmacies they serve. You see that the short line wholesalers, DE Pharma, Mawdsleys and Sigma sell mainly to independents, while the full line wholesalers, AHH and Alliance, sell predominantly but not exclusively to large pharmacy chains. Consistent with that division, the largest full line wholesalers, AHH and Alliance, mainly sold full label reflecting their large multiple customer base. However, the sales of skinny label to customers other than their respective integrated pharmacy chains, Lloyds and Boots, increased substantially in 2017. In contrast, DE Pharma and Sigma predominantly sold skinny label consistent with their customers being predominantly independents who made up

most of the switches.

Turning on a page to {IR-A/12/142} that is then reflected in the annualised data shown in paragraph 2.9.

Looking at the percentages to the right you see that AHH and Alliance bought mainly full label but they did increase skinny purchases as between 2016 and 2017, doubling them from 10% to 21%. But the evidence also shows that these sales were directed at the independents rather than their own integrated multiple chains. You see that from the rows for each of AHH and Alliance showing the sales made to customers other than their respective integrated multiples. If you look at the right-hand column, you see that the percentages are much higher for the customers, than their integrated multiples.

If you look at the volumes of skinnies purchased in the middle columns, you see that the great majority of skinny volumes purchased by each wholesaler are supplied to customers other than the multiples. In the case of AHH in 2017, 39,500 out of 46,000 tablets are supplied to other pharmacies, and in Alliance's case 59,000 out of 61,000, and that is all consistent with the major multiple pharmacies representing an assured customer base. To complete the picture you see that the short line wholesalers at the bottom bought predominantly

skinny label, given their independent customer balance sheet.

So this evidence relating to the wholesalers corroborates the evidence that Actavis enjoyed an assured customer base. It does not cast any doubt on it.

For the avoidance of doubt the fact that the big full line wholesalers purchased both full and skinny label tablets did not translate into any substantial pressure on Actavis to reduce its prices. It is common ground that there is no price discrimination on the basis of customer preferences for full or skinny labels. Instead, as the pricing data shows, Actavis kept its prices high and their tablets were, therefore, overwhelmingly used by the wholesalers to meet demand from the multiples, not the independents.

So that is the first submission, the data on purchasing patterns.

That brings me to my second point, how strong was the commitment of the large multiples to purchase full instead of skinny? During the course of the hearing, sir, you indicated you were interested in seeing an articulation of how much exactly was left on the table by the pharmacies in purchasing full rather than skinny label tablets.

The tribunal, of course, knows that the price differential between full and skinny labels was significant throughout the entire post-entry period but in order to put some flesh on the bones of this point, the CMA has produced a note which I am going to hand up. It draws on material that was already in evidence and it ought to be uncontroversial, although, of course, the relevant appellants can address it as necessary in reply. It provides a clear illustration that the pharmacies in question left a large amount of money on the table in sticking with Auden/Actavis rather than switching to the considerably cheaper skinny label alternatives.

So looking at the note, you will see on page 2 an estimation of the extra sums that the large pharmacy chains were expending as a result of their decision to purchase full label rather than skinny label tablets in 2016 and 2017. We see the figures presented in both monetary terms and as a proportion of overall expenditure on hydrocortisone tablets.

So taking Boots as an example, we see that Boots spent an additional £7.5 million or thereabouts on hydrocortisone tablets in 2016 and 2017 as a result of buying full rather than skinny label tablets, and that represents no less than 48% of its total expenditure on

hydrocortisone tablets in those years.

Scanning through the table, we see that the monetary amounts differ in accordance with the size of the pharmacies concerned, but there is nonetheless an extremely similar picture in terms of the additional expenditure expressed as a percentage of overall expenditure on hydrocortisone tablets. The note does not take account of volume discounts but we hope that it is nonetheless a helpful indication of the broad financial consequences of these pharmacies' purchasing decisions.

Of course, spending more on hydrocortisone tablets meant foregoing profits, that is because, in short, the pharmacies are reimbursed at the fixed drug tariff rates for hydrocortisone tablets, regardless of how much they are paid to purchase the tablets. So where they incur greater costs in buying full rather than skinny label products, there is a corresponding reduction in their profits, and that is the money that they leave on the table.

PROFESSOR HOLMES: Mr Holmes, sorry to interrupt, I have just got two clarification questions if that is all right.

MR HOLMES: Of course.

PROFESSOR HOLMES: These calculations that you have just

presented us with --

MR HOLMES: Yes.

PROFESSOR HOLMES: -- are they based on figures that are already somewhere in the bundle or --

MR HOLMES: Yes.

PROFESSOR HOLMES: They are. So these are manipulations of figures that are already in the packs that we have been --

MR HOLMES: Yes. To assist, we will, of course, assist the parties -- the other parties to understand them but you see we have given the sources, but with references to Opus in case the tribunal does wish to drill down into any of them.

PROFESSOR HOLMES: Very good. You have anticipated my second question there, which is that the appellants have not yet had a chance to check -- accepting that you manipulated existing figures, there is always then a question of interpretation and so on, and that is yet to be checked with the appellants?

MR HOLMES: Of course, that is yes, and we anticipate that any points that we have -- we hope it will be uncontroversial but we anticipate any points that they have can be ventilated in replies, which is still I think eight or nine days off, so allowing time for a consideration of the note and for any necessary

liaison in relation to it.

PROFESSOR HOLMES: Okay, thank you.

MR HOLMES: So what is the significance of this evidence? To drill down into this question it is perhaps helpful to see how Intas's counsel explained Actavis's approach to pricing in his oral closing submissions.

If we could turn, please, to the Day 15 transcript and look at page 107, line 24 {Day15/107:24}. What is said here, starting at line 24 at the foot of the page -- sorry, that should be page 107, not page 27.

Looking at line 24 at the foot of the page, so if we could go down the page, please. Sorry, it is still on the previous page, but if we could just show the bottom of that page:

"So the interest if you are in Accord-UK [that is Actavis] is keeping the price differential at such a level that a do not give your customers a reason to go back and re-evaluate that position and actually review that position. That is the last thing you want them to do. You have got to cut your prices enough certainly to keep their margins to respond to the competition as well, to respond to the difference between your selling price and the drug tariff. You have got to take that all that into account."

Intas's counsel then says that:

"... the notion that these customers were assured is entirely fictional. They were in fact precarious in those particular circumstances."

Now, that submission needs to be considered in the light of the evidence as to the strength of the major multiples commitment to purchasing full label tablets. We have just seen how much freedom Actavis had to keep its pricing at a level that was above the competition.

The relevant pharmacies were prepared to leave millions of pounds on the table and in some cases to spend literally twice as much on full label tablets as they would have spent on skinny.

Now, if those differentials were not enough to prompt them to revisit the regulatory position to which Intas's counsel referred in submissions, I ask rhetorically, what would be? What is clear is that the commitment was strong enough to permit Actavis to behave to an appreciable extent independently of its skinny label competitors, maintaining prices well above the levels that were charged for hydrocortisone skinny label tablets. That is not consistent, in my submission, with the notion that their custom was in any way precarious or that Intas had reason to believe this to be the case.

Now, that brings me to my third topic: what are the reasons which go to explain the behaviour of the large

retail pharmacies? Why did the multiples buy full label tablets from Actavis, despite their significantly higher price tag?

The CMA's conclusion in the Decision was that the large pharmacies considered that they had no choice but to buy full label tablets because of their regulatory concerns about dispensing off-label. The position in the Decision was, therefore, not that the pharmacies were in fact legally prohibited from switching. The CMA looked at that question and concluded that there was no such prohibition. But for the purposes of the dominance analysis, the relevant question is not whether pharmacies were actually precluded from dispensing skinny label to adult adrenal insufficiency patients. The relevant question is instead whether the pharmacies regarded themselves as needing to purchase the fully indicated product for all or the large majority of their requirements.

The pharmacies' own views and attitudes to the regulatory position are what determined the purchasing decisions they made and their willingness to switch, and that in turn is what conditioned the strength of the competitive constraints upon Actavis during the post-entry period.

In these proceedings, Intas challenged the

conclusion that multiple pharmacies considered that they were required to purchase full label tablets through the evidence of Mr Bishop and his analysis of the contemporaneous documents. Intas's pleadings and opening submissions in turn relied on Mr Bishop's analysis.

You will recall that I asked Mr Bishop a series of questions about his evidence on that point and he very clearly and fairly accepted the difficulties with his analysis of the documents, and we have set out the relevant material with transcript references at paragraph 264 of our written closings.

Intas's counsel suggested that the documents that were put to Mr Bishop in cross-examination were in some way selective. That is, with respect, not a fair criticism. The CMA referred Mr Bishop to the very same documents that Mr Bishop had referred to in his own analysis of this issue. In my submission, the significance of Mr Bishop's various concessions in cross-examination is that they reflected a candid recognition of the position disclosed by those documents.

It is also worth noting that Mr Bishop's lengthy arguments by reference to price discrimination in his written reports are no longer relied on by Intas. They

are not even mentioned in their written closing submissions. In the circumstances, I will not say anything more about that.

Now, in closing submissions Intas unsurprisingly shifted its reliance from the evidence of Mr Bishop to a 100-page annex, which they appended to their written closing submissions, and that is said to show that the Decision was based on an incomplete and misstated analysis of the evidence. I should say that the CMA strongly disagrees with that submission. I cannot in the time available hope to address the annex orally and Intas's counsel did not attempt to do so either. Instead, the CMA has prepared a written response to the annex to be read alongside it, and I have copies that I propose to hand up, and they can also be found on Opus at a reference which I will provide to the tribunal subsequently. (Handed).

What I propose to do orally is to focus on the small number of points made by Intas's counsel in oral submissions and these were said to identify the key errors alleged with the CMA's assessment of the evidence. For your note, Intas's oral submissions on the issue can be found in the Day 15 transcript at pages 102 to 109 {Day15/102-109}.

The first alleged error to which Intas referred was

to say that the CMA froze the frame in June 2016 and did not look at the later documents concerning the Intas period. Intas supported that submission by reference to two multiple chains, Asda and Sainsbury's.

The key point to note about those two pharmacies is that, as I showed earlier, they are tiny players compared to pharmacies like Boots and Lloyds. Asda was less than a sixth of the size of either Boots or Lloyds, and Sainsbury's was tinier still, 3,500 purchases in 2016 and none in 2017.

They represented in combination 3 or 4% of the total assured customer base, as found in the Decision. In my submissions, it is telling that the first error Intas's counsel purported to identify concerned those two very small players.

If the CMA did err in putting Sainsbury's and Asda into the assured customer base camp, and I do not accept that the CMA was wrong to do so, it was the very definition of an immaterial error.

The second point concerned Morrisons switch in purchasing. Intas's reliance on Morrisons is a curious one given, as I showed you earlier, Morrisons in fact switched from skinny label to full label tablets in bring 2017. So it was an example of a change during the Intas period towards, rather than away from, full label

tablets.

Intas's counsel suggested that this change was the result of what he described as cheeky tactics by the wholesaler Alliance when pushing its own brand products. But we should look at what Morrisons itself said about the switch. The relevant document is {IR-H/1058/1}.

Looking at the first email in the chain, just enlarging the top of the page, please, once -- you see that this email states that:

"Once the superintendent pharmacist was fully aware of the situation, Full Label was his preference, as it allows our Pharmacy Teams to dispense without having to check/research which licenced indications are covered by the Skinny Label, thus making the dispensing process easier and safer for stores and customers".

What this makes clear is that, as found in the Decision, Morrison's decision to purchase only full label tablets was for regulatory reasons, to avoid individual pharmacists having to check which licensed indications are covered by skinny label. In other words, they understood that they could not dispense for unlicensed indications, and it does not matter whether that was right or wrong in terms of the regulatory position, and it also does not matter whether it was induced by cheeky tactics from a wholesaler or indeed by

Auden/Actavis's own efforts to encourage full label prescribing through Project Guardian. What matters for present purposes is that Morrisons was in the assured customer base, as the Decision found, from April 2017 on, and you see from the first line of the email that this applied to all purchases since April 2017. It is borne out, of course, by the fact that Morrisons purchases were de minimis hovering between 0 and 3% for the remainder of 2017.

Having started with some of the very small multiples, Intas's counsel next turned to some of the larger ones. His next target was Well and he said that the CMA wrongly characterised Well as having no choice, even though it actively considered changing its volumes to skinny label having regard to the price differential.

Now, if we could look at the relevant document on that, please. It is {IR-H/992/1}.

This is an internal Well email from December 2016, so just over a year following skinny label entry and immediately before the start of the Intas period. On the first page we see in the third paragraph a clear statement that the non-Actavis product can only be dispensed on licence for circa 8%" of scripts. That is a reference to paediatric use. In other words, the terms of the licence would on Well's internal assessment

preclude dispensing skinny label tablets to the 92% of demand represented by adult adrenal insufficiency prescriptions.

There is then a discussion of a large price differential that Actavis was able to maintain, £56.74 compared with £24.20 for the skinny label suppliers, and the very large amounts that could be made in additional profit by Well if it were to switch to skinny, £141,000 per month. Various points are then identified.

First off, the concern that moving away from Actavis would mean we were knowingly dispensing off licence.

Secondly, it would involve sending a communication out to branches advising them, in effect, to dispense an unlicensed product. That gave rise to two further concerns. Would branches comply? Would its own branches report Well to regulators? A question about what price they could sell skinny at and, finally -- they could source skinny at and, finally, a note from the author that neither Lloyds, Boots or Rowlands have moved away from the fully indicated product. So a clear recognition in the market that three of the four big chains bought full label and that was a matter of general understanding.

There is then a discussion of the commercials. The skinny label tablets, it is noted, just looking at the

bottom of the page, feed into the Scheme M pricing bringing the drug tariff down.

In the final paragraph, the point that the profit made on the non-indicated product is probably taken into account in the margin survey and accounted for in the £800 million. So if anything, the margin survey creates an incentive to prescribe skinny label.

Then over the page, one sees the recommendation. In the first line, a clear indication that the use or not of the non-indicated product is a clinical decision. In other words, a decision for the superintendent pharmacist to take based on their understanding of the appropriate course, having regard to regulatory considerations.

There is then a reference again to the very significant financial benefit that that involves foregoing.

Then an alternative is canvassed, switching only in relation to scripts for children. This would not be off licence or off label as the skinny label tablets are authorised for use in children, so they do not give rise to a regulatory concern. Just on that 8% of scripts, there would be an £11,000 saving.

Standing back, one asks what this shows. Well, first, while the author refers to the amount of profit

in play, she clearly states that the choice between full and skinny label is a clinical decision, not a commercial one.

Secondly, the author appears to be influenced by the position taken by the other three largest pharmacies who were all sticking with full.

Thirdly, she suggests as a fallback dispensing skinny label tablets to children which would support purchasing around 8% of volumes from the skinny label suppliers.

Fourthly, and most importantly, this document strongly confirms the huge amounts that were on the table for the multiples if they were to switch.

What then is the outcome of this consideration of the potential commercial benefits of switching to skinny label? I will not take us back there, but table 3.8 shows that the ultimate result of this allegedly highly significant internal deliberation by Well was that Well purchased precisely 50 packs of skinny label tablets in 2017, the following year.

So, in my submission, the document actually strongly supports the CMA's position on the assured base. It shows that Well engaged in precisely the kind of internal reconsideration of price and regulatory factors that Mr Palmer suggested Actavis was concerned to avoid,

but the result of that reconsideration is that Well is prepared to leave very large profits on the table and to stick with full label tablets bar de minimis purchases of skinny. So that is Well.

Intas's counsel had nothing to say about Rowlands.

He turned next to Lloyds. He said that Lloyds had specifically acknowledged that its position may change depending on the price differential. We take it that this is a reference to some email exchanges involving Lloyds' parent company, Celesio. If we could briefly look at that, please, it is {IR-H/844/2}.

Beginning with the email from the Focus Pharmaceuticals individual at 4.10, the upper of the two emails, we see that he is asking:

"... what your Superintendent Pharmacist's view was on the Hydrocortisone Tablets Indication issue ..."

He says that:

"... I assume that you cannot use a product unless it has the full indications."

Then turning back to internal page 1 we see Celesio's response. After pleasantries at the foot of the page, the author states:

"Your assumptions are correct, need all indications to be of any use to us really.

"For sure independent pharmacies won't care but just

not worth the hassle for us at the moment.

"That may change if the price differential grows.

"Also, [we are] not sure what the proportion of scripts are for paediatric use (the only indication Alissa have)."

Now, in my submission, Intas attaches too much significance to this document. It is not clear whether the email is referring to switching by Lloyds or by the wholesaler, AAH. More over, the concluding reference to paediatric scripts suggests that the author is envisaging, at most, a partial switch. That was why I was careful in putting the question to Mr Holt when taking him to this document to refer to the possibility of switching volumes for paediatric use.

But even if the document does concern the possibility of a full switch by Lloyds, that really only confirms Professor Valletti's point that even a customer like Lloyds is not infinitely price inelastic. We have already seen the evidence on just how price inelastic it proved to be. Only 4% of its purchases in 2016 and 2017 were of skinny label tablets, despite the price differentiation, and we saw from the hand-up note that Lloyds was prepared to forego millions of pounds in profits.

As regards Lloyds slight increase in its purchasing

in September 2017, the increase was to around 10 to 13% of volumes. The tribunal will recall that there are actually some very plausible explanations which I canvassed with Mr Bishop in cross-examination why pharmacies like Lloyds purchased some skinny label products, despite their general understanding that they were required to purchase full label tablets. Those reasons were explored with and assented to by Mr Bishop in cross-examination.

One of the reasons is the point that the regulatory issue identified by the pharmacies did not apply to prescriptions for children, and it is not surprising to find that some pharmacies were prepared to switch part of their custom to skinny label products, despite having regulatory concerns about switching the large majority.

Can I show you another telling piece of oral evidence on this point? It is something that arose with Mr Bishop in cross-examination.

You will recall that Mr Bishop sought to characterise all the relevant pharmacies as engaging in a trade-off between price and other considerations, even pharmacies like Boots and Lloyds, and Mr Palmer in his oral submissions reiterated the language of trade-offs on several occasions. The point was explored with Mr Bishop in cross-examination, and can I just turn that

up. The relevant exchange is in the Day 7 transcript, beginning at page 83, line 3 {Day7/83:3}, and we see the following question is put, using Lloyds as an example:

"... if Lloyds was generally making its decision to a material extent on the basis of price, would you not expect it to purchase a much higher proportion of skinny label tablets given how much cheaper they were and the significant extra profit this could have earned if they purchased and sold more skinny label tablets?"

Mr Bishop then confirms unequivocally that he agrees, and we say that is plainly correct.

Taking these elements together, the fact that Lloyds was prepared to purchase slightly greater volumes of skinny label tablets towards the end of 2017 is not intention with the findings in the Decision that for all, or most of their needs, the major multiples represented an assured customer base. What the chain suggests is that the Lloyds ultimately did decide to switch its paediatric business, which did not raise the same regulatory concern about off-label purchasing and dispensing, but its purchasing patterns were not consistent with Lloyds abandoning its regulatory scruples wholesale, otherwise why confine purchasing to such a modest portion of demand? Mr Bishop had no answer to that point and, in my submission, there is

none.

Lloyds was crystal clear about its position when it responded to the CMA information request in January 2018. If you look at {IR-H/1105/2}, please. IR-H/1105/2, you see the penultimate paragraph on the page states, with crystal clarity, that Lloyds approaches this issue from a clinical perspective, and it is said that it considered it to be contrary to the principles of the UK licensing system to use skinny label outside their therapeutic indication. So this is clear, price was not a factor for Lloyds when it came to hydrocortisone tablets for adults.

Intas's counsel only turned to the largest player at the end of his oral submissions, that is Boots, and that was in itself revealing. But what he said was strikingly light on detail because Boots is a difficult pharmacy for Intas to fit into its theory of the case. It was the largest pharmacy by volume of hydrocortisone tablet purchases. It purchased almost no skinny label tablets at all. It provided extremely clear explanations to the CMA, as late as April 2021, confirming that price was not a factor in its decisions around the purchasing of 10mg tablets, and that explanation prompted Mr Bishop to accept in cross-examination that the CMA was right to characterise

Boots as considering that it had no choice but to buy full label products from Actavis, in light of its view of the regulatory position.

If we could, please, look at what Intas's counsel said orally. That is at page -- sorry, Day 15, page 105 at the beginning of line 1 {Day15/105:1}.

You see there that the first point he makes in the first six lines is that Boots made a decision in late 2015 or early 2016 and then never reviewed the position again. But he says, beginning at line 7, that the key point is that Accord, that's Actavis:

"... could not proceed on the basis even that Boots was assured because Boots could review its decision at any time and it was unknown to Accord at what point the price differential would cause it to review its understanding of the market and its trade offs."

Then at around line 16 Mr Palmer confirms that he is not suggesting that Boots might have said:

"... to hell with regulation, we do not care about regulatory consequences, the price looks good."

He recognises that this is probably impossible to happen for a responsible pharmacy like Boots.

Pausing there, this is a very clear recognition that Boots was not engaging in any meaningful trade-off between price and regulatory risk.

Then looking at line 22 on the same page, the point that Mr Palmer makes is that:

"... by the time of the Intas period it would be totally open to Boots at any point to say, this price by French is too big for us, we are foregoing this profit. Let us have another look at [turning over the page] whether in fact it is correct that we have to buy the full label product ..."

He goes on to say that had Boots engaged in a reconsideration of the position, it would have realised that there was no regulatory reason to stick with full label tablets.

Now, there are several points to be made about this. The first is that it is wholly unclear what level of price differential and foregone profit would ever have led to Boots reconsidering the matter. We know that Actavis was charging five times its competitors' average prices by the end of the Intas period, and we saw from the hand-up that Boots was leaving millions of pounds of profit on the table. We say that that is a clear indication that Boots' demand was very far from precarious.

The second point is that the suggestion that Boots' custom was precarious is one that is actually harder for Intas to advance, given its position in the timeline.

By the time of the Intas period in January 2017, there had already been a year and a half of independent competition. Actavis had observed a significant initial decline in its market share as the independent pharmacies largely switched to buying skinny label products. But it had then seen its market shares stabilise as the large pharmacies kept their custom with it, despite the relative price differential between full and skinny label increasing over that period.

So by January 2017, Actavis had seen that Boots had stuck with it for around 18 months without any material shift of purchasing.

The third point here is that the proof is again in the pudding. If Actavis had a genuine concern that a large customer like Boots would switch its custom away to the cheaper product, how would you explain the very significant price differential with consequent effects for Boots' profit that Actavis retained over its rivals?

There is a further point, if there were a genuine concern about losing Boots and Lloyds' custom, one would expect to see evidence of Actavis considering this risk and taking account of it as part of its pricing strategy.

Now, the CMA specifically asked Intas about this during the investigation and it is instructive to see

what Intas said. The response is at {IR-H/111/1}. This is a Section 26 response from Intas and its subsidiaries to a question from 20 December 2017, and if we could look on internal page 2 {IR-H/111/2}, so internal page 2. (Pause).

So that is 111, I think. Slightly further down. 111. No, again further down. That is great. Perfect. Great. Thank you. So just talking it from the right of the screen, we see in the box on page 2 -- can we just go down the page, please?

Is it -- is that the foot of the page? Sorry, could we try page 1, please? {IR-H/111/1}.

I am so sorry, it is the wrong document. Yes, it is IR-H/111. What is the document we are in? Oh, I see, 1111, please {IR-H/1111/1}.

Yes, here we go. If we look at the internal page 2 {IR-H/1111/2}, please, just down the page.

Sorry, if we could go up to the first page. (Pause).

Sorry, I think this is the correct document, sir, but I am going to pause for a moment and perhaps come back to that, if I may. The short point is that the CMA asked for contemporaneous documents showing AAH, Lloyds and/or Alliance, Boots threatening to switch their demand to Actavis.

Yes, is that page 3? Yes, if we look at the top of page 3 {IR-H/1111/3} we see in the box that the CMA asked for contemporaneous documents showing AAH, Lloyds and/or Alliance, Boots threatening to switch their demand to Actavis UK's competitors, and the CMA also asked for any documents evidencing Actavis internal decision making and/or strategy in this regard.

We see the response immediately below the box, and in the first paragraph Intas makes the point that it has majored on these appeals, this is the point that it had no guarantee that it would continue to enjoy the custom of these large customers in the future, and Intas says that these customers are able to credibly threaten to switch their custom to Actavis's rivals.

But then the kicker comes in the second paragraph. Intas says that it is not able to provide the CMA with any written documentation in response to either of the CMA's requests. In my submission, if the risk of losing custom from Boots and Lloyds were a genuine concern on Actavis's part it is inconceivable that one would not see this reflected in contemporaneous documents. This is -- you will see the date, 2017. So we are talking about the immediate period we have just been considering. There is no great lapse of time. It is why the CMA investigated the point but it got a nil

return. There is also no witness evidence from anyone involved in pricing for Actavis that suggests that in the witnesses' recollection the risk of losing these large pharmacies' custom was a factor in its pricing decision.

So that concludes my submissions on the assured customer base point. In my submission, the CMA's conclusions on this point are sustained by the quantitative evidence about purchasing patterns, about the amounts of money that the multiples were prepared to forego and the available documentary evidence as to the reasons why the large pharmacies stuck with Actavis's full label product.

The assured customer base evidence provides the structural explanation for the large market share, higher prices and very significant profits that Actavis was able maintain during the profit-entry infringement period. It all goes to support the conclusion that Actavis could, to an appreciable degree, act independently of competitors, customers and consumers, despite the entry of the skinny label suppliers.

Now, turning to the flip side of the coin, I would like briefly to address you on the discrete points made by Intas on buyer power. These were not developed orally, so I can deal with them briefly.

Insofar as Intas relies on NHS buyer power, you have my response in relation to Ms Ford's case, which is the same, but Intas also contends that Actavis's customers acted as a constraint on its prices, that is to say its pharmacy customers, and that is set out in paragraphs 101 and 102 of Intas's written closings.

Now, the relevant question for these purposes is not whether Actavis's customers imposed some degree of constraint but whether Actavis had the power to behave, to an appreciable extent, independently of its customers. In my submission, it is clear that Actavis's customers were very limited in their ability to constrain Actavis's pricing. Any limited negotiating power they possessed did not amount to the account of countervailing buyer power that would negate a finding of dominance, and I make three points in support of that.

The first point is that the contention that Actavis was constrained by material buyer power is irreconcilable with the evidence. It cannot be reconciled with the uncontested findings in the Decision concerning the price premium, and it also cannot be reconciled with the evidence about the extent to which customers like Boots and Lloyds sacrificed very large profits in sticking with full label.

The second point is the point that I have just made about the absence of any evidence that large customers like Alliance, Boots or AAH, Lloyds ever threatened to switch away to rival suppliers, and the absence of any evidence of internal deliberations showing that Actavis saw this as a real concern. As we just saw, the CMA asked for such evidence, but Intas was unable to provide it, although the facts were in the very recent past.

So this suggestion that the risk of customers switching to rivals operated as an effective constraint on Intas's pricing is an entirely theoretical one.

The third point to make about Intas's reliance on buyer power concerns the evidence on the case file which Intas claims to show that customers negotiated on price.

Can we briefly look at that, please? So the submission can be seen at {L/5.1/59} at paragraph 101c of Intas's written closing submissions. So that is L/5.1/59.

We see here a reference to Dr Burt's witness evidence "that it 'was always' possible for a customer to negotiate ... on price", and then a reference to some evidence from the case file and we see at i a reference to Alliance telling that CMA that it:

"... has negotiated the cost prices with Actavis UK on a regular basis throughout the period (from July 2015

to present) ..."

Then Alliance says that after 2016 reimbursement price has consistently fallen.

Turning the page {L/5.1/60}, the price was negotiated "each time a new category M prices was issued."

Now, I am afraid that that is a materially incomplete presentation of the evidence from Alliance. It is taken from a Section 26 response provided in January 2017, which is at {IR-H/1107/1}, and if we could turn to internal page 2. So it is {IR-H/1107/2}.

Great. So looking towards the bottom of the page, we see the CMA poses at number 2 the question:

"Since July 2015 how frequently if at all has Alliance negotiated hydrocortisone tablet prices, including any discount/rebates with Actavis UK?"

Then the CMA sees some further detail -- seeks some further detail, and you will see that is the response to this question that we just saw quoted in the Intas written closings.

But if we turn over the page, Alliance provides some further very relevant information that Intas omits to mention. So on page 3 {IR-H/1107/3} under the heading "10mg tablets" we see that Alliance distinguishes between two periods, the period when prices were

increasing and the period when prices decreased. So the first period is July 2015 to March 2016, obviously before the Intas period, but it is instructive to see what Alliance says about it.

At the bottom of the page we see that Alliance were notified of a price increase by Auden Mckenzie on 29 June 2016.

Then over the page {IR-H/1107/4}.

"As Alliance were not aware of any alternative suppliers of the full label product that could be used as leverage in price negotiations the increase was accepted."

Now, of course, in June 2015 Auden was a monopolist and it would be a bold argument to suggest that it was subject to countervailing buyer power then and, rightly, no one has suggested that.

But we then see exactly the same thing is said about a further price increase at the start of October 2015. Then, if we look at what is said under the heading April 2016 to the present, during the post entry period, Alliance notes in the first paragraph that category M reimbursement price has consistently fallen during this period. That is the extract quoted in the Intas written closings.

But look then at the second paragraph, which Intas

does not refer to:

"As Alliance were not aware of any alternative suppliers of the full label product the only leverage to be used in price negotiations was the margin available against drug tariff. Therefore, the price was renegotiated each time a new category M price was issued." [As read]

Then the third paragraph, which is crucial:

"Alliance attempted to seek more discount to drug tariff than was offered by Actavis UK. However, Alliance was unsuccessful in securing any addition reductions above Actavis UK's initial offers. Alliance presumed that Actavis UK were able to take this stance as they too were aware that there were no alternative suppliers of the full label product." [As read]

In my submission, the following points are, therefore, very clear.

First, we see that Alliance was able to renegotiate prices when new category M price lists were issued, but that is hardly surprising. The drug tariff mechanism required Actavis to reduce its prices to maintain margin, but it does not show significant buyer power as distinct from the indirect constraint of the drug tariff itself.

Secondly, Alliance is making very clear here that it

was not able to secure any additional price reductions beyond Actavis's initial offers based on the drug tariff. That is the very opposite of buyer power. It is the exercise of market power by Actavis.

Thirdly, what is the reason that Actavis was able to resist additional price reductions over and above the drug tariff? It is the fact that there were no alternative suppliers of the full label product and a speculation that Actavis knew that this put it in a strong bargaining position.

So as Alliance put it, the only leverage it possessed was the drug tariff. Alliance was not able credibly to threaten to switch its custom, and I would suggest that the obvious explanation for this is that Boots, Alliance's principal pharmacy customer, was only interested in full label products.

Now, this is all highly salient material when it comes to considering Intas's argument about customer buyer power, but it was regrettably omitted from Intas's closing submissions. When the document is read as a whole, it shows that Alliance was not exercising effective buyer power, and that confirms, of course, the evidence about price, the substantial premium.

Intas also refers in its written closings to some material from AAH, which shows that AHH, like Alliance,

was able to secure some price discounts from Actavis, but the same document clearly states that AAH did not threaten to switch its custom to skinny label suppliers and it is, therefore, unclear why this is said to demonstrate effective countervailing buyer power.

So to conclude on this topic, the topic of dominance, in my submission it is clear that Actavis was not effectively constrained by buyer power from its customers, just as it was not subject to countervailing regulatory power from the NHS. Its position as the sole supplier of full label 10mg products meant that its wholesaler customers lacked the ability to credibly threaten to switch supplier and that they did not do so.

The exercise of buyer power requires an outside option. There is no such option available when supplying the likes of Boots, and this is confirmed by the significantly higher prices that Actavis was able to sustain throughout the infringement period.

So that concludes my submissions on dominance, subject to any questions from the tribunal. I propose now to turn to abuse. I am making very good progress. I propose, if I may, to take a short break now, if that is convenient.

THE PRESIDENT: That is appreciated by the transcribers. We will rise for five minutes and resume at 10 past.

MR HOLMES: I am grateful.

(11.06 pm)

(A short break)

(11.16 pm)

MR HOLMES: So we now reach the final topic, unless anything has occurred to you over the adjournment.

THE PRESIDENT: No.

MR HOLMES: Very good. I propose to address matters under this head in the following order.

First, I will begin with a consideration of the applicable legal principles, and in that context I propose to make brief submissions on the tribunal's helpful note on excessive pricing, which provided the parties as a basis for discussion with an indication of a possible approach.

Secondly, I will show you in more detail what the CMA found in the Decision.

Finally, I will make submissions on the principal arguments advanced by the appellants in the appeals, beginning with their preferred comparators, Plenadren, Hydrocortistab, then dealing with economic value, and, finally, addressing a couple of legal points, Allergan's argument by reference to the *Napp* judgment and Intas's argument based on the language of "imposed".

So starting with the applicable legal principles,

the first point to note is a very obvious one but it bears emphasis in view of some of the submissions that have been made. The UK system of competition law very clearly applies to control exploitative as well as exclusionary conduct by dominant firms. So by investigating Auden/Actavis's pricing behaviour, the CMA was following a well-trodden and orthodox path.

Section 18(2)(a) specifically prohibits the practice of directly or indirectly imposing unfair purchase or selling prices, and that language is identical materially to what is used in what is now Article 102 of the Treaty on the Functioning of the European Union. Of course, by the time section 18(2)(a) was enacted, it was well established that EU law prohibited pricing that was excessive and unfair, drawing on the *United Brands* judgment of 1978.

The well-enshrined place of exploitative abuse among the categories of conduct prohibited by UK competition law was recently confirmed in clear terms by the Court of Appeal, giving judgment in the *Gutmann* case. That is one of the collective actions that are now before the tribunal. It is well familiar, I think, to Professors Mason and Holmes who were both on the panel for the certification stage. Specifically, as they will know, it involves an allegation of unfair train fares

and, in particular, an alleged failure to publicise boundary fares leading to customers paying twice.

The appellants before the Court of Appeal were the defendants below, and were challenging the tribunal's decision to certify the proposed claim partly on the basis that it should have been struck out as wrong in law, and that argument was emphatically rejected by Lord Justice Green, giving the judgment of the court.

The key point for our purposes is how Lord Justice Green summarises the goal of the law relating to abuse. If we could go, please, to {M/191/30} and look at what he says at paragraph 93. So if we could just enlarge paragraph 93, please:

"The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is by definition, freed from the competitive shackles which otherwise incentives and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of 'unfair' terms and prices. These are often described as 'exploitative' abuses."

So a control on unfair conduct by dominant undertakings, including unfair pricing, is intrinsic to the Chapter II prohibition and goes to the foundations

of it. That is because the law of abuse concerns situations in which a firm's market power freeze it from adequate competitive constraints, allowing it to act in ways harmful to customers and consumers.

Can I also show you a recent European authority which highlights the continued vitality of unfair pricing in the context of EU competition law and the justification for controlling it. It is the recent opinion of Advocate General Pitruzzella in the *SABAM* case. It was a reference, a preliminary ruling by a Belgian court in one of a number of cases concerned with the prices charged by performing rights societies, or collective management organisations, bodies that licence on behalf of performers the use of their musical works, and typically there is a monopoly in each state that undertakes that licensing.

Now, while *SABAM* concerned a very different factual situation from that which presents in this case, it represents the most recent consideration of the *United Brands* case, and it is also notable that Advocate General Pitruzzella sets out a careful and detailed analysis of the general principles relevant to the assessment of excessive pricing going beyond the particular facts at issue in that case.

The passage I want to show you is at {M/175/6}. So

starting at paragraph 21 at the top of the page, if we could enlarge that, please, the Advocate General notes that:

"Unlike in other legal systems, such as ... the [US], EU competition law regards as an anticompetitive practice any abuse of a dominant position that consists of 'directly or indirectly imposing unfair ... prices or other unfair trading conditions'. For a long time, the Commission and the national competition authorities pursued that type of anticompetitive practice on a rather limited basis. In recent years, however, there has been a revival of the concept of 'unfair prices', as evidenced by the growing number of cases handled by the national competition authorities and the Commission, and by the cases brought before the Court. For the most part, those cases have concerned the prices of medicines and the tariffs applied by collective management organisations."

Then looking down the page at footnote 14, you see various types -- various cases concerning the pricing of pharmaceutical products identified, cases pursued in Italy, the UK and Denmark, and by the European Commission.

Going back up to paragraph 22, the Advocate General turns to consider what explains this situation, that is

to say the reluctance to use the concept and its subsequent resurgence in some economic sectors.

He begins by explaining the reasons to be cautious, and I should say at the outset that the CMA certainly does not shy away from those in these proceedings, we recognise that this is a nuanced and complex area for competition law.

The Advocate General notes:

"... that the identification of a price as unfair and thus contrary to competition law is an extremely difficult process and one that is fraught with the risk of false positives (which occur when a price is mistakenly considered to be above the competitive price), or worse, the distortion of competition law in a form of dirigisme that replaces market dynamics with a framework of economic relations corresponding to the regulator's subjective preferences. In addition, the erosion of profit margins may be a disincentive to improving the quality of the product or service, to innovation and to the entry of new competitors. Ultimately, therefore, it is consumer welfare -- the main (and some would say the only) objective of competition law -- that suffers."

He continues at paragraph 23:

"Normally in a competitive market, high prices are

corrected by the fact that because they are high they attract new entrants, thereby increasing supply and resulting in lower prices. The market is thus self-correcting. This is the main thrust of all currents of economic thought which emphasise the ability of markets to self-correct. It was advanced by the Chicago school, which heavily influenced the North American antitrust practice."

So that is the case for caution which explains the traditional reluctance to apply the principles.

But at paragraph 24 the Advocate General turns to consider the reasons for the subsequent resurgence in relation to pharmaceutical products, among other sectors, and he gives two reasons.

First, he notes that:

"... it is not always possible for markets to self-correct, least of all where there are legal barriers to the entry of another operator ..."

PROFESSOR MASON: Could you scroll down, please?

MR HOLMES: I am so sorry.

Sir, paragraph 24:

"... not always possible for markets to self-correct, least of all where there are legal barriers to the entry of other operators, for example because a legal monopoly exist ... There might also be

a de facto monopoly in markets where multiple factors ..."

He gives various examples, can make the entry for new competitors especially difficult. He refers there, for example, to consumer habits, absence of alternatives to the monopolist's product or service, lock-in effects, and so on.

In the present case there were, of course, legal barriers to entry, the need for marketing authorisations and then the orphan designation, and there were also factual features which disrupted entry. In the pre-entry period, there were the agreements which led the first two holders of marketing authorisations, Waymade and AMCo, not to enter the market independently for a number of years, despite their ability to do so.

Analogous with consumer habits, there was the strong belief on the part of the multiple pharmacies that they should not dispense skinny label tablets to adult adrenal insufficiency sufferers.

Now, returning to the Advocate General's opinion at paragraph 25, he makes a second point to explain the resurgence. He notes that:

"... it is not always the case that there is a maximum price that the consumer is willing to pay for a product, with a result that, in those situations,

there are no obstacles to the introduction of excessive prices. In the case of a life-saving medicine, for example, the only spending limit is the financial capacity of the purchaser (whether the patient or the national health service)."

Pausing there, that is, of course, the situation here in the period prior to competitive entry, in which Auden steadily increased the prices charged for a life-saving medicine in the knowledge that doctors would continue to prescribe and the NHS would have no choice but to pay.

Then he gives another example of particular relevance to the specific context of performing rights societies, which was at issue in the *SABAM* case:

"... even where less fundamental values than human life are at stake, there may be cultural or behavioural factors that mean that the consumer is willing to pay an extremely high price. In order to attend a concert of a world-famous rock star, who is the idol of millions of young people, the price may be limited only by the financial resources at the fan's disposal."

Now, clearly, as I observed earlier, this is a very different factual situation from the present case but, in my submission, it bears at least some analogy with the behavioural factor affecting the larger multiple

pharmacies in the post-entry period, whose perceptions of regulatory risk led them to continue to pay Auden/Actavis a substantial premium above cost-plus and skinny labels prices during the post-entry period.

At paragraph 26 the Advocate General pulls the threads together:

"In cases such as those described in the previous two points, the failure of competition law to intervene would result in a false negative since -- according to the concept of market self-correction -- the price would mistakenly be considered not to be above the competitive price. In cases of this kind, there is more at issue than simply the distortion of competition. Indeed, this could amount to an attack on some of the fundamental values of our society, such as social equality, where there is a point at which differences in the possession of basic goods cannot depend on earning capacity without undermining social cohesion. In our society, health care -- and thus the availability of medicines considered essential -- and the consumption of culture are intrinsic aspect of belonging to a community. In those areas, therefore, the issue of 'unfair prices' is more acute. This is especially the case during an economic recession or when there is heightened public awareness of social inequality. The concept of

excessive prices characterises EU competition law precisely because it is framed within a legal system and is engendered by an economic culture which makes reference to the 'social market economy' ..."

So pausing there, where there are market features which prevent competition from operating effectively to constrain price and where, as with essential medicines, demand is extremely inelastic to price, there is a countervailing risk of false negatives if one was simply to rely on the potential for markets to self-correct. In the present context, the issue of unfair prices is particularly acute, given the importance of health care as a social good.

So as the Advocate General's opinion shows, in EU as in UK competition law, there is a clear and recognised role for the control of unfair pricing, particularly in the context of medicines, like hydrocortisone. Care is, of course, needed in relation to this type of infringement, as with other types of infringement, to limit intervention to cases where it is warranted. In the Advocate General's language, "to guard against false positives".

But the concept of excessive pricing is an established element of our system of competition law, as is the *United Brands* methodology. When confronted

with the evidence of Auden/Actavis's pricing conduct, with the mountain figure, the CMA, like the tribunal, was right to consider that it required an explanation. So that is the first point in law.

The second point concerns the framework for assessing whether prices are excessive and unfair. In my submission, that is clear and well established. Indeed, this is the next point that the Advocate General makes.

So you see at paragraph 28, down the page, if we could just move down, the Advocate General observes that to navigate the delicate balancing exercise he has described:

"... the court has identified methods which have been specified in the subsequent development of case-law. In the light of that case-law, it is possible to build a fairly detailed picture of the methods and criteria that must be used to classify a price as unfair ..."

That is the framework set out in the Court of Justice's 1978 judgment in the *United Brands* case which the Advocate General then proceeds to summarise. I propose to take it from that case itself, so we will go there in just a moment. It concerned the supply of bananas in various European countries and it was

an appeal against the decision of the European Commission which found that *United Brands* had abused its dominant position in various ways.

If we could go, please, to the judgment, which is at {M/4/60} and if we could pick it up, please, at page 60 of the judgment, which is, sorry -- yes.

If you look at paragraph 3 you see at (c) that one of the forms of abuse found by the Commissioner was by imposing unfair prices for the sales of bananas on its customers in a number of market member states, and the discussion of unfair prices begins on page 91 {M/4/91}, and you see at paragraph 235 that the Commission had found that prices were unfair because they were excessive in relation to the economic value of the product supplied.

At paragraphs 236 and 237, one sees the basis of the Commission's conclusion. It relied in support of that conclusion on the differences in prices charged between member states.

As explained at paragraph 238, the Commission did not analyse -- so down the page, please -- the Commission did not analyse -- can we go down, please? -- the Commission did not analyse United Brand's cost structure but treated the prices charged in the low-price member state, Ireland, as representative.

So, in other words, it proceeded on the basis of a comparative analysis without considering how prices related to the costs of supply.

The court's analysis begins at page 93 {M/4/93} at paragraph 248, and it first notes the treaty text mirroring section 18, prohibiting the imposition of unfair prices.

Then at 249 the court observes that:

"It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition."

So one of the ways in which prices may be unfair is if they result in the dominant firm reaping trading benefits, that is to say profits, that would not have been available if there were no dominant position and the market was instead competitive.

At paragraph 250 an example is given of an unfair pricing abuse, namely charging a price which is excessive because it has no reasonable relation to the economic value of the product. So excessive pricing may give rise to an unfair pricing abuse and prices are excessive if they bear no reasonable relation to

a product's economic value. The language of no reasonable relation is significant. It shows that the prices must be seriously dislocated from economic value.

This is one respect in which the framework has caution built into it for good and understandable reasons outlined by the Advocate General in *SABAM*. The dominant undertaking's prices must be given generous headroom to anticipate a point that I will come back to when considering the tribunal's note.

At paragraph 251, the court then identifies an objective methodology for determining whether prices are not reasonably related to economic value, and are therefore excessive.

The excess could be determined objectively by making a comparison between the selling price and its costs of production, which would disclose the amount of the profit margin.

So, in other words, to assess whether the dominant firm's prices are excessive, whether they bear a reasonable relation to economic value, one can analyse the dominant firm's profits by comparing the prices it sells and the costs which it incurs.

In my submission, that makes very good sense. In a competitive scenario, where dominance is removed from the equation, one would ordinarily expect effective

competition to produce some reasonable relationship between a firm's costs and its prices. In many contexts that will shed light on the price that can be expected to be obtained under conditions of effective competition and will serve as the most reliable proxy for economic value.

Then at paragraph 252, the Court of Justice pulls these threads together:

"The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."

So here you see the two-limb test as a permissible method for assessing whether prices are abusively unfair. The first limb asks whether the prices are excessive having regard to the profit margin analysed by comparing costs and prices, and the comparison specified in the paragraph focuses on actual prices and actual costs, to see whether the profits in fact achieved are excessive.

At the second limb, the question is whether the prices charged, if excessive, are also unfair and there

are two alternative ways of assessing that: whether they are unfair in themselves or whether they are unfair when compared to competing products.

So again the framework is a cautious and conservative one. A competition authority cannot leap straight to a subjective assessment of what it regards as fair or appropriate. At least in cases of tangible products such as the present, one must start by considering how prices compare with costs. Only if the prices are shown to be excessive, having given the dominant firm a generous headroom above cost-plus, is there the potential for abusively high pricing.

But equally the assessment of prices and costs must be placed in a wider context. The authority must also consider whether the prices are unfair having regard to the nature of the product, the market context and the impact on consumers, or alternatively having regard to the position with other competing products.

Then turning over the page to paragraph 253 {M/4/94}, the court makes clear that there are other ways that might be devised for selecting rules for determining whether the price of a product is unfair. So the *United Brands* test is not exhaustive. But it is a tried and tested method for establishing unfair pricing and it has been consistently applied by the

Commission, competition authorities in the member states, the Court of Justice, the High Court, the tribunal and the Court of Appeal.

One final point to note at paragraph 254. The court observes there that the assessment of production costs may need to include a discretionary apportionment of indirect costs in circumstances where it supplies a number of different products. So that is another example of the cautious approach specified under *United Brands*, the cost assessment should be properly undertaken and it should be comprehensive. It should include common as well as direct costs.

So the court then proceeded to assess the Commission's Decision against the two-limb test and it found that the Commission had not -- sorry, had erred by not assessing UBS's production costs in order to see how their prices related to costs and that led to partial annulment.

So that is the *United Brands* test.

The third point on the law is to note that this two-stage approach in *United Brands* has been recently and authoritatively endorsed by the Court of Appeal in *Phenytoin* as a legitimate framework for assessing whether prices are excessive and unfair and it fairly reflects the current state of UK competition law.

The Court of Appeal's judgment in *Phenytoin* is at bundle {M/170/1}. As the tribunal is aware, the case arose out of appeals brought both by the CMA and the appellants against various aspects of the tribunal's Decision to annul and remit the CMA's decision binding unfair pricing in the *Phenytoin* case.

Lord Justice Green and the Chancellor, Vos, both gave judgments. In his judgment the Chancellor agreed with Lord Justice Green, and Sir Stephen Richards agreed with both and took the view that there was no material difference of substance between them. For your note that is at paragraph 190.

While there was some differences between the views expressed by the tribunal and the Court of Appeal, they were primarily of relevance to the conduct of the case on remittal and they did not affect the tribunal's judgment on the facts, which was upheld.

If we could turn, please, to page 29 {M/170/29} which is in the judgment of Lord Justice Green, and look at paragraph 97, in which he sets out a characteristically pithy summary of his conclusions applying from the case law after considering a number of authorities, including *United Brands*. At point (i) he notes the basic test for an abuse of this kind is whether the price is unfair:

"... a price will be unfair when the dominant [firm] has reaped trading benefits which it could not have obtained in conditions of 'normal and sufficiently effective competition' ..."

That, of course, reflects *United Brands*.

At point (ii):

"A price which is 'excessive' because it bears no 'reasonable' relation to the economic value of the good or service is an example of ... an unfair price."

Again, then, as in *United Brands*, a price may be unfair because it is excessive.

At point (iii):

"There is no single method or 'way' [of establishing abuse] and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely on."

Pausing there, in this context I rely on the case law which we considered before the festive period on the margin of manoeuvre and the implications of that for the tribunal's review of the CMA's Decisions.

Then at (iv):

"Depending on the facts and circumstances of the case a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring

competition authorities to use more than one test or method ..."

So again pausing, in exercising its margin of manoeuvre the authority has a discretion as to which tests to employ. It can rely on a single test if it wishes.

The Court of Appeal then turns to consider the particular type of test described in *United Brands*, namely a test which compares prices and costs, which is described as cost-plus. The plus reflects the approach taken by the CMA in *Phenytoin* and in this case of allowing, in addition to a cost, a reasonable rate of return.

So at (v):

"If a cost-plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is 'excessive'. This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales ... or to some other appropriate benchmark such as return on capital employed ..."

So Lord Justice Green begins by describing the excessive limb of *United Brands* and confirms this is

about assessing the profit margin, the trading rewards which are reaped, and he introduces a further cautious and conservative element which has emerged in the case law: when comparing prices to costs one should allow a reasonable rate of return. That is the plus element of cost-plus.

As we will see, it is a further illustration of the headroom or margin of appreciation that the dominant firm enjoys in its pricing.

Then in the remainder of point (v) Lord Justice Green turns to consider the second limb:

"When [the cost-plus assessment] is performed, and if the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive."

So where prices are excessive one then turns to consider whether the price may nonetheless be fair. Lord Justice Green describes the approach at the fairness stage at (vi):

"In analysing whether the end price is unfair a competition authority may look at a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself, and/or evidence of comparables drawn from competing products

..."

At (vii) {M/170/30}:

"If a competition authority choices one method (e.g. cost-plus) and one body of evidence [if we could go over the page] and the defendant undertaking does not abuse other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone."

Then at point (viii):

"If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it."

So when analysing the unfairness part of the *United Brands* test, Lord Justice Green makes clear that the authority may base its analysis on material relating to the defendant undertaking, that is to say whether the price was unfair in itself, or evidence of comparables, that is to say the position of other competing products. Again of course that matches *United Brands*. If the undertaking relies on other methods or evidence, then consistent with the principle of good administration, those other methods or evidence must be fairly evaluated.

In my submission, Lord Justice Green's analysis

there makes clear that a competition authority may proceed to assess prices by reference to the *United Brands* framework, considering first the relationship between price and cost and then whether the prices are fair, if excessive.

The fourth point is that in endorsing the *United Brands* test, Lord Justice Green conducted a careful view both of the prior case law but also of the economic literature. Now, last term the tribunal expressed an interest in the relevant literature on excessive pricing. The Court of Appeal expressed the same interest in the *Phenytoin* case and Lord Justice Green's conclusion, having reviewed the literature, was that the legal framework was consistent with the approach which emerged from the economic literature.

So if we could turn to page 32 of the judgment {M/170/32}, you see at paragraph 105 in the middle of the page that he refers to an OECD Paper which summarised arguments from the literature, that identifies *United Brands* as the seminal test:

"... and observes that European competition authorities and courts have made use of a variety of different methods, all said to be consistent with the case law, to determine whether a price is excessive and

unfair. In some cases, a comparison between production costs and prices is used but price/cost analysis is not feasible in all cases [whether] due to lack of data or because the disputed price relates to an intangible good such as an IP right."

Now, pausing there, obviously where you are dealing with an intangible, as in the case of the *Attheraces*, the data at issue in *Attheraces*, or the *Performing Rights Society* cases, marginal costs will be very close to -- will be very low or indeed zero, and the intangible may be protected by intellectual property rights, the purpose of which is to protect the opportunities to recoup the costs of innovation and to incentivise innovation.

Price discrimination may be equally possible without a risk of arbitrage and indeed may be beneficial, increasing consumer welfare, and in these circumstances, price cost tests may not be appropriate and one may need to look at other methods, which is what we see done in the Collecting Rights -- the Collecting Society cases where one goes straight to the comparison limb. One looks at a comparison of the prices charged between Collecting Rights Societies in different member states, and that explains that line of the case law.

But my submission will be that we are here very far

from that intangible scenario. We are dealing with a generic pill which is long off patent.

Returning to paragraph 105 at E on the page, Lord Justice Green records that other methods are also used, such as benchmarking:

"Price-based benchmarks are used by comparing the investigated price with prices charged by the dominant firms in different markets or over time or by comparing the prices charged by the dominant firm and those charged by other firms, either in the same market or in other markets."

So in answer to the question I think you raised, sir, temporal comparisons certainly are used as an established part of the tool kit and other methods are also described in the final three lines:

"... [a] combinatorial approach ... there are no fixed rules, assumptions or presumptions ... [It] depends on the facts of the case."

Turning on a page {M/170/33} you see Lord Justice Green's overall conclusion from the economic literature at paragraph 97 -- no -- sorry, 107. Yes, exactly. He sees it supporting the conclusions of law that he had derived from the case law and which were summarised at paragraph 97, a paragraph we looked at:

"... many different tests ... there are or may be

difficulties with all tests ... all cases are ... fact and context specific; there is a need for competition authorities to be able to intervene ex post in pharmaceutical cases; and it is economically rational that competition authorities should have a margin of appreciation as to the choice of method and evidence they seek to rely upon."

So that is the *United Brands* test as carried across into UK law and confirmed recently as consistent with the economic literature by Lord Justice Green in the Court of Appeal.

The fifth point to note in relation to the law is that the Court of Appeal's judgment rejected any requirement to establish a benchmark competitive price for the purposes of determining whether a dominant firm's pricing is excessive, and this is worth drawing out, I think, sir, just in order to assess the limits on the assessment that the CMA might have been required to undertake in this case.

The tribunal had suggested that such an approach might be appropriate, drawing on some remarks from the Advocate General in the *Latvian Copyright* case, but the Court of Appeal did not agree. If we could turn on, please -- turn to page 38 of Lord Justice Green's judgment {M/170/38} you see at paragraph 118 that the

tribunal held, in the quotation, that the CMA should "establish a benchmark price", or above the quotation, should:

"... establish a benchmark price, or range, that reflects the price that would pertain under conditions of normal and sufficiently effective competition."

At paragraph 120 you see Lord Justice Green's response:

"The answer to this ground lies in the summary at para 97 ..."

That is the key focal paragraph we looked at.

"The authority has a margin of manoeuvre or discretion as to how it goes about proving its case, subject always to the appellate jurisdiction ... To the extent, therefore, that the Tribunal compelled the use of a particular test, then in my view, it has misconstrued the case law. It is not entirely clear what the Tribunal was referring to when it used the expression 'hypothetical' price. If this was intended to refer to an artificially constructed price, then I agree with the CMA and the Commission. But it might well be that the Tribunal was referring simply to the exercise of calculating a benchmark, return on sales or return on capital employed, that is to say the plus part of the cost-plus and/or the exercise of looking to

external comparators."

He then makes a series of observations on what sorts of evidence should be used. At paragraph 121:

"First, as to the expression 'hypothetical' nothing suggests that in every case there is a need for the creation of a hypothetical benchmark, in the sense of an artificial construct. Indeed, the thrust of the OECD Paper and academic literature ... suggests that the counterfactuals of greatest practical value are often those drawn from real life, as opposed to some hypothetical model. The case law supports this conclusion."

Then at the top of the following page {M/170/39}, there is a consideration of the case on exclusionary abuse and the point that the Court of Appeal -- the Court of Justice in *Latvian Copyright*, did not endorse any suggestion by the Advocate General in support of a hypothetical price benchmark.

Then at paragraph 122, the point that as to whether the benchmark must relate to price, Lord Justice Green agreed with the CMA and the Commission. He also agreed with Flynn's counsel that:

"... all that is required is that there be 'a' benchmark or standard against which to measure excess or unfairness. The need for a comparator is

economically logical since the concepts of fairness, excessiveness and reasonableness are all relative concepts. They must be compared with their counterfactual e.g. unfairness, normality or unreasonableness. But case law and literature make clear that there are numerous counterfactuals which might be used, and importantly this includes the costs of the dominant undertaking as well as benchmarks ... for ROS or ROCE ..."

That is to say the plus part of the cost-plus.

"As was pointed out in argument, the overarching description of an abuse in *United Brands* is by reference to a comparison with 'trading benefits' realised in conditions of normal and sufficiently effective (i.e. workable) competition. This necessarily comparative exercise does not exclude a benchmark premised upon the undertaking's own cost base or an assessment of ... a reasonable rate of return."

So pausing there, the competition authority may proceed at the excessive limb by reference to the dominant firm's own costs, as the *United Brands* case itself suggested, without modelling a hypothetical competitive benchmark price instead or as well.

Then third, at paragraph 123, Lord Justice Green noted that in paragraph 249 of *United Brands* the court

said only that it was:

"... 'advisable' to ascertain whether the undertaking had exploited its dominance in a way which it could not have 'if there had been normal and sufficiently effective competition' ..."

Those are the words relied on by the Advocate General in *Latvian Copyright* to support a requirement to estimate a hypothetical benchmark price. As Lord Justice Green observes, however:

"There is no specific reference to price in the paragraph and in any event the expression 'advisable' is inconsistent with the court intending to provide anything more than guidance as to best practice."

So -- and then --

THE PRESIDENT: Do you take Lord Justice Green as saying that the fundamental objective in excessive pricing cases is to ascertain whether the price in fact charged in the case of dominance is above the price that would have been charged in a competitive market?

MR HOLMES: I am so sorry, sir, I did not catch the first part of the question. Would you mind repeating it?

THE PRESIDENT: What I am getting at is what one is trying to do when working out whether there has been abuse of a dominant position in the case of pricing, and can we agree that the price that is -- the price that would be

obtained in a competitive market ipso facto cannot be abusive, the whole point of a competitive market is to determine the price?

MR HOLMES: Yes, sir, we can.

THE PRESIDENT: Right.

MR HOLMES: In principle, if the price is set under conditions of normal and sufficiently effective competition, that cannot be an abusive price.

THE PRESIDENT: So what one has got is one has got a distorted factor, which is the presence of a dominant undertaking --

MR HOLMES: Yes.

THE PRESIDENT: -- meaning that one does not have a competitive market in play.

MR HOLMES: Yes.

THE PRESIDENT: The goal has got to be to eliminate the pernicious dominance and ask oneself what would pertain if that state all of affairs did not exist?

MR HOLMES: Yes.

THE PRESIDENT: So, so far, the tribunal's focus in Flynn v Pfizer on what would the hypothetical price be seems actually bang on point. The problem is that you do not know what would happen in the counterfactual and therefore there are a variety of methods which will recommend themselves in varying degrees according to the

facts of any given case as to how one works out what a market price would be and there one has got a whole range of options, because one does not know, because it is counterfactual, it is hypothetical, what the market price would be.

So are we really just disagreeing about methodology by which one gets to an actually quite clearly definable end?

MR HOLMES: So in terms of the purpose of the exercise, I would agree entirely and endorse as a clear and correct summary of the position the account that you have canvassed with me, sir. What Lord Justice Green's judgment suggests, and we will see that the Chancellor takes a similar position, is that in the generality of cases, particularly when dealing with tangible products, products like generic pills of a considerable age, a reasonable approach to determining the excessiveness of the price and to assessing how the price compares with what one would expect under conditions of normal and sufficiently effective competition is to conduct the first limb stage, and so to that extent it is a question of methodology, and the methodology which has been endorsed in the case law and that Lord Justice Green and the Chancellor accept as appropriate in the generality of cases is a price cost test, with all of the cautious

elements that are identified in the case law and which I will come back to when considering your note.

THE PRESIDENT: All I am saying is that the reason you have to go to that, or variants on that, is because you cannot tell what the counterfactual price would be because you do not know what would happen if you removed the pernicious dominance.

MR HOLMES: Yes, I --

THE PRESIDENT: You have got to do it in some way and talking about a hypothetical price. If dominance was removed, well, that is the goal, but you cannot hypothesise a price out of nothing.

MR HOLMES: No, indeed, sir, and again I think we are in -- we fully concur with what you are suggesting. The advantage of a cost-plus test at the first stage among others -- first of all, it does have a rational connection with what one would expect in conditions of normal and sufficiently effective competition for products that do not have this particular intangible element, you would expect some relation between price and cost. Not, of course, the perfectly competitive scenario, in every case a price being competed down to marginal cost, but you would expect some relationship between price and cost to emerge from a process of competition, not in every case but in many cases. So it

does have a rational basis.

But the other great advantage of it is that it is administrable. It is, as you say, in circumstances where the counterfactual is ineffable, we cannot -- we simply cannot know for sure what it would be, it provides an effective basis for targeting that question. If behind your question there is an ulterior question of whether there may be cases in which one does have other reliable and effective proxies for the competitive price, again that is I think something that I would not dissent from.

The tribunal will have noticed that under the excessive pricing limb in this case, the CMA did rely not only upon the cost-plus assessment but also upon a comparison between Auden and Actavis's prices on the way up the mountain and immediately following entry during the infringement period with those prices which have eventuated from a process of fair and reasonably effective competition, which are now, of course, below the CMA's estimate for cost-plus.

So that is -- that does provide, if you like, an independent indication of what prices might be under conditions of fair and reasonably effective competition. But as you say, sir, that kind of guidance will not be available in every case and the methodology of the first

limb of *United Brands* commends itself partly because it is a test that can be undertaken. Does that address your question, sir?

THE PRESIDENT: Yes, thank you.

MR HOLMES: I am grateful.

PROFESSOR MASON: Mr Holmes, just before you resume, I just want to check whether it is me or whether others are having problems with the realtime transcript.

MR HOLMES: I am entirely in the tribunal's hands but if it would assist the tribunal to see the realtime transcript, it might be worth investing that time very briefly.

THE PRESIDENT: We will take a minute.

MR HOLMES: Just to round this point off first of all in Lord Justice Green's judgment, you see the fourth point at paragraph 124, the court in *Latvian Copyright* did not approve the statement in the Advocate General's opinion that there was no single method or test or set of criteria, and that is inconsistent with the court having approved any statement to the effect that the use of a hypothetical benchmark price was mandatory.

Then at paragraph 125, his conclusion:

"In my view by the nature of the abuse in issue, there needs to be 'a' benchmark. But, in the first instance at least, the choice of benchmark is for the

competition authority and can be based upon the costs of the undertaking being investigated or ... [on] comparables such as ... prices charged by the same or different undertakings in the same or different geographic markets or indeed any other benchmark or combinations thereof capable of providing a 'sufficient' indication that prices charged are excessive and unfair. It follows from the above that assuming the Tribunal was mandating the use in all cases of a hypothetical benchmark price which did not include the costs of the undertaking or some other benchmark related to the undertaking, then I respectfully disagree with the Tribunal. I would allow this ground of appeal."

I think that is fully consistent with the points that you were canvassing with me, sir.

The Chancellor agreed. If we turn on to page 70 {M/170/70} you see at paragraph 252:

"In my judgment, the first step in the analysis for the excessive limb is likely in most cases [the generality of cases] to be for the competition authority to see whether the costs of production or the costs actually incurred in relation to the product in question, including of course a reasonable rate of return, can be ascertained. In some cases, that simply cannot be done, and in others, it may provide

an i*Napp*ropriate counterfactual."

One has in mind the intellectual property cases:

"But, where it can be done, there is no reason, based on the applicable authorities, why the authority should not use that methodology, a cost-plus assessment, to ascertain an appropriate counterfactual for the excessive limb of the analysis. In other cases it may be need to determine the excessive limb by other methods."

At 253:

"It is true that the cost-plus calculation must take some account in the 'plus' part of the calculation of the economic value of the product, but once again, I do not think that the CMA is required to adopt any particular approach to the determination."

And at 254:

"I agree, therefore, with the CMA that the CAT fell into legal error when it held ... that it had to establish a benchmark price or range of prices, beyond a cost-plus calculation, in order to determine whether the prices charged by Pfizer and Flynn were excessive."

And there is a sixth and related point on the law which emerges from the Chancellor's judgment. It is that the legal framework must be applied having regard to consideration of practicalities. Again, consistent

with the point, sir, that you were just canvassing with me.

If we turn back to page 68 {M/170/68}, the tribunal here offers some framing observations. There's an introduction to the discussion of the issues in the case.

Beginning at 243, the Chancellor notes that:

"It was quite easy [in the *Phenytoin* case] to lose sight of a stark reality, which was that, literally, overnight *Pfizer v Flynn* increased their prices by factors of between approximately 7 and 27, when they were in a dominant position in each of their markets. That did not, of course, abrogate the need for a rigorous reasoned approach but it was important to keep in mind."

Then at paragraph 244:

"Neither *United Brands* nor Advocate General Wahl's opinion ... should be read as deeds. The CMA has to be able to do its job depending on the economic circumstances of the case. This was a case [involving a generic pharmaceutical product] where costs and reasonable profit margin (cost-plus) could reasonably be assessed, unlike, for example, the performing rights cases. It was also a case where the alleged comparators themselves had a lengthy economic history. It would be

undesirable to establish an approach or a methodology that is so complex and time-consuming that the CMA has neither the time nor the resources to deal with cases of alleged unfair pricing."

So in considering the approach to be applied, it is appropriate for the tests to be kept administrable. The framework should not be excessively complex or time-consuming. That is the sixth point.

The seventh point is that the *Phenytoin* judgment also gives guidance as to the role of economic value. We saw in the *United Brands* case that the cost-plus assessment of the excessive limb is expressed as a way of testing whether the price bore a reasonable relationship to economic value, and you have my submission that that can readily be understood. In a competitive market you would typically expect price to bear some reasonable relationship to cost, although that may be less true in the context of intangible products. But for an off patent generic medicine, it holds true.

Lord Justice Green makes a series of relevant observations in relation to economic value which are consistent with that conclusion. If we could turn, please, to 48 of the judgment {M/170/48} you see at paragraph 154, Lord Justice Green begins by noting that:

"The concept of economic value is not defined."

His Lordship then says that:

"In broad terms the economic value of a good or service is what a consumer is willing to pay for it. But this cannot serve as an adequate definition in an abuse case, since otherwise true value would be defined as anything that an exploitative and abusive dominant undertaking could get away. It would equate proper value with an unfair price."

That is a well-known conundrum in international competition law.

And at paragraph 155 Lord Justice Green's reinforces this point:

"The simple fact that a consumer will or must pay the price that a dominant firm demands is not therefore an indication that it reflects a reasonable relationship with economic value."

Now, of course, against this background then arises: what is economic value to be understood as meaning? That is the million-dollar question.

THE PRESIDENT: Yes, I wonder whether the million-dollar question is how one considers economic value in the non-abusive case and then translates it over to the abusive case.

MR HOLMES: Yes. Well, sir, if I may say so, we would fully endorse that position. We say that again it is

consistent with what -- it joins the dots in Lord Justice Green's judgment.

You see at paragraph 155 his indication of the appropriate proxy:

"... a proxy might be what consumers are prepared to pay for the good or service in an effectively competitive market ..."

And he notes there that this connection is supported by paragraphs 249 and 250 of *United Brands*, where the court obviously first referred to the dominant firm reaping benefits not available under conditions of normal and sufficiently effective competition and then identified as abusive the charging of a price that bears no reasonable relation to economic value.

So both of those points, the *United Brands* case, the origin of all of this, and Lord Justice Green's comments here, in my submission, are entirely consistent with the point that you just put to me, that the starting point should be economic value abstracting from or removing the dominance element which is distorting of the price or is considered to be potentially distorting of the price that one is testing.

THE PRESIDENT: I mean, you may be coming to our note and do stop me --

MR HOLMES: Yes.

THE PRESIDENT: -- if this is something that I am anticipating, but when one has a competitive market, not a perfect competitive market but just an ordinarily competitive market and one looks simply at a dichotomy between buyers and sellers, so one loses chains on either side, the buyer is interested in paying obviously the least, but will be willing to pay up to the value that he or she individually attributes to the product in question. The seller is concerned not so much with consumer value but in maximising the price and minimising the cost, thereby maximising consumer surplus.

MR HOLMES: The prices --

THE PRESIDENT: Sorry.

MR HOLMES: I think you may have misspoken, sir, producers.

THE PRESIDENT: You are absolutely right, I misspoke. The control on price in a competitive market is the other sellers.

MR HOLMES: Yes.

THE PRESIDENT: And all that that does is ensures that there is a degree of squeeze on the consumer producer surplus side, with the result that when one is talking about, as it were, the allocation of where the value belongs in the divide between -- if you imagine price as a line, and on one side one has got the buyer and on the other

side one has got the seller, the value in a competitive market sits on the buyer's side.

MR HOLMES: Yes. Sir, I should say, first, the reason why I am going through this case law with some care, I hope it is not too slow for the tribunal.

THE PRESIDENT: No.

MR HOLMES: You must hurry me along if it is, but the reason is precisely because I think it is very helpful in unpicking the thoughts in your note, which I propose to come to next, but I was not attempting to put off the question for another hour.

The basic theoretical propositions which you are putting to me are ones which we would endorse. We would not dispute any of them. There is a question about administrability and what that means in practical terms for the test which an authority is to apply, and I will come to that perhaps if I may when I turn to the note. But you are quite right that where these two forces interact or these two values interact, if you like, what the consumer is prepared to pay and what the producer is prepared to accept and the respective surplus that that generates on either side is through a competitive process, which leads to the price under conditions of fair and sufficiently effective -- effective and sufficiently -- sorry, fair and

sufficiently effective competition, and that is, I think, a very helpful elaboration of the propositions that one finds already perhaps in germinal form in these cases and in the suggestion of Lord Justice Green, that a helpful proxy for assessing economic value is the price that would obtain under conditions of fair and sufficiently effective competition.

But, if I may, I will go through your note with some care because it is an important document and it merits proper attention and analysis.

Now, there were just two further observations on economic value besides the proxy point, which we obviously put weight and attach significance to. The first is at paragraph 171 on page 52 of the judgment {M/170/52}, and here there is a proposition advanced that the tribunal may struggle slightly with in view of the evidence that we have all heard.

Lord Justice Green states that the concept of economic value:

"... is 'legal' in the strictly limited sense that it has been ascribed a meaning in a court judgment but, at base, it is an economic concept which describes what it is that users and customers value and will reasonably pay for it and arose in the *United Brands* judgment ... as an economic description of the abuse of unfair

pricing."

Now, of course, the suggestion that economic value is an economic concept is one that is somewhat in tension with the position that was taken by the economists in the hot tub during the course of evidence in this case. But his Lordship's comment comes back, in my submission, to the distinction between willingness to pay and what they will reasonably pay and the touchstone which emerges from that is what evidence there is as to what consumers would expect to pay in an effectively competitive market. So I think it leads one back to an assessment of the kind that you were putting to me, sir, at least at the level of theory, without yet touching on how that translates into practice.

And then at paragraph 172, the final sentence makes the important point that:

"... economic value needs to be factored in and fairly evaluated, somewhere, but it is properly a matter which falls to the judgment of the competition authority as to where the analysis occurs."

And then turning on to page 53 {M/170/53}, just one final point to note relating to economic value. His Lordship considered that the question of economic value was a factual one that would need to be addressed on remittal but you see at the top of the page that he

says that:

"The CMA has advanced what seems to me to be plausible submissions that given the very high disparity existing between cost-plus and ultimate price, the possibility of any 'economic value' attributable to patient benefit exerting any effect on the outcome is remote. The Tribunal did not suggest otherwise. Whether this ultimately turns out to be so will be a matter for the CMA to consider on remittal."

So the point here is the CMA in *Phenytoin*, as in this case, allowed a generous headroom above cost-plus. Cost-plus already is well above marginal cost. The price measure -- the cost measure that one might expect in a perfectly competitive market, because it includes an allocation of common costs. It is more of a total cost measure. It also includes a reasonable rate of return.

But the CMA does not stop at cost-plus. There have been times where there has been some loose language, I think, in criticisms of the CMA which suggests that the CMA is requiring a strict cost-plus measure in terms of pricing as a kind of shadow regulator. That is categorically not what the CMA did in this case. Its intervention occurred only once there was a massive headroom between its measure of cost-plus, it's

uncontested measure of cost-plus, and the prices that were prevailing in the market, a multiple of five at the very beginning, and that was in the foothills of the mountain.

So this -- obviously this is only his Lordship expressing a view pending reconsideration on remittal, but I do say that that plausible submission is equally plausible in the context of this case and I will come to that when I develop my submissions in response to my learned friends' case on economic value.

So the eighth and final point on the law is this. In my submission, the case law provides no support for the notion that *United Brands* is subject to an additional limb, a third limb, if you like, under which unfair pricing may only be found when the dominant undertaking is in a monopoly position and where competitive pricing is not to be expected within a reasonable period of time.

Now, the high point of the appellants' submissions on this was a paragraph in the *Napp* judgment and indeed my learned friend Mr Jowell, I think, referred to the second limb of *Napp* as though this was a well-embedded feature of the legal apparatus applicable to assessing excessive pricing.

Can we please look at Lord Justice Green's tour of

the case law at page 27, which includes *Napp*, among a number of other cases. So page 27 of the judgment {M/170/27}} at paragraph 91, one sees that the Director General of Fair Trading, who was then the UK competition authority, had stated that he considered a price to be excessive:

"'if it is above that which would exist in a competitive market and where it is clear that high profits will not stimulate successful ... entry within up reasonable period. Therefore, to show that prices are excessive, it must be demonstrated that (i) prices are higher than would be expected in a competitive market, and (ii) there is no effective competitive pressure to bring them down to competitive levels, nor is there likely to be."

So that was what the Director General had to say in that case.

But it is important to note that Lord Justice Green was careful to record what the tribunal said about this, and I think that comment was included with good reason:

"While there may well be other ways of approaching the issue of unfair prices under section 18(2)(a) ... the Director's starting point, as stated in paragraph 203 of the Decision, seems to us to be soundly based in the circumstances of the present case."

So the tribunal in *Napp* itself was cautious. It was prepared to accept the Director's approach based in the circumstances of the specific case that was before it, but it was also at pains to emphasise that there may well be other ways of approaching the issue of unfair prices, and in his summary of the case law, at paragraph 91 -- 97, apologies --

THE PRESIDENT: Just sticking with 91.

MR HOLMES: Yes.

THE PRESIDENT: All I am reading in (i) is that the Director is framing the ultimate goal, which we discussed earlier on, namely you want to work out what the price would be if you remove the tumour of dominance. How you do it, that is not stated.

MR HOLMES: No, indeed. If that is all that this is understood as saying, we would not take issue with it at all. I think what has been suggested is that there must be no -- they gloss over the word "effective". They say there must be no competitive pressure and it must be the case that there is no competitive pressure likely to eventuate within a reasonable period. I think that is how the point is put against me. It is said that if entry can be foreseen and the market is, therefore, likely to be self-correcting within a reasonable period, from that point on, no infringement is possible. You

will recall that that is the submission that is made against me in this case, as I understand it. You will recall that Mr Jowell in response to a question from Professor Mason said that it might take one to two years to enter and that conveniently I think would exclude the possibility of finding prices excessive and unfair during the Allergan period, and it is that point that I think I am being cautious of. Insofar as that is read as an indication that one requires a monopoly with no reasonable prospect of competitive entry within a reasonable period, my submission is that that is -- that was not endorsed by the tribunal in its reasoning in *Napp*, and nor did it feature at paragraph 97 of Lord Justice Green's summary of the legal principles.

THE PRESIDENT: Just to understand your caution about *Napp* --

MR HOLMES: Yes.

THE PRESIDENT: -- is it more in relation to (i) than (ii)?

MR HOLMES: It is indeed, sir, that's absolutely right, yes.

THE PRESIDENT: And would you agree with this that (ii) is in a sense -- can we bring back paragraph 91, just so I get the wording absolutely right? What is going to constitute effective competitive pressure to bring down prices to competitive levels is in itself a very fact-dependent question, not what the price should be

but how long it would take in a competitive market to adjust to a blip in prices that is above the competitive price.

So to go back to our face masks example, if it is hugely difficult to gear up to manufacture face masks, of course it is not but let us suppose it is, and it takes an enormously long time with massive capital investment to do all this, then the process is perhaps going to take a few years.

If on the other hand it is simply a question of diverting what were formerly producing other forms of clothing or apparel and diverting them over to the face mask manufacture where you can make a killing and you can do that in, you know, three days, well, then, three days is the measure of what it will take to bring the prices down. It all depends on what the competitive market context is.

MR HOLMES: Sir, I would fully agree, respectfully, with all of what you say, and understood in those terms, which, in my submission, is a fair reading of that second part of the Director General's comments, it is an entirely benign account of well-established principles.

Insofar as an attempt is made to extract from that a rule that one can only price excessively and unfairly under conditions of monopoly and that even in a monopoly

an excessive and unfair price cannot be found once there is a reasonable prospect of any competitive entry that would be a wrong reading of what the -- it would be to take too much from what is said in paragraph 203 of *Napp*. It would, in the language of Advocate General Pitruzzella in *SABAM*, risk giving rise to false positives in markets that are not capable of self-correcting within a reasonable period. False negatives, I apologise. False negatives.

In my submission, the *United Brands* framework deals with self-correcting scenarios in a more nuanced way. If one wants to fit it within the structure of *United Brands*, the obvious place for it to come would be under the unfair in itself limb when considering competitive conditions. If the market, to take your example of the COVID masks, was liable to self-correct rapidly and all one was seeing was a temporary imbalance of supply and demand, one might readily conclude that those prices were not unfair in themselves, and I will show you the case law that identifies as a relevant criterion or aspect of the analysis under unfair in itself the competitive conditions in the market. That is specifically identified particularly in *Albion Water II*. But that is a flexible way in which this point, which is heavily fact-specific, is to be

incorporated into the legal analysis, not by means of the blunt instrument of any kind of absolute barrier to an application of excessive and unfair pricing rules, which has been, I think, suggested to a degree in these recent cases wherever there is some competition in the market or some prospect of competition. One needs a finer grained analysis to see whether this market really is capable of self-correcting within a reasonable period, and I will address you on the facts of this market with that point in mind subsequently.

THE PRESIDENT: Entirely unsurprisingly, you are happy for the reasonable period to be a short one and you will agree with that. In the face mask example where one can come into the market effectively quickly, well, that is a good example for you.

But let us take a less easily contestable market, but without the barrier that constitutes dominance. It is just a market that requires considerable investment of time and money in order to bring oneself into a position to compete. Would you agree that under limb 2 of *Napp* there is effective competitive pressure to bring price down in those circumstances, it is just going to take longer to do so than in the face mask example where the barriers to entry are less than in this example?

MR HOLMES: Yes. That may very well be the case, sir, and, you know, we do not shy away at all from the complexities and the nuances of applying law in this field. But on the facts of this case, my submission will be that there is no scope for reasonable correction within any reasonable time.

THE PRESIDENT: I entirely understand. Take, for instance -- oh, let us take a telecoms network. Let us suppose we have got A who sets up a telecoms network name and it is working wonderfully and everyone thinks it is fantastic to be able to talk by way of mobile devices one to the other and the prices being charged are commensurately massive, so you are paying a price per minute that is in the pounds, not pennies. Now, that is going to attract people coming in, but they are going to have to build a new network. They are going to have to make it work. They are going to have to make it work competitively. That is going to take, let us say, years. During that time, as part of the attraction of bringing competition in, you are going to be charging, as the incumbent, these higher rates and the fact that it is over years does not in any way diminish the existence of effective competitive pressure to bring them down to competitive levels.

MR HOLMES: Yes, sir, I would not dissent from any of that.

(Pause).

I am grateful. So it may well be the case that -- one would need to consider, of course, whether there was effective competition with -- which may very well, of course, be felt already prior to the entry of others in constraining the dominant undertaking. One would also need to factor in, of course, considerations of incentivising innovation and investment, but this -- you know, you have my point, sir, that we are very far from that case here.

THE PRESIDENT: Yes, those are details -- I am assuming a very odd situation where effectively competition is sequential in that you have got an incumbent who has got the system up and running and everyone is seeing after the event the huge profits that are being reaped and then they come in. In practice it is likely to be in parallel rather than in series.

MR HOLMES: Yes.

THE PRESIDENT: So these are all complicating factors but I just wanted to extract from you a degree of agreement that the period of time for prices to move down to competitive levels through effective pressure may, depending on all the facts, be quite a considerable period.

MR HOLMES: I would not dissent from that at all, sir.

In the light of those submissions, can I now, in the time remaining between now and lunch, turn to the tribunal's note on excessive pricing and just round off my submissions on the law by reference to that note. I could not, myself, find it in the bundles and I am not sure it is there, perhaps for good and sensible reasons, but does the tribunal have it to hand in soft or in hard copy?

THE PRESIDENT: I think we do, yes.

MR HOLMES: We have copies if anyone does not have it at their fingertips but ...

Good. I am grateful, sir.

If we could -- so if I may, I will begin with the practical conclusions set out in paragraph 10 in the note and take those in turn and then turn to the theoretical underpinnings subsequently. So as a preliminary point, the tribunal refers to the method of assessing whether a price is excessive.

Now, we take it from this that the main focus of this note is on the first limb of the *United Brands* framework. That is to say, working out whether a price is excessive comparing price with cost, and that seems to follow from the points which follow, which all relate to production costs, but that is certainly the way in which we have approached it.

Taking the sub-paragraphs in turn, the first refers to computing costs of production in the widest sense, e.g. to include common costs. We would agree that this is appropriate. We think that it is part of the caution which applies in this field. It means one is not looking at a situation of perfect competition from the outset. One is looking at a fully allocated cost measure, and indeed one goes beyond just the costs of the product, including common costs, but includes a reasonable rate of return. So there is already a margin, if you like, the cost of capital required to perform the activity, which is built into the assessment. We say that that generosity at the first stage has been accepted since *United Brands* and I will show you shortly that it is naturally what the CMA did in this case. So we have no difficulty at all with that first proposition.

A good example -- sorry, the second point refers to allowing for legitimate pricing practices that cause prices to depart from pure cost-plus and, again as a general principle, it is a point that we would entirely agree with.

A good example, in my submission, is the specific approach which is taken to intangibles, for example recorded music, where cost is unlikely to be

a particularly informative measure. In those types of case, a comparative approach has been used instead of the cost-plus assessment introduced by *United Brands*.

There is then the specific example given of portfolio pricing. You have my submission that it does not apply on the facts of this case. If I may, I will address you on the law about that when I come to defending the -- addressing the grounds of appeal.

The third sub-paragraph refers to allowing for the average producer surplus as opposed to the surplus of the most, second most or least effective competitor.

Now, we agree with these concepts as a matter of economics, and it is very much -- this proposition that you were canvassing with me earlier, sir, we do not dissent from it at the level of theory. What we are less sure about is what exercise the tribunal considers might flow from it as a matter of practical assessment.

What the case law certainly makes clear is that one should allow for a reasonable rate of return and then headroom on top of that. Moreover, in practice the dominant firm's own costs are typically used as the primary source for calculating the cost measure in practice, and that happened here. So you are not abstracting and trying to work out what the most efficient operator would have done in the market. There

might be some cases where some adjustments are needed because with a very long-run monopolist, costs can be grossly inflated. But subject to that qualification, the general approach is to look at actual costs, to look at full costs, and to look at costs plus a reasonable rate of return and to build on top of that a generous headroom.

For all of those reasons, properly applied, the framework -- the first stage of *United Brands* is very unlikely to generate a measure of the most efficient imaginable competitor.

If the tribunal has in mind the need to be cautious about expecting superior efficiency of the dominant undertaking, we think that those various features of the analysis are sufficient to accommodate the concern.

The fourth and the final point is to allow a generous headroom when considering whether the dominant firm's prices are excessive. Again, we agree. It follows from the no reasonable relationship language which has been built into the law since the *United Brands* case itself and was endorsed by the Court of Appeal in *Phenytoin* and, as we will see, it is what the CMA did here. It only intervened once a very large differential had opened up between price and the cost-plus measure, which already provides for

a reasonable rate of return.

Now, turning to the earlier discussion of economic value --

THE PRESIDENT: Mr Holmes, before you embark upon that, it might help you if I make a couple of points about why we drafted this and what it was intended to provoke in terms of debate and, let me be clear, I am expecting much more pushback from the appellants than from the CMA on this note.

So, first of all, I think it should go on Opus because we have expressed a view and we really do want the parties to carve chunks out of it to the extent they disagree. So it should be on the record as an expression of a target, which has very firmly painted on it "object to me if you want to."

The second point is that the end of the note has how one calculates what is not an excessive price or one works out what is an excessive price and that is perhaps the least important part of the note. I mean, we are, I think, not giving anything away, when speaking entirely for myself, the notion of average producer surplus is something that I think could certainly be improved upon as a term, but the improvement has escaped us.

What I think is the key point that the note seeks to

articulate is that when one is talking about economic value and where it fits in the equation in terms of computing price, the consequence of the note and why we are expecting pushback from the appellants is that value is something that sits on the buyer's side as a thing that is maximised as part of the consumer surplus in a not perfectly competitive but in an ordinarily competitive market. In other words, what one cannot do, however one is computing the excessive price or the non-excessive price, what one cannot do is throw questions of value as a means of pushing the price up.

MR HOLMES: That is a very helpful clarification, sir. So taking those points in turn.

First of all, we hear what you say about Opus and we will arrange for the note to be uploaded.

Secondly, that is very clear and it is a proposition that we would not dissent from at all. Our concern, if there was one, was if the tribunal had in mind the possibility of some additional quantitative assessment that might be used to determine the extent of average producer surplus. So, in other words, if one was going beyond a theoretical framework for understanding economic value and the notion that economic value should not be increased in the way that you have described and was envisaging some further assessment of a kind that is

absent from the Decision, I apprehend that that is not what you were suggesting and, on that basis, I do not think we have any difficulty with the note. I will take instructions over the short adjournment but I think --

THE PRESIDENT: Mr Holmes, to be clear, this is very much intended to be a theoretical rather than a concrete articulation of approach.

MR HOLMES: Yes.

THE PRESIDENT: So the reason it is fuzzy at the end is because -- I mean, thinking about it this morning, one might have competitive markets in which all of the competitors are actually looking at not past costs, but future costs. So, for instance, they may be thinking, in order to maintain our competitive position in the market we actually need to invest in the future.

I mean, imagine, going back to my telecoms example, a need to expand the network to move it from, you know, 5G to 6G. Now, that is something which is not a past cost but is something which is going to have to be in some way accounted for in a competitive business, even though those costs have not yet been incurred, and that is something which I do not think features in the formulation that we have. I am pretty relaxed about that, because it may or may not be a factor here. If it is, we will look at it. If it is not, then we will not.

The take-home is that the -- to stick with the communications network -- the price that the consumers, the users of the network, are prepared to pay, and going back to the example of the highlighter pen, where someone might be prepared to pay £10 for a 50p highlighter, well, the fact that there are people out there willing to pay pounds per minute to use this mobile service, well, that should not be a factor affecting what the sellers can reasonably charge.

The price should be kept competitive so that the value to the consumer is maximised. So if I am one of those strange few who is willing to pay £10 per minute to communicate, I ought to be sitting there thinking, "Gosh, I am a very lucky person. I am not having to pay £10 a minute, I am paying much less than that", and so my subjective consumer benefit is maximised. That is where I think economic value sits in the understanding and that is why we have crafted this note because we do want pushback.

MR HOLMES: Yes.

THE PRESIDENT: Because that is our thinking at the moment.

MR HOLMES: Yes.

THE PRESIDENT: I am not expecting that pushback to come particularly from the CMA, but I am keen to have our cards, as it were, on the metaphorical table, so that

those acting for the appellants can have a good shot at telling us why that is wrong.

MR HOLMES: Yes. Well, that is a very helpful indication, sir, and on that basis it might be better if I leave the point for them to address, insofar as they have not already done so, in -- I know that there have been various notes provided --

THE PRESIDENT: Indeed there have.

MR HOLMES: -- already to the tribunal.

So I was going to turn now to the second part of my submissions and to the Decision, unless there are any other points on the note.

THE PRESIDENT: Thank you.

MR JOHNSTON: I will, if I may, just reserve my position until I have spoken with those behind me just to see if there are any points which I need to further develop in relation to the note.

THE PRESIDENT: We would be very grateful to hear them, Mr Holmes.

MR HOLMES: Very good.

THE PRESIDENT: (Inaudible).

MR HOLMES: So if I could start then, with the excessive limb. On this I think I can be brief, as it is not really challenged by the appellants, but the tribunal asked how costs were assessed and where that is shown in

the Decision. So let me briefly show you that.

The CMA worked out costs, plus a reasonable rate of return and compared that with prices to see if there was a reasonable relation, and it found prices that were many times above the cost-plus measure.

If we could turn, please, to {IR-A/12/445} where the CMA begins its cost-plus assessment, and you see at paragraph 5.87 the results across the infringement period, cost-plus ranged between £2.91 and £4.45 for 10mg and 2.91 and £5.20 for 20mg tablets.

Glancing to the figure at the top of the page, we see that the cost-plus figures are, of course, well above Auden/Actavis prices throughout the infringement period.

Then at paragraph 5.88, the CMA explains the components of cost-plus. There are two important points to note, both of which I have already referred to.

First, you see from sub-paragraph a that the costs included both direct costs and an appropriate apportionment of indirect costs. That is consistent with the case law and with the note from the tribunal.

The second point also explained in sub-paragraph a is that the costs used were those actually incurred by Auden. So there was no attempt to correct and arrive at a measure of efficiently incurred costs.

Turning on to page -- turning over the page {IR-A/12/446} you see at the top of the page, a pictorial representation of cost-plus, direct cost, share of indirect costs and a reasonable rate of return which is the plus element.

On page 448 {IR-A/121/448} you see the direct costs across the four periods, and they include the prices paid to Auden's CMO per pack. You will recall, sir, that the manufacturing process was contracted out and the storage and distribution costs that are added on top of that and you see that they remain very low across the whole period.

Then turning on to page 449 {IR-A/12/449}, the CMA turned to consider indirect costs. At paragraph 5.102, in principle, those could include joint costs but they are not relevant to this case and common costs, that is costs incurred across the business to supply a number of different products.

5.104, they include administrative employees and head office overheads. In order to determine the relevant common costs for a particular product, a proportion of the total costs need to be allocated to each of the products.

Paragraph 5.106, the CMA notes, down the page, that as the tribunal has recognised in *Phenytoin*, there are

a number of different methodologies that can be used and the CMA opted to use an output-based measure. That is using sales values. It rejected input-based measures because of the lack of evidence about which products used inputs in what proportion, and it rejected a value-based measure because of the well-recognised circularity that would give rise to in the context of excessive pricing.

If we turn on to page 458 {IR-A/12/458} you see the assessment with common costs in the first column. So 458, please. We see common costs in the first column and the hydrocortisone allocation overall and by pack shown to the right.

And you see that following Auden's -- or Actavis's acquisition by Allergan, the common cost allocation in fact fell because of the larger number of other products supplied by it reflecting economies of scale and scope.

For the rate of return, the CMA have set the capital value of the business, including a valuation of the intangible assets represented by the marketing authorisation and goodwill in the business. The CMA applied an 8% return on capital to that, and that reflected the real-world valuation of Clyde by Allergan at the time that Actavis UK acquired the business.

At 479 -- page 479 {IR-A/12/479} please -- you see

the overall broken down into the constituent parts -- 479 -- on an annualised basis throughout the infringement period for 10mg and 20mg packs. You see the 10mg.

Then at 481 {IR-A/12/481} there is the comparison with price, and you see from the bar chart the massive differentials that are recorded, and those are uncontested in those appeals, and the very, very significant headroom or margin of appreciation shown by the yellow part of each bar.

So the CMA found prices to be excessive only once they were a very significant -- there was a very significant differential between price and cost. That, of course, grew enormously over the period of the infringement, peaking in 2015 and 2016 under Allergan's ownership.

The short point is this is not a borderline case. It is not a case in which the benefit of the doubt needs to be given to the undertakings. There was no reasonable doubt about these differentials. The prices were on any view manifestly excessive.

There was -- as I mentioned earlier, the CMA also considered other measures of excess, the real-world price benchmarks that are at 5.229 to 5.242. The result of this excess was a pure profit of some £263 million

above cost-plus for 10mg tablets and £11 million for 20mg.

For your note, that is explained in the Decision at 5.220 at {A/12/480}, and we would also invite the tribunal to take account of the differentials, again running into the millions, for each appellant ownership period, which is at paragraph 5.227 {IR-A/12/485}. So that is the first limb.

The CMA then went on to consider whether Auden/Actavis's prices were nonetheless fair and it began whether they were fair in themselves. On this I can again be brief as the appellants do not seriously challenge the CMA's findings under this limb either.

Intas says that the market was sufficiently competitive when it owned the undertaking, but that is really just a recycling of its case on dominance. If it is wrong about that, the point does not affect the CMA's finding of abuse in that period.

For its part, Auden and Actavis has sought to portray the factors identified by the CMA under the unfair in itself limb as being:

"... in reality a recycling of the CMA's cost-plus analysis adding limited, if any, additional analytical content to the CMA's reasoning."

You will recall Ms Ford's submission to that effect.

An examination of the CMA's reasoning shows that that is not a fair criticism, and if it is convenient to the tribunal I will take you to that after the short adjournment.

THE PRESIDENT: Thank you very much, Mr Holmes.

We will resume at 2 o'clock.

(12.59 pm)

(The luncheon adjournment)

(2.00 pm)

MR HOLMES: I am pleased to report that no one behind me was at all concerned by any of what you were saying or what I was agreeing to, so that is encouraging.

There is one last point on the note, which is simply to note some further support for the position that you were advancing that may perhaps be derivable from the case law. It is undoubtedly an elaboration, it helpfully joins the dots, but it does not start from a completely blank canvas, as one would expect, and one sees that from *Attheraces* case, which is at {M/55/38}.

This is, of course, an authority which is relied on against me, in particular by Allergan, and you see at paragraph 205, under the heading "Conclusions on excessive pricing":

"On the one hand, the economic value of a product in market terms is what it will fetch. This cannot,

however, be what Article 82 and section 18 envisage, because the premise is that the seller has a dominant position enabling it to distort the market in which it operates."

One can readily see that that fits comfortably within your framework of analysis, sir.

Looking on to paragraph 206, the judgment continues:

"On the other hand, it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position."

Well, of course, that must also be true, and in this case there were careful and cautious considerations applied to explain why in this case the particular price that was fixed upon by Auden/Actavis was not one that could be accepted.

At paragraph 207, there are then -- and in the following paragraphs there are subsequent comments, but they are, in my submission, very much to be read in the light of the product at question, pre-race data, and we accept, of course, that when one comes to the realm of intangibles a price cost test does not perform well, because the value of a product may very well not rest neatly in the costs of production. Certain -- certainly that would not bear a relation to the marginal costs. So, for that reason, we can -- we think this case needs

to be treated with some caution when it is carried across to the facts of the -- quite different facts of this case.

Now, picking up where I left off before the short adjournment, I was about to consider the factors that the CMA relied upon in responding to Ms Ford's submission that they were simply a recycling of price cost, the price cost test, without much by way of additional analytical content.

If we could turn, please, to {IR-A/12/503} and look at paragraph 5.296. So this paragraph was the one that Ms Ford showed you, and it summarises the elements considered by the CMA under the unfair itself head.

The first is the scale of the disparity between price and cost. Now, we accept that this factor does concern the relationship between price and cost-plus but the point being made goes beyond just undisputed findings of excessiveness. It rests on the enormous scale of the gap between price and cost. As Lord Justice Green made clear in paragraph 97 of *Phenytoin*, the relationship between trials and cost is relevant and may be able to be relied on at the unfairness limb as well as the excessive limb. The scale of the disparity is clearly a highly relevant matter when assessing the fairness of the dominant

firm's pricing.

The second point concerns the features of the product itself. In other words, was there anything about hydrocortisone tablets that could explain the scale of the price increases? You see that the CMA concluded that there was not. The product was long off patent. In terms of the tribunal's note, this was, therefore, not a case in which there were legitimate reasons for departing from cost-plus, such as the existence of a patent exclusivity period to reward innovation.

Equally, turning over the page {IR-A/12/505}, the product was not the subject of any investment, development or risk taking, the example that you were canvassing with me before the lunch adjournment. The price increases simply reflected the opportunistic exploitation of a long-standing generic product.

And you see at c the CMA also considered the features of the relevant market, what were the conditions of competition at work in the market and the CMA's conclusion was that there were certain features of the relevant markets that meant the markets were incapable of restraining Auden's exercise of market power.

And just to glance down to page 510 {IR-A/12/510},

we will come back to this paragraph but just to show you the factors that were considered at page 510, 5.323 you see Auden's monopoly position between 2008 and 2015.

At b the orphan designation barrier to expansion and the fact that there were customers that had no choice but to buy Auden's product, all of which ensured that Auden/Actavis was shielded from effective competitive pressure.

At c the limitations on the drug tariff mechanism given the exclusion of a number of skinny label suppliers from the calculation of category M and, of course, for 20mg we were not even in category M, it was category A and the drug tariff, therefore, hardly changed following entry.

In my submission, these market characteristics are plainly relevant considerations when assessing fairness. They help to test whether the dominant firm's pricing reflects an exercise of enduring market power.

Now, the features of the market are relevant to fairness, and I will show you case law about that. They are the concerns about the scope for entry within a reasonable period and the prospects for effective competitive constraint are appropriately to be fitted.

There is no independent *Napp* limb, to use Mr Jowell's terminology, that needs to be added to the

test which would rule out an infringement wherever entry is foreseeable within a reasonable period. That rule would be crude and would run the risk of false negatives. It is not supported in the case law.

The fourth point identified in the Decision, if we could go back, please, to paragraph 5.296 on page 503 {IR-A/12/503} -- sorry, 504, forgive me {IR-A/12/504}, at point d is the scale and significance of the price increases. So in assessing fairness, the CMA rightly considered not only the static disparity between price and cost, but also the very stark upward trend, unexplained by any other factor than an exercise of market power. The scale of those price increases, the upward trend, was in itself a factor relevant to assessing the fairness of Auden's pricing.

Then the penultimate point at sub-paragraph e is an important one and should not be lost sight of. It is the impact on the end customer.

As we saw earlier on, Lord Justice Green emphasised in the *Gutmann* case that the law on abuse is there to protect the consumer, and in this case that is the NHS and the patients it serves. As the CMA found in the Decision, this was not a victimless act on Auden/Actavis's part. The extremely high prices that were imposed on the NHS took their toll. They diverted

resources away from other pressing public health priorities.

As the Advocate General observed in *SABAM*, this explained why the issue of unfair pricing in the present context is a particularly pressing and serious one. The harm that was done was to the range and quality of health care services that the clinical commissioning groups within the NHS were able to afford for patients in their localities.

The final factor at sub-paragraph f is the lack of independent justification. This comes back to the submission with which I began, considering the mountain figure, no alternative legitimate explanation for the price increases that were imposed on the NHS in this case, no cost increase, no innovation, no change in supply or demand, just the reaping of trading benefits that would have been unavailable under conditions of normal and sufficiently effective competition.

So standing back, we say that there is no basis for Ms Ford's attempts to impugn the factors relied upon by the CMA on the unfair in itself stage. They were all legitimate and important considerations for that assessment.

Indeed, the same factors have been expressly approved in the previous case law. A number of the

factors were accepted as relevant by the tribunal in the *Phenytoin* case. That is at {M/150/118}. If we could look, please, at paragraph 369, it states, starting in the fourth line:

"As regards ..."

Sorry, in the middle of the -- yes, in the fifth line:

"As regards the other factors, we agree with the CMA that such factors as: the increase in price ... the impact on the buyer; the lack of any independent or objective justification; the commercial purpose of the arrangements and the approach of the parties to them; could all be factors which it was relevant for it to weigh when considering the application of the 'unfair in itself' test, although we note that in this case the CMA also relied on several of these factors in its Excessive Limb analysis."

In this case, as if we have seen, the CMA properly took account of the steep increases in Auden/Actavis's prices over time, the impact on the NHS as the buyer and the lack of an independent justification for exorbitant pricing of a 60-year-old generic drug.

So these were not considerations that the CMA plucked out of thin air. They were factors endorsed in the case law as appropriate at the unfair in itself

limb.

The case law also endorses the relevance of considering market structure and competitive conditions under the unfair limb. One can see that from the tribunal's judgment in *Albion* Water Number II. If we could go to that, please. It is the 2008 judgment, which is {M/64/86}.

You see at paragraph 266:

"When assessing the relationship between the disputed price and the economic value of a service, and thus the potential unfairness of a price, we must take into account the competitive conditions and any related abusive conduct that may enable the undertaking concerned to fulfil its pricing ambition ..."

And I would invite the tribunal to note that the tribunal went on to take into account Welsh Water's 100% market share and the absence of effective constraints on its conduct at paragraph 267, over the page {M/64/86}.

At 268 we then see that it concluded that these factors in the final three lines:

"... inform our consideration of whether the relevant market is capable of functioning in a manner that is likely to produce a reasonable relationship of price to economic value of the services to be supplied."

In my submission, again this was a legitimate,

a valid and a relevant consideration at the unfair in itself stage and it added independent value to that assessment.

The CMA did not stop at the unfair in itself limb. In addition, it made a finding of unfair by comparison to competing products under the second limb. It found in this case that Auden/Actavis's prices were unfair by comparison to the weighted current average prices of competing hydrocortisone tablets in the early part of 2021.

That finding corroborates the finding that Auden/Actavis's prices were unfair in themselves, but it also stands as its own sufficient basis for finding abuse of dominance. None of the appellants, in my submission, have properly engaged with this comparison, still less have they shown that it was materially flawed.

If we could go, please, to page 526 of the Decision. So that is {IR-A/12/526}, and look at paragraph 5.377.

So you see from 5.377 the CMA found that competing hydrocortisone tablets are sufficiently similar to Auden/Actavis's tablets to enable a meaningful comparison of their respective prices. That is not surprising given that they were, of course, bioequivalent products used to treat the same

conditions, and that for your note is set at paragraph 5.380.

If we turns on to page 531 {IR-A/12/531} the comparisons are set out in tabular form and we can see from tables 5.49 and 5.50 that the current average skinny prices are £1.34 for 10mg tablets and £1.85 for 20mg, and I would also invite the tribunal to look at the differentials between Auden/Actavis' prices during the infringement and the weighted average of competing skinny label prices in 2021. For 10mg the difference ranges from 2,104% to 4,774%.

So there an independent basis based on a fair and appropriate comparison and again not significantly contested by the appellants.

Finally, the CMA considered economic value. As we have seen, Lord Justice Green makes clear that this needs to be factored in and fairly evaluated somewhere but it is properly a matter which falls to the judgment of the competition authority as to where in the analysis this occurs. In fact the CMA opted to give it separate consideration.

If we turn to page 540 of the Decision {IR-A/12/540} we see in paragraph 5.430 reference to Lord Justice Green's judgments in *Phenytoin* economic value understood as what:

"... users and customers value and will reasonably pay for'."

Paragraph 5.431, the point that competition authorities are not required to adopt any particular approach to assessing economic value, and have a margin of appreciation.

And at 5.432 the finding that there are no non-cost related factors associated with hydrocortisone tablets that increase the economic value beyond that which is already reflected in cost-plus. Cost-plus, of course, incorporating total costs and total costs not of the most efficient operator but of Auden/Actavis itself.

At paragraph 5.433, a summary is then given of the reasons underlying that conclusion, the product is an old one, long off patent and would ordinarily be priced as a commodity generic.

Secondly, the current prices for competing products under conditions of competition and now well below cost-plus, and that includes Waymade's competing product, which is full label.

Thirdly, so are Auden's own prices, which over time have been eroded, notwithstanding its full label status.

As regards the current evidence, the CMA explains the reliance it places on those measures at 5.437 {IR-A/12/542}:

"The CMA used the current prices of competing hydrocortisone tablets because they had been reached following a prolonged competitive process. As such, they do not simply provide a 'proxy' for the economic value of hydrocortisone tablets. They provide real-world evidence of what consumers are prepared to pay for hydrocortisone tablets in conditions where their prices are no longer distorted by Auden/Actavis's exercise of substantial market power during the Unfair Pricing Abuses."

As we understand the approach set out in the tribunal's note, that analysis conforms with what is suggested in that note.

There is a final point that is worth noting at this stage. While the CMA's conclusion that there is no economic value going beyond cost-plus, that is its primary conclusion, it makes an important further observation on page 549 at paragraph 5.470 {IR-A/12/549}. If we could look at that, please.

The tribunal there says:

"Finally, in any event, notwithstanding that the CMA's calculation of Cost Plus itself is a generous measure for reasons that are explained above, the CMA has not made a finding that any price above Cost Plus was excessive or unfair."

You see that, instead, the CMA only found an infringement at £20 per pack.

In the final sentence you see the observation:

"... that the lowest price at which the CMA has made a finding that Auden/Actavis's prices were excessive and unfair exceeds the upper bound of Cost Plus by more than 280% and Auden/Actavis's current prices by at least ..."

Then a confidential figure.

So in other words, the economic value would need to be very significantly above cost-plus to show that the CMA had made a material error of assessment, such that it would call the CMA's findings of abuse into question. That is the point you will recall which Lord Justice Green regarded as plausible in *Phenytoin*.

So even if cost-plus does not capture all of the economic value, the very significant headroom between cost-plus and the prices found to be abusive gives one great confidence that any residual economic value is properly reflected.

So that is a very high-level and non-exhaustive summary of the approach take in the Decision. We, of course, rely on all of the detailed additional reasoning set out.

But now can I turn to give you my submissions on the grounds of appeal.

The first of those concerns the CMA's evaluation of the appellants' preferred comparators, Plenadren and Hydrocortistab. The appellants say that the CMA did not properly evaluate the prices charged for those comparators which are said to show that the Auden/Actavis prices were at all times fair.

Now, in a nutshell, our response is that the CMA did exactly what is expected of it according to the Court of Appeal's judgment in *Phenytoin*. It did consider the comparators and found that they were not apt.

Beginning with *Phenytoin*, we have already looked at this in the context of market definition and there are clear and significant differences between it and hydrocortisone. We see them set out in the context of the abuse analysis beginning at page 535 of the Decision.

And at paragraph 5.407 you have the point that hydrocortisone tablets are a very old product, long off patent. In paragraph 5.08 Plenadren by contrast is a new and innovative product.

Indeed, the tribunal will recall that Plenadren was under patent during the infringements. It was, therefore, quite differently placed. There were legitimate reasons why its pricing could be expected to be very much higher than hydrocortisone tablets. In

particular, the exclusivity period allowed under a patent as a reward for the innovation it represents.

Looking on in the Decision to paragraph 5.409 you see the point that Plenadren was specifically developed for a niche use and was for that reason awarded an orphan designation.

At paragraph 5.410, over page {IR-A/12/536}, you see that it was granted this as a reward for the significant benefit it brought to patients, conferred following an examination of the evidence by the European Medicines Agency and the Committee for Orphan Medical Products.

Paragraph 5.411 you see the threshold that was applied, a clinically relevant advantage or a major contribution to patient care.

Those clinical advantages, the CMA found, were a further and distinct reason why one would reasonably expect to see its pricing differing from an old generic product, like hydrocortisone tablets.

Now, Auden/Actavis complain that the CMA lacked concrete factual evidence to show that Plenadren provided a clinical advantage. Ms Ford sought to suggest in her oral submissions that the CMA was doing no more than citing the legal requirement for orphan status. In my submission, that is not correct.

We can see a summary of the evidence relied on at page 87 of the Decision, if we could go there, please, and look at footnote 226 at the foot of the page {IR-A/12/87}.

You see there that the EMA noted:

"The sponsor has provided sufficient information to show that the hydrocortisone ... might be a potential significant benefit for the treatment of adrenal insufficiency because it is designed to mimic more closely the natural level of cortisol in the body, which house a variable profile over the day. In particular it may improve the early morning fatigues and the patient's compliance of the treatment since it will be a single administration per day. This assumption will have to be confirmed at the time of marketing authorisation, in order to maintain the orphan status."

Yes.

Then at the end of the paragraph you see in March 2016 the conclusion of the Committee for Orphan Medical Products:

"... that Plenadren continued to provide 'Significant benefit over existing treatments ... because based on clinical data, its once-daily modified release formulation produces benefits in terms of body fat, control of blood sugar, and aspects of patients'

quality of life compared with existing treatments. This was considered a major contribution to patient care."

Now, the CMA, therefore, did not simply rely on the requirements of the legislation. It is clear from what we have just seen that the European institutions had evidence upon which to base their decision to grant the orphan designation. In my submission, the CMA was entitled to rely on that evidence. It was not required to revisit it and undertake the exercise afresh, any more than it was required to consider the validity of the patent.

Auden also relies on the fact that it happened to benefit from the orphan designation itself, and this is said to underline the similarity between its tablets and Plenadren. But, of course you have the point, sir, that Auden/Actavis's protection under the orphan designation was no more than a regulatory works. It was an unintended windfall. Auden's product did not possess the clinical innovation which went to justify the orphan designation.

So there were clear and material qualitative differences between Plenadren and hydrocortisone tablets, which meant that Plenadren was not a meaningful comparator and its price was not a reliable measure of a fair price for hydrocortisone.

The differences do not end there. There were also very material differences between the level of prescribing and sales volumes of Plenadren and hydrocortisone tablets.

If we could go back to page 536 of the Decision {IR-A/12/536} and look at paragraph 5.413, please. You see there the point in the third line that Plenadren was barely prescribed in the UK. It was not recommended by CCGs in England or Wales nor is it recommended or endorsed for use in Scotland and Wales. You will note that is at paragraph 3.131.

At 5.414 you see that it was not even a blip on the radar of treating adult suffering adrenal insufficiency in the UK. Ever since its launch in 2012, four years after the abuses began, it has been used to treat fewer of 1% of adult patients.

Turning over the page to 5.415 {IR-A/12/536} you see that Shire no longer proactively markets or promotes the product.

At paragraph 5.416, the conclusion:

"... little can be read into the price levels that Shire attaches to [its] product."

The fact that another product, which hardly anyone buys, is priced higher can give no real assistance as a proper point of comparison for a product that is

widely prescribed as the first line treatment for adrenal insufficiency.

And this leads to the third point, which is the market context for the supply of Plenadren in the UK at the time.

You see at paragraph 5.417 there is no evidence that the Plenadren price is set under conditions of effective competition. Paragraph 5.41, Plenadren is the only delayed release hydrocortisone tablet on the market and it is in category C of the drug tariff, that is only used where there is no competition for the supply of the drug.

And if we could turn back a moment to page 437 {IR-A/12/437} you see at paragraph 5.57 the obvious point reflected in the case law that comparisons should be drawn or should not be drawn with products the price of which is not constrained by competition and which may well have been inflated by market power.

At paragraph 5.58 you see that point set out in a quotation from *Albion* Water I:

"If the [price under consideration] is not cost justified, and since the evidence strongly suggests that the price was excessive, it does not in our view assist that the price is based on a comparison with other prices which are not cost justified either."

We see that all these factors point against Plenadren serving as a valid and meaningful comparator. It was new drug under patent, developed for a minuscule use which, of course, was why it was granted orphan status, and it was sold by one supplier facing no competition at all. In those circumstances, it does not assist in understanding what would be a fair price for a first-line generic treatment in the market. Auden/Actavis refers to the claims by Messrs Barnard, Patel and Wilson during the investigation, that the business regarded Plenadren and also Hydrocortistab as comparators. None of these individuals have been called by Auden to give evidence to the tribunal. None of the individuals referred to any contemporaneous document that backed up the suggestion made at interview, nor did Auden produce any for the purposes of this appeal. The lack of records is all more surprising, given these same individuals did discuss pricing strategy on other occasions.

So just for your note, one sees that, for example, on the agreement side of the case from the document at {H/65/1} concerning the volumes and supply prices to offer to Waymade.

But even assuming that they had taken any comfort from a higher price for Plenadren, that was obviously

misplaced for the reasons set out in the Decision. Counsel for Auden/Actavis also referred to what Shire, the owner of Plenadren, was doing at the time. You may recall the document {H/993/1} that compared the price of 20mg Plenadren and two 10mg hydrocortisone tablets.

Now, that document was issued in January 2017, nine years after the abuses began. It was a promotional pamphlet and it does not come close, in my submission, to providing an objective basis on which to find that Plenadren is a suitable comparator. In any event, in 2016, Shire told the CMA that Plenadren was not in primary or secondary formularies at this time and had encountered severe market access problems.

For your note that is explained at footnote 1185 of the Decision at {IR-A/12/315}.

We say that what this clearly shows is that Plenadren was not a mainstream drug. For all Shire's efforts, it is clear that there was no competitive interaction between its product and hydrocortisone tablets.

Indeed, the launch of Plenadren in September 2012 did not prevent further increases in reimbursement prices or change the trend in volumes of hydrocortisone tablets dispensed. That is, for your note, at paragraph 4.73(b) of the Decision.

On the contrary, the rate of price increases for hydrocortisone tablets intensified significantly, from £49.88 to £81.11 for 10mg tablets, with no evidence that this resulted in switching to Plenadren.

The fact that Shire sought to market its product by comparison with hydrocortisone pricing, therefore, cannot show hydrocortisone prices were in themselves in any sense fair.

So that is the -- subject to any questions from the tribunal, that is the Plenadren comparator.

The second comparator put forward by Auden/Actavis was injectable hydrocortisone under the brand Hydrocortistab, and on this I can deal with the point shortly.

It is fair to say that this was not, sir, at the forefront of the representation or evidence during the administration phase and for that reason it is addressed briefly in the Decision. It is at footnote 1842, which is at {IR-A/12/533}.

In footnote 1842 at the foot of the page, the CMA makes three points.

First, it notes that Auden provided no contemporaneous evidence to support the witnesses' claims that Auden/Actavis priced by reference to the price of Hydrocortistab. So this is the same point

again. While we accept that Mr Patel and Mr Barnard made the claim during their interviews that they set prices by reference to Hydrocortistab, there was nothing at all in the company's internal documents to back that up. Even if they did take account of Hydrocortistab, one still needs to consider whether the comparator is an appropriate one.

The second point that the CMA makes is that Hydrocortistab is a product in a different form. It is an injection, not a tablet, and it is used primarily to treat an entirely different condition from hydrocortisone tablets, namely certain arthritic conditions.

It is not used to treat adrenal insufficiency, save in exceptional circumstances, where oral medication is not appropriate or tolerated.

The third point that the CMA makes about Hydrocortistab is that it was supplied by one supplier and, like Plenadren, is in category C of the drug tariff, which is used when there is no competition for the supplier product -- for the supply of the product.

Again, we say these were valid indications that the price of Hydrocortistab was not itself set in conditions of effective competition and Auden/Actavis did not adduce any evidence to the contrary.

Taking these points together, we say that is sufficient to discharge the CMA's obligation to give reasons for rejecting Hydrocortistab as a valid comparator.

So that is the other part of the case on comparators, and unless the tribunal has any questions I will turn to economic value.

The second issue raised by the appellants is to challenge the CMA's finding that Auden/Actavis's prices were not justified by any additional economic value going beyond cost-plus. They make various complaints and I will address you orally on four broad arguments which have been advanced in the appeals.

The first argument is to say that hydrocortisone is a life-saving and essential medicine. The tribunal will recall that in her oral submissions for Auden/Actavis Ms Ford made reference to the value that had been placed on the drug in terms of quality assisted life years.

The argument is, therefore, that Auden/Actavis was justified in charging such high prices because, without access to hydrocortisone tablets, patients would have died.

Now, this argument confuses willingness to pay with economic value. Of course, doctors continued prescribing hydrocortisone tablets and the NHS continued

to pay for them, given their value to patients suffering from adrenal insufficiency. But the reimbursement prices that had to be paid by the NHS are not the prices that they would reasonably have paid under conditions of normal and sufficiently effective competition. They are distorted by the exercise of Auden/Actavis's market power unconstrained by competition or regulation.

There are many old generic products which are life-saving but cheap, because they have been around a long time and they are supplied by competing providers. Penicillin and many other generic antibiotics are a good example of this.

So, sir, we say that this is a consideration that ties in with -- again with the tribunal's note. The fact that under conditions lacking effective competition Auden/Actavis was able to exploit its market power and the NHS was left with no choice but to pay does not mean that the product had value -- economic value considering the position that would have prevailed under conditions of fair and effective competition. The situation is akin to the marker pen scenario, a product that health care providers may find themselves having to pay, given the importance of the product to their patients, but it is not the price that they would reasonably pay if producer surplus was effectively constrained by the

operation of fair and effective competition.

We have, of course, in this case a good indication of what price could be expected under conditions of fair and effective competition because we have competition now in the marketplace which after a lengthy period has produced prices that can be regarded as those applicable under conditions of normal and sufficiently effective competition, and they sit below the CMA's calculation of cost-plus.

So applying Lord Justice Green's reasonable proxy, this suggests that the CMA was right to conclude that no additional economic value should be afforded to hydrocortisone tablets.

The final point on this topic, even if there were some economic value attaching to the supply of hydrocortisone tablets by reason of the patient benefit, that would not justify the many multiples above cost-plus which Auden/Actavis charged throughout the infringement period. It is notable that Auden launched the 10 and 20mg tablets under conditions of monopoly and without regulatory constraint at around £5 a pack in April 2008. There has been no suggestion that that price was not profitable. It was the price at which it was prepared to supply the product, even absent competition. Of course, you have the point that

suppliers now supply at prices well below that.

So this gun-to-the-head argument based on the need to treat chronically ill patients does not support a higher economic value.

The second broad point is the allegation that Auden/Actavis priced their products on a portfolio basis. So the argument appears to be that Auden/Actavis was justified in charging excessive prices for hydrocortisone tablets to compensate for other unprofitable products in its portfolio.

You have my point that this is not supported by evidence. What are the products that were allegedly cross subsidised? Why was such cross-subsidiary required? Is it said that cross-subsidy was agreed with either the NHS or with pharmacies? If so, where is the evidence of that? If not, why should a higher price be paid because Auden claims that it was using the funds to support some other line of business?

In my submission, the submission is also wrong in law. We can take this conveniently from the Decision at {IR-A/12/496}. We see here a quotation from the tribunal's decision in the *Napp* case:

"*Napp*'s whole argument based on 'portfolio pricing' impermissibly directs attention away from the specific product market which we are required to consider when

deciding whether there is an abuse of a dominant position under section 18 ... In our view, it is not appropriate, when deciding whether an undertaking has abused a dominant position by charging excessive prices in a particular market, to take into account the reasonableness or otherwise of its profits in other, unspecified, markets comprised in some wider but undefined 'portfolio' unrelated to the market in which dominance exists'."

Now, that quotation speaks for itself. In deciding whether an undertaking has charged abusive prices for product X it is simply not appropriate to look at its prices for other unspecified products.

Clearly there will be cases where products are sold as a bundle. In those circumstances, the customer can assess the economic value of the whole package as in the case of loss-leading in a supermarket. But a dominant firm cannot simply allege that it has used the profits earned through exploitation of market power on one product to invest in other business lines. In my submission, that would be contrary to principle.

We say that the approach set out in *Napp* is the right one.

THE PRESIDENT: Mr Holmes, you are making two points. One is the evidential one that there just is not the

material to work out whether portfolio pricing is or is not relevant, I understand that. How does one tie in portfolio pricing with a strand of analysis that one gets in price controls, where one has got a price control in respect of a multi-product firm and economists tend to analyse those price controls by saying that they are less effective than what they might be because of what they call the waterbed. So you push down one price and it pops us somewhere else. Does not that suggest that there is a nexus between, subject, of course, to the evidence, but a nexus between the pricing of one product and the pricing of another by a single firm, which ought to be reflected when Auden is considering whether a price is or is not excessive?

MR HOLMES: Well, sir, it is a fair point that there will be some contexts in which a waterbed effect may apply and that may need to be factored into the assessment. But, of course, the waterbed effect is never taken as read. It is never assumed that there is such an effect. That needs independent assessment. It requires validation. It requires careful consideration by reference to the nature of the products at stake and the conditions under which they are supplied.

So it is something that would need, if it were to apply, to be carefully explained by the party that is

pricing in that way, identifying the products in relation to which this is said to apply, and then it can be considered.

But I think that what it cannot -- it may come down to the evidential point. What one cannot do is simply assume a waterbed effect is applying in all cases. It is usually a hotly contested aspect of analysis in price controls where it is invoked by one side or another, either by the regulator or by parties to regulation. You know, it needs to be carefully considered and assessed by reference both to the product which is under price control and the other products for which it is said there will be knock-on consequences.

Generally, the products will be sold in some bundled relation to one another. So take a mobile telephone where it is sometimes said that -- or it was said -- I think, I forget, sir, these cases all blur on to one, but I think you were on mobile call termination --

THE PRESIDENT: Certainly my knowledge of waterbeds is derived through one or other price control case. That is certainly right.

MR HOLMES: I mean, the argument there which was advanced, if I recall it correctly, was that handset prices might rise if mobile firms were deprived of the opportunity to exploit their market power in relation to the pricing of

mobile call termination in relation to which they effectively had individual monopolies on each addressable number in their range.

But there, of course, you have clear product bundling which is being supplied, the connection service which is being supplied, the handset which is being supplied. You can readily see the consumer is purchasing there a combined bundle of products and there is careful identification of how the waterbed effect might operate, which was then the subject of investigation, consideration and evidence.

The portfolio effect which is alleged in this case never descends to that level of detail. What were the products that Auden claims it was making a loss on? Was there any understanding on the part of the NHS or on the part of pharmacies that they were buying -- they were getting a bargain on some products in exchange for paying higher prices on hydrocortisone tablets? None of that is developed and so one should be very cautious, in my submission, of this type of special pleading. It will be something really for the firm in question to bring forward and justify.

It could, of course, push very far against the effective administrability of unfair and excessive pricing if it were accepted too readily and without

precise and careful articulation in evidence by the undertaking that was claiming it on its behalf. You will be mindful, of course, of the considerations of practicality which the Chancellor regarded as important in the *Phenytoin* case in the Court of Appeal.

So I think one can see readily why the legal position in *Napp* was stated as it was in circumstances where, and I would just reiterate the point, the products in question were unspecified and the portfolio was undefined. Those are both points that were included, no doubt deliberately, by the tribunal in framing its comments in the *Napp* case.

So at a minimum, I think, one would expect some account of the particular product in relation to which it was said supplies were being made at a loss. What this case is not, sir, is the case of an innovator in which you have a series of different innovative products, some of which are being supplied at a loss or an initial loss. There is nothing of that nature here.

You saw what the contemporaneous evidence showed about the business model that Auden was pursuing a high margin company and if there were anything in this, there would have been specific concrete evidence brought forward.

We have seen that there was an attempt to argue this

at a quite generic level at the administration stage, but it was one that the CMA addressed. I showed you the relevant paragraph in the Decision. There has been no comeback in this case. No attempt to offer an accounting analysis to contest the conclusions which the CMA reached there about the lack of any viable portfolio justification.

Sir, that is in a nutshell our position on the portfolio case.

The third broad argument on economic value advanced by Intas is that customers attached value to the fact that Auden/Actavis's product was fully indicated and this comes down again to an argument that Auden/Actavis's prices were justified because pharmacies like Boots and Lloyds were willing to pay a premium for them.

Now, the law is clear, and we have now debated this -- we have discussed this on a number of occasions over the course of this morning, that economic value is not to be equated with the price that a dominant firm's customers are prepared to pay.

Over time Actavis's prices have converged on the prices charged by the skinny label suppliers. The evidence shows that under conditions of effective competition, customers are not reasonably willing to pay

a substantial premium.

Intas's argument also ignores the 20mg market. In that market, Auden/Actavis was not the only supplier with a full label licence. Waymade had one too, though the same regulatory -- through the same regulatory quirk that gave Auden/Actavis the sole full label licence in the 10mg market, and if there were really economic value to the full label indication, one would expect to see Waymade also commanding a premium in relation to 20mg tablets.

If we could see what the Decision says about this. It is at {IR-A/12/544}. IR-A/12/544. Yes, perfect.

At paragraph 5.448, you see in the final two lines of that paragraph, the CMA makes the point that Waymade commanded no premium when compared to skinny 20mg tablets, and that is vividly illustrated in figure 5.52, if we could just go down for a moment to look at that, please. You see there the average skinny competitors' prices shown by the broken line and Waymade's price shown by the solid line and they are very closely correlated.

So this argument runs up against the evidence as to the prices that have prevailed under conditions of normal and sufficiently effective competition.

The final broad argument on economic value concerns

Intas's reliance on Auden/Actavis's general attributes as a supplier. In that regard Intas relies on the evidence of Dr Burt, a former executive of Actavis.

If we could go, please, to paragraph 128 of Intas's written closings, that is at {L/5.1/73}, which sets out the characteristics this relied upon. So if we could just enlarge the lower half of the page, you see a number of general characteristics identified. He refers to reliability at a.

At b the range of products supplied.

At c adaptable logistics.

At d packaging design.

Then over the page {L/5.1/74} at e a market leading sales and customer service team.

At f quality perception.

At g full coverage.

At h environmental friendship -- credentials.

Then at i "complimentary training to our customers".

Now, in my submission, this evidence really cannot help Intas for four reasons.

First, none of the factors listed by Dr Burt is specific to customer demand for and valuation of hydrocortisone tablets in the UK.

Secondly, at least one of the skinny label suppliers, Teva, is of a similar scale with a similarly

strong reputation. That was a finding which the CMA made at 5.473 of the Decision.

Thirdly, the CMA, of course, allowed a reasonable rate of return as part of its cost-plus analysis, and then on top of that it did not find any prices to be abusive below £20 a pack, so there is plenty of headroom in the CMA's approach to allow for the attribution of some value to the general business considerations invoked by Dr Burt.

And the question is, do such factors justify charging prices that were many times above both cost-plus and the prices charged by competitors? In my submission, that question answers itself.

Fourthly, all of the factors listed by Dr Burt apply just as much today as they did at the time of the abuses. But, of course, today customers pay £2.99 for Actavis's 10mg tablets. For your note, that is at paragraph 5.456(a) of the Decision. So this point leads on to a debate with Intas as to whether economic value of the Accord UK product properly declined over time.

Now, as to that, in principle the CMA accepts that the economic value of a product may change over time. Circumstances may change materially, such that the value is altered. But in this case there was no material change of circumstances.

As paragraph 5.317 of the Decision concluded, there has been no improvement in the production or distribution of hydrocortisone tablets and no innovation. Nor does Intas suggest that its other advantages for customers have in any way declined since the infringement period to explain the convergence of its prices with those of its competitors.

So the short point is this, if Auden/Actavis's full label product really did have greater demand side value than its rivals' products, then one would expect customers to be willing to pay higher prices for those tablets in conditions of normal and sufficiently effective competition than they are willing to pay for other providers' hydrocortisone tablets. The same differentiating considerations would apply today in a competitive market as they did during previous periods, but we do not see any significant differential.

On the contrary, by early 2021 Auden/Actavis's prices had fallen to levels in line with cost-plus and they had converged much more closely on the prices charged by the skinny labels suppliers. In my submission, that is the benchmark for the real economic value of these products.

So those are the a main lines of argument on economic values, as we understand them. We have

obviously debated the point a little before lunch, but if the tribunal has any questions I was otherwise proposing to turn to *Napp*.

THE PRESIDENT: Thank you.

MR HOLMES: No? So a third issue in the appeals is the one advanced in particular by Allergan based on what it has termed "the second limb of *Napp*". And you have my submission on the law. There is no *Napp* limb to add to *United Brands*. If there were, Lord Justice Green would have called it out in paragraph 97 of the judgment. Instead, he was careful to note that the tribunal in *Napp* did not treat the approach of the Director General as a canonical statement of the legal test. In any event, the Director General does not go so far, as you pointed out, sir, as is being submitted on our understanding of its case by Allergan.

But in any event, Allergan's case fails on its facts. It is clear that Auden was able to sustain very large price increases without any prompt or effective correction of the market. Its price increases continued for years, including during Allergan's ownership of Auden/Actavis when they reached their zenith, and part of the reason why is because of the agreements which Auden itself put in place to stave off competitive entry. It kept the two operators with legal rights to

enter, in the form of marketing authorisations, that is Waymade and AMCo, from entering the market with an independent product and from competing.

Even when independent entry did occur, in the particular circumstances of this case, competition did not lead to an effective self-correction.

On the one hand, prices had reached such extreme levels, they took a number of years to unwind, and on the other hand the orphan designation combined with the regulatory concerns of the major multiples allowed Actavis to sustain a substantial premium over the rest of the market, even post-entry.

Now, Allergan's argument would also, in my submission, if it were accepted, have extremely unattractive consequences for the state of the law.

Allergan says that an exploitative pricing abuse cannot be found once entry is expected within a reasonable period. But during the Allergan period, prices were savagely increased and reached their very highest levels. Those price increases reflected a continuation of the same commercial strategy which Auden had been pursuing for years. The price increases also prolonged the time needed post-entry to unwind the excessive pricing. In my submission, the fact that entry was soon anticipated to occur should not immunise

that exploitation of market power from being found to be excessive and unfair.

So subject to any questions on that, sir --

THE PRESIDENT: Well, you have mentioned just en passant the agreements to not enter the market, the 10mg and 20mg agreements. To what extent are the two issues, continued abuse of dominance and these agreements intertwined, and to what extent can one consider them separately? I mean, is it -- I am really just thinking about how our judgment would be structured, but is it going to be necessary for us to reach a view on the 10mg agreement in order to answer the dominance question or can we treat them as separate?

MR HOLMES: I think, sir, you can definitely and categorically -- unequivocally treat them as separate. The key submission is that in this case there were -- the evidence shows that Auden/Actavis was not constrained by the prospect of entry. The market did not self-correct within any reasonable time frame. It did not -- that explains why prices remained on their upward trajectory for such a prolonged period, and it also is indicated by the slowness with which prices came down, the time taken to unwind Auden/Actavis's position after competitive entry, and that stands irrespective of whether -- whatever conclusion you reach on the

agreements.

The agreements point is simply, in my submission, icing on the cake. If you are with us on the agreements point, that is a further independent and additional reason why it would be particularly perverse to find that these prices were not to be found excessive because of the absence of -- because of the agreements that were in place and, on the CMA's view, the way in which they contributed to keeping the market from self-correcting.

THE PRESIDENT: I mean, could one approach it in this way that one looks at -- the way it was put with Professor Valletti, one looks at, as it were, the gradient of the fall in price and one looks at the constraints on entry of competition as per the second limb of *Napp* and one works out whether or not there has been a sufficiently quick entry into the market so as to enable one to say that the stickiness of the prices is actually competitive rather than not competitive? One can answer that question without reference to whatever reasons by way of side agreement other persons may or may not have entered the market. In other words, one can look, I think, is what you are saying, one can look at the question of dominance disregarding or even assuming that the agreements are not material to that outcome. As you say, it may be that it provides

an additional explanation for the non-entry but I think you are saying one can decide the dominance question in isolation from the other parts of the CMA's Decision.

MR HOLMES: Exactly so, sir, yes, that is our position. The final point is a legal point advanced by Intas as its first point on abuse and it contends that a price can only be imposed.

The language used in section 18(2)(a) if customers have no choice but to pay it and it is said that once there is competition and an alternative, prices cannot be imposed.

Now, as we understand this submission, it would impose a legal restriction on unfair pricing to situations of monopoly. If that is correct, the position is not supported by the case law. In *United Brands*, the foundation authority of this area, one was concerned with a dominant undertaking with a market share of 40 to 45% in a sector where there was lively competition. If that were a barrier to finding an infringement, the Court of Justice would no doubt have said as much.

As with Allergan's *Napp* limb, the creation of such a rule would apply an inflexible constraint on principles which should focus on the economic substance. The courts have consistently eschewed such rigid,

hard-edged rules of law in developing the Chapter II prohibition, given the key importance of economic context.

Now, there will be markets in which even following entry, in the CMA's submission, particular features of the market prevent competition from operating to constrain pricing effectively. As regards the present case that brings us back to where we started today, to the orphan designation and the regulatory perspective of the major multiples. Given those features of the post-entry market for hydrocortisone tablets, Actavis was in substance able to impose its prices at levels well above skinny label suppliers.

As I submitted this morning, the major multiples clearly did consider that they had no choice for regulatory reasons but to purchase hydrocortisone tablets at least for dispensing to adult adrenal insufficiency sufferers and the CMA, therefore, committed no error in finding that unfair and excessive pricing continued during the post-entry period.

So that is the short answer to the imposed point. It fails on the facts and it imports a constraint which would be wrong in law.

Subject to any questions from the tribunal on that or any other aspect of its case, those are the CMA's

closing submissions.

THE PRESIDENT: Mr Holmes ... (Pause).

MR HOLMES: Sir, I am grateful to Mr Bailey. He points out that paragraphs 5.328 and 5.329 explain the relationship between the agreements and the abuse case and what they basically do is to treat the agreements as part of the context. They are part of the factual context which the CMA was considering, but it does not matter for the purposes of the CMA's assessment whether the tribunal accepts the proposition that they constitute an independent infringement of the Chapter I Prohibition. So the cases do stand, in my submission, separately of one another.

THE PRESIDENT: I am very grateful. We have no further questions. We are very grateful to you.

MR HOLMES: I am grateful, sir. I hope the tribunal will not regard this as at all a discourtesy but unfortunately I must depart for the period of Mr Jowell's submissions, so if that were a convenient moment to take a break, I shall take my leave.

THE PRESIDENT: We will certainly rise now and, of course, you are at liberty to leave Mr Jowell to his own devises.

MR HOLMES: I am grateful.

THE PRESIDENT: We will rise for ten minutes until 20

1 past 3.
2 (3.11 pm)
3 (A short break)
4 (3.24 pm)
5 Closing submissions by MR JOWELL
6 THE PRESIDENT: Mr Jowell, good afternoon.
7 MR JOWELL: May it please the tribunal, I intend with the
8 tribunal's permission to address you on three subjects
9 in reply, the first being the discrete issue of the
10 Allergan hold separate period and why we say that there
11 is -- should be no liability for that period from
12 10 March.
13 The second is the law on excessive pricing insofar
14 as it applies to the period of Allergan ownership.
15 The third is the disproportionate nature and size of
16 the penalty on Allergan.
17 I am hopeful, assuming we have until 4.30 tonight
18 with a following wind I may finish two of those topics.
19 I do not think I will finish the third, but we can carry
20 that over to the next occasion. I think we are now in
21 reasonably good shape for time, although I do think we
22 will need the 9.30 start still.
23 THE PRESIDENT: I will not resile from that.
24 MR JOWELL: I am very grateful, Mr Chairman.
25 Turning then to the Allergan hold separate period

issue, Professor Bailey helpfully provided you with a note on the law summarising the test to be applied. Now, we were not consulted on that -- in formulating that note in advance, but we do not take issue with the contents of the note insofar as it goes, although we should say that in certain respects it should be added to and in particular we would add the authorities that are mentioned in paragraph 77 and 78 of our written closing and in particular the three examples that are given by Advocate General Kokott of the circumstances in which decisive influence does not pertain and which we cite in our submissions.

If I may just remind you of those. They are most conveniently set out in our written closing, which is at {IR-L/1/28}.

You see -- in paragraph 78 you see there the three examples where there is no decisive influence. First, where the parent company is an investment company and behaves like a pure financial investor.

Secondly, where the parent company holds 100% of the shares only temporarily and for a short period.

Thirdly, the parent company is prevented for legal reasons from fully exercising its 100% control over the subsidiary.

Now, those examples are non-exhaustive but for our

purposes we say we squarely fall at least within (c) of that.

If we then turn up Professor Bailey's very helpful note, which is in {IR-L/11/1}. Thank you. If we could go to paragraph 15 of that, I imagine that is about three pages in, unfortunately I do not have the page reference {IR-L/11/5}. There we are. You will see that the core test we are agreed is that of decisive influence by the parent over the subsidiary, and we are all agreed that there exists a rebuttable presumption in the case of 100% ownership of decisive influence. So the burden is on -- the burden of proof is on Allergan to show that it did not exercise decisive influence.

But the issues cannot plausibly turn on the burden of proof. It turns on the critical point, which is the content and meaning of the decisive influence test.

That is set out in paragraph 16 of Professor Bailey's note, where he gives four ways in which the decisive influence test can be formulated, and those four formulations are taken from the introductory words of paragraph 22 of the *Durkan* case that Professor Bailey also took you to. I do not think we need to go to it, but for your note it is at {M/81.1/11}.

Now, looking at paragraph 16, we can see that the

first formulation is:

"... did the parent exercise decisive influence over the subsidiary ..."

Well, that is not very helpful. It is rather tautologies.

The second formulation is more helpful. It says: does the company concerned determine its own conduct independently on the market?

The third way is to ask: does the subsidiary comply with the instructions or directions that the parent issues?

The fourth way is very similar, it asks: can the parent direct the conduct of the subsidiaries to such an extent that the two must be regarded as a separate -- as one economic unit?

What one must do, therefore, is ask those questions in relation specifically to the relevant period, which is the period of the hold separate from 10 March 2016 to 2 August 2016. The situation in the prior period can be taken into account as a factor as to whether there is decisive period -- decisive influence in the subsequent period, but it is just that. It is just a factor. It is not determinative. The facts of the later period must be considered in their own right.

So Professor Bailey and I are agreed that that is

what the tribunal must consider and it must apply those tests to the relationship between Allergan and the divestment business in the relevant period.

Now, you have seen and read the commitments, and both I and Professor Bailey took you to them, and it was not suggested in the CMA's submissions that those commitments were not complied with in full, either by Allergan or by the hold separate undertaking. We respectfully say that once that is accepted and you have regard to the terms of the commitments, whichever one of those precise formulations of the test of decisive influence you use, there is only one proper answer. Did the company concerned determine its conduct independently on the market? Yes, that is precisely what commitment 38 says the hold separate manager must do, it must manage the divestment business independently, ensuring its independence from the business retained by the parties.

The hold separate manager works closely and co-operates with the monitoring trustee and reports to the monitoring trustee. That is just what -- again, what commitment 38 says.

Indeed, paragraph 112 of the Commission's notice on remedies gives the monitoring trustee power to give instructions to the hold separate manager. Again, for

your note that is {M/62/23}.

So if we pose the alternative formulation of the test, could Allergan give the subsidiary instructions or directions that it had to comply with? Well, again, the answer's very straightforward, absolutely it could not.

First of all, giving instructions would have been a clear breach of commitment 37. That is what that commitment says is, that it is Allergan management and staff are to have no involvement in the divestment business.

Indeed commitment 40 ensures that it does not even have the confidential business information to be in a position to give it meaningful instructions, because of the ring-fencing provisions, and that includes confidential information as to pricing, as to customers and as to costs.

So if Allergan in this period had sought to give instructions or directions to the divestment business, then the answer to that is -- would have been a complete violation of its commitments. The hold separate manager ought to have reported that to the monitoring trustee as a serious breach of those commitments.

On the contrary, the monitoring trustee did have power to give instructions. Those answers are consistent not only with the terms of the commitments

but also with their purpose, because their purpose, as one sees from the Commission's notice, is precisely to establish that the hold separate undertaking would conduct itself as an independent competitor on the market, independent of Teva and also independent of Allergan, and that could only be the case if it could decide its conduct autonomously.

Now, the CMA's Decision, you will recall, relied essentially upon two factors to seek to establish decisive influence. The first of these was the close connections between the individual who became the hold separate manager, [redacted], and Allergan. Now, that factor was quite rightly not seriously persisted in by Professor Bailey in his oral submissions, and I do not intend to say anything more about it.

But the second factor that was relied upon in the Decision is the fact that Allergan approved the strategy of the business in the prior period. The argument is that the legal effect of the commitments was to cement that status quo.

Now, that argument could only work if there was a binding obligation on the hold separate manager to follow the prior business strategy laid down by Allergan. If there is no such obligation, then the CMA's argument cannot succeed and Professor Bailey

tacitly accepted that when he metaphorically suggested that the effect of the commitments was, as he put it, to put the divestment business in permafrost. In other words, the business had to be run according to the prior strategy.

But the fact is that you will find no such permafrost, either in the commitments or anywhere else. All there was was an expectation on the hold separate manager to stick to the prior strategy. All there was was an expectation that matters would carry on in the ordinary course of business. In the ordinary course of things, that would mean that the business would continue to be managed based upon the existing budgets and existing business plans.

That does not get the CMA even close to where it needs to get to. It does not establish a power on the part of Allergan to give instructions that the divestment business would have to comply with. It does not negate the independence of the hold separate manager, and it does not, therefore, establish that Allergan exercised a decisive influence in this period.

Now, when he sought to persuade you to the contrary, Professor Bailey referred you to two terms in the commitments themselves. The first is -- was paragraph 36(b) and the second was the definition of the

"hold separate manager".

If we could just go back to look at those again, the first, 36(b), is in {IR-H/986/8}, please. If we could focus in on the bottom of the page at 36(b), you see the undertaking is on the parties and they undertake:

"to make available or procure to make available, sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans."

So it is an obligation on Allergan to provide a certain level of resource. In essence it is a negative obligation not to stifle the divested business from carrying on as it was by starving it of cash or other resources. It is not imposing any obligation at all on the hold separate manager, nor on the divestment business and it is certainly not imposing on them an obligation to continue with the pre-existing business plans that Allergan had approved.

In fact to the contrary, if one then goes on to commitment 37 you see -- and 38 -- they say in terms they have got -- they are obliged to run the business independently and in its own independent best interests.

Now, the second point relied on by Professor Bailey was the definition of the "hold separate manager" and that is on page 2, if we could have you look at that

{IR-H/986/2}. You see the definition of the -- of the hold -- of the "Hold Separate Manager". I think we need to go -- yes, it is at the bottom of the page, where it says it will -- collectively appointed by the parties to manage the day-to-day business under the supervision of the monitoring trustee.

Now, I would understand my learned friend's point, if the definition said "under the supervision of the parties" or "under the supervision of Allergan" for the relevant period but it does not say that. It says "under the supervision of the Monitoring Trustee".

So, if anything, this is a clear indicia that it is the monitoring trustee that controls strategy, not Allergan. Indeed, consistent with that the monitoring trustee steps into the position of the board, where you have a company, which was previously occupied by the parties -- the parents' representatives.

Indeed commitment 36(a) says in turn that one thing that Allergan cannot do is to alter the commercial strategy.

So we say that those two provisions do not even come close to establishing that there was any obligation on the hold separate manager to follow the prior business plan.

We would make one further point about the way that

the CMA now puts its case, because the way they put it, or largely put it, does not depend actually on the specifics of Allergan's position or the particular terms of this hold separate.

The CMA's essential point is that the mere existence of prior business plans for the divestment business combined with the terms of the commitments is sufficient to ensure that decisive influence continues. So the implication of that is that this point will apply really for most divestment businesses that are created by the CMA, and -- or at least in all cases where there has been an oversight of prior business plans, because the terms of these commitments, as one can tell from the Commission's notice, are essentially in standard terms.

That has got very important implications more generally, going well beyond the question of the liability for the fine in this case or indeed the liability for a fine in other cases, because if the divestment business, subject to a hold separate, is regarded as still being part of the undertaking of the parent, which is the CMA's argument, then that will have implications if, for example, the parent company and the divestment enter into an agreement, because it is well known that the concept of undertaking, if you have an agreement within an undertaking, then there can be no

agreement for the purposes of competition law. Inter -- effectively inter-group agreements of that nature -- inter-undertaking agreements of that nature fall outside the ambit of Article 101, or chapter 1.

So if, for example, a divestment business and a selling business agree to fix their prices charged on the market, the logic of the CMA's argument would mean that there would be no infringement of Chapter I or Article 101, and that -- one can see that in -- I mean, many of the cases -- the foundational cases on the meaning of undertakings, such as case C7395, the *Parker Pen* judgment, are all about just that. That inter-undertaking agreements fall outside Chapter I and Article 101.

We say that actually when you think about the intended effects of the commitment -- of the commitments, which was to establish an independent operator competing on the market, it shows that actually the CMA's position here cannot be right, because if they are part of the same undertaking and able to collude in that way, then that would undermine the very purpose of establishing them right from the outset as an independent competing undertaking.

Now, there are various other points that Professor Bailey mentioned, but we say that they are all

clearly irrelevant, unless he can establish his prior point that there was an obligation on the hold separate manager strictly to follow the prior business plan.

The employment contract of [redacted], for example, which he referred to, that obliged her to carry out her commercial efforts substantially unaltered. It did not, with respect, require her to carry out the prior business plan substantially unaltered. It was simply that the commercial efforts were expected to be based on the existing business plan but that is a different thing.

The Cleary Gottlieb advice is cherry-picked from, with respect, because again it says that the hold separate manager's efforts will be based on existing business plans and budgets. It does not say that she was bound by those pre-existing business plans or budgets. On the contrary, when you read that advice as a whole, what it stresses time and time again is that the business must be run independently, wholly independently, and not given instructions by Allergan at all, but rather under the guidance and instruction of the hold separate manager and the monitoring trustee.

Professor Bailey also sought to refer to presentations which show that business plans were broadly followed unaltered as a matter of practice.

But, again, there is nothing in that point. The presentations from the hold separate period were not even seen by Allergan. Given that the obligation on the hold separate manager was to report to the monitoring trustee, they would, presumably, have been seen by the monitoring trustee, but they were not even seen by Allergan, let alone under its directions or controls.

It is just irrelevant whether as it so happened the divestment business continued to be run in the period to March to August broadly along the lines of the pre-existing budgets and business plans. Very often when you have a change -- you can have a complete change of ownership and in the first six months of the new owner, you can well expect that the business -- prior business plans and budgets will be adhered to. But that does not establish that the prior -- that the seller who has divested themselves of the business still has decisive influence over the business or that there was any obligation on the new owner to follow those prior business plans.

THE PRESIDENT: It shows the danger of analogy. You have mentioned Professor Bailey's reference to permafrost and I was thinking (inaudible) having the business plan set in aspic.

MR JOWELL: Yes.

THE PRESIDENT: Neither of them are particularly apt because what you are really saying is that the direction of travel, the rails on which the business is to proceed are laid down in the sense that you cannot sort of embark upon some radical new venture. You have got to carry on as before. So it is very much a -- these are the railway tracks that are set out by way of continuation.

One of the points you have made is just how firmly is the train that is the divested enterprise forced to follow those tracks.

MR JOWELL: Yes.

THE PRESIDENT: And that may be the true area of --

MR JOWELL: Yes.

THE PRESIDENT: -- dispute or argument between the two of you.

MR JOWELL: Yes, I think that is a fair summary but I think that the CMA does go further and does say -- they do use the term "permafrost". They do say it cemented the status quo, and I think they say that because they realise if they cannot establish that these were very firm obligations, then they do not get home because if you look at the terms of the test, it is the power to give instructions. So unless these were effectively instructions that had to be followed, then they -- for

the whole period, they do not get home on this.

THE PRESIDENT: But suppose, and I appreciate this is not this case, but suppose for sake of argument one had a particularly clear articulation of an obligation to follow the preset strategy. In other words, the railway lines were very clearly articulated and there was an instruction, "You will do this".

MR JOWELL: Yes.

THE PRESIDENT: Now, would you say that that was crossing the lines of decisive influence, in the sense that although decisive influence is not being exercised at the time, it has been laid down such that future decisions are mapped out in a particular way?

MR JOWELL: Well, I think it would all depend on the facts. But theoretically I would accept, Mr Chairman, that you could potentially give an instruction that was sufficiently clear and comprehensive and binding that it would -- that that would amount to decisive influence on the strategy of the business in the subsequent period. But there is nothing here that is been pointed to.

THE PRESIDENT: No.

MR JOWELL: And in fact everything suggests -- for example, one knows that in this period prices for hydrocortisone are actually tumbling. So it is not as though there was some sort of particular direction that was suggested was

given here.

So we are not in that business but I can -- I accept that theoretically you could, but here all you have is a broad expectation that there will be business as usual.

THE PRESIDENT: But suppose one has got a very firm direction that you carry on, but it is subject to an express derogation that, of course, anything that is unlawful or anti-competitive you should not do. Would that get you out of decisive influence or would that be covered by Professor Bailey's point that decisive influence is not in relation to the specific decision, but in relation to the general?

MR JOWELL: Well, I think I accept that it has generally been looked at as is relating to the general, but it -- and it is about the power -- it is really about the power of the parent to give instructions to tell the subsidiary at the relevant time what to do. The whole point about these commitments is to say, hands off, completely off. Ring-fenced. You let them do what they want. Actually, if you like, the acid test is really -- is if you ask yourself what would happen if there was something that required an alteration of strategy here?

Professor Bailey discussed this in the context of the discontinuance of a dangerous product, you will

recall.

THE PRESIDENT: Yes.

MR JOWELL: (Overspeaking).

THE PRESIDENT: That was one of his examples. Yes, indeed.

MR JOWELL: And his answer was -- he said, well, the hold separate manager, he said, would raise that -- would be obliged to raise that with the monitoring trustee. He then went on to say, oh, and the monitoring trustee would have told the parties and the Commission.

Well, we certainly agree with him that the first -- port of call would have inevitably have been the monitoring trustee because the monitoring trustee is the one who is supervising the business. That is what the commitments say. That in itself is telling you who has -- really who has the decisive influence.

We accept also the monitoring trustee is ultimately answerable to the Commission. So the monitoring trustees might have asked the Commission, they might not, but when Professor Bailey then suggested that the monitoring trustee or the hold separate manager would necessarily have informed the parties, who would have been in this case Allergan and Teva, with respect he was just descending into speculation and even more speculation when he suggested that those parties would have requested a derogation from the Commission.

It is important one focuses on the first point. Where is the obligation on the hold separate manager or the monitoring trustee to turn to the parties in that kind of situation? There is nothing. There is no provision that he identified that specifies that the parties are to be informed when a product is to be discontinued or when -- or when a -- for example, there is to be some alteration to the strategy of the business.

There is nothing. There is nothing to that effect in the commitments. On the contrary, there are actually -- what there are in the commitments are provisions that say the parties are not allowed to have access to any confidential information. So insofar as this information about the product being dangerous was confidential, actually the hold separate manager and the monitoring trustee were not allowed to tell them.

It is far from obvious that the monitoring trustee or the hold separate manager would have chosen to tell them. There is nothing that obliged them to do so. Their obligation is to run the business independently and in its own best interests.

Now, we accept they might have gone to the Commission and said, "We think in this exceptional circumstance we think the parties should not be

informed." They might have done so before instituting a radical change to strategy. They might have done so after instituting a radical change of strategy so the parties were informed. They might have just instituted it and not informed them. They would have been within their rights to do so.

But whatever one scenario one considers is most probable, what the analysis confirms is that, on any view, Allergan did not have the power to give instructions to the hold separate manager. It had no power to give instructions to alter strategy. That is what the commitments say and it had no -- equally had no power to oblige -- to oblige the hold separate manager to maintain strategy.

Only the hold separate manager, the monitoring trustees and ultimately the Commission had that power. Whilst this hold separate was in force, the final word, control, decisive influence, lay with the monitoring trustee if it lay with anyone and ultimately with the Commission. It clearly did not lie with Allergan.

So those are my submissions on the hold separate period, unless there are any further questions.

THE PRESIDENT: Thank you.

MR JOWELL: If I may then move on to the question of the law on excessive pricing and infringement.

Now, the tribunal will recall that we largely left the issues of -- well, entirely left the issue of dominance and largely left the issue of abuse to Auden and to other appellants who directly participated in the alleged infringements or were alleged to have directly participated in the infringements.

The focus of our submissions in -- all along and in closing on the law was really mainly focused on the lack of certainty in the law of excessive pricing and in particular the lack of certainty at the relevant time in 2015 and 2016.

We pointed out that there was an almost total lack of certainty at that time and that that is an important mitigating factor in relation to penalty. But there was one point that I did insist on and that was what has been called the *Napp* -- the second limb of *Napp*.

THE PRESIDENT: Yes.

MR JOWELL: And I will come back to that and I will also come back, if I may, because I know that the tribunal is very interested in it, to the tribunal's note and our key responses to it and to what the absent Mr Holmes said about the note as well, because I think clearly the important points of principle are raised.

So starting with the *Napp* point, we say it is a complete answer to the alleged excessive pricing

infringement for the period in which Allergan was involved that it was clear that high profits from hydrocortisone would stimulate successful new entry within a reasonable time, or put another way that there was likely to be effective competitive pressure bringing prices down to competitive levels.

We say that in two ways, we use that in two ways. First of all, we say that means there was no infringement at all and, in the alternative, we say on any view that the -- that perception of the law is a very important mitigating factor which should have mitigated against any fine on Allergan and certainly mitigated against a fine of anything like the magnitude that has been imposed on it.

THE PRESIDENT: Mr Jowell, you heard the exchange on *Napp* (ii) which we are discussing at the moment --

MR JOWELL: Yes.

THE PRESIDENT: -- between the panel and Mr Holmes, and I think we agreed it was a very fact-specific thing. But in terms of how it was framed do you have any particular pushback on the abstract formulation of (ii) or is it, as you are certainly submitting now, down to the facts?

MR JOWELL: Well, I accept that the application must be down to the facts, but I -- but I do say that *Napp* -- the

Napp (ii) and the way it is formulated there gets it right and it should not be, as it were, interpreted in a very narrow -- first of all, it should not be airbrushed out, as the CMA seek to do, and -- nor should it be read down in some overly restrictive way and I would like to explain, if I may, why we say that is so.

First of all, I want to address -- effectively there are two -- as I understand it, the CMA makes two main arguments about *Napp* and the first is they said, and this is the way Mr Holmes put it the first time round before Christmas, he said, "Well, it would mean that the -- it would be terrible, that approach", he said, "because that would mean that abuse ended at the point in time when prices were at their very highest". Mr Chairman, you put it very elegantly when you said it is always darkest just before the dawn, as it were.

And one can see that that -- that way of looking at things has got an intuitive appeal, because one can ask, well, why should a dominant undertaking be let off the hook just when it is making the most profit margin and by extension consumers are suffering the most?

But actually that approach of looking at prices in isolation and not looking at the presence of entry barriers is actually, in our submission, wrong. In

fact, the academic economists who have considered this point seem to be in rare unison that it is wrong. They say where there are no significant entry barriers, there should be no findings of excessive pricing.

The reason for that and the reason why actually the high price on its own does not matter is because the high prices -- the prices are high but there are no significant entry barriers, or when there were significant entry barriers and they have been lifted, or are about to be lifted, then those high prices act as a signal that attracts new entry and allows the market to self-correct. If you bring down the price, effectively do not allow that to occur, if you bring down that price at that point in time when there are no entry barriers you will mute the signal and so it comes back in a way to the mask example. The temporary high price operates as a signal to attract the new entry.

The effect if you mute the signal too early or when -- at the point in time when entry barriers are lifted, is likely to be counterproductive because what it will undermine is the process of the market self-correcting and that will lead to fewer new entrants, fewer competitors, and ultimately potentially higher prices.

THE PRESIDENT: Does it make a difference, looking at the

darkest hour before the dawn when prices are their highest, whether those prices are legitimately high or illegitimately high? Let us assume the shape of the mountain as Mr Holmes calls it is the same whether it is an unlawful abuse of pricing, excessive, or whether it is a lawful face mask case where one is taking a short-term advantage of one person in the market being able to supply.

Now, let us postulate that the shape of the curves are exactly the same, but their cause is remarkably different. One is simply an ability to charge prices because you happen to be in a good place coincidentally with the products that you have and you are able to gear up fast and so the signal of high prices will attract people in, whereas in the second hypothetical case you have got someone who is charging excessively, abusing a dominant position and in that case is the signal wrongly sent, or am I actually making a distinction that you cannot in fact draw?

MR JOWELL: I think there is no proper distinction to be made there.

THE PRESIDENT: Yes.

MR JOWELL: It is counter-intuitive because one can see why, when the price is -- but actually some things in economics, like some things in science, are

counter-intuitive and this is one of them. If I can show you -- this is not me making this up, let me show you {M/55.3/1}, please.

{M/55.3/1}. This is an article by Amelia Fletcher and Alina Jardine and I could tell you that -- as we will see in the footnote, if we could go over the page, please {M/55.3/2} you can see on footnote 2 -- forgive me, not footnote 2, the first footnote, you can see that they were at the relevant time the chief economist and economic adviser at the UK's OFT. So we are not talking -- this is not a sort of -- a particularly non-interventionist Chicago school approach.

And if one goes to page 6, please {M/55.3/6}, and if you -- perhaps if I can leave you to read paragraphs 20 to 24. Perhaps if I may, may I read them out in fact? Let me read them out:

"In the absence of excessive pricing rules, firms set prices to maximize profits. If they are concerned that their profit-maximizing prices might be seen as exploitative under competition law, though, this could lead them to alter their pricing behaviour in all sorts of unpredictable and distortive ways. By contrast, where competition authorities engage in ex post regulation of infringing firms, any distortions can be taken into account on a case-by-case basis and can, to

some extent, be avoided by careful intervention design.

"The distortions associated with the 'deterrent' effect of excessive pricing rules provide a good policy argument for minimising this deterrent effect, in particular by steering clear of imposing fines for excessive pricing and of allowing private damages actions in respect of such behaviour, since each of these strengthens firms' incentives to abide by competition law. By limiting available sanctions to the imposition of ex post penalties, such as future price regulation, firms are likely to be less concerned about breaches of excessive pricing rules, and as such the associated distortions across the economy should be greatly reduced.

"Another concern highlighted above was the risk that price regulation might inhibit entry or expansion by competitors, and so prolong the dominant firm's market position. This is potentially a serious issue. However, it is worth noting that it would be less likely to arise in practice if the policy approach were adopted of only intervening in markets where one does not expect the hype prices to stimulate successful new entry within a reasonable period."

Now, just pausing there, that is almost exactly the same language as is used in *Napp*:

"Under this policy, price regulation should not occur where competitors are realistically willing and able to enter or expand through undercutting the dominant firm's prices, and so become a real restraint on the dominant firm."

And then paragraph 23:

"In summary, one might reasonably conclude from the above arguments that a sensible policy approach towards excessive pricing would have the following characteristics {M/55.3/7}:

"There would be no intervention against high prices if one expects them to stimulate successful new entry within a reasonable period."

Again, the absolute mirror of *Napp*:

"In examining high prices for one element of a firm's product portfolio, it is important also to consider carefully the pricing of other elements of its portfolio, the competition the firm faces in those other markets, and the impact on consumers' choices.

"In order to reduce deterrence, firms should not face fines for excessive pricing ..."

She says:

"None of the above are currently explicitly (or even implicitly) incorporated with EC competition policy. Their adoption would therefore go a long way towards

meeting the concerns set out above. Of the three, the third would probably be the most controversial."

That is not facing any fines or private damages actions.

Now, just pausing there, if someone had said to Ms Fletcher and Ms Jardine that the successor to the OFT, the CMA, was planning to fine a company for alleged excessive pricing in circumstances where it was a parent company of a subsidiary that was anticipating new entry with prices for the product in question expected to fall 90% in the next three years, it is very hard to see that they would not have been firmly opposed.

If they had been told that the plan was to impose a fine on that parent company of £74 million for that conduct, so-called conduct, alone, even though it had not participated in the alleged infringement, one suspects that they might have thought that the CMA was taking leave of its senses.

Now, the approach of not finding excessive pricing where there are no extant entry barriers or significant entry barriers is actually widely held and Lord Justice Green, as Mr Holmes said in *Phenytoin*, surveyed the economic literature.

And I think it was suggested, this was I think the second limb of Mr Holmes's submissions, he suggested

that somehow something was to be read into the way in which Lord Justice Green had referred to the *Napp* test or the directors' -- the tribunal's comment on the *Napp* test in *Phenytoin* as a way of suggesting, in some way, that Lord Justice Green was not adopting that approach.

But it is very important to bear in mind *Phenytoin* did not raise this particular issue of whether -- effectively whether new entry negatived abuse. This was just not -- this was not a point that was before Lord Justice Green.

But if you look at his survey of the economic literature and he refers to the OECD report -- if we could go to that, please. It is in {M/170/31}. And if we see paragraph 104, at the bottom, please, he says:

"These features served to distinguish the present case from other markets where patent expiry removed the principal obstacle to market entry. Where there are no material barriers to entry, high prices can act as a magnet to entry which, in due course, drives prices down."

So, in our respectful -- and this is in a section in which he is summarising the effect -- the effect of the OECD report.

We respectfully say that to suggest that he was -- in light of that comment, that he was somehow backing

away from *Napp* is wholly unjustified and if you go to the OECD report itself, we can find that in {IR-E5/10/1}, please, this is the OECD report which Lord Justice Green referred to. And if one goes, please, to page 8 {IR-E5/10/8} one sees -- you see paragraphs 19 and 20, which set out the arguments against intervention. It says:

"A first argument against intervention is that prices operate as a mechanism through which markets self-correct. If a dominant firm is earning excessive profits in a given market, this will typically send a signal to attract new entrants into the market ..."

And it refers to an article by Professors Motta and Streel and Professor Jenny.

"In the absence of substantial barriers to entry, any intervention that reduces the profit of an incumbent might not only be unnecessary, but could actually prolong the monopoly situation by blocking efficient signals to promote market entry. For this reason, it would be a sensible policy approach not to intervene against high prices if one expects them to stimulate successful new entry within a reasonable period ..."

And it cites the Fletcher and Jardine article that I have shown you.

If one then goes forward to page 10, please

{IR-E5/10/10}, and if one has -- if one could focus in on paragraph 27 and 28, it says:

"Secondly [this is the articles in favour] it has been argued that intervention against excessive pricing may be justified in certain circumstances. There may be markets where high prices would not lead to self-correction, at least within a reasonable period. After all, it is post-entry prices, not pre-entry prices, which ultimately attract entry. If potential competitors are aware that dominant undertakings will decrease prices after their entry, they may not enter that market even if current prices are high ...

"Furthermore, exploitative abuses taking place over a prolonged period usually occur only where there are high and non-transitory barriers to entry or expansion, preventing competitors from undercutting the dominant firm and eroding its market position. As such, where high margins or high prices are adopted over long periods and there are high barriers to entry, it is far from obvious that entry will take place ..."

So even the contrary arguments are not actually disputing the basic proposition. They are just saying that where there are high and persistent entry barriers, then there may be -- it may be appropriate to find excessive pricing.

If one goes forward to page 13 {IR-E5/10/13}, and one sees -- forgive me there should be paragraph 69 on this page, I think. Maybe if we -- can we go to the previous ... no.

Well, in any event, I will tell you what it says. It is paragraph 69, if we can find it, when it comes to the recommendations. What it suggests is there should be a screen -- ah, there we are {IR-E5/10/19}. It suggests that there should be -- you can see in there that there should be -- one of the -- there should be a screen of in effect timely market entry, of there being no prospect of timely market entry of alternative products.

So we say that this is a soundly based part of the law of excessive pricing based both in the economics and in the case law. One can in fact, we say, on reflection see that it should be applied in the present case.

Suppose that shortly after Allergan purchased Auden it had instructed Auden to bring its prices for hydrocortisone right down to £20 a pack, the level that the CMA now relies upon as being its cut-off. That is effectively, it seems to us, the only way that the CMA says that Allergan could have avoided its enormous fine, if it had given that instruction effectively on day one of its ownership.

Well, what effect would that have had in practice? Well, it is true that it would have brought down prices for consumers to lower than they were for a year or two, but it would also have had at the same time the effect of making entry by other suppliers or potential suppliers of hydrocortisone less attractive, and it is plausible that a number of the companies that subsequently entered the market and stimulated the vigorous price competition that occurred would not have done so.

That would have had two effects, potentially, if that had occurred. First of all, prices might not ultimately have come down to the very low prices that Mr Holmes was referring to at the end of his submissions and, secondly, it would have meant that there would have been fewer suppliers of hydrocortisone on the market and that would have led to less resilience in the supply chain and the possibility of shortages. And when one is speaking of life-saving drugs, the resilience of the supply chains and multiple sources of supply is very particularly important, more important in fact to consumers even than price.

So we say even in the instance of the present case it is far from clear that consumer welfare overall would have been enhanced by short-circuiting the competitive

process, even in this case, and as a general rule -- and the tribunal must be concerned with rules -- it is a very bad policy decision to say -- to effectively read down or read out the second condition of *Napp*.

We say even if we are wrong on that, we say *Napp* was apparently good law. Allergan was faced with a situation where it was anticipating plummeting prices and not only that but the proof of the pudding was in the paying because Allergan was not prepared to pay £200 million, it insisted on that coming off the purchase price, precisely because it anticipated these collapsing prices arising from imminent competitive entry.

So we say that that is on any view something, if not negativing any abuse in that period, it certainly should negative the fine or mitigate the fine.

Finally, I should mention *Albion* Water just out of completeness because Professor Bailey alluded to it when he was making his submissions and he said that I had wrongly omitted *Albion* Water as one of the important cases that would have been around at that time, in 2015/2016.

Of course we accept that a well-informed lawyer advising Allergan would have had regard to *Albion* Water, would have known about *Albion* Water, but we respectfully

suggest that it is not a case of great importance in the present context and that is for three reasons.

First of all, as in *Phenytoin*, the second element of *Napp* just did not come up in *Albion* Water at all because there was no possibility at all or realistic possibility of entry -- relevant entry because the market was a natural monopoly.

But actually if you look at the judgment it does not -- it cites -- both *Albion 1* and *Albion 2* do cite *Napp* and do not dissent from the basic point about the importance of new entry. If I could just show you that in *Albion 1*, I will give you the reference if I may, it is at paragraph 109 which for your note is {M/50/98} and in *Albion 2 Napp* is cited in {M/64/10}, paragraph 18. But if I could just take you in *Albion 2* to page 69. So that is {M/64/69}, please. And you see in 212:

"The Chapter II prohibition is not intended to prevent the market from self-correcting unduly high prices."

So the principle is clearly -- is clearly stated there, the importance of allowing self-correction to take place. And it goes on to say it is not about high prices as such.

So if the market is going to self-correct, we respectfully say all of the case law is saying leave it

alone.

Of course, the specificity of *Albion* Water was highlighted also by the CAT in its judgment in *Phenytoin* where it effectively says, well, that case is really about -- it related to the particular circumstances of prices for common carriage, which was intended to be a means of introducing competition to the water industry. If I could just show you that. It is {M/150/99}. You will see paragraph 3 and 4 and perhaps if I could just invite you to read paragraphs 3 and 4.

THE PRESIDENT: Yes, of course. Could you put the two pages on one screen? (Pause).

Yes, thank you.

MR JOWELL: So very clearly stressing the specificity of the fact of *Albion* and really the lack of comparability with the position in *Phenytoin*.

Now if you were a lawyer and you were asking yourself in 2015/2016 which of these cases, *Albion* Water or *Napp*, is closer to the position of Allergan, well, the answer is very obvious. I mean, *Napp* was a case about the pricing of a generic drug and the legal test in *Napp* is the natural and correct one to apply, and certainly in the absence of any dissent from the *Napp* approach in subsequent cases. In fact the only extent to which one might say there had been a dissent from

Napp in subsequent cases is in *Attheraces* where this additional element of economic value is introduced, and so in effect what somebody advising Allergan in 2015/2016 would be looking at would be *Napp* but with the added loss of this huge uncertainty over whether one can really ever get an excessive pricing case off the ground given the wide notion of economic value.

So if I may then turn more broadly to the tribunal's note and to our response to it and so on.

You will see we have provided a detailed response in our -- and if I may what I would like to do is just highlight certain features of that and of course respond to any points that the tribunal may have and merely add one or two additional things as well in light of the further submissions.

First of all I should say that we say in paragraph 2 that we welcome the tribunal's desire to inject legal and economic rigour into the analysis, and in fact the very fact that we are all having these debates about these very fundamental -- the meaning of these very fundamental concepts shows the extreme levels of legal uncertainty in this area and therefore the i*Napp*ropriateness, in our submission, of imposing these sorts of enormous fines.

We genuinely welcome it and we are not just

toadying. But we do have a few words of caution because we start off with, if you like, some basic points of sort of first principles, which is: the first point is that when one talks about dominance being -- having a pernicious effect, one needs to be a little cautious because it is clear that it is not unlawful in itself for an undertaking to be in a dominant position and it is not part of the purpose of Article 102 to prevent an undertaking from acquiring on its own merits a dominant undertaking -- a dominant position. For your note, you can find that again, I do not -- I am not sure the case is in the bundle, but it is well established, it is *Intel* in case C-413/14 P at paragraph 133, or the *Google Android* judgment more recently in case T-604/18.

THE PRESIDENT: Dominance is the hallmark for the imposition of a special duty, if you like.

MR JOWELL: Yes, Mr Chairman, it is.

THE PRESIDENT: You can abuse when you are dominant.

MR JOWELL: Yes.

THE PRESIDENT: Whereas if you are not dominant, no problem.

MR JOWELL: Absolutely. But in general terms it is a bit dangerous to talk about the pernicious effects of dominance or the cancer of dominance or the tumour of dominance, because dominance -- acquiring a dominant position is not in our system of law regarded in itself

as being a bad thing in any sense and really there are specific abuses, we would say, where extreme types of behaviour by dominant undertakings are not -- are not acceptable.

THE PRESIDENT: You are absolutely right, Mr Jowell, but the reason I was focusing in the exchange with Mr Holmes on the elimination of dominance was not to say that it is intrinsically a bad thing --

MR JOWELL: Yes.

THE PRESIDENT: -- but to articulate what the counterfactual question of what a proper competitive price was --

MR JOWELL: Yes.

THE PRESIDENT: -- required the -- that was the point, you may want to push back -- required the elimination of the --

MR JOWELL: Yes.

THE PRESIDENT: -- dominant element in order to work out what the price ought to be. Now of course --

MR JOWELL: Yes.

THE PRESIDENT: -- that does not entail an automatic assumption that the abuse was present. It may be that if you remove the dominance --

MR JOWELL: Yes.

THE PRESIDENT: -- the price is exactly the same.

MR JOWELL: Yes.

THE PRESIDENT: But that is the goal of all this testing.
MR JOWELL: Yes.
THE PRESIDENT: But because one does not have a fully functioning crystal ball, in that one cannot actually work out what if you remove the dominance the market price would be --
MR JOWELL: Yes.
THE PRESIDENT: -- you have got to go somewhere else in order to find the data which is why the Tribunal, I think, was rapped on the knuckles in *Flynn v Pfizer* for saying we want a hypothetical price. Well, of course we all want a hypothetical price.
MR JOWELL: Yes.
THE PRESIDENT: It is just you cannot get it by hypothesising a price.
MR JOWELL: No, indeed, and I do not dissent with anything that you have said. Clearly there needs to be a benchmark and the cases talk about an effectively competitive market, but one needs just to be a little bit careful because whilst it is true that there is a prohibition on exploitative abuses in law, it is one that has been very rarely -- very rarely exercised in practice. I mean, there are -- you can count almost on the fingers of two hands the number of cases that have actually found excessive pricing and this is across the

whole of the European Union, across decades.

So clearly the Court of Appeal was right in *Attheraces* when it said -- on two occasions it said it does not -- it is not a general provision for the regulation of prices. So it is not -- the prohibition on exploitative abuse is not about, if you like, stripping out the effects of supradominant or supracompetitive profits.

THE PRESIDENT: Mr Jowell, I completely agree. I mean, take -- well, let us take branded and non-branded T-shirts.

MR JOWELL: Yes.

THE PRESIDENT: Now, if I want to have a T-shirt with a Nike swoosh on it I am probably going to paying five times more than the unbranded T-shirt.

MR JOWELL: Yes.

THE PRESIDENT: Now, the relationship between cost and price there is -- well, I mean, I am sure there is some advertising cost that Nike incur in establishing their brand but there is going to be a massive difference in price which is not explicable by cost.

MR JOWELL: Yes, yes.

THE PRESIDENT: One would hesitate to say that the branded T-shirt was an abusive price. It is simply the fact that certain people want to have this product even

1 though it has no objective differentiating features from
2 the unswooshed product.
3 MR JOWELL: Well, quite. And those are the sorts of issues
4 that make it such a minefield to try to lay down any
5 general rules in this area, and also really why
6 competition authorities have stayed clear of this and
7 why we say one should continue to stay clear of it in
8 the absence of continuing entry barriers, because it is
9 better to let the market -- either to let the market
10 self-correct or to regulate it properly on an ex ante
11 basis, as we do with regulated industries.
12 And it is particularly dangerous to sort of extend
13 the law, if I may say, in this area in an era where one
14 now has class actions and so on, because it is -- of
15 course one of the inhibiting features on this is the
16 discretion of the regulator, but that goes when you have
17 private actions.
18 THE PRESIDENT: Yes.
19 MR JOWELL: So one needs to exercise great caution. The
20 Court of Appeal's judgment in *Attheraces* is binding, of
21 course, on -- both on this court and indeed on the Court
22 of Appeal itself, because the Court of Appeal is bound
23 by stare decisis.
24 So one needs to be very cautious when Mr Holmes
25 tries to say, oh, well, that was all about an intangible

product, because really it certainly was not -- it was not an IP. There was no IP protection any more for the runners and riders' data. There was a clear cost, a marginal cost, associated with collating it. It was approximately £5 to £6 million. You can see that from the judgments. It had no sort of -- there was not the -- there was no sort of brand value to it. It was bog-standard information about who were the runners and who were the riders immediately prior to the race. So trying to read it down when you have these very clear statements of the Court of Appeal, saying the index of abuse is not simply the differentiation of the cost, and really they say also one sees in paragraphs 207 and 208, we see them saying that the -- that cost-plus really has got a very limited role, they say, it is just a baseline below which you -- there cannot be any excessive pricing, trying to read down those sorts of statements and say it is confined to its facts, it is not clear actually that one is entitled to do that. It is part of the ratio -- part of the ratio of the judgment.

The same applies I am afraid when one comes to the concept of economic value, because whilst I can perfectly well see that if one were starting out with a clean slate upon economic value it might be economically more coherent to approach it in the manner

that is set out in your note, the tribunal's note, but in my respectful submission that is not a path that is open to the tribunal any more, because we say that both in Commission decision-making practice in *Scandlines*, which we refer to in paragraph 8 of our note, and in *Attheraces* itself, which we deal with at paragraph 12 of our note in particular, and in the Advocate General's opinion in *Latvian Copyright*, which we deal with in paragraph 14, and perhaps most importantly of all in Lord Justice Green's judgment in the Court of Appeal, upholding the CAT's finding and rejecting the fourth ground of appeal of the CMA, we say that you are respectfully bound by the notion that economic value is a demand side concept. It is about the value that consumers place on the product. It is not to be ascertained by reference to cost.

I will not take you through all -- I have already gone through *Attheraces* with you in my opening submissions, but if one takes, for example -- take, for example, ground 4 in *Phenytoin*. The CMA's ground for appeal was that the CAT was wrong in saying that the CMA had erred in attributing no -- nothing for patient value as part of economic value, because of the existence of the patient's dependency on the product, and they said that was wrong.

Well, if the Tribunal's note were correct and economic value is divorced from the demand side and is about producer surplus, it is impossible to see why ground 4 would not have succeeded, because the Court of Appeal would just have said, well, there are -- this is -- economic value is not about the demand side. It is not about patient value. It is about average producer surplus.

So we say it is simply not open to the tribunal to adopt that approach. One has to live with economic value as a demand side concept, which is in -- the only way we can see to interpret it economically is as part of consumer surplus, which is allowed as some additional element in the case law.

THE PRESIDENT: Yes, I mean, I think what you are saying is that you are accepting that it is a demand side element that forms part of the consumer surplus but what you are saying is that it is permissible to allow that consumer surplus to be eroded --

MR JOWELL: Yes.

THE PRESIDENT: -- by causing the price and so the producer surplus to increase.

MR JOWELL: Yes, yes, that is one way of putting it, yes. Yes.

THE PRESIDENT: Yes, I understand.

MR JOWELL: Yes. That is a better way of putting it, yes.
THE PRESIDENT: Not at all, I am just trying to get your submissions clear.
MR JOWELL: But the fundamental point is it is about the value. It is about the value that the consumer places on the product.
THE PRESIDENT: Oh, yes.
MR JOWELL: That is over and above what they are actually --
THE PRESIDENT: The driver is the value the consumer pays or is prepared to pay for.
MR JOWELL: Yes.
THE PRESIDENT: That is absolutely right.
MR JOWELL: Yes.
THE PRESIDENT: It is a question of how far the trajectory of abuse of dominance in this area allows that undoubted value which causes people to shell out more than they otherwise would --
MR JOWELL: Yes.
THE PRESIDENT: -- to the effect the price which, pace, I note -- but there may be argument about this -- pace, I note in a competitive market --
MR JOWELL: Yes.
THE PRESIDENT: -- is not featuring in price, because the competitors are seeking to push down the producer surplus --

MR JOWELL: Yes.
THE PRESIDENT: -- so that they can sell more widgets --
MR JOWELL: Well, yes, yes.
THE PRESIDENT: -- in that way --
MR JOWELL: Yes.
THE PRESIDENT: -- in order to attract into the market those people whose value as buyers of the product is less high than the others who are prepared to pay more.
MR JOWELL: I suppose what they are actually seeking to do is to maximise their profits, and they do that --
THE PRESIDENT: They are.
MR JOWELL: -- by slightly reducing their prices as against their competitors in order to expand their market share.
THE PRESIDENT: Yes. Well, indeed.
MR JOWELL: That is right. But it is very important to bear in mind that it is only an effectively competitive market -- that is, not a perfectly competitive market -- and that one is that is the -- that is the general benchmark that can be used in the first stage of excessive pricing.
THE PRESIDENT: We absolutely accept that.
MR JOWELL: Yes.
THE PRESIDENT: That is why we have got this rather unattractive label of "average consumer surplus", which is intended to reflect the fact that we are not talking

about perfect competition where, essentially, everyone who is not as efficient as the most efficient competitor --

MR JOWELL: Yes.

THE PRESIDENT: -- is driven out.

MR JOWELL: Yes. But I think the difficulty that we have with the notes approach is really squaring it with the concept of economic value being a demand side concept, being about the value that -- the purchaser's value, because then you are squarely into consumer surplus. You are not into -- I mean, as I think the note rightly says, in paragraph 8, a producer surplus varies not according to value but according to producer efficiency. That is absolutely right. The difficulty is that the term "economic value" and the way it has been interpreted is about value. It is about value to the consumer. It is not about the cost to the producer.

That may or may not have been a misstep in the case law, but it is clearly binding case law, we say, because otherwise there would have been a completely different analysis in *Phenytoin* in relation to ground 4 of the appeal. It would have gone the other way.

So I am afraid, in our respectful submission, the Tribunal's hands are tied. They cannot reduce the concept of economic value to a concept of producer cost,

whether that is average producer cost or lowest producer cost.

THE PRESIDENT: That is helpful. I mean, we will draw stumps now, but --

MR JOWELL: Yes.

THE PRESIDENT: -- I think when you resume it would be helpful to understand, assuming Lord Justice Green and the Chancellor have articulated a position that is unequivocally consistent with our note, and that we will argue about.

MR JOWELL: Yes.

THE PRESIDENT: But assuming that is the position --

MR JOWELL: Yes.

THE PRESIDENT: -- is that actually a proposition of law or a proposition of, as it were, economic fact?

MR JOWELL: I will give that due reflection, yes.

THE PRESIDENT: Because that is one of the --

MR JOWELL: Yes.

THE PRESIDENT: -- very interesting areas in this jurisdiction: that there is a rather odd body of -- I do not really want to call it law, but a rather odd body of norms that are not legal but economic.

MR JOWELL: Yes.

THE PRESIDENT: So, I mean, if the Court of Appeal were to say, "Well, the demand curve slopes down from right to

left" --

MR JOWELL: Yes.

THE PRESIDENT: -- is that something that is binding on us?

MR JOWELL: Yes. Well, I will give that some reflection, yes, yes.

THE PRESIDENT: Well, we will start at 9.30 on the 3rd.

MR JOWELL: I am grateful.

THE PRESIDENT: I hope that will give enough time for everyone --

MR JOWELL: I probably will have another hour, I would guess, but not more than that.

THE PRESIDENT: We are grateful. We will leave it to the --

MR BAILEY: I hesitate to raise. It is just simply to correct one small point that was made by my learned friend. He said at page 181 at lines 17 to 18 that *Napp* was a case about the pricing of a generic drug. Of course, that was not correct. *Napp* was a case about the pricing of a branded drug. One can see that from paragraphs 13, 16 and 18 of the tribunal's judgment at {M/24/9-10}. I did not want the tribunal to be mislead that it was about a generic drug.

THE PRESIDENT: I am sure it would not because we will be rereading all of this stuff, but --

MR JOWELL: No, forgive me, it was a case about a drug and not about access to water facilities.

THE PRESIDENT: Thank you. 9.30 on the 3rd. Thank you all very much.

(4.43 pm)

(The tribunal adjourned until 9.30 am on Friday, 3 February 2023)