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**IN THE COMPETITION**

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

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 22<sup>nd</sup> November-Friday 23<sup>rd</sup> December 2022

Before:

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

BETWEEN:

**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”)**

AND:

**Respondents**

**COMPETITION AND MARKETS AUTHORITY (“The CMA”)**

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## **A P P E A R A N 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, 7 December 2022

(10.00 am)

Housekeeping

THE PRESIDENT: Mr Holmes, good morning.

MR HOLMES: Sir, before cross-examination resumes, if the Tribunal will permit me. I was going to return to your question of yesterday as to how we propose to deal with Dr Bennett's postscript.

THE PRESIDENT: Mr Holmes, that is extremely helpful because that is exactly what I have on my note here, but I will hear you first and then --

MR HOLMES: I am grateful. So, we have had an opportunity to discuss on our side and our current view is that we do not need to detain the Tribunal with further questioning of Dr Bennett. We think that the note can be dealt with by way of submission. We would like, of course, to discuss with Professor Valletti when he emerges from purdah before we reach a final view, but that is our current position and we do not have any particular questions that we feel the need to put as matters stand.

As regards the cross-examination of Professor Valletti, we also do not object, on reflection, to Mr O'Donoghue asking him about the note, provided of course that Professor Valletti feels

1 comfortable that he is able to respond to it in view of  
2 the limited time he has had to consider it. We are  
3 conscious the note was produced over five days by  
4 Dr Bennett in consultation with his team, whereas  
5 Professor Valletti has had it since late yesterday  
6 afternoon, 5.30 pm, and he is on his own and no doubt  
7 with other commitments as well as this.

8 So we have no -- I am sure that if  
9 Professor Valletti does not feel able to deal with  
10 a point he will say so, but subject to that we are very  
11 happy for him to be questioned in relation to it.

12 THE PRESIDENT: Mr Holmes, that is very helpful. That is  
13 more or less where we had come out, but I am going to  
14 articulate it a little more clearly and then,  
15 Mr O'Donoghue, I will hear whether you have any issues.

16 MR O'DONOGHUE: I will put you out of your misery, that  
17 sounds more than fair.

18 THE PRESIDENT: It does. I think we just need to be clear  
19 what we are expecting of the parties and what,  
20 Professor Valletti, we are expecting of you and I will  
21 at some point invite your -- I will invite your views  
22 now but I will give you, I hope, helpful direction as to  
23 what you may or may not answer if questions are put.

24 But let me start with the point that this is  
25 material produced by Dr Bennett which arose in response

1 to a request from the Tribunal, so this is absolutely  
2 not late evidence that is produced by a party. The  
3 first question that we think we have to address is: was  
4 the question asked and the response it produced  
5 something that we regard as potentially of interest in  
6 the decision we ultimately have to make. In other  
7 words, if we regarded the question, and I am not going  
8 to be very rude to Professor Mason, but if we regard the  
9 question as essentially misconceived in the light of the  
10 answer produced then we would simply, with the best of  
11 thanks, put this in the bin and proceed.

12 We do not think that the question was misconceived.  
13 Nor do we think that the answer is immaterial. We do  
14 not want to say how material it is, because frankly we  
15 do not know. But it seems clear to us that this  
16 evidence needs to be admitted and we propose to do so.

17 Essentially, Dr Bennett has done exactly what we  
18 asked. He has substantiated by the graphs and tables in  
19 his report, he has substantiated his  
20 back-of-the-envelope job and that is exactly what we  
21 asked him to do and exactly what he has done.

22 We cannot possibly expect Professor Valletti to  
23 comment on the calculations in the report in any way,  
24 shape or form at all and I know Mr O'Donoghue would not  
25 ask questions on this, and to be clear, I would not want

1       you to respond to those, Professor. It seems to us that  
2       the variance on the data and the reworking of the data  
3       is something that can be done on the papers over the  
4       next few days, and what we are minded to direct on the  
5       data question is that the CMA put in such response as it  
6       is minded to include by close of business on Monday,  
7       12 December.

8               Now, that is, I think, as much time as we can give  
9       to the CMA because obviously, it may feature in the  
10      course of closing submissions which will begin the very  
11      next day and to be clear, we will give every latitude to  
12      the appellants to take such points as they wish. But  
13      what we are expecting is essentially more statistics,  
14      and we would hope that the granular mechanics of those  
15      statistics can be agreed, and we would very much hope  
16      that the manner in which Dr Bennett has done his  
17      workings can be agreed, leaving over the question of  
18      their significance to submission, and that is really  
19      what we are interested in; the data is no more than  
20      a platform for understanding whether there is something  
21      to this point or not.

22              So that is what we want to do on the granular  
23      detail. Just one further point on this. Obviously, it  
24      is for the CMA to decide what it wants to put in in  
25      response, but looking at figure 2 on page 3 of

1 Dr Bennett's report, we have two graphs.

2 A. I am sorry to stop you, but nobody has provided me with  
3 a hard copy of that. It would be helpful.

4 THE PRESIDENT: Professor, we will produce it while I am  
5 talking, but we will make sure we get it before we get  
6 to your part. If that could be gathered together we  
7 will make sure you have that.

8 But these two graphs curve-fit certain data points  
9 which are ex facie split. In other words, one has one  
10 curve fit which deals with the contemporaneous Auden  
11 price and the data points there, which is figure 2A, and  
12 then one has a second curve fit, which is the Auden  
13 price two quarters ago, and we see that on Dr Bennett's  
14 evidence the fit is better at point 6.8, the correlation  
15 is better in B than it is in A.

16 What we wonder is whether a regression could be  
17 performed which, as it were, threw in all of the data  
18 that is conceivably relevant to see what, on  
19 a regression analysis applied to all of that data, one  
20 gets in terms of the data that matters and the data does  
21 not matter. Because what concerns me is that we are in  
22 danger of articulating this as a chicken-and-egg  
23 question, whereas in fact it may be that there is a more  
24 comingling of pricing which involves, as it were,  
25 looking at drug tariff and prices.

1           Now, who knows whether that is the case or not, but  
2           it is something which I would like to see the material  
3           on. So if that could be dealt with we would find that  
4           helpful. It may be when we get it produced it is  
5           totally unhelpful, but you do not shoot, you do not  
6           score.

7           So that is, as it were, the paper side of things.  
8           Moving on to the extent to which Professor Valletti can  
9           assist. Professor, did you have a chance to read this  
10          document overnight?

11         A. Yes, I did.

12         THE PRESIDENT: I am very grateful. If and to the extent  
13          you have anything to say about this, and you heard  
14          Dr Bennett's evidence, I think, in the witness box and  
15          indeed you touched upon it yesterday in answer to  
16          Mr O'Donoghue's questions, so this is not a new point,  
17          the question of what is driving the prices. We think  
18          that you should be given an opportunity, as it were,  
19          freestyle to say whatever you fancy on this document.  
20          If you have nothing to say then that is absolutely fine,  
21          but if you have anything to say then we would like to  
22          hear it.

23          Mr O'Donoghue can then ask what questions he wishes.  
24          Again, ordinarily we would oblige you to answer because  
25          this is clearly a matter in your expertise, but if you



1           were to say, I am sorry, I just have not had time to  
2           think about this, I need more time, then that is  
3           an answer that we will accept. We will not have you  
4           back in the witness box later, we will just have to  
5           accept that you have not been able to think about things  
6           overnight.

7           But to be clear, we would only be wanting your  
8           opinion on the general question that is being  
9           articulated, the question of the lag that is featuring  
10          in -- well, featuring in figure 2B, for example. We do  
11          not want, as I have indicated already, any kind of  
12          debate about whether Dr Bennett has his sums right or  
13          not. I am quite sure he has, but if he has not then  
14          that is something that needs to be pointed out in the  
15          process of the next few days.

16          So that is the course we are minded to take. It is  
17          substantial, I think, Mr Holmes, what you have suggested  
18          in your very helpful submissions. Mr O'Donoghue, do you  
19          have anything to add or subtract from that? I want to  
20          be satisfied that both sides are happy at the fairness  
21          of the process that we are envisaging.

22       MR O'DONOGHUE: Sir, I am content.

23       THE PRESIDENT: I am very grateful, Mr O'Donoghue.

24       MR HOLMES: We are also content, sir, we will go away and  
25          see what further data work can be done. It may, of

1           course, be that we feel that there are other points that  
2           can more fruitfully be made in responding to this  
3           material, but we hear what you say and we will try to be  
4           as helpful to the Tribunal as we can.

5       THE PRESIDENT: That is very helpful, Mr Holmes. I mean,  
6           this is something which simply occurred to us when  
7           reading this report, and we are at a high level of  
8           distance from this point and we are quite sure that the  
9           parties will do a better job in terms of identifying and  
10          extracting the data as necessary.

11           There is one other thing I should say. We do think  
12          that Dr Bennett ought to have the last word, as it were,  
13          not to originate new data but clearly it would be  
14          unhelpful if we had the CMA's work not responded to by  
15          Dr Bennett. We are not expecting, as it were, fresh  
16          points coming out but we would be, I think, quite  
17          uncomfortable in taking the CMA's workings without  
18          having an assurance that the workings, as opposed to  
19          their significance, was agreed or disagreed by  
20          Dr Bennett. That is something which we are not going to  
21          put a time frame on, but we do think that that is an  
22          expectation that we have that Dr Bennett will come back  
23          and say: yes, fine, I do not accept the interpretation  
24          but I do accept the maths, or more helpfully if there is  
25          dispute on the maths we sort that out, because we do not

1           want to do the spreadsheet work ourselves for pretty  
2           obvious reasons. I do not think the parties want us to  
3           do that either.

4       PROFESSOR HOLMES: Can I ask for one point of clarification  
5           when you are looking at the data, obviously not for now,  
6           something which would help me is: When they are looking  
7           at the data in figure 3, if it could be clarified at  
8           that time whether or not the average competitors' price  
9           there referred to is all the competitors or just those  
10          in Scheme M. I think that would be helpful, thank you.

11       MR HOLMES: I am grateful, sir, and we will be sure to  
12          address that point.

13       PROFESSOR HOLMES: Thank you.

14       THE PRESIDENT: Now, Professor, have we got a copy for  
15          Professor Valletti? Not yet. Can we find one,  
16          otherwise, Professor, you can have mine, with some  
17          marks. I'm sure --

18       MR HOLMES: No, no, I suspect that you have the facilities  
19          here to produce one more rapidly than the parties, if  
20          that were something that could be taken in hand by the  
21          registry.

22       A. As long as it can be put on the screen.

23       THE PRESIDENT: No, we will make sure you have a paper copy.  
24          One is coming over now. (Handed)

25          What I propose we do is, Mr O'Donoghue, you resume

1           and Professor Valletti can take the short break that we  
2           have mid-morning to think about whether he has anything  
3           to say, and then maybe you can address any points after  
4           that.

5       A. I am happy to address any points at any time.

6       THE PRESIDENT: That is very helpful. Mr O'Donoghue.

7                   PROFESSOR TOMMASO VALLETTI (continued)

8                   Cross-examination by MR O'DONOGHUE (continued)

9       MR O'DONOGHUE: Professor Valletti, good morning.

10      A. Good morning.

11      Q. Can I start with SSNIP, please?

12      A. No, can I start first, to -- I would like to clarify  
13           a point in the transcript of yesterday if that is  
14           possible, if that is the right point in time.

15      Q. Sure.

16      A. So can we please have the transcript of yesterday,  
17           pages 64 and 65 {Day8/64:1}. No, that is not the one  
18           I have. We were talking about Morrisons. Maybe if we  
19           go further down.

20      MR HOLMES: I think you may have discussed Morrisons on  
21           pages 67 and 68, to assist {Day8/67:1}.

22      A. Thank you. On my screen, was it 67? No, it is not  
23           that. Can you go further down. We are talking about  
24           switching back and forth, that was the -- how come on  
25           my -- you know, you use a different device and you

1           see --

2       MR HOLMES:  If you go down another page.

3       THE PRESIDENT:  I am afraid when it is tidied up the page  
4           references get --

5       A.  I see.  I had a pdf.

6       MR O'DONOGHUE:  If you want to check this over the short  
7           break I am content with that too.

8       A.  Okay, it is there.  The page before, thank you so much.  
9           I have found it.  Page before that, 68.  Thank you  
10          very -- okay.  So at line 25 {Day8/68:25} I am being  
11          asking the following:

12                "Question:  But I would suggest, what you say in  
13           your report is at best incomplete.  You said they  
14           switched only once, but what you omitted in your report  
15           was to say, yes, and they switched back to full --"

16                So, and what I answer, because I am very honest,  
17           even apologetic, I said:

18                "Answer:  So I should have written perhaps they  
19           switched back and forth only once.  That is what  
20           I meant, yes.  They switch [only] once and back and  
21           forth, yes."

22                "Question:  ... It is an important difference?"

23                Okay?  Then we pause there.  Can I ask, please,  
24           because I went back to my report and my report is at --  
25           paragraph 37 of my report, please.  So my report will

1           be -- I have taken it from ...

2       MR O'DONOGHUE:   {IR-F/1/60}.

3       A.   Thank you.   So paragraph, I said 37, please {F/1/16}.

4           So that is the only paragraph where I talk about this  
5           firm which is blacked out, and I say:

6                 "Indeed, some pharmacies actually did switch  
7           substantially (mostly independents, but also Day Lewis  
8           and Tesco, and [redacted] switched [and I am referring  
9           to [redacted]] switched back and forth although only  
10          once;"

11                If you go to the footnote 21 I say:

12                "[Redacted] initially switched to skinny label ...  
13          but from ... [redacted] switched back ..."

14                So I do say explicitly in my report that, as  
15          I thought, that they did switch back and forth. That is  
16          what I said, and so your question was mischaracterising  
17          what I had said in my report. Thank you.

18       Q.   But you do accept the upshot of the point, which is when  
19           they switch back for clinical and safety reasons they  
20           did not switch again?

21       A.   That is not the point we were discussing there. You  
22           were making an allegation that I did not say they  
23           switched back and forth, which I did write very  
24           explicitly, and that is the only point in my report  
25           where I mentioned about Morrisons, so I will stop there.

1 Thank you. I just wanted to clarify the point.

2 Q. Okay, well, let us move on. Now, on SSNIP can we agree  
3 on the orthodoxy. So, the SSNIP test involves  
4 identifying a candidate market and then considering  
5 whether a monopolist in a market so defined would find  
6 it profitable to increase price above the competitive  
7 level by a small but not insignificant amount, 5, 10%  
8 over a non-transitory period; yes?

9 A. Starting, as we said, from competitive prices.

10 Q. Now, if it appears that a hypothetical monopolist in  
11 that candidate market would find it profitable to  
12 increase prices in that manner, then the candidate  
13 market is accepted as the relevant market?

14 A. That would be a stronger indicator in that direction,  
15 yes.

16 Q. If instead it appears that a price increase of this type  
17 would be unprofitable because the price increase would  
18 trigger significant demand-side substitution the  
19 candidate market is rejected and the market boundaries  
20 are widened?

21 A. That is a very likely possibility.

22 Q. Can we go to Dr Bennett's second report, {IR-D3/2/7},  
23 please. You will see about halfway down he cites  
24 a series of CMA, Commission and OECD guidelines and  
25 guidance. You see the point of the quotations,

1 Professor Valletti, that each of these regulators or the  
2 OECD, they say it would be usual to perform a SSNIP  
3 test; do you see that?

4 A. I do see that.

5 Q. "Usually employed". Now, you presumably agree with  
6 that?

7 A. So it may be useful for the Tribunal to remind ourselves  
8 that the SSNIP test is one method. It has been  
9 introduced -- also called a hypothetical monopoly test.  
10 It has been introduced in merger assessments. That is  
11 the typical use of the SSNIP test, in merger  
12 assessments. So -- and it is a usual test which is  
13 sometimes, or I would say often used in merger  
14 assessments. When it comes to dominance it is much more  
15 tricky.

16 Q. But the CMA in this case, in the context of Plenadren,  
17 did apply the SSNIP test.

18 A. It is a case I do not want to have any opinion about.

19 Q. In this Decision the CMA did apply the SSNIP test in  
20 relation to Plenadren; correct?

21 A. Well --

22 Q. They either did or they did not.

23 A. They observed that the increases in the prices that we  
24 had observed in Hydrocortisone did not cause any change  
25 in Plenadren. That did not need a formal application of



1 the SSNIP test because the evidence was very clear.

2 Q. Let us look at what they say. It is 459 of the  
3 Decision, {IR-A/12/316}, please, 4.59. You see they  
4 say:

5 "... the key consideration when determining ... [and  
6 so on and the end] ... so that, in practice, they would  
7 substitute between products to an extent that would  
8 prevent a monopolist supplier of Hydrocortisone tablets  
9 from sustaining a small but significant and  
10 non-transitory increase in price ('SSNIP')."

11 Yes?

12 A. Yes, I can read that.

13 Q. By contrast, when it came to full and skinny 10mg the  
14 CMA did not perform the SSNIP test; correct?

15 A. They did not.

16 Q. You and your report did not perform a SSNIP test either?

17 A. I did not, and no one else in this case has performed  
18 a SSNIP test.

19 Q. I do not accept that, I am going to come to that. Now,  
20 the point of the hypothetical monopolist test, the SSNIP  
21 test, call it what you will, is that it gives  
22 an objective quantitative threshold for sufficiency, and  
23 in the absence of such a threshold one is left with  
24 subjective things like product characteristics. So it  
25 sets a threshold for sufficiency; do you agree with

1           that?

2       A. I disagree, because it is not a mechanical application  
3       that you should do when you are defining markets.

4       A SSNIP test, especially when it is applied to  
5       differentiated product markets as in this case, suffers  
6       from the so-called binary fallacy, which is either you  
7       are in the market or you are out of the market. These  
8       boundaries are artificial, we know that. So we have to  
9       be very careful. It would be a method, which is  
10      important I would look at that evidence, which I would  
11      need to top up with additional evidence. In itself this  
12      would not give me any reason to believe it is in or out.  
13      As I say, 01, these fallacies are very dangerous in  
14      practical cases. It is perfect when you analyse  
15      homogeneous product markets, it works fine. But as you  
16      enter the realm of product differentiation you try to  
17      understand, you know, where there is a sufficient cut in  
18      the chain of substitution you have to be extremely  
19      careful.

20     Q. We have seen the Commission and the CMA say you would  
21     usually do this. Why did you not do this in this case?

22     A. Because those statements were, I suppose, I do not have  
23     a full answer, but I would bet my money that they were  
24     referring to merger analysis where it is very common  
25     indeed.

1 Q. But you did not even try, correct?

2 A. Because in this case the evidence that I have seen was  
3 enough to define the boundaries of competition. That is  
4 what the market definition is about.

5 Q. You agreed with me yesterday that the critical test is  
6 sufficiency. How in the absence of any objective  
7 threshold can you calibrate sufficiency? Is it not like  
8 trying to clap with one hand?

9 A. I do not know what objective means in this case. I have  
10 seen objective data in front of me, and I am sorry to  
11 repeat but very slowly but it is very important in this  
12 case, you should never lose sight of the bigger picture  
13 that when skinny label products entered the market, 50%  
14 of the market switched away and we observed over time  
15 also a decrease in price of 95%. This is objective  
16 evidence that with a very good degree of confidence  
17 tells me those products were competing against each  
18 other.

19 Q. Can we look at some pricing data, please. Can we first  
20 go to the Decision {IR-A/12/436}. (Pause) Sorry, can  
21 we go to page 530. My mistake. {IR-A/12/530}.  
22 Professor Valletti, there you see the CMA set out  
23 a series of competing Hydrocortisone product prices.  
24 Now, they are confidential, as I understand it. Can  
25 I ask you to note the two figures there. Can we go to

1 the IR version, please so we can see the third figure.

2 Thank you.

3 So if you can note those three prices there for 10mg  
4 skinny, 20mg skinny and Waymade's 20mg full. Do you see  
5 those?

6 A. Yes, in April 2021 is it? Yes.

7 Q. Yes, so after the infringement has ended.

8 Now, you are also aware, presumably of the average  
9 selling price of 10mg full label tablets for the same  
10 period, are you?

11 A. Yes, I do not remember off the top of my head. If you  
12 can remind of those that would be great.

13 Q. It is also confidential.

14 A. In the same period just to make sure we are comparing  
15 the same period.

16 Q. I think if we go to the previous page.

17 A. Is it higher than (b), lower than (b), what is it?

18 Q. Yes, it is about double.

19 A. Okay.

20 Q. Now, the three figures we have seen, would you agree  
21 that these are reasonable benchmarks of the competitive  
22 price level for 10mg full label?

23 A. So, I have not analysed any competitive situation in the  
24 period, but this seemed to be the reasonable benchmark,  
25 yes. Historically we know that is where the prices

1           started from, a bit lower. It went incredibly high and  
2           then it went down to those levels.

3       Q. Would you also agree if the price of 10mg full label for  
4           the same period is, for example, more than double  
5           the price of 10mg skinny label tablets, that that price  
6           is very, very substantially above the three prices you  
7           see in front of you?

8       A. It is a differentiated product market. This happens in  
9           a lot of differentiated product markets. If you just go  
10          on Fleet Street and you will find different retail shops  
11          which command different prices.

12      Q. So the answer to my question is yes?

13      A. What was your question again?

14      Q. Is the price of 10mg full label for the same period very  
15          substantially above the three prices you see in front of  
16          you?

17      A. It tells me that the 10mg full label still has some  
18          market power. That is what it says.

19      Q. I asked you a different question and I am asking you, do  
20          you accept that the three prices for Hydrocortisone  
21          tablets in front of you are competitive price  
22          benchmarks?

23      A. For 10 skinny, 20 skinny and 20 full, probably, yes.  
24          I have not done a full analysis. They represent a good  
25          order of magnitude.

1 Q. Yes, but you say in proposition 7 of the joint statement  
2 that the 20mg full label price is "a useful benchmark  
3 for the price of full label 10mg"?

4 A. Yes, as a benchmark, yes. Also if I can -- sometimes  
5 the -- because otherwise the discussion is entirely  
6 abstract, this is an abuse of dominance case where  
7 sometimes you want to see what is roughly the level of  
8 competitive price, and I do agree around those prices,  
9 especially compared to the incredibly different  
10 historical prices of 10mg full, they are reasonable.

11 Q. Can we look at what the CMA says. It is {IR-L/6/1},  
12 please.

13 A. Which paragraph, please?

14 Q. It is 171. So the CMA says:

15 "Hydrocortisone tablets sold by other suppliers  
16 (skinny label in the case of 20mg ...). These prices  
17 were competitive and no longer inflated by the unfair  
18 prices. They are indeed the very best benchmark that  
19 could possibly be envisaged in this case."

20 You presumably agree with that?

21 A. Sorry, I did not find it, which, 171 you say?

22 Q. 171, yes.

23 A. Okay, yes.

24 Q. So if we then go to page 529 of the Decision.

25 {IR-A/12/529}, please. (Pause).

1           Professor Valletti, while we are waiting, you were  
2           quick to say that the CMA and Commission guidelines are  
3           addressing mergers but you accept that these are general  
4           guidelines and market definition for --

5       A.   I do.

6       Q.   529, please.

7       EPE OPERATOR: There are technical issues.

8       THE PRESIDENT: Is this something that we can resolve easily  
9           if we rise or is it a problem that we do not understand  
10          the issue because it is somewhat disruptive --

11      MR O'DONOGHUE: It is extremely disruptive, sir.

12      THE PRESIDENT: -- to counsel. Would it help if we arose  
13          now and allowed the issue to be addressed or is it  
14          something that we just do not know?

15      EPE OPERATOR: So we tried to fix it this morning.

16          Obviously there are still issues. I can check for you.

17      THE PRESIDENT: I think we probably should, Mr O'Donoghue,  
18          because it is not helpful to you or indeed the witness  
19          or indeed anyone else.

20          All right, look, we will rise for ten minutes just  
21          to get this addressed and see what ...

22      (10.32 am)

23                               (A short break)

24      (10.48 am)

25      MR O'DONOGHUE: Sir, the reprise.

1 Can we go to {IR-A/12/424}, please. (Pause)

2 So, Professor Valletti, they have all the prices in  
3 one place, just to be very clear. Now, can we go to 529  
4 {IR-A/12/529}, please, so if you can keep your finger  
5 and mind on those prices, and can we go to 529 of the  
6 same document, please. So you see at the bottom of the  
7 page, 5.391:

8 "Accordingly, the current prices of competing  
9 hydrocortisone tablets allow for a meaningful comparison  
10 with [Auden's] prices ... and can therefore be used to  
11 determine whether [Auden's] prices were unfair when  
12 compared to competing products."

13 If we then scroll over the page, please. The next  
14 page, please {IR-A/12/531}. So there you will see,  
15 Professor Valletti, that these are the benchmarks for  
16 the competitive price that the CMA uses in its unfair  
17 pricing case to assess the issue of the excessiveness of  
18 the 10mg full price; yes?

19 A. Yes, the CMA uses a bunch of prices for that assessment.

20 Q. So the CMA considers that the current prices, these are  
21 2021 prices, for competing Hydrocortisone products  
22 provide a good benchmark for the competitive price of  
23 10mg full label. They are the counterfactual  
24 competitive price for 10mg full label; correct?

25 A. So they are the counterfactual, the counterfactual, they



1           are the benchmark they are using in its conclusion that  
2           Auden's prices of full tablet 10mg were unfair.

3       Q.   To be clear, they are the benchmark for what the CMA has  
4           determined is the competitive price level for 10mg full  
5           label.

6       A.   Sure, as you well know, that is in a section where the  
7           CMA is assessing whether prices were abuses or not. The  
8           CMA is not taking a view of what should be the  
9           competitive price, they are simply saying that above  
10          £20, which is the -- and these prices are clearly below  
11          that. So this is the context, so there is no way they  
12          are saying these are clearly the competitive prices.  
13          They are simply saying they put a cut-off for 20 for  
14          10mg, and actually at £50 for 20mg, which is a very  
15          conservative benchmark. Then they are saying, why can  
16          we see that? We do not need to determine, we just know  
17          that if we take an array of indicators they are all way  
18          below £20. That is what they are doing.

19       Q.   But to be clear, the only competitive price benchmark  
20           the CMA puts forward is the figures before you; correct?

21       A.   No, it is -- as I said, it is an array of indicators in  
22           the context of understanding whether prices were abusive  
23           or not. This is where we say. So if you ask me  
24           individually, do you accept that prices around those  
25           ranges are competitive, I will tell you yes. They look

1           like pretty competitive in this market.

2           Q. Yes, thank you.

3           A. You are welcome.

4           Q. Now, as we saw in the four figures I just put before  
5           you, we know that the current price of 10mg full label  
6           is more than double all of the current prices of the  
7           other Hydrocortisone products; yes?

8           A. So, if I am allowed, because I --

9           Q. Can you answer the question first.

10          A. Just for the benefit of the court and for full  
11          disclosure, during the interruption we had the CMA very  
12          kindly gave me a cup of espresso, because I needed some  
13          espresso because I had a very long night looking at the  
14          documents. I appreciate -- and I have to disclose  
15          I did not pay for it. It was something I received as  
16          a gift.

17                So -- and that was a good espresso and I looked on  
18          the cap, it was from a company called Pickwick.  
19          Pickwick Coffee Club, which is on Fleet Street. A good  
20          espresso. If I may just use my own Italian stereotypes,  
21          I accept it was well done. Let us assume the price was  
22          1.50. On Fleet Street, though, there is also my  
23          favourite barista called Giovanni that is selling coffee  
24          currently at £2.50, £3, double the price, okay? Now, if  
25          you go in that direction and look in the same double

1 Italian espresso I have just had from Pickwick, if you  
2 accept that analogy you are going to conclude that  
3 Giovanni represents a separate market for coffee in  
4 London, which does not make any sense. It does not make  
5 any sense, any common sense because you can conclude  
6 anything. You would narrow down market definition in  
7 all differentiated product markets to super-narrow  
8 markets. That is the wrong exercise. It is not a SSNIP  
9 exercise. It is a wrong conclusion because it is  
10 a wrong observation. Just looking at actual prices  
11 tells you nothing about market definition. It is  
12 an indicator of course, but in itself is not going to  
13 lead you anywhere. So we can continue, Mr O'Donoghue,  
14 with your interrogation.

15 Q. So the answer to my question is yes?

16 A. What was your question again?

17 Q. The CMA has determined that all of these prices of other  
18 Hydrocortisone products -- you saw the three prices, are  
19 a good benchmark for the competitive price of 10mg full  
20 label?

21 A. They are a benchmark, a good benchmark in the context of  
22 assessing whether prices were unfair.

23 Q. You are not saying the CMA's abuse case is wrong, are  
24 you?

25 A. No, I have just clarified what the CMA does in its own

1 Decision.

2 Q. Now, we can see from that competitive price benchmark  
3 and the current price of 10mg full label a difference of  
4 more than 100%. Plainly it was profitable to impose  
5 a price increase of more than 5 to 10% above the  
6 competitive level. Does that not tell us convincingly  
7 that there are separate markets for full and skinny?

8 A. It does not, because I go back to the example, Giovanni  
9 is currently charging twice as much as Pickwick and  
10 I would not say that is a relevant market at all. It is  
11 the same analogy. It is the same example.

12 Q. But you are quick to criticise Dr Bennett for relying on  
13 the 20mg Hydrocortisone price as a benchmark, but is  
14 that not exactly what the CMA has done?

15 A. I am criticising Dr Benchmark in the way he is putting  
16 his own analysis claiming he has performed a SSNIP test,  
17 which he has not done.

18 Q. Well, you criticise his critical loss. Let us stick to  
19 SSNIP.

20 A. Without SSNIP you cannot run a critical loss.

21 Q. He relies on 20mg as a competitive benchmark. Do you  
22 accept, in the light of the CMA's own findings, that is  
23 a good benchmark and that that price level is very  
24 substantially in excess of a SSNIP increase?

25 A. No one has performed a SSNIP test in this case.

1 Q. Now --

2 A. Would it be helpful if I explain to the Tribunal how

3 a SSNIP test should have been done or not?

4 THE PRESIDENT: I will leave that to elucidating questions.

5 I think you can take it that we are very familiar with

6 the way in which SSNIP tests are and are not run.

7 A. Very good.

8 THE PRESIDENT: But thank you.

9 MR O'DONOGHUE: Professor Valletti, you told me a minute ago

10 you did not do a SSNIP test.

11 A. Because I do not think in this case it is needed,

12 a SSNIP test, in order to conduct a market assessment of

13 what the definition is -- sorry, a definition of what

14 the relevant market is. Apologies for stumbling.

15 THE PRESIDENT: But are you not going a little further than

16 that, Professor? I mean, of course we accept that there

17 are many ways in which one can define a market, and that

18 was indeed put to you in Mr O'Donoghue's early

19 questions. But I think you are saying that where one

20 has -- well, take your two espressos, where one has

21 a similar product but dramatically different pricings in

22 regard to those products, you do not consider the SSNIP

23 test to be a particularly useful tool to work out

24 whether your two cups of espresso are in the same

25 market?

1       A. I did not say that, apologies if that was what you  
2       understood. I must have misspoken. I simply said that  
3       observing different prices in itself is just telling you  
4       the price. That products might be differentiated, still  
5       belonging to the same market, in itself doesn't tell you  
6       anything about whether or not they belong to the same  
7       market, in the context of product differentiation. If  
8       they were homogeneous products that is a different  
9       thing, but here we are talking about differentiated  
10      product markets.

11     MR O'DONOGHUE: Professor Valletti, if I may --

12     A. So, and just to help conclude the previous example.  
13       What I would have to do in that case, I would have to  
14       say, first determine what is a reasonable competitive  
15       benchmark for espressos in London, and let us assume it  
16       is some price, let us say £2 for the sake of it. Then  
17       let us assume that Giovanni increases its prices.  
18       Remember, the definition of the SSNIP for a significant  
19       and non-transitory. Let us say this is six months.  
20       I have no idea. I will have to analyse it. So the  
21       price of Giovanni is going to be, keeping everything  
22       else constant, because ceteris paribus is a tenet in  
23       economics and a key factor in this application, the  
24       correct application of a SSNIP test. Then I would need  
25       to understand, observe or hypothesise how the demand to

1 Giovanni's coffee shop will evolve if he keeps his price  
2 substantially above those of the competitors for  
3 six months.

4 Q. Professor Valletti, you keep mentioning differentiation.  
5 I would suggest to you it is a red herring. The  
6 question in the context of SSNIP is a simple one: if  
7 a monopolist in full increased its prices would it be  
8 profitable to do so? Now --

9 A. These are --

10 Q. Let me finish my question, please.

11 A. You said if a monopolist increases its prices, you  
12 already assume an answer to your question. Can you  
13 rephrase it, please.

14 Q. Well, if we take the full label as the focal product the  
15 question is: if, starting from competitive price level,  
16 that price is raised by 5 to 10%, would the loss of  
17 sales make that price increase profitable or  
18 unprofitable?

19 Now, you have agreed with me that the CMA has put  
20 forward a competitive price benchmark for full label  
21 10mg, and we see on the data that it is highly  
22 profitable to the tune of double to make that increase.  
23 We are only dealing with full. The question of  
24 differentiation under SSNIP does not arise.

25 A. Sorry, what is your question? I have lost you.

1 Q. The differentiation is a red herring in the context of  
2 SSNIP.

3 A. So this is a differentiated product market. I think  
4 this entire case has been -- we have been discussing the  
5 nature of the differentiation, whether it was perceived  
6 or actual, because -- so then if this is  
7 a differentiated product market. Why is it a red  
8 herring? I do not understand. You apply the SSNIP test  
9 in the context of very likely differentiated product  
10 markets. There is a general agreement that these are  
11 differentiated product markets.

12 Q. But the question is: can a supplier of full label 10mg  
13 profitably increase the price?

14 A. That is a question, yes. That is a question.

15 Q. A question of differentiation to skinny does not answer  
16 that question?

17 A. Oh, I see. So you would want -- fine, fine, I accept  
18 that.

19 Q. Now --

20 A. Just, once again it is just a restatement of what  
21 a hypothetical monopolist should be doing with the data,  
22 yes.

23 Q. One final question before we move to a different topic.  
24 Isn't it completely illogical to say that Auden could  
25 not profitably make a small price increase but it can



1           profitably make a very large price increase, as the CMA  
2           has found? So a big increase is easy but a small one is  
3           not. That makes no economic sense, does it?

4       A. The missing point in all this discussion, the missing  
5       point in this discussion is: to do a properly applied,  
6       to apply properly a SSNIP test in this instance, that no  
7       one has done, we need first not to look, not to start  
8       from current prices, definitely, especially in an abuse  
9       case, they are clearly not competitive. You have to  
10      establish a competitive benchmark. Let us assume it is  
11      around £2. I have not done that analysis, no one has,  
12      but it means it is reasonable in the current context  
13      given the history, given the prices, given the cost that  
14      we have observed. Then you would have to ask Auden how  
15      much would they sell at those current competitive  
16      prices? My educated guess is that all those pharmacists  
17      that we know are very price-insensitive and wanted the  
18      full would buy the full, obviously, because not only it  
19      is full, it is cheap so they have a double advantage.  
20      But also the price-sensitive pharmacies because all of  
21      a sudden that good is particularly cheap, they start  
22      buying that product. They may have a small edge. They  
23      may not be too interested in it, but it is not bad. It  
24      is offered almost at the same price as the skinny, they  
25      will go for it. So the large -- the market share of

1 Auden would be very large. So you have to start from  
2 that. No one has done this assessment, let alone  
3 Dr Bennett.

4 Then, *ceteris paribus*, not changing anything, not  
5 looking at the actual prices of the other competitors,  
6 you would increase unilaterally the price of full, 10%,  
7 whatever, okay? From £2 is it goes to 2.20, and it has  
8 to stay there for -- in a market like this, again  
9 educated guess, and I teach in a business school,  
10 I would think as a minimum of 3 months, maybe 6 months,  
11 it would have to stay there constant at 2.20 without  
12 changing at all the price of the other goods. What will  
13 happen? What will happen is I would expect that it  
14 would be obviously profitable for those customers with  
15 a strong preference for full. However, remember what  
16 I said earlier, I would expect a lot of pharmacies that  
17 are price-sensitive to actually buy the full at the £2  
18 benchmark, the competitive benchmark. But if you  
19 increase to 2.20 they will switch away.

20 So if they switch away it may not be profitable at  
21 all, and that is what a properly conducted SSNIP test  
22 should do. It has not been done, it has not been done  
23 by anyone. It has not been done by me, not by the CMA,  
24 not by Dr Bennett.

25 Q. But in that long answer the critical thing you mention

1 is you do not look at a current prices, you look at  
2 competitive prices. Now, I showed you the Decision.  
3 The CMA has looked at a range of competitive prices and  
4 each and every one of those is very substantially below  
5 a SSNIP.

6 A. I am sorry, this is becoming -- but I will respond. No  
7 one has done a SSNIP. You would have to increase those  
8 prices above that current level by 10%, leave those  
9 prices only unchanged for six months and observe the  
10 reaction of the customers, which is nowhere, nowhere --

11 Q. It has been done because we saw the price, the current  
12 price of full label 10mg. That has persisted for  
13 a substantial period of time, and in each and every  
14 occasion it is either a multiple or many multiples above  
15 these competitive price benchmarks. So it has been  
16 done.

17 A. It has not, because you are falling again into the same  
18 mistake that if you do that, just as observing prices,  
19 this is just telling me that Auden, with a 10mg full  
20 label, is a differentiated product which still has some  
21 market power, and you would conclude that Giovanni is  
22 a separate market. It is the same mistake you are doing  
23 over and over again. It is not enough to look at price  
24 differences. You have to have a persistent increase in  
25 price starting from competitive level, non-transitory,

1 leave it there after having predicted what the market  
2 shares would be under the competitive prices that we  
3 have not observed, because you are telling me that  
4 Waymade -- sorry, not Waymade, Auden is not setting  
5 a competitive price because it is too high, you would  
6 have to produce that counterfactual and then ask people  
7 what did they do if the price was increased to 10%. It  
8 is not a difficult test. I know the Tribunal knows how  
9 the test should be done. This is not the way it has  
10 been done in this case.

11 Q. But the CMA has looked at three years of data  
12 post-infringement. That is a substantial period, it far  
13 exceeds your handful of months, does it not?

14 A. The CMA has prioritised up to -- when was it, 2018?

15 Q. 2021.

16 A. It has prioritised the abuse case until 2018, I think,  
17 not 2021 and it has not done any analysis about the  
18 abuse after 2018. Maybe Auden was still abusing, maybe  
19 not.

20 Q. You have not looked at that.

21 A. Sorry? I have not looked at the abuse --

22 Q. You are just making that up.

23 A. I am not making anything up. How do you dare?

24 Q. You have not looked at the post-Decision infringement  
25 period, that is what you say in your report?

1 A. Can you be more respectful sometimes?

2 Q. You have not looked at the post-infringement period, you  
3 say that in your report.

4 A. I have said that the CMA has prioritised, as far as the  
5 abuse is concerned, until 2018 when the price was £20  
6 for 10mg and whenever it was, a bit earlier, £50 for  
7 20mgs. That is a prioritisation for the abuse. I have  
8 looked at the entire period when it comes to market  
9 definition. I have not looked after 2018 when it comes  
10 to the abuse period. Is that clear?

11 Q. Why then are you quick to say maybe Auden is still  
12 dominant? You have not looked at that.

13 A. Maybe or maybe not, I have no opinion. I have no  
14 opinion either way.

15 THE PRESIDENT: Professor, when one is considering an abuse  
16 of a dominant position let us accept that the price in  
17 the market is not something that is necessarily going to  
18 be a competitive price, in other words, your point that  
19 you have to apply your SSNIP test to a price that is not  
20 the price that features in the market. That is,  
21 I think, the point you just made in an abuse case.

22 A. Correct.

23 THE PRESIDENT: How do you determine, for purposes of  
24 applying your SSNIP, the price that should be used  
25 without presupposing an abuse of a dominant position?

1 In other words, how do you get to -- let us move away  
2 from these facts, but a differentiated product A which  
3 is selling at 10 times the price of a very similar  
4 product B?

5 Now, it may be the theory of harm that you have that  
6 actually the price of A is not a market price, not  
7 a competitive price because there is an abuse of  
8 a dominant position for whatever reason. So when you  
9 are applying your SSNIP, to what level do you reduce  
10 the price of product A?

11 A. So, this example tells you very much why it is so  
12 difficult to apply the SSNIP test when, as in practice  
13 it is done a lot of times in merger cases because you do  
14 not need to make any hypothesis because you start from  
15 current prices, and then these two entities, they merge  
16 and you are trying to predict what happens after the  
17 merger.

18 In abuse cases it is extremely difficult. So you  
19 cannot start if there is an abuse from the ongoing price  
20 otherwise we fall into the cellophane fallacy. We know  
21 that. So you have to make assumptions. You have to  
22 make positions. You study the market. You say, if the  
23 same product was offered by another firm with similar  
24 characteristics, can I predict -- we look at the cost,  
25 you look at similar markets, you look at benchmarks. In

1           this case we have a lot of benchmarks, okay? They give  
2           you a range of prices. We have seen from 1 to 3 to 4,  
3           something like this, this is a range of prices. But  
4           there is no clear answer to that. In fact, many  
5           economists -- many economists are saying that when it  
6           comes to dominance, I know this is not a legal comment  
7           at all because I am not an expert, it is an economist  
8           comment, going through market definition in abuse of  
9           dominance is not very helpful. You should look at the  
10          effects directly.

11                 So this is a debate ongoing among economists, you  
12          just go and look at the effects.

13       THE PRESIDENT: We are going to come to the -- or if we have  
14          not already, to the difficulty of defining an excessive  
15          price, and I am sure we will be having many hours on  
16          United Brands.

17       MR O'DONOGHUE: Not my dog, not my fight, but yes.

18       THE PRESIDENT: But certainly we will be debating that, and  
19          we will have the difficulties of working out what is  
20          an excessive price when the market is creating a price  
21          that is the market price.

22                 What you are saying is that these United Brands  
23          difficulties fold into the anterior exercise of market  
24          definition, and you have exactly the same problems there  
25          in terms of determining what is your start point price

1 to which you apply a SSNIP?

2 A. Yes.

3 THE PRESIDENT: Your answer to that is, it makes the SSNIP  
4 in dominance cases a bad test or a test that needs to be  
5 applied with caution.

6 A. With great caution, that is my point. So, using these  
7 figures I possibly would be happy to see a SSNIP test.  
8 I do not think it is needed -- by the way, you have seen  
9 in my report that the evidence that we had in this case  
10 is sufficiently clear to define the economic boundaries.  
11 Again, let us try to remind ourselves what are we trying  
12 to do when it comes to market definition. We are trying  
13 to define the economic boundaries of competition to then  
14 move on into the dominance assessment, which is  
15 a different stage in the assessment otherwise it would  
16 be conflated to the same stage, and they are not.

17 So in a sense, dominance is digging deeper into  
18 a case, and market definition you can be a bit more,  
19 shall I say, superficial? Maybe it is not the right  
20 term, but you understand what I mean. You can be a bit  
21 quicker on market definition, you define the boundaries  
22 and then you do a much deeper assessment at the dominant  
23 stage.

24 In this case, if you want to do a SSNIP test I would  
25 be very happy to start from this range of prices.



1 I cannot tell you if it is exactly 2, exactly 2.50,  
2 exactly 1.19. I do not know, I do not know. To be  
3 honest it is not needed, I would say, at the SSNIP  
4 level, if you do it correctly starting from those prices  
5 predicting what market shares would be at those prices  
6 and then moving on by subjecting the focal product to  
7 the 10% price increase and sticking to that price for  
8 a non-transitory period, and then you would have to do  
9 that also kind of assessment.

10 So you have to do some work to get there. It is not  
11 enough, but that is what I am saying. It is too quick  
12 just to jump to the conclusion by observing the price  
13 differences are high. That is a different market. You  
14 need much more work if you want to follow the SSNIP  
15 route. I am not saying it is a bad test. I am saying  
16 it has to be done with great caution.

17 MR O'DONOGHUE: Professor Valletti, just to pick up on the  
18 present question. So, I think you agreed with the  
19 President that the fact that market conditions are  
20 already distorted means that considerable caution must  
21 be exercised when dealing with the presence or absence  
22 of switching, because evidence of switching in such  
23 a context would not be a reliable guide to what would  
24 occur under competitive conditions, correct?

25 A. That is a cellophane fallacy, yes.

1 Q. Now, in your report you have not looked at this problem,  
2 have you?

3 A. I do say that -- I do say explicitly that in this market  
4 I do not think that the cellophane fallacy is at all  
5 a concern, because this is a market where I have enough  
6 evidence, as long as the market definition is concerned,  
7 that is initial stage of the analysis, I have enough  
8 evidence of changes in quantities and prices to inform  
9 me that, with no reasonable doubt, skinny excerpted  
10 a competitive constraint on full, to some extent. That  
11 is all I am saying. That is all I am saying.

12 Q. Professor Valletti, the main point you make is they were  
13 switching away from full to skinny and prices fell.  
14 Now, all of the data you rely on concerned a period in  
15 which prices according to the CMA were excessive. Is  
16 that not precisely the situation in which the cellophane  
17 fallacy is at its most acute, and you have not adjusted  
18 for that in any way in your report; correct?

19 A. That continues well over that period. As I said, when  
20 it comes to market definition I analysed the entire  
21 period up to the latest available data, including  
22 periods where there is no allegation of dominance.

23 Q. But most of the period is the period of excessive  
24 pricing; correct?

25 A. Yes, like -- yes.

1 Q. You have not adjusted for the cellophane fallacy in any  
2 way; correct?

3 A. I do not think the cellophane fallacy plays any role in  
4 this case.

5 Q. You have not even analysed it in your report.

6 A. Because I think it is not important.

7 THE PRESIDENT: Well --

8 A. Put differently, it would be important if I had run  
9 a SSNIP test at abusive prices. Imagine I had run  
10 a SSNIP test at the abusive prices and found a very  
11 large market, but I have not. I have not --

12 Q. But you have observed switching at abusive prices.

13 A. Sorry?

14 Q. You have observed switching at abusive prices.

15 A. I have observed switching when the new product entered  
16 the market, yes, as expected when products are  
17 substitutable.

18 Q. When the prices were abusive?

19 A. Well, no, also -- it is also as expected when products  
20 are kind of substitutable with a degree of substitution.  
21 So it is not going into -- the cellophane fallacy is  
22 when people stop buying because it is too expensive. So  
23 it is not profitable to increase, or they just go to  
24 another -- they have outside options. This, instead  
25 they went to products that were biologically equivalent,

1           that some pharmacies, we know, found them almost as  
2           perfect substitutes. So there is no --

3       Q. Professor Valletti, I would suggest that an independent  
4       economist assisting the Tribunal in a case involving  
5       excessive pricing would absolutely look at the  
6       cellophane fallacy in some detail. Why did you not do  
7       that?

8       A. Because the evidence in front of me is very strong  
9       suggesting that these two products exerted competitive  
10      constraints on each other, and I have a plethora of  
11      evidence there which I can repeat. I observed the entry  
12      of something that did not exist before, a lower quality  
13      product perhaps, especially for some pharmacies. This  
14      entry produced switching in the first period of 50% plus  
15      fluctuations, plus 10%, around 50% for all the  
16      subsequent periods. I observed the prices keep  
17      decreasing over time. I also observed that Auden took  
18      steps in order to deter the entrants via the information  
19      they were supplying to the market.

20           I also observe an agreement which is an  
21      anti-competitive agreement which happens precisely when  
22      the rents were created and entry was about to happen,  
23      and I also observe that the price that Auden sold itself  
24      to Allergan was decreased by 40% precisely because it  
25      was understood that it was going to face competition

1 from differentiated competitors.

2 So -- plus there is internal evidence, plus, plus.

3 So these are a lot of elements which cannot be ignored.

4 Q. Professor Valletti, the President looks like he has  
5 a question. Let me ask one question before he  
6 intervenes. The problem you have, and you agreed with  
7 Mr Brealey, the bulk of switching took place when the  
8 price was at its highest and there has been limited  
9 switching thereafter. The CMA has found that for  
10 a number of years of the post-entry period the prices  
11 were excessive.

12 A. Correct.

13 Q. That is exactly the situation in which the cellophane  
14 fallacy would be at its most acute, and you have not  
15 even looked at in your report, correct?

16 A. So, this is a situation where there is a product which  
17 is monopolised. This monopolisation, precisely because  
18 a monopolisation leads to the entry as expected in  
19 a market, the entry happens with another product which  
20 has a degree of differentiation. Competition  
21 intensifies at the lower end. The firm which is  
22 supplying the product at the higher end retains market  
23 power and exercises it, so this is a problem which is  
24 very neatly defined. It is a problem where a product in  
25 the same relevant product market, they are not

1 identical, they are on margins, we understood that.  
2 There is competition here, there is no competition  
3 there. There is a lot of switching at first because the  
4 market is dramatically affected. There is no  
5 competitive dynamics change, no going from competition  
6 to a more competitive situation. However, because of  
7 the differentiation which exists market powers is  
8 retained in the lower end. This is what the case is  
9 about.

10 In a sense, if I may just conclude, I think the CMA  
11 did the right thing. If we follow all these other  
12 suggestions of going down to narrower and narrower and  
13 narrower markets, Giovanni becomes a market on its own,  
14 agencies have been accused many times of going so narrow  
15 into market definition they are going to find an abuse,  
16 because they are going to find monopolies everywhere.  
17 Instead they did the right thing. They did a bigger  
18 market definition because lots of evidence is telling me  
19 that those products were exercising some degree of  
20 competitive constraints on each other.

21 Then it moves on to the next stage and asks, were  
22 those degrees of competitive interaction sufficient to  
23 determine market power, and the answer is no, it does  
24 the right thing. A bigger market definition but then  
25 concentrate the abuse on a narrower part. This is what

1           this case is about.

2       THE PRESIDENT: Professor, let us move away from this  
3       particular market. Let us suppose that a regulator is  
4       looking at an abuse of a dominant position in the car  
5       market, and let us suppose that, entirely hypothetically  
6       speaking but I will use the Rolls-Royce as the standard  
7       example for the extremely expensive car, let us suppose  
8       the concern is that Rolls-Royce is abusing a dominant  
9       position. So the first step is you have to work out  
10      whether they actually have a dominant position in the  
11      market.

12           Now, we have a car that is selling at £500,000  
13      compared to an average car that is selling at, let us  
14      say £15,000. So a fraction. Now, how, intellectually  
15      speaking, does one go about working out whether or not  
16      there is a market for luxury car products or cars in  
17      general? Now, you said earlier, and I quite understand  
18      why you did say it, one would work out what the proper  
19      price was for the hypothetical monopolist selling  
20      a Rolls-Royce.

21           Now, to what would you reduce the £500,000 for the  
22      car? I am not asking you to come up with a figure, but  
23      what intellectual mechanism would you use to work out to  
24      what price you apply your SSNIP? Would you say, I will  
25      look at the average price of cars in the market and

1           reduce the £500,000 for the Rolls-Royce to the average  
2           of -- I forget what I said, £15,000, or would you do  
3           something else?

4       A.   So if you ask me, I would probably try to do a good  
5           analysis of the demand side to start with, so let us  
6           take the costs away, and I would try to understand how  
7           is the distribution of preferences of people driving  
8           cars between products, which would depend on product  
9           characteristics, and I would try to see in that  
10          distribution of preferences if there is a large cut in  
11          the chain of substitution. So if you only have the  
12          £15,000 -- so those two cars will have different  
13          attributes, otherwise what would be -- if it is only  
14          brand it is difficult. I would assume one is faster,  
15          one has better materials. So there will be preferences  
16          of customers over those components.

17                Then I will try to see, given those preferences, are  
18                those preferences continuous? Are they instead more  
19                bunched? Some people do not care about driving fast  
20                cars, they just want to have a reliable car, and some  
21                people instead do not have those kind of preferences, so  
22                there is heterogeneity.

23                I would try to understand first of all the demand  
24                side, what is the nature of preferences over those  
25                dimensions, over those characteristics. That is what



1 an economist will do, estimate demand and then you can  
2 see if, in this chain of substitution, there are some  
3 people which are considering trading off the better  
4 quality of the Rolls-Royce for the cheaper price of this  
5 other car, which I do not know what brand it is.

6 So if you understand there is some -- so you look  
7 for the margin of consumers and then you can see  
8 the degree of competitive interaction which is going to  
9 be affected by how many customers of that type exist.

10 As you can see there, I am not even asking about  
11 costs or the starting point. I will try to understand  
12 how interrelated those markets are from a demand side.  
13 Does it make sense?

14 THE PRESIDENT: Well, in the absence --

15 A. So I have not applied a SSNIP test. I have done  
16 a demand estimation in this case.

17 THE PRESIDENT: In the abstract of course it does, but  
18 practically speaking you have an allegation that you are  
19 investigating, hypothetically speaking a price for the  
20 Rolls-Royce car that is too high because there is  
21 a dominance in the market. Of course I understand that  
22 there is a different set of values that informed demand  
23 in the market. Some people will be interested in value  
24 for money in a very efficient sense, they want a car  
25 that gets them from A to B and they will pay the minimum

1 price that achieves that.

2 It is quite clear that in that sense our  
3 hypothetical Rolls-Royce is rather different. But if  
4 one was, for instance, to take account of whether there  
5 was a cellophane fallacy in play in that market or not,  
6 one of the things you would look at is the sheer cost of  
7 the components that go into a Rolls-Royce. You have got  
8 very expensive components, high luxury. One could say,  
9 therefore, that simply looking at cost one can justify  
10 a price that is coming closer to £500,000 and it would  
11 be unreasonable to say that the price, the average price  
12 ought to be applied to Rolls-Royce because it has no  
13 basis on the costs, and you are probably talking about  
14 the couple of wing mirrors and a few wheels for £25,000,  
15 and you have many more components on top of that.

16 Now, that is a case of a tangible product where the  
17 components are costing something that is in themselves  
18 definable. What happens when one has an intangible  
19 benefit? In other words, here we have, on full label,  
20 the intangible benefit of a full range of indications,  
21 whereas on the skinny label one does not. There is no  
22 cost difference because we are talking about,  
23 pharmacologically, exactly the same product. We are  
24 talking about simply a difference in terms of how that  
25 product is described for the medical uses it can be put

1 to.

2 Now, how do you work out that what people are  
3 prepared to pay for the full label product represents  
4 an articulation of the cellophane fallacy, a leveraging  
5 of the market, and how far it actually represents simply  
6 the price that people are willing to pay between the  
7 difference of skinny label and full label, apart from  
8 saying it is simply my view?

9 A. So, first let me agree, with what you said. I told you  
10 in the Rolls-Royce example that I would start from some  
11 analysis of preference for characteristics and see how  
12 people make, eventually, trade-offs between those  
13 characteristics.

14 If you want to start from, as you said, from  
15 a supply side, I would indeed start exactly as you did,  
16 by looking at the price of the components, adding some  
17 marginal returns and doing all that and then see -- and  
18 then perhaps that could be a starting point for a SSNIP  
19 test if you wanted to do it. Once it is a starting  
20 point then you will try once again to understand how  
21 people will trade that price increase with the better  
22 characteristic that Rolls-Royce is offering.

23 Then you move on to the intangible. So intangible,  
24 generally speaking, can be accommodated quite well in  
25 this framework because when you again start from a cost-

1 based approach all those intangibles which come from  
2 R&D, investment in brand value, you pay people to tell  
3 nice things, those are included in the cost base you  
4 impute, in the cost-plus because it is not just a direct  
5 cost of manufacturing. So in general I would say most  
6 of those intangibles will be in the plus, and I take  
7 that as a starting point.

8 So if Auden has a lot of advantages because they use  
9 lots of people to inform pharmacies of how good they  
10 are, they invest in publicity, advertising, how nice  
11 their product is, or they put R&D, which they did, let  
12 us step away from this case, all these figures would be  
13 included in the plus element of a cost-plus assessment,  
14 and this is in a different level of course, but that can  
15 become also perhaps a starting point of a SSNIP test.

16 THE PRESIDENT: Thank you, Professor. Sorry, Mr O'Donoghue.

17 MR O'DONOGHUE: Professor Valletti, one last question on the  
18 cellophane fallacy. Can we look at what the CMA  
19 actually says about this in the Decision. It is  
20 actually in a footnote, so it is {IR-A/12/335} and it is  
21 footnote 1242, please. So you see in the first half  
22 they say what the cellophane phallacy is inside the *Du*  
23 *Pont* case. Then if you look at the second half:

24 "The CMA has been mindful of this when assessing  
25 observed substitution patterns in this case and, in

1 particular, observes that the pattern of switching to  
2 skinny label tablets is maintained even when price  
3 levels are eroded to levels that are less influenced by  
4 the market power of Auden/Actavis."

5 I want to ask you a few questions about this  
6 footnote. Do you know what price levels the CMA is  
7 talking about here?

8 A. No, I do not.

9 Q. Did you ever ask them?

10 A. So I remember we did discuss the cellophane fallacy, but  
11 I suppose this is over the entire period for the  
12 definition of the relevant market, because they do say:

13 "... maintained even when price levels are eroded to  
14 levels that are less influenced by the market power of  
15 Auden/Actavis."

16 So they looked at the substitution patterns  
17 throughout the post-entry period, I would imagine, yes.  
18 That is my best guess.

19 Q. But you agree with me that looking at substitution  
20 patterns when prices are excessive --

21 A. Sorry, would I agree with that?

22 Q. -- is dangerous, because of the cellophane fallacy?

23 A. Sorry, if I still observe sandwiching or the ability to  
24 switch, which is more important when market power has  
25 been eroded, you are not into the cellophane fallacy any

1 longer. This market, which has been constant over time  
2 but for the entry of skinny, so I have not seen any  
3 changes in the characteristics of products that would  
4 let me think that I have to re-do an assessment over and  
5 over again. They are simply saying even when the market  
6 power had been eroded, the CMA argues, you may disagree  
7 with that finding, that there was still a pattern of  
8 switching, so there is no cellophane fallacy at all.  
9 That is what it is saying, in my opinion.

10 Q. Now, what does the CMA mean by "less influenced by  
11 market power"?

12 A. It means that the prices are converging to a more  
13 competitive level, that is what --

14 Q. So what is their price?

15 A. What is a price? I would presume below £20.

16 Q. But did you discuss any of this with the CMA?

17 A. Of course, I have -- well, discuss, I have analysed the  
18 switching and ability to switch and price data, quantity  
19 data because remember, you have to do always the  
20 assessment of those two things together when prices were  
21 below £20, so after 2018.

22 Q. But again, we agreed that the bulk of switching happened  
23 in 2016, limited switching thereafter. Now, in 2016  
24 prices were very close to their highest ever level.  
25 Surely substitution observed during that period is

1           fundamentally tainted by the cellophane fallacy?

2           A. It is not. We already had this discussion earlier with  
3           Mr Brealey, and I said indeed we observe most of the  
4           switching in the first period, a substantial switching  
5           but we also agreed there were still market shares  
6           fluctuating between 40 and 60%. So it is not as  
7           substantial as it initially, but I did observe  
8           switching, I did observe the -- plus I also made  
9           an important point that when you reach a new equilibrium  
10          you may not observe switching yet two products are in  
11          the same market. So I gave that example yesterday.  
12          I do not think I should repeat it.

13          Q. Do you agree, Professor Valletti, based on this footnote  
14          that in the absence of any reference to the cellophane  
15          fallacy in your report, that the CMA's and your  
16          treatment of the cellophane fallacy, was completely  
17          superficial?

18          A. So thank you once again for putting nice words into my  
19          analysis. I do not think the cellophane fallacy is  
20          an important one. I have said that in the joint expert  
21          report. So my position is very clearly expressed. If  
22          I may ask to go to the -- where do we discuss about the  
23          cellophane fallacy? Because we did discuss it with the  
24          experts. If I may, it must be initially -- apologies.  
25          Cellophane fallacy comes -- if somebody can help me

1 I would be most grateful. I discussed so much about  
2 this.

3 MR HOLMES: Sir, just to assist with the reference I think  
4 it is proposition 22.

5 A. Okay, 22 where I have a qualified agree. That is  
6 {IR-G1/1/16}. Thank you. So I do discuss there, and  
7 I do observe that generally speaking you want to be  
8 mindful about the cellophane fallacy. It is always  
9 a concern. I qualify my agreement by saying that in  
10 this case I personally -- this is my expert opinion, so  
11 that is a realm of opinion, and we all work under  
12 limited resources and I would not concentrate my efforts  
13 in going around this debate, which I find a very  
14 academic debate in this specific case. Not generally,  
15 not generally. So you accuse me, Mr O'Donoghue, to go  
16 back sometimes to common sense, and to conclude  
17 otherwise in this instance that full and skinny are in  
18 a different market because, say, of the cellophane  
19 fallacy, this really goes against common sense, which  
20 I think should be a guiding principle for all of us, in  
21 a market where we have observed that the entry of skinny  
22 has changed volumes dramatically and prices dramatically  
23 as well. So it would defy common sense. So yes, I do  
24 consider it a theoretical possibility that in this case  
25 it does not have any bind in explaining the data.



1 Q. So your evidence, to be clear, is that footnote 1242 is  
2 an adequate treatment of the cellophane fallacy in this  
3 case, is that your evidence?

4 A. Is that your words? But I agree --

5 Q. I am asking you. I am asking you.

6 A. I have not devoted a lot of attention to the cellophane  
7 fallacy in this case because of the evidence that I have  
8 observed on several dimensions that I will not repeat on  
9 this occasion, telling me that it is clearly the case  
10 that skinny exercised some degree of competitive  
11 constraints on full, and that is enough for me to  
12 conclude that these two products belong to the same  
13 market.

14 Q. Now, let us move on to the drug tariff, please. Can we  
15 first look at the conditions for inclusion in  
16 category M. It is in the Decision, {IR-A/12/91},  
17 please. Do you see under category M, about two-thirds  
18 of the way down, Professor Valletti?

19 A. Yes.

20 Q. So first condition, generics that were available from  
21 several sources. Do you see that?

22 A. Mm-hm.

23 Q. "Readily available in a given presentation (i.e. made by  
24 more than one Scheme M manufacturer) and met one of the  
25 following conditions:

1           One, you see the annual net ingredient cost and then  
2           volumes.

3           You then see at the bottom of the page the price of  
4           the drug tariff for category M was a weighted average  
5           from retrospective sales values, and so on. Do you see  
6           that?

7       A. Yes.

8       Q. So is it not clear that the inclusion of a product in  
9           category M is not based on any economic consideration of  
10          substitution of the kind we would normally associate  
11          with market definition. It is concerned with things  
12          like net ingredient cost, volumes and so on. Do you  
13          agree with that?

14      A. Yes, those are important elements which are typically  
15          necessary for the inclusion in the relevant market but  
16          not sufficient.

17      Q. That wasn't my question, to be fair.

18      A. Good.

19      Q. My question is -- you see the conditions for category M.  
20          My question is: do you agree that those conditions for  
21          category M are not really concerned with the economic  
22          question of substitution that we would consider for  
23          market definition purposes?

24      A. Well, I have actually found this information from the  
25          regulatory mechanism important because this is telling

1 me what an expert in the industry, and I am not, would  
2 consider as being products which are, at least from  
3 a medical point of view bioequivalent, substitutable  
4 from a medical, clinical point of view. So for me it is  
5 an important starting point for an economic analysis,  
6 which is, in line with my previous answer, which is  
7 these are products to me which represent almost  
8 a necessary condition for being included in the relevant  
9 product market, not sufficient, I agree because I would  
10 want to consider also switching, patterns of prices and  
11 the discussion we are having. So category M is  
12 informative. It is not that it is -- so, if the  
13 question is, is it an economic analysis, the answer is  
14 clearly no.

15 Q. I am putting something a bit more to you. The  
16 conditions are not concerned with the economic question  
17 of substitution.

18 A. That is not a concern that the regulator has, of course.

19 Q. Thank you. Now, it must also follow from what you say  
20 that the indirect effect that you rely on would still be  
21 present if two products are in the same drug tariff  
22 basket but they are not actually therapeutic substitutes  
23 at all?

24 A. Effect on what, can you please clarify?

25 Q. The indirect effect of the drug tariff that you rely on.

1 A. On prices or on quantities?

2 Q. You rely on it for prices.

3 A. That is not enough. So a basic tenet of market  
4 assessment is to do a joint analysis of what happened to  
5 prices and quantities together. So if I observe -- so,  
6 I have clarified. So I would expect, if products  
7 belonged to the same market, to have an effect on  
8 the price but also an effect on the quantities, so  
9 without joint information I cannot conclude either way.

10 Q. Let me put the question in a more specific way: do you  
11 agree, at least in theory, that the drug tariff  
12 mechanism can cause the price of full label to fall when  
13 the price of skinny label falls even if the two products  
14 were completely independent and did not constrain each  
15 other?

16 A. Absolutely. This is an example that was called in  
17 another case, the price of bananas going down and they  
18 are included. So there is no disagreement about that on  
19 the price. It is a price effect.

20 Q. So you therefore agree that if two or more products are  
21 in the same category M basket and the lower price of one  
22 of them leads to the overall drug tariff price falling  
23 for both, that it does not follow that those two  
24 products are in the same product market?

25 A. It does not follow. On that information alone it does

1 not follow, no.

2 Q. Now, can we go to figure 417 of the Decision. It is  
3 {IR-A/12.1/13}. If that can be made bigger. We saw on  
4 3178 that the drug tariff is retrospective. Do you  
5 remember that?

6 A. Yes.

7 Q. So the latest drug tariff price will be based on the  
8 sales data from the preceding two quarters, there is  
9 a temporal lag.

10 Now, in the figure before you I suggest what we see  
11 is Auden's prices moving simultaneously with the drug  
12 tariff, and do you agree that that shows Auden --

13 A. I am sorry, which period again are you referring to?

14 Q. For all periods, effectively.

15 A. For all periods.

16 Q. Does this not show that Auden was reacting to the drug  
17 tariff for a given quarter and then setting its price  
18 just below the drug tariff to follow the drug tariff?

19 A. It is consistent with that, but it is not the only  
20 cause. There is also a macro change in the market which  
21 is prices coming down from skinny, and we had a long  
22 debate, is it possible to disentangle these two effects?  
23 I do not think so.

24 I also observe that if you interpret the difference  
25 between the dashed curve, which is the drug tariff

1 price, and the Actavis's price which is to some  
2 extent -- life is always more complicated, to some  
3 extent is a measure of the margin that Auden can make,  
4 this is -- I am sorry, let me rephrase this.

5 The higher the margin there, it is -- yes, it is  
6 a margin that can be left to the pharmacies. I observe  
7 that those margins are changing over time, so if there  
8 was always the same market power of Auden I would expect  
9 things to be almost parallel. They are not.

10 So there are lots of factors there that I am sure  
11 that -- so I am confident that the drug tariff mechanism  
12 has an impact on Auden's price, but it is also a very  
13 strong possibility that on top of that it is not  
14 either/or. There is also a direct competitive effect  
15 which is corroborated by the other evidence that we had,  
16 switching in the market, etc, etc.

17 Q. So, to paraphrase your evidence, tell me if you  
18 disagree, you agree that there is correlation. Your  
19 point is, well, there may be other causes at work. Is  
20 that a fair summary of your evidence?

21 A. Sure. So, I agree that the drug tariff mechanism has  
22 an effect on the price of Auden, yes.

23 Q. That is not what I am putting to you. I am putting to  
24 you a more specific point. Do we not see from the two  
25 lines on top, the correlation between Auden's price and

1 the drug tariff, that Auden is reacting to the drug  
2 tariff for a given quarter rather than setting its price  
3 to follow drug tariff movements?

4 A. I cannot conclude anything from that figure. It is  
5 evidence of both. I mean, I can -- you may be right.  
6 You may be right, and I accept that. There is also the  
7 possibility that Auden is setting its prices as  
8 a reaction to the entry prices which are also going  
9 down. There is also a correlation there. I personally  
10 think both are happening at the same time. You cannot  
11 tell which one is driving what.

12 Is it needed more fundamentally when it comes to the  
13 market definition? I do not think so. It is needed to  
14 disentangle these two effects. That is my opinion,  
15 because we have observed not just these changes in  
16 the price but also, like, changes in the quantities.  
17 That is a whole mark of goods which are in the same  
18 product. If -- because this is, again, the price of  
19 bananas, you would not see any quantity change in  
20 the market of bananas. Instead here we have observed  
21 a lot of quantity changes in the relative market shares  
22 of full and skinny, and this evidence, for me it is very  
23 difficult to reconcile with a mechanism which is purely  
24 related to a contagion effect coming from the price of  
25 the drug tariff mechanism.

1 Q. Two final questions before I move on to my last topic.

2 The drug tariff, as you understand, is a maximum ceiling  
3 in practice. It sets out the underwriters' maximum  
4 willingness to pay or reimburse for a particular product  
5 category.

6 A. Yes.

7 Q. So it is a ceiling on reimbursement. Now, you can of  
8 course therefore price below the drug tariff, and again,  
9 if we look at figure 417 I would suggest what we see is  
10 Auden is consistently pricing close to the drug tariff  
11 price, obviously leaving a margin for the pharmacies,  
12 and we see the percentage difference between Auden's  
13 price and the drug tariff is reasonably constant over  
14 time. By contrast, we see the skinny label suppliers  
15 pricing well below the drug tariff price and  
16 substantially undercutting full label prices.

17 Do you agree that the fact that Auden seems to set  
18 its price at a constant percentage below the drug tariff  
19 suggests that they are being dragged down by the  
20 constraint rather than choosing to reduce prices to  
21 compete with skinny label?

22 A. First, I do not see evidence of this constant margin you  
23 are talking about. I do not, I do not.

24 Q. Well, I said fairly constant.

25 A. But I see something I agree with. I see the competition



1 intensifies a lot over time for skinny label, and we  
2 know that. There has been a lot of entry. There has  
3 been many producers entering the market attracted by the  
4 profitability that the market represented for them.

5 I also observe that the declining prices of Actavis  
6 is not that strong which is, in my opinion, related to  
7 the fact that they had market power over a subsegment of  
8 that market and they are exercising. So it is coming  
9 down. So I would imagine in fact, contrary to what you  
10 have posited to me, that margins would be much lower  
11 towards the end of the period compared to the initial,  
12 and in fact the margins, if you consider margin with  
13 respect to what? Margin with respect to costs for sure  
14 must be higher in the initial period because we know the  
15 costs are around £1, maybe 2 or whatever. Here  
16 the prices are 60, 50, 40, 30, so they are incredibly  
17 high margins at first which are declining over time, so  
18 I do not accept your premise.

19 Q. I will put to you a more precise point, which is the  
20 headroom between the drug tariff and Auden's price,  
21 which is really the pharmacy margin, they have to allow  
22 the pharmacy some margin because of the drug tariff  
23 otherwise you would sell nothing, right?

24 A. Auden is maximising its own profits taking into account  
25 the reaction of the pharmacies, of course.

1 Q. But that margin --

2 A. So for me the margin, the margin of Auden, if I want to  
3 analyse whether or not they have market power, not the  
4 margin of the pharmacies.

5 Q. So that is the first main point made by Dr Bennett in  
6 his note. I am going to put the second point to you,  
7 just to be fair.

8 A. Sorry, what was the point?

9 Q. On the causal relationship between the drug tariff --

10 A. Are you talking about the new report or --

11 Q. The first main point made in the report.

12 Now, the other point which picks up on a point you  
13 made yesterday, so you said yesterday that other  
14 suppliers did not enter the drug tariff immediately  
15 after entry of skinny label suppliers and that Auden  
16 reduced its price during this period, and you said  
17 yesterday this shows evidence of a direct constraint  
18 which is not linked to the drug tariff.

19 A. If I may, just to be also a bit more relaxed, it is one  
20 of the few areas where Dr Bennett and I are in  
21 agreement. So in that period both of us understand the  
22 drug tariff mechanism in the same way.

23 Q. I am not sure that is right.

24 A. The drug tariff mechanism. What is in the drug tariff  
25 mechanism.

1 Q. Maybe, but the second point he makes in his report, and  
2 again you may not have had time to --

3 A. In fact we disagree with the interpretation.

4 Q. It is more fundamental.

5 THE PRESIDENT: Let us -- put what you say Dr Bennett says,  
6 I want to see how far you disagree.

7 MR O'DONOGHUE: Yes, I want to be fair, you may not have had  
8 time to deal with this but I want to at least put the  
9 question.

10 Dr Bennett says that it is simply factually wrong to  
11 say that Auden reduced its price for the period you  
12 consider. Do you agree or disagree with that?

13 A. That is almost an assumption he is making there. So  
14 I disagree with Dr Bennett, and if I may go back to what  
15 we said earlier. So there has been a transition into  
16 a new topic now. I was told despite the limitation  
17 I could have a little bit of time to express what  
18 I thought about --

19 THE PRESIDENT: Of course we will come back to that,  
20 Professor.

21 A. So tell me when I should do that, or if I should answer  
22 the question first.

23 MR O'DONOGHUE: I have asked the question, we can come back  
24 to it in due course.

25 THE PRESIDENT: Professor, we will let you have your say.

1           We are doing it in slightly the wrong order, but I have  
2           a question arising out of this graph which may -- well,  
3           it will answer a question I have.

4           So, we have got three lines here, and what we are  
5           asking ourselves is the influence of the red dotted and  
6           the black dotted line on the solid red line in the  
7           middle. That is what we are debating. Now, what  
8           Mr O'Donoghue is putting to you and what Dr Bennett is  
9           saying is that there is a correlation between the two  
10          red lines, the dotted upper line and the solid middle  
11          red line, that suggests an influence of one on the  
12          other. That is a point which is made partly because  
13          there is a -- well, there is an argument that there is  
14          a relationship between the drug tariff and the price of  
15          the Actavis good, but there is a more fundamental point  
16          which is simply look at the lines and they are roughly  
17          following in parallel. One is not saying they  
18          completely follow, but there is a broad degree of  
19          correlation.

20          Now, simply taking that point about correlation,  
21          there is, I think, we would all agree, less correlation  
22          between the solid red line and the dotted average  
23          competitor price. Will you accept that?

24        A. I do agree with that, of course, 100%.

25        THE PRESIDENT: So what one does not have is -- it may be of

1           little weight, I do not know, we will have to think  
2           about it, what one does not have is the more precise  
3           correlation of the upper two lines in relation to the  
4           lower two lines.

5           Now, I understand of course you are saying there  
6           ought to be an unquantifiable and difficult-to-quantify  
7           correlation because the product that Actavis is selling  
8           is in the same market as the average competitors' price.

9       A.   They are in the same market with a differentiated  
10       product.

11       THE PRESIDENT:   So what you are saying is that if one  
12       reaches the conclusion that they are in the same product  
13       market, there really ought to be an influence of one on  
14       the other?

15       A.   Yes.

16       THE PRESIDENT:   That is what you are saying?

17       A.   Yes, of course.

18       THE PRESIDENT:   But if one were to say that actually the  
19       dotted line was something utterly unrelated with the  
20       solid red line, it was the average number of people  
21       travelling into London on trains over a period of time  
22       and one sees a reduction, you would not be able to say  
23       that there was some kind of influence of one phenomenon  
24       on the other because clearly they are unrelated --

25       A.   Yes.

1 THE PRESIDENT: -- and one does not have any kind of  
2 additional correlation between the two lines such as one  
3 does have in the upper two lines.

4 A. I agree, but the additional piece of evidence that it is  
5 fundamental when we are talking about market definition  
6 is assessing what happens to quantities. In your  
7 example, the London Underground, I would still see  
8 the prices of this good going down because of the  
9 mechanical application of the drug tariff mechanism.  
10 I would observe market shares stable at 100%. Here  
11 instead I have observed market shares declining from 100  
12 to roughly 50, and yesterday we continued to say, and  
13 then fluctuation between 40 and 60%. So the correlation  
14 in itself is not conclusive. I need to match it with  
15 additional evidence.

16 THE PRESIDENT: So you are very fairly making two points,  
17 I think. First of all, you are saying this is one set  
18 of data. It is concerned only with price, it does not  
19 look at quantity and one needs to look at the data in  
20 the round. Well, if that is not accepted by the parties  
21 we will hear about it in due course. I understand the  
22 answer.

23 You are also saying that there is a broad but much  
24 rougher correlation between the two lines on the lower  
25 part of the page, in the sense that they are both going

1 down. But what you do not have, and it may not be worth  
2 very much in terms of evidence, what you do not have is  
3 the more precise correlation between the upper two lines  
4 on the lower two lines, but that is something that does  
5 not change your opinion one way or the other. You still  
6 say that there is an effect of the lower line on the  
7 middle line when one looks at all of the evidence.

8 A. That is correct. That is correct. I also think, and  
9 maybe the discussion is going in the wrong direction,  
10 I think. It is not a horse race between the drug tariff  
11 mechanism and the direct constraints from skinny label.  
12 It is not either/or, and the discussion is in which  
13 mechanism is more likely to explain the data which is  
14 one of the faults of Dr Bennett's report.

15 I am saying that most likely it is both. For sure  
16 the drug tariff mechanism, but compounded with the other  
17 information also the skinny will have an impact  
18 directly, and doing this either/or analysis is not going  
19 to conclude -- at best it is going to tell us which  
20 mechanism is more relevant than the other, at best.  
21 This is what we might conclude if we were able to do  
22 an analysis, which again, in my opinion is not needed  
23 but the Tribunal is interested in it, which is  
24 absolutely fair.

25 THE PRESIDENT: Thank you, Professor. I think now is a good

1 time to let you say whatever you wish if you wish to say  
2 anything about Dr Bennett's document, and then I will  
3 invite Mr O'Donoghue to ask any questions that he has  
4 arising out of that. I want to be clear, you certainly  
5 should not say anything about the detailed metrics  
6 because that will be handled as it were, out of the  
7 witness box by yourself in conjunction with the CMA.  
8 But if you have anything that you wish to say about the  
9 more general points that has not already been drawn out  
10 by questions, then I would be delighted to hear it.

11 A. Thank you very much, thank you very much for the  
12 opportunity, and also for the opportunity of having  
13 spent my night on this report. That was a great night.

14 So, what am I going to say? First, because I think  
15 I should use this also to exercise my judgment, it is  
16 one of those cases we are talking about yesterday when  
17 I encounter economic analysis which is of low quality,  
18 which ultimately is not helpful to a case. It creates  
19 a lot of smoke. It diverts our attention away from more  
20 meaningful questions, and I think -- so I am against  
21 this type of economic analysis. I know that the  
22 Tribunal has introduced -- I am not making myself any --  
23 in a good light, perhaps, but I should say what I think.

24 So more precisely, because I want to detail why  
25 I think this is a bad analysis performed by Dr Bennett.



1       The first point is that, as I have already said, I think  
2       it is a wrong question. This horse race between direct  
3       and indirect is, I will argue, impossible to answer but  
4       certainly the way it has been framed, either/or, is  
5       untrue, unnecessary and it is not what we should be  
6       discussing. So it is really the wrong approach.

7       The second point I would like to make is that this  
8       is a partial analysis, I have already made this point,  
9       because it is not enough to conclude on anything if you  
10      do not look at quantities, and if this even fails by the  
11      very standards that Dr Bennett puts for himself, if  
12      I can take the joint report, {IR-G1/1/3}, that  
13      proposition 4. So Dr Bennett's column that is, of  
14      course, accusing me but somewhere he says:

15       "I have not seen in Professor Valletti's report  
16      a joint analysis [there is an emphasis on joint] of the  
17      actual changes in volumes in response to changes in  
18      price to answer the relevant question [about the  
19      relevant market] ..."

20       So any phase is on standards. I have not seen any  
21      joint analysis of what happens to prices and quantities  
22      which to me is the informative question, is the right  
23      question.

24       The third point I would like to make -- is it  
25      possible to put on screen the analysis of Dr Bennett?

1           Is this available or not?

2       MR HOLMES:   Yes, it is.

3       A.   I do not know the reference, please.

4       THE PRESIDENT:  It will be provided, hopefully.

5       MR O'DONOGHUE:  {IR-D3/1/1}.

6       A.   Thank you.  Next page, please, figure 1 {IR-D3/1/18}.

7           In that figure 1 you see a yellow line called "10mg drug  
8       tariff".  Do you see that?

9       THE PRESIDENT:  I do.

10      A.   Very good.  As you said, I will not be able to comment.

11           I have not received the data code for that.

12      THE PRESIDENT:  No, no, we understand.

13      A.   So I just did some, you know, eyeballing, that is the  
14           best I could do.  Night time.  So this is what  
15           Dr Bennett calls a 10mg drug tariff.  Can I then go to  
16           figure 3, please, which is a couple of pages later  
17           {IR-D3/1/24}.  There is a dashed red curve called "10mg  
18           drug tariff".  Do you see that?  They are labeled the  
19           same.  One comes from the Decision, one comes from  
20           Dr Bennett's analysis.  Those two curves are not the  
21           same because they are not.  So I checked some random  
22           points, as I said, eyeballing.  So I really do not know  
23           what Dr Bennett has done because there is no way I could  
24           check any of his calculations since he has not supplied  
25           the raw data, he has not supplied the data code.  So

1 I am simply saying there may be a data issue. I am just  
2 flagging that -- maybe it means something else with the  
3 10mg drug tariff in his own diagram, but he has not put  
4 me in a position to --

5 THE PRESIDENT: Professor, you should not worry about that  
6 because that is something which will be taken into  
7 account.

8 A. Very good. But it is the problem that I just wanted to  
9 make you aware of.

10 The fourth point is that we know there is a formula  
11 for the drug tariff mechanism. There is a formula, and  
12 we are all in agreement the formula says -- I will be  
13 very slow, that the price, the drug tariff price, this  
14 is the dashed red line, at time T is a weighted average  
15 of the products which are included in some baskets two  
16 quarters before. That is what it says. So it says any  
17 particular -- we also know that Auden, with a small  
18 glitch at the beginning but let us forget about small  
19 things, throughout the period had a big weight in the  
20 basket, we know that. We remember 70%, 80%, so big  
21 weight. So for sure the price of Auden at price T  
22 minus 2 mechanically affects the drug tariff at price T.  
23 So for sure. Yet he has concluded that there is no  
24 impact. That is his conclusion. He is saying the  
25 opposite, the drug tariff mechanism is affecting

1 the prices of Auden and not vice versa. This is  
2 illogical. It is illogical. We noted -- of course, of  
3 course I do accept that there may be also the other way  
4 round. The problem here is that because of this  
5 mechanism there are feedback loops. These are  
6 continuous feedback loops between the past and the  
7 present, the present and the future and so forth.

8 So any correlation analysis is going to be polluted  
9 by this. So this is where, I am sorry, I have to lower  
10 your expectations, to infer the working in this  
11 direction which I am very happy to disentangle to help  
12 the CMA, to help anyone in this case, it is not going to  
13 be conclusive because, if I may just put my academic hat  
14 on for once, this is something you can do only with  
15 a fully dynamic model which is honestly not the  
16 direction I would want to take for policy decisions like  
17 this one.

18 There is an entirely circular reasons but the  
19 position is calling us, Dr Bennett is actually  
20 explicitly saying that the price of Auden does not have  
21 an impact on the drug tariff mechanism. It has to be  
22 wrong because it is in the formula itself, it is Auden  
23 price of two periods ago that for sure determined the  
24 drug tariff today, the circularity is a fundamental one  
25 which is going to plague any interpretation of the

1 result.

2 The last point, and then I have concluded, and it  
3 leads to a different interpretation, is that Dr Bennett  
4 ignores one of the fundamental tenants in economics  
5 which is if you want to assess causality, that was the  
6 question Professor Mason had asked and I am sorry,  
7 Professor Mason, I do not think you are going to get any  
8 answers. Causality means that you need to have some  
9 exogenous change, causality of a factor on something  
10 else. You need to have a change of that factor, keeping  
11 everything else constant. This is called ceteris  
12 paribus in economics, other things equal. If you do not  
13 do that there are all sorts of indoctrinated problems.

14 What is not equal here, what is not equal here is  
15 that there is entry, competition changes, competitive  
16 dynamics change over time. There is entries of Alissa  
17 first then Bristol Lab and then more, Resolution, then  
18 Teva and you go on, and nothing. You may try -- good  
19 luck, we may try with that, to condition the  
20 regressional analysis on those ex-observable factors.  
21 I do not think we are going to go very far.

22 The fundamental difference, and it is very  
23 interesting, actually, it is on this page so you do not  
24 have to say anything. At some stage Dr Bennett in his  
25 typical style decides to do some salami slicing of one

1       period, because that is what he does all over the place.  
2       He never wants us to look at the full picture. He just  
3       wants us to look at -- it is like a puzzle sometimes.  
4       I was really thinking about it, and when you have  
5       a puzzle in front of you and you know exactly what you  
6       are looking at, imagine it is a wonderful scene at the  
7       seaside with a tempest, a storm or something like this.  
8       You know that is a wave, that is a sail, that is  
9       a cloud, that is the sky. If you extract, though,  
10      a single element of that jigsaw away and you ask me, is  
11      that the sea? I would not even know if that is  
12      horizontal, vertical. But in the context I exactly know  
13      what it is or with a good deal of confidence.

14           Now, the last point I am going to make is this  
15      interesting April 2016 reduction in Auden's price that  
16      Dr Bennett has decided to comment upon, which is by  
17      coincidence because I did not know about the existence  
18      of this report until yesterday when we concluded, 4 pm,  
19      4.30, whenever it was. If you can please go back to the  
20      transcript of yesterday. In my version it was page 29  
21      {Day8/29:1}, but I was talking exactly about this  
22      period, if you recall. I was talking exactly about this  
23      period by sheer coincidence. So I am not being -- my  
24      opinion was already expressed even before that, and I am  
25      sorry, it is not there. This is where I was talking

1 about the drug tariff mechanism in April 2016, when  
2 I said that at that point in time I could explain what  
3 was happening to the drug tariff mechanism, because  
4 before that it was only AMCo in the drug tariff  
5 mechanism, and finally Auden is included. So Auden is  
6 a bit cheaper than Auden. These are the only two drugs  
7 included and the price goes down, the drug tariff  
8 mechanism price because of that, because Auden was  
9 a couple of pounds cheaper.

10 This is what is drug tariff and we agree, as I say,  
11 it is the only area of agreement between me and Matthew  
12 Bennett. We agree that -- what is in the tariff  
13 mechanism at that point in time.

14 Yet -- yet, he says, "I observe that the price of  
15 Auden goes down at that point in time", April 2016, and  
16 he writes, which is an extraordinary conclusion, and  
17 that is on page 5 of his report, the new report,  
18 paragraph 15:

19 "As such, the reduction in Auden's ASP in April 2016  
20 cannot be attributed to the introduction of skinny label  
21 tablets."

22 That is what he concludes. Rather, it was due to  
23 the impact of Auden's entry to the DT six months  
24 earlier.

25 If you go back to my transcript yesterday, we could

1 not find it but it does not matter, I have a good  
2 memory, I used the same point to say I also observed in  
3 April 16 that is when there was a lot of competition  
4 amongst skinny label, because there was further entry.  
5 That is a point in time when there had already been  
6 Alissa and Bristol Lab, they all were coming into the  
7 market. The expectation was the competition was  
8 increasing. Everybody knew that, and I am saying in my  
9 report in more than one way it could be perfectly  
10 compatible, that decrease in price, with the increase in  
11 competition from skinny, and I conclude in the  
12 transcript of yesterday I am not able to disentangle the  
13 two effects. I am not saying there is no effect from  
14 the tariff. I am not in the zero 1 world. I am not in  
15 that world. I am simply saying that there always is two  
16 movements of things and it is very unlikely we will come  
17 to the bottom of it.

18 I have finished, thank you very much.

19 THE PRESIDENT: Mr O'Donoghue.

20 MR O'DONOGHUE: Thank you, Professor Valletti.

21 Professor Valletti, I am sorry you were up late last  
22 night looking at this. I can assure you that was not  
23 deliberate. If it is any consolation a lot of time was  
24 spent over the weekend by me and others looking at this  
25 as well, so I want to put your mind at rest on that.



1           I have two questions, if I may. You understand, of  
2           course, this note was produced in response to a question  
3           from the Tribunal?

4       A. Yes, we heard earlier today.

5       Q. You are presumably not suggesting that Dr Bennett's  
6           analysis was conducted in anything other than good  
7           faith?

8       A. (Pause) It is not very objective what I have seen in  
9           front of me, so I do not know -- I would prefer not to  
10          answer about this question.

11      Q. Do you think it was not in good faith?

12      A. So, I have a view about the report that the expert did.  
13          I had no problem whatsoever even if I had a different  
14          opinion with Mr Holt, with Mr Bishop. When it comes to  
15          Dr Bennett, at several points in time I had serious  
16          questions about his intellectual honesty. Put it this  
17          way: we speak the same jargon, we met, I have problems  
18          about his intellectual honesty, and I would --

19      Q. I would put to you that is an outrageous suggestion that  
20          you should withdraw immediately and apologise.

21      A. Then I do apologise.

22      Q. Now --

23      MR HOLMES: Sir, I do not really understand why this line of  
24          questioning is being pursued. Professor Valletti has  
25          engaged conscientiously with the substance of this note,

1           although it was produced when he was already in purdah  
2           and although he had to give his evening to it. I think  
3           there is absolutely no reason to move the discussion on  
4           to a question about the faith, good faith, bad faith or  
5           otherwise, of any of the experts, and I think  
6           Mr O'Donoghue should really cease with this line of  
7           questioning.

8       MR O'DONOGHUE: I am moving on. There was a criticism of  
9           the economics as being poor quality, I wanted to see how  
10          far that criticism went.

11               Now can we go back to the Decision at {A/12.1/14},  
12          please. So Professor Valletti, we saw the three lines  
13          for 10mg. So we saw the three lines for 10mg drug  
14          tariff, skinny and full. What I am now showing you is  
15          the same diagram for 20mg, and we see something very  
16          different, which is for a substantial part of this  
17          period there is significant convergence between full and  
18          the drug tariff for skinny and full.

19               Now, the only distinguishing -- or the main  
20          distinguishing factor in the context of 20mg is there  
21          was a second full label supplier, namely Waymade. Now,  
22          I would suggest to you this helps us understand the  
23          question of causation in relation to 10mg because we see  
24          when there is competition in full there is much greater  
25          convergence and we see a very distinct picture for 10mg;

1 do you agree or disagree?

2 A. So, unfortunately things are more complicated than this  
3 because there are two differences between this picture  
4 and the previous one. One difference you alluded to,  
5 and I agree with, there is a direct competitor, Waymade,  
6 which is offering a full label tablet. Okay. There is  
7 another competitor who has a full label. The other  
8 difference, though, is that the drug tariff mechanism is  
9 completely different. You see this horizontal --  
10 because it was a category A drug. So what we observe  
11 here is for sure direct evidence of competition, but  
12 this direct evidence comes from two channels.

13 One is the channel of Waymade with a full label  
14 tablet, which is confounded with the direct evidence  
15 from skinny, so we have two types of direct competition,  
16 and you cannot, alas, compare to the previous figure  
17 because they are two things which are changing at the  
18 same time.

19 Q. But I am making a simpler point, I think, which is for  
20 20mg we see very substantial convergence between Auden  
21 and its competitors. For 10mg we do not see that.

22 A. So I -- again, there are two different regulatory  
23 settings so the comparisons is plus entry of full label.  
24 So these are two counterfactuals which cannot be  
25 compared with each other, I am afraid.

1 Q. Now, I move on to my last topic. I want to leave time  
2 for Mr Palmer. I hope I can take this a bit more  
3 briskly. This is on the question of object,  
4 Professor Valletti.

5 Now, can I first take up where exactly you differ  
6 from Dr Bennett. So the point you make is that, and  
7 I quote {F/1/33}:

8 "... there is no possible consumer gain ever arising  
9 from a fixed quantity supply agreement, compared to the  
10 counterfactual with independent entry."

11 Correct? It is paragraph 84 of your report, yes?  
12 Then at proposition 74 of the joint statement {G1/1/37}  
13 the reason you give, you say, I am quoting:

14 "The entrant does not have an incentive to undercut,  
15 as it cannot expand sales beyond the fixed quantity it  
16 has been given."

17 Correct?

18 A. Yes.

19 Q. Now, you agree in proposition 75 with Dr Bennett  
20 {G1/1/38} that there is no allegation of explicit or  
21 tacit coordination in this case on price?

22 A. Correct.

23 Q. The CMA does not suggest that there has been a market or  
24 customer allocation agreement between Auden and AMCo;  
25 correct?

1       A. It has not been investigated either way. Yes, there is  
2       no allegation.

3       Q. Yes. But your point is, well, that does not matter, the  
4       lack of tacit or explicit coordination on price or  
5       non-price factors, because you say the key is the  
6       incentives that a fixed quantity agreement creates to  
7       compete on price; correct?

8       A. Yes.

9       Q. So to be clear, even if there was no agreement on price,  
10      explicit or tacit, the key issue from your perspective  
11      is what incentives does AMCo have and Auden; correct?

12      A. Yes.

13      Q. Now --

14      A. I am anticipating, why is this special -- this is  
15      a special case because we are in a market with fixed  
16      quantities, as we know more or less 80,000 units per  
17      month. So we do not have a market expansion effect,  
18      okay.

19      Q. Yes. Now, are you then saying that in general entry  
20      with a fixed quantity will not generate any price  
21      competition?

22      A. No, that is not what I am saying. Entry -- so, the key  
23      here is not the quantity, is not a quantity that comes  
24      out of a mysterious god. The quantity is supplied by  
25      an incumbent himself, so I have to look at the

1 incentives. In other words, if you are an incumbent  
2 monopolising a market, why do you give quantities to  
3 some else? Why are you creating competition to  
4 yourself? Why are you shooting your feet? There must  
5 be a reason, so you look at that in the incentives.

6 I do not know from a legal of point of view how the  
7 contract is defined, but it is a fundamental question  
8 for me, that is why I am emphasising incentives --

9 Q. I will come to incentives.

10 A. -- understanding why something which is unnatural, and  
11 I say it is not true under any circumstance. If, as an  
12 incumbent, you can find a market opening somewhere else,  
13 so someone else can be your distributor in a different  
14 area, in a different country, on a different market  
15 segment, you do that, of course. There is a common  
16 interest to do that. But otherwise, why would you? So  
17 there must be a reason, and the reason is understanding  
18 what would the counterfactual be? Without me giving you  
19 the quantities what would you do, and that is a very  
20 interesting economic question which I have analysed and  
21 answered in my report.

22 Q. To be clear and to be fair to you, I am going to come to  
23 incentives and rationality in a minute but let us start  
24 with the question of price competition. I think you  
25 were agreeing that in general it is not the case that

1 entry with a fixed quantity will generate no price  
2 competition?

3 A. So again, this is a famous element of the jigsaw that  
4 you take out of context. In general it is not true  
5 that -- in general, yes. But if that quantity is not  
6 coming out of nowhere, the rest of the element in the  
7 puzzle, that quantity is given to you by somebody, why  
8 am I giving you units at cost in order to compete them  
9 back away?

10 Q. That is a question of incentives. We will come to that,  
11 I am not shutting you out.

12 A. Yes, yes, but this is --

13 Q. I am focusing on price. Now, suppose a generic --

14 A. But it is wrong to focus on price alone with --

15 Q. I get to ask the questions, that is how it works.

16 A. I get to answer them, yes.

17 Q. Suppose a generic entrant entered independently, and  
18 because of supply constraints it could only enter with  
19 a fixed limited volume. Would you say that generates no  
20 price competition?

21 A. Sorry, suppose that an entrant?

22 Q. Enters independently with its own product, but because  
23 of supply constraints it can only enter with a fixed  
24 limited volume, is it your evidence that that would  
25 generate no price competition?

1       A. So generally speaking and -- yes, that would generate  
2       very limited competition in the market, yes. Because --  
3       so, again, the key is understanding how binding are  
4       those competitive -- those constraints, of course. So  
5       imagine you have a market which is monopolised, monopoly  
6       price, and you can enter with very few units so you  
7       cannot contest the whole market. The equilibrium for  
8       the entrant would be to set the limited quantities at  
9       about a monopoly price as well, because why -- he knows,  
10      this entrant, that can supply those units at the  
11      monopoly price and if he undercuts more it just -- it is  
12      just going to erode his own margins. It does not have  
13      any possible expansion. The key there is how binding  
14      the capacity constraint is. I am understanding from  
15      your question that this capacity constraint is quite  
16      serious. So if it is quite a serious capacity  
17      constraint the entrant will not compete on price, no.

18     Q. Now let us consider two scenarios. Let us assume there  
19     is a generic company who can get 12,000 units from  
20     an incumbent supplier, and then a second scenario where  
21     the generic company gets 12,000 units from a third-party  
22     CMO. Do you say the generic company can compete more in  
23     the second scenario than the first?

24     A. I mean, this again, distracting our attention, focusing  
25     on quantities without understanding the context, the



1 terms of the agreement, the expectation of prices.  
2 Again, quantities are not coming from independent  
3 entities. Some are competitors in the same market.  
4 This is a result of an agreement. This question to me  
5 does not make sense. More fundamentally also, and I was  
6 here when Dr Bennett was actually talking and he was  
7 emphasising that an entrant will want to sell  
8 quantities, this is going to align the incentives of the  
9 entrant with the consumers. Putting on the side whether  
10 that is the right description of what a firm does in  
11 maximising quantities, but fundamentally if they really  
12 want, I am sticking to his assumption that you want to  
13 sell as many units as possible, if it can procure 10,000  
14 units from a guy and 12,000 units from some other guy  
15 you buy from them both, do you not, if you are assuming  
16 that you really want to maximise your expansion into the  
17 market. Why do you trade one against the other unless  
18 there are other reasons for doing so, which are the  
19 reasons contained in the agreement. But looking at  
20 quantities the way you are suggesting, then buy from  
21 both. I should say you should buy from both. So why  
22 would you limit yourself to only one?

23 Q. Let me ask my question again. Do you say the generic  
24 company can compete more in the second scenario than the  
25 first?

1       A. I -- under -- so if you cut off, because that is your  
2       assumption, cut off any link, your supply agreement has  
3       no expectation on the prices that you have. You are  
4       going to set. Completely. You are basically  
5       constructing a procurement market. I just want to  
6       procure, and I assume that I want to procure as many as  
7       possible. That is what you are saying. Yes, if you  
8       want to procure as many but then you already answered.  
9       You will buy 12,000 units because that is what you have  
10      assumed, but in general where do you buy from depends on  
11      your expectation of how you are going to compete under  
12      that supply agreement in that market.

13             Again, doing this what I called earlier, salami  
14      slicing without going into the full context is not  
15      a helpful discussion.

16      Q. So is the answer to my question yes or no?

17      A. I cannot tell if I do not know -- so --

18      Q. Okay.

19      A. I will be very precise. If the terms of the supply  
20      agreement have no impact whatsoever on the downstream  
21      market price, this is set independently because, you  
22      delegate different people, they never talk to each  
23      other, they are around, and so I just want to set my  
24      price, give me the quantities, whatever. The second,  
25      most likely the second situation might generate more

1 competition than the first.

2 Q. But --

3 A. Might.

4 Q. I do not understand that.

5 A. 12,000 is --

6 Q. Quantities in both cases are identical.

7 A. No, "might". I said "might".

8 Q. The product is the same. It makes no sense.

9 A. So with that -- put it differently. The way I rephrase

10 your question is, let us --

11 Q. I get to ask the questions.

12 A. I have to understand, this is the way I understood it.

13 If I misunderstood you are going to correct me.

14 Q. It is not a complicated question.

15 A. That is -- well, I am sorry, I am very slow and you are

16 quicker than me. So, if I understand the question,

17 I have a firm that is competing in some market. It can

18 take either 10,000 units at a certain cost or 12,000

19 units at the same cost per unit, because that is -- so

20 at least I can understand.

21 Q. I said 12 and 12.

22 A. 12 and 12?

23 Q. Yes.

24 A. So if they buy the same quantities?

25 Q. Yes.

1       A. And there is no expectation that those quantities they  
2       are buying have any impact, the contractual terms or  
3       their understanding of the contractual terms have any  
4       impact on the market price, the situation will be the  
5       same.

6       Q. So the answer to my question is no. Thank you.

7               Can we look at what the CMA says?

8       A. So, what is the question, because maybe I don't --

9       THE PRESIDENT: No, I think Professor, you must understand  
10      that we are not going to lose the context of these  
11      questions.

12      A. Sure.

13      THE PRESIDENT: Mr O'Donoghue is quite properly putting his  
14      client's case.

15      A. Sure, I understood, but I lost the question, so  
16      apologies. As I said, I am slow in the understanding  
17      that, my night was what it was, so the question was?

18      THE PRESIDENT: The question was, let us now consider two  
19      scenarios. Let us assume there is a generic company who  
20      can get 12,000 units from the incumbent supplier, and  
21      then a second where the second from a third-party CMO.  
22      Do you say the generic company can compete more in the  
23      second scenario than in the first? The assumption  
24      implied in that question is that you cannot buy from  
25      both.

1       A. You can buy from both, and the assumption is also that  
2       buying has no impact on the retail price, which is an  
3       assumption I would disagree with. So if you assume that  
4       this has no impact whatsoever on the retail price the  
5       answer is the impact would be the same, but because it  
6       follows from the assumption.

7       MR O'DONOGHUE: Yes, okay, thank you.

8               Let us look at what the CMA says, it is  
9       {IR-A/12/807} and it is 6.887 at the bottom. It is the  
10      last sentence:

11             "Waymade's and AMCo's entry would have been, in  
12      principle, favourable to competition, beginning  
13      a process" --

14      A. Sorry, which paragraph again?

15      Q. Sorry, Professor Valletti, it is the last sentence,  
16      bottom of the page.

17      A. So line 1?

18      Q. Yes.

19      A. Because I keep seeing -- 887, now. That is why I am  
20      saying ...

21      Q. 6.887. Last line.

22      A. Okay, thank you.

23      Q. The last line:

24             "Waymade's and AMCo's entry would have been, in  
25      principle, favourable to competition, beginning

1           a process resulting in potentially lowering the cost of  
2           healthcare."

3       A. I am sorry, 887 or 888?

4       Q. 887.

5       PROFESSOR MASON: Could we have a two-page view so we could  
6           see two pages together and the split of the paragraph.

7       MR O'DONOGHUE: Excellent idea, if I may say so.

8       A. Thank you. I see it, thank you.

9       Q. The bit I am interested in is, it would have been in  
10          principle favourable to competition.

11      A. Sorry?

12      Q. Yes.

13      A. I need to read the whole paragraph.

14      Q. Sorry, yes, of course. (Pause)

15      A. Yes.

16      Q. So the CMA is saying in principle the kind of agreement  
17          alleged is anti-competitive, and so I think we can agree  
18          the CMA did not compare the impact of competition  
19          between Auden and AMCo under the supply arrangements  
20          with the impact of competition between Auden and AMCo in  
21          the absence of supply arrangements. Just to be clear as  
22          to exactly what I mean by that, to do a counterfactual  
23          analysis you would need to understand the actual prices,  
24          the volumes, non-price competition under the Auden  
25          supply arrangements with prices, volumes, non-price

1 competition in the absence of the supply arrangements,  
2 and you would also need to form a view on when in the  
3 counterfactual AMCo might have entered independently,  
4 and so on.

5 Now, the point I am putting to you here is the  
6 Decision does not approach it in that way. It says  
7 instead in principle this is an anti-competitive type of  
8 agreement.

9 A. So I am not a legal expert as you all know. First this  
10 paragraph is saying there is precedents and then I am  
11 sure there will be a debate on the terms of the  
12 contract, whether they were legal by object or not.  
13 What -- the CMA is actually saying that whereas in  
14 *Lundbeck*, *Servier*, some of the cases that I also was  
15 involved with at the Commission, there was an area,  
16 a grey area which was about patent disputes, patent  
17 infringement. The CMA is saying this -- the case here,  
18 there is no pattern. There is no pattern, so it is  
19 a much clearer case. So it is not even agreeing or  
20 disagreeing whether an infringement has occurred. This  
21 is the first bit.

22 Then it is saying these are cases where the entry in  
23 principle would be beneficial to competition because  
24 they have observed what happens when there is entry in  
25 this market, skinny label prices go down, also full

1 label go down, directly or indirectly. We know the  
2 benefits of competition. That is what this paragraph is  
3 saying.

4 Q. Can I put the question a different way, or in a slightly  
5 different way. In your report you do not look at the  
6 actual prices under the agreement, the quantities, the  
7 time of entry and then compare that with the  
8 counterfactual of prices, quantities, time of entry and  
9 so on; yes?

10 A. I have done something which is very simple and very  
11 powerful in fact, very powerful and --

12 Q. I am just trying to establish what you have --

13 A. Well, I have, I have.

14 Q. It is not a criticism --

15 A. Well, if I may express what I have done and then you  
16 will decide whether I have done the right thing or the  
17 wrong thing.

18 So, this is what I have done: so imagine I want to  
19 strike an agreement with Professor Mason, okay. Without  
20 the agreement I am making 10, Professor Mason is making  
21 10. That is what we are making independently, and  
22 I simply said, of course I do not know the terms of the  
23 agreement, it is very complicated the counterfactual,  
24 but I said, if we sign an agreement, Professor Mason and  
25 myself, jointly we need to make at least 20. Is that



1       obvious? Because if we make jointly less than 20 there  
2       will never be any terms of the agreement that will make  
3       both of us sign. If we make 25, maybe there is  
4       a question, do they get 12.5, who gets the surplus?  
5       These are details that we cannot master but it is not  
6       relevant.

7               So I am simply saying if there is an agreement it  
8       must be that the parties which are signing the agreement  
9       must be jointly better off with the agreement. I think  
10      this is a very simple proposition, very simple  
11      proposition, everyone, I would hope agrees with it.

12             Then I made a second step because you have to go  
13      step by step, this particular market, this is also an  
14      agreement among many of us there are fixed quantities.  
15      They are fixed quantities. So it is not one of those  
16      markets where there is an expansion.

17             So if we agreed with my initial step jointly,  
18      Professor Mason and I need to be better off with an  
19      agreement than without, otherwise you will never observe  
20      in the data an agreement which we know has been signed,  
21      so we must be jointly better off. Jointly our profits  
22      must be higher under the agreement. Very simple minimum  
23      rationality requirement. I do not need all the  
24      complicated details from the real world. Jointly we  
25      need to be better off in a market with fixed quantities,

1           okay.

2           I may return to that. I really think it is a minor  
3           detail. Let us assume that our costs are fairly  
4           similar. So the only difference between the agreement  
5           and not, joint revenues with and without the agreement  
6           is not going to come from the cost because we are using  
7           the same quantities anyway. You more, me less, jointly  
8           still the same, jointly we are still producing the same  
9           quantities.

10          The only difference can come from the revenues but  
11          if the only difference come from the revenues and  
12          quantities are fixed, it must be with the agreement  
13          prices will be higher than without the agreement.

14          That is as simple as I can be. It does not  
15          necessitate at all looking at the details that you are  
16          asking me about, and it is a point of economics and  
17          I would say it is a strong one that tells me why  
18          I consider that an agreement of this type in a market  
19          with these characteristics, I am not saying any fixed  
20          supply quantity, I am not saying in a market with fixed  
21          quantities where if I give it to you, you will sell it  
22          and I will not. We need to create a higher share of the  
23          pie. The pie can only increase if we increase the price  
24          and so I am pretty confident that, and I am not a legal  
25          expert, an agreement of this type is bad for consumers,

1           this agreement will lead to higher prices.

2           Q. Professor, can we go back to my question. It is a very  
3           simple question. The CMA did not conduct  
4           a counterfactual analysis of prices, volumes, time of  
5           entry under the agreement compared to a counterfactual  
6           in the absence of the agreement?

7           A. To me it is not because they -- no, they have not  
8           because there is no need because, as I say, the only  
9           possible economic conclusion is that prices --

10          Q. I do not accept that. I am going to come back to that.  
11          I do not accept that.

12                 Let us look at a comparison of the supply  
13           arrangements the CMA complains about in the Decision  
14           with independent entry. Can we start with volume and  
15           first it is {IR-A/12/243}, please, and at 3.559. It  
16           starts with "Mr Beighton". If you can read --

17          A. Which paragraph again?

18          Q. The bottom of the page.

19                 "Mr Beighton's forecast ..."

20                 If you can read that.

21          A. Yes.

22          Q. So you see the reference to Aesica, so this suggests  
23           that AMCo thought it could supply 10,000 packs  
24           independently and managed to negotiate a higher volume  
25           of 12,000 packs from Auden. Now, I do not want to get

1           into an arm wrestle with you on the facts but let us  
2           assume that is right. Do you agree that securing 12,000  
3           is a better outcome for competition than 10?

4       A. So it is impossible for me to answer to this question  
5           because you are talking about outcomes if I do not see  
6           what the terms of the agreement are and what is the  
7           understanding and the incentives to enter into those  
8           agreements. I am sorry this is a question that cannot  
9           be answered on its own.

10      Q. Do you agree that 12,000 is bigger than 10,000?

11      A. I do agree that 12,000 is bigger than 10,000, thank you.

12      Q. Can we look at the sales that AMCo actually made of  
13           skinny label in the post-entry period. It is at  
14           {IR-A/12.1/6}, please. If we can blow that up. Now, do  
15           you agree that the sales of skinny label actually  
16           achieved by AMCo are lower than the sales it made under  
17           the Auden supply arrangements?

18      A. Totally irrelevant comparison. Those sales of AMCo come  
19           where they are actually the third entry, an entrant in  
20           the market -- well fourth actually because it was  
21           Alissa, Bristol, Resolution Chemicals, so AMCo comes  
22           later in time. At the time of the agreement they were  
23           the only one that was ready so they could have done  
24           a totally different amount.

25           So looking at the ex-post sales under a different

1 competitive situation does not tell me anything. I am  
2 sorry about what they had expected during the time, yes,  
3 on the negotiation.

4 Q. 12,000 packs is just shy of 16% of the market. What you  
5 see before you are single digit percentages?

6 A. What I see is that the first entrant Alissa gets 40% in  
7 the first year, so the first entrant could have got  
8 a lot more. But obviously the price went down as well,  
9 so again, we are going around this question. No, the  
10 comparison of those figures is completely unwarranted.

11 Q. But the answer to my question is yes?

12 A. What is your question again because sometimes I am  
13 confused I am sorry. Your question is whether 3,000 is  
14 lower than 12,000, yes, if we go back to comparing  
15 numbers? Yes. Is that a meaningful comparison? No.

16 Q. Okay, thank you. So you mention Alissa. Can we look at  
17 what they said. It is {IR-H/1236/2}, please. It is  
18 under 2.4. So their target was 10% and 10% is around  
19 7,700 packs compared to total market size and that is  
20 also less than 12,000, is it not?

21 A. By the way, we have observed that Alissa got much more  
22 than that but at this --

23 Q. This is ex-ante.

24 A. Is this annual sales, monthly sales?

25 Q. Whether it is annual or monthly it is still 10%.

1 A. The figures that you showed me earlier were monthly  
2 sales.

3 Q. Let us do monthly. 10% on packs per month is 7,700  
4 based on a 77,000 pack?

5 A. Again, it is mathematic I agree.

6 Q. That is volume. Let us look at price. Under the  
7 Auden/AMCo supply arrangements AMCo was pricing at  
8 a discount to Auden, albeit a small one. Do you agree  
9 with that?

10 A. AMCo was pricing at --

11 Q. At a small discount to Auden?

12 A. The -- I am sorry, I am a bit confused. You said AMCo  
13 to -- Auden gave to AMCo -- sorry, what did you say.

14 Q. AMCo and Auden were competing?

15 A. Yes, and typically historically the price of AMCo was  
16 typically a bit more expensive? In which period?  
17 Sorry, during the agreement?

18 Q. Yes.

19 A. During the agreement typically the price of AMCo was  
20 a bit more expensive. This is what I said yesterday.  
21 This is why there were some glitches in the --

22 Q. I am not sure that is right. {IR-H/489/1}, please.

23 A. -- by A couple of pounds, yes.

24 Q. {IR-H/489/1}, please. In future all my references will  
25 be IR unless I say otherwise. If you look at the top of

1 the page this is confidential but the point being made  
2 there is that AMCo was pricing at a small discount to  
3 Auden.

4 A. Can we go back to the evidence that has been put in  
5 front of us by Mr Bennett yesterday. Can we --

6 Q. Can you first look at this.

7 A. Page 5, page 5, please. Page 5 of Bennett's report.  
8 Because I have counted, 80% of the time it was actually  
9 cheaper by a little bit by AMCo. So page 5 of the  
10 Bennett report, please. We have this document earlier  
11 on. {IR-D3/3/5}. Paragraph 15: July September 2015, so  
12 during the agreement the price of Auden went to 65 to  
13 68 -- can I say those numbers?

14 THE PRESIDENT: Yes.

15 A. Thank you. So the price of Auden was in excess of 65.  
16 But at that point in time Auden's price was 63. So --

17 MR O'DONOGHUE: That is one example. Can we look at what  
18 Mr Sully says.

19 A. Right, sorry. That is why I was a bit puzzled by your  
20 question.

21 Q. Isn't it logical if Auden has all the customers and AMCo  
22 is new to the market it needs to persuade customers to  
23 switch from AMCo and the most obvious way to do that  
24 is to give a small discount?

25 A. You are assuming they want to compete. But they are

1           selling 10,000 units or maybe 12, or maybe 12, over  
2           a market which can accommodate 80,000 units, so why  
3           would they do that?

4       Q.   Now, can we look at what Alissa did.  It is  
5           {IR-A/12/130}, please.  This is the Decision.  It is  
6           3.272.  And you see Alissa's launch, offering its skinny  
7           label tablets at a small discount over the full label  
8           product's price?

9       A.   Mm-hm.

10      Q.   You recall from Dr Bennett's second report that Alissa  
11           charged a price that was very similar to Auden at the  
12           time and the larger price drops only occurred when  
13           further skinny label entrants entered.  Do you remember  
14           that?

15      A.   I do remember the price competition took some time.  But  
16           did it start quite -- it is very evident that it started  
17           when entrants started that we are in agreement with  
18           that, entry by independent firms, yes.

19      Q.   Now, Alissa's evidence also was that it entered as  
20           quickly as it could.  It wanted to enter earlier but it  
21           could not.  Can we look at {IR-H/1236/2}, please.  The  
22           names are confidential, Professor Valletti, but you will  
23           see under 2.6 and 2.7:

24                 "Alissa could have launched its Hydrocortisone  
25           tablets earlier if it could have."



1           So there is no suggestion that AMCo's earlier launch  
2           of skinny label tablets would have accelerated Alissa's  
3           entry. They are saying we entered as quickly as we  
4           could and we face some exogenous difficulties?

5       A. Yes, I remember also that, unless I am mistaken, Auden  
6           had approached Alissa to enter in a similar agreement as  
7           they had with AMCo and they had said we are not  
8           interested, so this is really when competition hits up  
9           and it is a point of time which is very interesting to  
10          see what happens to prices and quantities. They wanted  
11          to enter, yes.

12       Q. But the point I am putting to you is that Alissa came in  
13          as quickly as they could. That is what they say?

14       A. That is what it says.

15       Q. Yes. They are not saying had AMCo entered earlier, we  
16          would have entered earlier. They faced some problems?

17       A. They. This phrase does not say that.

18       Q. They say the delays --

19       A. Sorry, which paragraph? I was just commenting on the  
20          paragraphs you put in front of me.

21       Q. 2.6, 2.7.

22       A. Right, apologies.

23       Q. So they say the delays were caused by some development  
24          issues and a legal dispute and so on. So they had to  
25          make some --

1 A. Yes, was keen to launch its Hydrocortisone tablets as  
2 quickly as possible because there were some commercial  
3 benefits in being first in.

4 Q. Indeed. Now, you mention commercial benefits. Can we  
5 look at the Decision on this.

6 A. I also made a qualification, I do not know how relevant  
7 it is, Alissa is a firm that was not interested, despite  
8 being approached by Auden, to sign an agreement similar  
9 to the one that AMCo had with Auden.

10 Q. Indeed, that supports my point. There was nothing  
11 stopping these other people coming in if they wanted?

12 A. Yes, but the agreement had started much earlier on for  
13 AMCo, so let us remember that the first company that  
14 could actually supply the 10mg full tablet was Waymade.  
15 You will remember that. It was Waymade. And then  
16 Waymade, if -- again, this case is very complicated.

17 Q. Professor Valletti, that is a factual point that is in  
18 dispute. I do not think it is appropriate for you to  
19 give evidence on those points.

20 A. This is my understanding of the case. The first firm  
21 that I understood could come because they could obtain  
22 marketing authorisation was Waymade and Waymade, if  
23 I may, can I have {IR-A/14/664}, please. It is  
24 a figure.

25 So Waymade which then inherited -- then AMCo

1           inherited this contract from Waymade, they were actually  
2           purchasing this drug at the retail price and then there  
3           is this thing which is for economists is very  
4           interesting. There is this incredible change in the  
5           pattern of the wholesale price they were paying. It was  
6           around that stage £30 or whatever it was and it goes  
7           down to £1. That is a huge change, is it not? That is  
8           very difficult to explain unless we take into  
9           consideration that that is exactly the date when Waymade  
10          get the marketing authorisation.

11       Q.   Professor Valletti --

12       A.   It is marketing authorisation. They could enter --

13       Q.   -- you are keen to advocate the CMA's case. Can you  
14          listen to my questions?

15       A.   I do not advocate -- I am relying on these extraordinary  
16          facts which I have in front of me and I do not accept --

17       Q.   Which has nothing to do with my questions.

18       A.   If this is a factual case the marketing authorisation  
19          happens at that time and at that time we had --

20       Q.   That is not accepted.

21       THE PRESIDENT: Let us not interrupt each other. Ask your  
22          question again.

23       MR O'DONOGHUE: Can we come back to the Decision,

24          {IR-A/12/57}, please. 3.56.

25       A.   I was answering your question saying that AMCo, because

1           they had inherited that contract, they were able through  
2           the market authorisation they had gotten from Waymade  
3           and reported to enter by themselves. Instead Alissa --  
4       Q. That is fundamentally in dispute.

5       THE PRESIDENT: Professor, you obviously cannot give factual  
6           evidence so it is very important I think that your  
7           answers that you are doing articulate the facts you are  
8           assuming them to be. Now, Mr O'Donoghue, if you want to  
9           put your question requiring the witness to make  
10          a different assumption on disputed points and answer on  
11          that basis, then of course please do so.

12       MR O'DONOGHUE: Yes.

13       THE PRESIDENT: It being the case that we will decide what  
14          the facts are.

15       MR O'DONOGHUE: Yes, sir, I am grateful.

16               Professor Valletti, 3.56:

17               "Usually, generic entry is phased ... It is expected  
18               that the first entrant will obtain the highest profits  
19               as it only needs to price slightly below the  
20               incumbent ... Other generic entrants might enter the  
21               market at a later stage, and it is typically with  
22               subsequent entry, and the initiation of price  
23               competition in a market with multiple generic entrants,  
24               that the price competition becomes fiercer."

25               So here the CMA is saying that the first generic

1 will only slightly undercut the incumbent because it  
2 does not want to provoke a price war and to be clear,  
3 this is obviously not because there is any agreement not  
4 to compete between the incumbent and the first generic  
5 entrant. It is just because it is a rational thing to  
6 do for each of them unilaterally.

7 Do you agree with that?

8 A. So it is a generic statement and I am in slight  
9 disagreement with the CMA there, so generally speaking  
10 entry in generic markets first of all we need -- we mean  
11 entry after a drug goes off patent. That is a different  
12 circumstance. And by and large entry happens in the  
13 first 1, 2, 3 years and prices decline rather rapidly in  
14 the first six to eight months and so I have no basis to  
15 say that generally the first entrant does not want to  
16 compete. But this is what the CMA says but that is not  
17 my assumption in general.

18 This case though is very different, is very  
19 different in that we do not have a branded good as we  
20 know. It is not something that was off patent. They  
21 were all generics to start with, and entry does not  
22 happen like in the other cases because that is the end  
23 of the legal monopoly phase, that is, a drug has in  
24 order to recover the investment. Entry happens here  
25 when prices were high and where the highest possible one

1           because of an abuse. So entry happens because of an  
2           abuse and the way competition happens and it did happen  
3           probably was affected by an understanding that this  
4           market was -- the incumbent was not ready to respond  
5           very aggressively given what they had seen. It is my  
6           interpretation of the facts at least.

7           But I disagree with the general statement that any  
8           first entrant in the market, by definition they will get  
9           a higher market share than necessarily they price  
10          higher. It depends on circumstances.

11         Q. The CMA is making a more specific point. They are  
12          saying in a single generic entry context there is one  
13          entrant?

14         A. But in this case we had six.

15         Q. I am talking about the phase of single generic entry.  
16          During that phase the single generic entrant has no  
17          incentive to substantially undercut the incumbent and as  
18          a result they will price only slightly below the  
19          incumbent. That is the point.

20         A. But this is -- so in this case we have seen prices going  
21          down a bit. So what is the substantial? This is going  
22          back immediately to the equilibrium.

23         Q. But you agreed with me two minutes ago when Alissa came  
24          in as a single entrant it priced only slightly below  
25          Auden?

1       A. For the first month and they went even lower and lower  
2       so again, we are talking over a time period which is  
3       long enough. Prices do come down.

4       Q. Under multiple entry?

5       A. Well, we had a long discussion about this in the other  
6       case which was Liothyronine and in Liothyronine we said  
7       typically prices come down with three, four, but there  
8       is exception as well, about three or four entrants is  
9       what you typically to get to --

10      Q. So we agree?

11      A. We agree?

12      Q. Now, one final point before I move on --

13      A. You said we agree, what do we agree on?

14      Q. We agree in general when a first generic entrant comes  
15      into the market it is irrational for it to price  
16      substantially below the incumbent --

17      A. Then you are right. Once again I expressed myself  
18      wrongly. I disagree with that statement.

19      Q. So the CMA is wrong is it?

20      A. I disagree with this statement too. I do not think that  
21      an entrant that comes in independently is irrational to  
22      undercut at all. They will want to get -- by the way,  
23      in typical generic markets where there is still a brand  
24      of good, there is a particularly strong incentive to cut  
25      the price at the beginning because a product is unknown.

1           It has to overpower some brand differential. In this  
2           case they are all homogeneous, but I had disagreed with  
3           the generality of your statement. It is irrational for  
4           an entrant to ever undercut the incumbent.

5       Q. You heard Mr Beighton's evidence. He said he would not  
6           want to get a machinegun onto his own foot and provoke  
7           effectively a price war?

8       A. There is a difference. When you are starting with  
9           prices which are £72 and the competitive prices are £2,  
10          there is a difference between saying it is irrational to  
11          have any price competition which is -- reducing  
12          the price to £60 that is a very large increase compared  
13          to 72. Think about the margin there, and saying there  
14          is no incentive at all. It depends also on the capacity  
15          constraints that you expect to have. If you are  
16          expecting not to be capacity constrained you have  
17          a higher incentive to actually undercut because you can  
18          command.

19               Now you are talking about Alissa. I am sorry, I do  
20               not know about their capacity constraints. I am not  
21               informed about that.

22       Q. But we know in fact that when they were a single entrant  
23           the price just blew open?

24       A. Can we go back to the prices then. So I have  
25           somewhere --



1 THE PRESIDENT: Mr O'Donoghue, you are trying to articulate  
2 a general proposition not a specific one.

3 MR O'DONOGHUE: One final point before I move on to my final  
4 two topics. Now you understand under the Auden supply  
5 arrangements AMCo was procuring a full label product,  
6 whereas if it entered it would be with a skinny label  
7 product, correct?

8 A. Yes.

9 Q. Now, the CMA makes the point, which you support that  
10 there is a captive market essentially for full and an  
11 a non-captive market for skinny, roughly 50%, 50/50. Do  
12 you agree that the Auden supply arrangement in principle  
13 allowed AMCo to access a wider customer base than under  
14 independent entry. It could supply both captive and  
15 non-captive customers?

16 A. I agree with the general principle. Specifically since  
17 you are telling me they wanted 10,000 units it does not  
18 make any difference in practice.

19 Q. We will come to that. I do not agree with that. Now  
20 I want to come on to my penultimate.

21 A. I am saying it does not make any difference in practice  
22 because we know that the market is roughly 50/50, as  
23 a simplification. 40,000 and 40,000 so your 10,000 are  
24 guaranteed either way, so it is not -- even if you could  
25 supply in principle a larger market you do not have the

1 capacity to do, so it is irrelevant.

2 Q. But you agreed with me earlier and if somebody comes in  
3 with a fixed quantity, they may be able to compete?

4 A. So again, as I said earlier, this question if you do not  
5 tell me what are the terms of the agreement, it is  
6 a question that I cannot answer from an economic point  
7 of view because my incentive to set -- not to sign the  
8 agreement, but to set particular prices depends on the  
9 terms of the agreement itself.

10 Q. Let us move on.

11 Now at paragraph 86 of your report you say and  
12 I quote:

13 "Prices actually increased during the agreement,  
14 indeed they rose at a faster rate than they had prior to  
15 the agreement."

16 You then elaborate on that point in the joint  
17 statement. I just want to pick up a few points to  
18 unpack that. For the period 2008-2018 Auden/Actavis  
19 were found to have charged excessive and unlawful  
20 prices. Now, that would obviously have been something  
21 important to consider in the context of the before and  
22 after analysis of the agreement. It obviously  
23 significantly complicates the analysis of the pricing  
24 effect of the alleged agreement. Do you agree with  
25 that?

1       A. Let me read what you just said.

2       Q. If prices are excessive, looking at the before and after  
3       effect of the agreement is significantly complicated?

4       A. The point I am making there, when it comes to the  
5       agreement we have three periods which are in my opinion  
6       of relevance. We have one period with entry. We have  
7       one period without entry at all, and we have a period  
8       which has been called managed entry and there may be  
9       disagreements, so there is no entry at all. Prices go  
10      from very low to £30. Then there is managed entry.  
11      They go from £30 to £72 and there is entry.

12             So this is telling me a few things. More or less we  
13      know what is happening with actual independent entry:  
14      prices fall. There is no dispute about it. Prices do  
15      fall with independent entry.

16             Then we have two previous periods without entry,  
17      independent entry, so we are not in disagreement.  
18      Prices increase in both periods and with the agreement  
19      they increase but the fastest rate on average, of course  
20      is also ups and downs on average over the period they  
21      increase at the fastest rate and they reach the highest  
22      possible levels they have ever observed in the history  
23      of this particular drug. They are reached during the  
24      agreement.

25             Since you are talking about the legality, the

1           legality of the agreement, let us remind ourselves, the  
2           highest possible prices ever observed in the history of  
3           this drug is during the agreement of what we call  
4           managed entry.

5       Q. I am putting to you a very simple point.

6       A. I am sure.

7       Q. Where you have a ten year period of excessive and  
8           unlawful prices, trying to disentangle the unique or  
9           incremental effect of the alleged agreement is very  
10          difficult.

11      A. I have just given you some features that to me are  
12          sufficient to delineate some commonalities and some  
13          differences. There is a huge, humungous difference  
14          between no independent entry when prices are going up  
15          and entry when prices are coming down. It is a breaking  
16          point. It is a breaking point, which is something  
17          I would put really my money on anything.

18                There is a second point is that before when there is  
19          no managed agreement and in the agreement there is  
20          a further differentiation between these two periods  
21          because price increase in both periods and in the latter  
22          at a higher rate. This is when -- again, because I am  
23          an economist, ultimately so, and I think about -- and  
24          I am an industrial economist -- I am trying to think the  
25          way firms reason, what they do and it is very natural.

1           The incumbent firm is exercising monopoly power. It is  
2           increasing prices. The prices go up. The profitability  
3           of this market increases. It attracts potential  
4           interest in entry.

5           However, it attracts potential interest from entry  
6           at precisely the point where an anti-competitive  
7           agreement is signed but you cannot keep at bay everyone  
8           else. There are guys like Alissa, who say, no, we are  
9           going to go. It is easy to buy off one entrant. It is  
10          very difficult to buy off entrants. Entry happens,  
11          prices go down.

12         Q. Can we look at the data. One last question before  
13           lunch. It is {IR-A/12/147}, please, and it is figure  
14           3.10. So in your before or after analysis you consider  
15           the period starting in October 2008, correct?

16         A. I think so, yes.

17         Q. Why did you only consider this period? We have data for  
18           the earlier period. Before October 2008 this was  
19           clearly pre-agreement. Now, are you aware if you  
20           include this period that the average monthly price  
21           increase pre-agreement was 4% compared to the 1% you  
22           rely on and second, is substantially higher than the 2%  
23           increase during the agreement?

24         A. I take your word for it. I have not analysed this  
25           because we are discussing obviously about the agreement

1           during a phase where there was an abuse, when there was  
2           a dominance, so I concentrated myself on the dominance  
3           period for very clear reasons.

4           Also, and I agree, I agree, any data has to be  
5           interpreted well otherwise it is just a matter of  
6           optics. Increasing though say 10% from a level of £1  
7           the price goes from 1 to 1.10. Increasing 10% from  
8           a level say, a hypothetical of 100, the price increases  
9           by a margin of 10 which is much larger. So you would  
10          have to look at both series. Indeed, when I was doing  
11          those broad cat of the data I looked only at the  
12          percentage changes.

13       MR O'DONOGHUE: Sir, I have about 20 minutes left. We have  
14          been delayed this morning for technical and other  
15          reasons.

16       THE PRESIDENT: No criticism.

17       MR O'DONOGHUE: I am very anxious Mr Palmer is not squeezed.

18       THE PRESIDENT: Mr Palmer, how squeezed are you?

19       MR PALMER: The budget for the counsel team was three hours  
20          each. Mr Brealey was a bit shorter. Mr O'Donoghue has  
21          been a lot longer. I think I have got about three hours  
22          as well. So I just want to flag now. I do not want to  
23          put this witness under pressure with a long day after a  
24          short night and a tag log start today. I think we will  
25          need to go into tomorrow morning with this witness and

1 I want to flag that now.

2 THE PRESIDENT: That is not an issue is it?

3 MR O'DONOGHUE: No. At the risk of proving unpopular, could  
4 we perhaps have a shorter lunch; would that assist?

5 THE PRESIDENT: What we will do is --

6 MR HOLMES: I am quite concerned at the suggestion of  
7 a shorter lunch.

8 THE PRESIDENT: Because of the witness?

9 MR HOLMES: Yes.

10 THE PRESIDENT: What we will do is we will resume at  
11 2 o'clock but, Professor, we will see how we are at  
12 4.15/4.30. If we can add a few minutes on then we will  
13 do so, but only if you are comfortable. We will resume  
14 at 2 o'clock. Thank you.

15 (1.01 pm)

16 (Luncheon Adjournment)

17 (2.00 pm)

18 Q. Professor Valletti, good afternoon, I hope you have been  
19 fortified by Giovanni's espresso --

20 A. Indeed.

21 Q. -- over lunch.

22 A. Quite a few people went to this Pickwick coffee shop  
23 I said. I should get a cut because they had a surge in  
24 demand. That is a natural experiment we can see what is  
25 the relevant market. Sorry for that.

1 Q. Let us hope there is no agreement.

2 Now, can we go back to your before and after  
3 analysis. If we can bring up {IR-A/12/147}. This is  
4 the figure 3.10 which we saw before lunch. Now, you  
5 see, Professor, the second comment square, there is  
6 a reference to a Daily Mail article. Do you see that on  
7 the left?

8 A. Yes, that was in July 2010.

9 Q. Yes, and are you aware that as a result of criticism in  
10 this article Auden, for about a year or indeed  
11 throughout 2011, maintained its prices more or less at  
12 a constant level?

13 A. I do not think it is for a year, but I do remember that  
14 there is some evidence in the Decision pointing to price  
15 cuts because of the negative publicity of that Daily  
16 Mail article, yes.

17 Q. If we go to {IR-A/12/149}, please. If you look at  
18 3.303. Do you see that?

19 A. 303?

20 Q. "Throughout 2011".

21 A. Yes, starting at the end of July 2010. So, yes. Yes,  
22 so -- it is fine.

23 Q. A year and a half.

24 A. It is not consistent with the previous figure, but that  
25 is -- the previous figure suggested about two periods



1           and I think it was a quarter of a period, so it  
2           suggested six months, the previous period, but let us go  
3           on of course.

4       Q.   Let us not fall out over that.

5       A.   Of course.

6       Q.   Now, you agree that was completely exogenous to the  
7           agreement, correct?

8       A.   Yes.

9       Q.   But it would necessarily --

10      A.   I am sorry, to what agreement?

11      Q.   To the alleged anti-competitive agreement.

12      A.   Okay, there was no agreement in place at the time.

13      Q.   No, that it was -- well, also, yes.  Would that impact  
14           on your before and after analysis?

15      A.   Well, it is a factor I have considered, but when you  
16           average out, as you can see prices were going up.  They  
17           stayed a little bit there because of the negative  
18           publicity.  They started increasing again.  So it does  
19           not alter my conclusion about -- we are talking about  
20           trends, no?  That is what we are talking about, trends.

21      Q.   What I am saying is, there is a period where as a result  
22           of press criticism, not for market reasons, the prices  
23           were held constant.

24      A.   Yes.

25      Q.   So that necessarily impacts on what would otherwise

- 1           happen in supply and demand, correct?
- 2       A.   Well, not demand because demand is --
- 3       Q.   The interplay of supply and demand.
- 4       A.   These are monopolies, they are in a stable market.   So
- 5           maybe you want to make a different point.   It does not
- 6           affect demand, it does not affect entry in that sense
- 7           because there is no market authorisation available at
- 8           that point in time.   It does affect the behaviour of the
- 9           firm which is allegedly abusing its market power, and
- 10          there is a moment in time where there is the kind of
- 11          moderated -- I am not saying stopped, but they moderated
- 12          and then they start again.
- 13       Q.   But this was not something you considered in your before
- 14          and after analysis?
- 15       A.   I do not know what you mean.   I simply gave an average
- 16          increase in that period and I said on average before the
- 17          managed entry agreement prices were increasing, it is
- 18          a mathematical fact, by an average of 1% per month.
- 19       Q.   So the answer to my question is you did not consider
- 20          this?
- 21       A.   Of course it is in the data.   Of course it is in my
- 22          data.   100%, I have considered it.
- 23       Q.   You did not consider this specific factor, the reason?
- 24       A.   I did not consider any factor.   When you are just
- 25          describing trends you just take an initial price.   You

1 compare it to the N price. N as an mathematical average  
2 will tell you what is the average price increase. No  
3 facts have been included, just a description of the  
4 trends.

5 Q. Okay. Now, if we can go back to page 147, to  
6 figure 3.10. Back two pages, please {IR-A/12/147}.

7 EPE OPERATOR: I am very sorry, it is playing up. (Pause)

8 MR O'DONOGHUE: So, Professor Valletti, back to the boxes on  
9 top. So another point noted here in this figure is that  
10 in January 2014 Auden became aware of the effects of the  
11 orphan designation and the fact that other suppliers  
12 would not receive a full label designation. You can see  
13 in this chart that the rate of price increase increased  
14 substantially from January 2014 onwards.

15 A. Yes.

16 Q. Obviously the CMA considered this and the Daily Mail  
17 article to be notable, which is why they appear on this  
18 chart. Now, this increase was not caused by the  
19 alleged -- this increase in January 2014 was not caused  
20 by the alleged agreement, was it?

21 A. When is the exact start date to the agreement?

22 Q. It is in October 2012.

23 A. So there was an agreement in place.

24 Q. Yes.

25 A. Okay. So the agreement was already in place, yes.

1 Q. My point is: these increases in January 2014 because of  
2 Auden's perception or appreciation of the orphan  
3 designation issue, that was not caused by the agreement.  
4 Do you agree?

5 A. It was not caused by the agreement, no.

6 Q. Now, you are also aware that until June 2014 10mg  
7 Hydrocortisone was in category A of the drug tariff?

8 A. Yes.

9 Q. Then in July 2014 it switched to category M?

10 A. Correct.

11 Q. Is this something you considered in your before and  
12 after analysis?

13 A. Again, just to be very clear, those were just trends  
14 which is just very simple mathematical descriptions of  
15 how prices move from an initial period to a later  
16 period, averaging out a lot of factors. I do not  
17 describe any of such factors. I just took as an initial  
18 point the start of the alleged abuse, as an end point of  
19 the first period when there is the agreement that starts  
20 and then I see when entry happens. I just cut. I just  
21 cut.

22 Q. I understand --

23 A. Then I just describe the data. I do not know what you  
24 mean, you take into account. Do I describe the events  
25 throughout the period? No. Do I average out? Yes. Do

1 I see a difference in the way prices move? I do. I am  
2 not attributing more or less than what I have just said.

3 Q. The point I am putting to you, just to be clear, is that  
4 the CMA evidently thought the events indicated in these  
5 different points in the graph were notable enough to  
6 merit being mentioned specifically. The point I am  
7 putting to you is that you did not control for these  
8 events in terms of identifying or isolating the impact  
9 of the agreement; correct?

10 A. So the CMA put those labels there because there are some  
11 trends as I describe, but then there are some notable  
12 events that change a little bit, and one is obviously  
13 asking what is going on and they provide a very cogent  
14 explanation as to what is a possible reason for those  
15 temporary downward pressure on prices in July 2010, or  
16 sudden increases in prices in 2014. So they explain why  
17 there are deviations away from the trends, but the  
18 trends still remain. So those -- I have not explained  
19 deviations from the trends. I have not.

20 Q. Now, moving on to incentives and rationality. You have  
21 said this, I think, more than once I think already, but  
22 in the joint statement you say in multiple places that  
23 Auden had no incentive to enter into the alleged  
24 agreement except for an anti-competitive intention to  
25 keep AMCo out of the market.

1 A. In this case, yes, that is what I have written.

2 Q. I just want to test that with you. Now, the first  
3 situation I want to explore is where -- let us assume  
4 Auden thought AMCo's entry was imminent and under that  
5 entry AMCo would sell as many packs as in the Auden  
6 supply agreement.

7 A. At what price?

8 Q. I am focusing on the supply price at this stage.

9 A. You know my answer, that is an incomplete question.

10 Q. Let me finish the question before you decide it is  
11 incomplete.

12 A. Of course.

13 Q. So let me just put the question again and then you can  
14 answer.

15 A. Sure.

16 Q. So let us assume Auden thought AMCo's entry was  
17 imminent, and under that independent entry AMCo would  
18 sell as many packs as in the Auden supply agreement.  
19 What would Auden lose by supplying those volumes to  
20 AMCo? Now, just to flesh out this point, we know  
21 the price that Auden was getting under the second  
22 written agreement, for example, was £1.78. That was  
23 higher than the CMO price Auden was paying and therefore  
24 it was rational for Auden to charge that price to AMCo  
25 because it was profitable. If AMCo came in

1 independently, took the volumes in any event, from  
2 Auden's perspective as a CMO in this context surely some  
3 money from AMCo was better than none?

4 A. So your question is highly incomplete or perhaps even  
5 wrong.

6 Q. Can you answer it first and then you can make your  
7 point.

8 A. The answer is that you cannot answer this unless you  
9 make your own informed judgment on what the price would  
10 be under the two scenarios. We cannot assume that the  
11 retail price would be identical. You are just comparing  
12 a purely supply side agreement with no impact at all on  
13 the rest of the picture, which is a statement I strongly  
14 disagree with.

15 So the answer to your question is completely  
16 dependent on what AMCo will do on the two scenarios. So  
17 if AMCo enters, at those conditions, a totally  
18 independent market that Auden is not supplying, that is  
19 what I call a pure procurement market. Of course you  
20 have transformed Auden not in a horizontal competitor  
21 but in a vertical supplier of an external market, okay?  
22 And yes, they would want to compete or that volume on  
23 itself.

24 However, that is not what you are talking about.

25 Q. Let us take this in stages.

1 A. But you are confounding things by taking it in stages.

2 The answer to your question I have just given you. If  
3 Auden was supplying an independent market your reasoning  
4 would make sense. If Auden instead is supplying its own  
5 market my answer is completely different, because there  
6 would be an expectation of what the agreement itself --  
7 what is the impact of the agreement on the downstream  
8 market.

9 Q. Let us take this in two stages. The first stage, which  
10 I think you would agree with, is that it would be  
11 rational for Auden to supply AMCo if the price that AMCo  
12 is paying for supply is higher than the CMO price that  
13 Auden is paying.

14 A. No, it would not, because you are just -- once again you  
15 are just considering not the profit of Auden, you are  
16 just dissecting the supply side of Auden on its own so  
17 no, I disagree with you.

18 Q. I think you misunderstand my point.

19 A. Try again.

20 Q. If AMCo comes into the market, let us assume it takes  
21 10,000 packs per month. So those sales --

22 A. On its own, by itself?

23 Q. Yes. Those sales would be lost entirely to Auden. Now,  
24 surely if Auden can make a profit on supplying 10,000  
25 packs at a wholesale price that is a rational thing for



1           Auden to do.

2           A. No, it is not.

3           Q. Why not?

4           A. Because in order to have an opinion and express also,  
5           and give you an answer to that question, in -- I would  
6           have also to understand what I call the incentives of  
7           Auden to enter the agreement in the first place, and  
8           Auden would have an incentive to do that only if there  
9           is a material impact on the downstream market.

10          Q. Let us assume the quantities are the same --

11          A. Yes, but Auden is acting on profits, not on quantity.

12          Q. -- and let us assume that the price AMCo would charge is  
13          also the same. It would be rational in that  
14          situation --

15          A. Sorry, which price, the wholesale price? Can you say it  
16          again, the wholesale price?

17          Q. The retail price.

18          A. We have done this before. If you assume that there is  
19          no impact, that the supply agreement whatsoever can have  
20          on retail prices, you have cut off any competitive  
21          interaction on the agreement. Instead I am positing  
22          a different thing, which is the agreement is written  
23          precisely because it will have an impact on the  
24          downstream prices.

25          Q. I am putting to you a very simple question.

1       A. But I give a very simple answer.

2       Q. Let us assume Auden's costs at a CMO level are 90p. If

3       it can sell to AMCo for anything above 90p, for example,

4       £1.78, that is a rational thing for Auden to do because

5       it is the difference between getting some money and no

6       money?

7       A. Again, the answer is still the same. If you assume that

8       there is no impact on the retail price of the agreement,

9       which is set independently by a completely different

10      mechanism which has nothing to do with the agreement

11      itself, you will be right.

12      Q. But you agreed with me before lunch that there is no

13      tacit or explicit coordination on price?

14      A. I did not say. I simply say on the impact that the

15      agreement can have on the downstream market, that is it.

16      Q. But we agree there is no tacit or explicit collusion on

17      price?

18      A. We did agree on that, yes.

19      Q. Now, in that situation --

20      A. You are just making --

21      THE PRESIDENT: Mr O'Donoghue, just to be clear, we are

22      conducting these questions on that assumption?

23      MR O'DONOGHUE: Yes.

24      THE PRESIDENT: Right.

25      A. So, on the assumption, on the assumption that the supply

1 agreement has no impact whatsoever on the expected price  
2 in a downstream market -- expected of course, it may be  
3 the right expectation, the wrong expectation, then, yes,  
4 it would be rational to do so because you basically  
5 carve out any impact that the agreement can have on  
6 downstream competition by assumption. By assumption.

7 MR O'DONOGHUE: That is fair. So that is the first scenario  
8 I want to put to you on incentives and rationality.

9 Now, the second scenario I want to put to you, let  
10 us assume there was uncertainty and asymmetric  
11 assessments of that uncertainty by each of Auden and  
12 AMCo. Just to be fair to you, to tell you where I am  
13 coming from, you are obviously aware of the orphan  
14 designation issue. We have discussed this more than  
15 once.

16 A. Yes, I am.

17 Q. Let me just show you a couple of documents to make clear  
18 the basis of the assumption I am putting to you. The  
19 first is {IR-H/863/1}, please. Professor Valletti, if  
20 you can read the email in the top half.

21 A. The one that starts "Hi gentlemen"?

22 Q. Yes. Let me read it out:

23 "Please see the below an email from the MD at  
24 DE Pharmaceuticals. This is a very interesting and  
25 significant change in market dynamics. At this

1 morning's meeting DE shared the detail of these changes  
2 in the hydrocortisone marketplace. Retail pharmacy seem  
3 now to be significantly more accepting of a product  
4 without the orphan indication. This is very very  
5 different to all previous market feedback we have had."

6 I am not going to get into an arm wrestle with you  
7 whether that is right or wrong. It does not matter.  
8 But you can see that there was an ongoing issue in the  
9 market as to whether there was a market for skinny label  
10 product and if so, how big that market was, and  
11 I suggest we see from this email that that was an issue  
12 that was changing and developing over time. So you see  
13 that point?

14 A. So we are in April 2016?

15 Q. Yes.

16 A. By then we even know that Alissa has already entered the  
17 market, by the way.

18 Q. Well, look, again, I do not want to get into the rights  
19 and wrongs of this.

20 A. No, I am saying it is information in the market. Skinny  
21 has a market potential.

22 Q. Yes. What I am saying is that there was uncertainty  
23 about the scale and scope or indeed existence of that  
24 market. That is the only point I am putting to you.

25 A. I accept that.

1 Q. So that is one type of uncertainty. Now, the other type  
2 of uncertainty is that Auden obviously did not know  
3 where AMCo was at in terms of its own independent skinny  
4 label product development and obviously AMCo had no  
5 incentive to give the impression to Auden that it did  
6 not have a product. That is the second.

7 A. Yes.

8 Q. Again, I do not want to get into the rights and wrongs  
9 of that, that is not for you and me, Professor Valletti,  
10 that is a matter for the Tribunal.

11 Now, given those two uncertainties let us assume  
12 these uncertainties on some tangible level were present.  
13 It would have been rational for Auden to enter into the  
14 agreement if Auden was uncertain about whether AMCo  
15 could enter and overestimated its ability to do so, or  
16 likewise if AMCo was able to use its negotiation skill  
17 to persuade Auden into thinking it could enter the  
18 market independently in circumstances where in fact it  
19 could not.

20 Do you agree that it would have been rational for  
21 Auden to enter into the agreement in the presence of  
22 those uncertainties?

23 A. So, if that means that Auden thought, rightly or  
24 wrongly, I am not there to dispute, that if Auden  
25 entered the market it would have a lot of quantities and

1           that would be very disruptive to the equilibrium price,  
2           and instead by supplying them it would be more  
3           profitable, that is what rational means, to supply them  
4           because that resulted in less competition in the market,  
5           I do fully agree with that.

6       Q. Now, the outcome in the presence of uncertainty is that  
7           Auden in practical terms might allow AMCo to supply  
8           a product in competition with Auden in circumstances  
9           where either AMCo was not able to enter at all or was  
10          only able to enter it with smaller volumes than Auden  
11          was willing to supply. On those assumptions, that would  
12          be a positive development for competition; do you agree?

13      A. Yes, but you are mixing apples with pears, in the sense  
14          that you are comparing the expectation and the behaviour  
15          of Auden under their expectations, right or wrong, I do  
16          not know, and then you compare with the actual market  
17          outcomes. Instead if I have to assess whether or not  
18          an agreement was anti-competitive I would then stick to  
19          the assumptions of Auden.

20                So if Auden thought, wrongly, that these guys are  
21                super competitive and they would destroy the  
22                profitability of the market and they would buy them out,  
23                and they are wrong, and they are wrong, they result to  
24                be wrong. But this is still the intent. So you have  
25                to -- once you decide on a benchmark you have to be

1 coherent. You cannot jump at will between one scenario  
2 and another scenario because that is not the relevant  
3 comparison.

4 Q. To be clear, Professor Valletti, this is not what I am  
5 doing. This is all ex-ante. Just to put some numbers  
6 in this, let us assume Auden thought AMCo could only  
7 supply or could supply 12,000 packs per month.

8 A. Yes, and it would make also expectation about the price  
9 in order to consider is it rational, I need to see what  
10 is the impact they expect on their own profits. So  
11 imagine they expect some impact on Auden autonomous  
12 entry has on their profits, yes.

13 Q. So, we assume that Auden thought AMCo could come in with  
14 12 --

15 A. -- thousand, at a certain price.

16 Q. Yes. Now, let us assume in fact for whatever reason  
17 AMCo could only come in with nine.

18 A. Yes. Again, you are omitting a price, which is an  
19 important element if I want to assess the rationality of  
20 a decision under certain asymmetric information, under  
21 all the assumptions you have made, you are always  
22 missing some element, but yes, please do go on.

23 Q. So there is a difference, there is an asymmetric  
24 assessment of the certainties, and the upshot is that  
25 Auden supplies 12,000 to AMCo in circumstances in

1           a counterfactual where AMCo could in fact supply no more  
2           than 10.

3       A. Yes, that is what you said earlier.

4       Q. Do you agree, on those assumptions, that that would be  
5           a positive competitive development?

6       A. Well, no, a positive competitive development -- again,  
7           in a market where we know incidentally that the total  
8           market size is fixed, if I want to understand where  
9           there is a positive competitive development I must  
10          assess the impact on prices, and without this element in  
11          analysis which is outside of your question, your  
12          question cannot be answered.

13      Q. But I think you agreed with me earlier that in a world  
14          where an independent entrant enters with 10,000 and  
15          a world in which there is an incumbent supply of 10,000,  
16          they would be practically identical in terms of impact  
17          on competition?

18      A. No, no, sorry, you are trying -- again, I disagree with  
19          that, in fact. I did not agree with that. I said that  
20          if you cut out any linkages between the agreements, the  
21          supply agreements and the prices they would, but  
22          I disagree that you can do that assumption of cutting  
23          out things.

24      Q. But you also agreed with me before lunch that in this  
25          case --



1 A. Which case?

2 Q. This case -- there has been no tacit or explicit  
3 coordination on price?

4 A. I do agree, yes. But there is a -- a whole continuum of  
5 prices between super -- we have seen prices went from  
6 £70 down to £2, so there is a continuum. There is  
7 an enormous range of possible prices.

8 Q. Yes, but there is no agreement on price.

9 A. This is a legal question. Whether there is a legal  
10 agreement on prices, I believe there is not, but --

11 Q. You have conceded in the joint expert statement that  
12 there is no case of tacit or explicit collusion.

13 A. Yes, and I agree with that. We have analysed it either  
14 way, which is fine. But competition can come in  
15 different forms.

16 Q. It is more than that. You have accepted in the joint  
17 statement that in this case no case is made as to tacit  
18 or explicit coordination on price.

19 A. I have already said yes many times to this question.

20 Q. Now, another commercial reason entirely exogenous to the  
21 alleged agreement was also touched upon by the factual  
22 witnesses last week. I do not know if you were here or  
23 not for that. For example, at the same time as Auden  
24 was supplying AMCo with Hydrocortisone it transpires  
25 that AMCo was supplying Auden with another drug called

1 Carbimazole which Auden was having difficulty in  
2 manufacturing, and we also know in 2013/2014 that Auden  
3 was keen that AMCo would acquire Auden's business as  
4 part of an acquisition.

5 Now, if there were wider commercial reasons, the two  
6 reasons I have given, again, I do not want to get into  
7 a ding dong with you on whether that is right or wrong,  
8 would that not make it rational for Auden to supply AMCo  
9 and at a lower price than it might otherwise?

10 A. I am not able to answer to this question because I do  
11 not know those other extra elements you have just put  
12 into the picture. So I would prefer not to comment on  
13 that. It is not part of my assessment.

14 Q. That is fair.

15 MR O'DONOGHUE: Sir, I have no further questions.

16 THE PRESIDENT: Mr O'Donoghue, thank you very much.

17 Mr Palmer.

18 Cross-examination by MR PALMER

19 MR PALMER: Professor Valletti, could we start by looking at  
20 your report at paragraph 33, that is {F/1/15}. Focus on  
21 paragraph 33, where you will remember you say that the  
22 evidence that you have seen:

23 "... points towards full label tablets being  
24 perceived by some pharmacies ... as ... a somewhat  
25 differentiated product from [skinnies]."

1           This differentiation being driven by:

2           "... the regulatory risk that some pharmacies  
3           perceived from dispensing off-label."

4       A.   Yes.

5       Q.   First of all, the evidence that you have seen, you say  
6           in brackets there, "eg quotations from pharmacies".  
7           That is a reference, we see from the footnote, to  
8           quotations set out in the Decision. It is right, is it  
9           not, and this is in no sense a criticism, that you were  
10          not provided with the underlying documents by the CMA at  
11          this stage?

12      A.   That is correct.

13      Q.   You were not asked to look at the raw materials. You  
14          took what you saw from the Decision; is that right?

15      A.   That is correct.

16      Q.   We note from 33 that you are careful to use the word  
17          there "perceived" rather than "actual risk that they  
18          faced". We can remind ourselves of what the President  
19          said yesterday, that if, as the CMA found in its  
20          Decision, there was not in fact any regulatory risk it  
21          still may matter that the perception of it persisted in  
22          terms of having an effect on the market, and that is  
23          what you are identifying there, I think?

24      A.   Yes, yes.

25      Q.   We can remind ourselves what the CMA did find. I am

1       going to do this quite quickly because I think you will  
2       be familiar with it, but I want you to have these points  
3       in mind. So if we can go to {IR-A/12/112} of the  
4       Decision and look first at paragraph 3.238 at the foot  
5       of the page. We remind ourselves that:

6               "... the overwhelming majority of prescriptions ...  
7       were open and typically did not specify the condition of  
8       the patient, [so] pharmacies were able to dispense any  
9       licensed hydrocortisone [over the page] tablets that  
10      were available. Pharmacies could either dispense [full  
11      or skinny] ... as both types of tablets were licensed  
12      medicines."

13              So that is the first point and the following  
14      paragraph again, we will take it quickly. You will  
15      recall the point that the same price is paid and the  
16      pharmacy was paid the same amount, but there was an  
17      incentive therefore on pharmacies to dispense a skinny  
18      label tablet to fill an open prescription as that would  
19      have allowed them to maximise the profits they make. So  
20      there is always that pull towards the skinny product.

21              At 3.240 {A/12/113}, the MHRA, this is  
22      contemporaneously, we note, before skinny label tablets  
23      were launched, so this is before October 2015:

24              "... the MHRA [it is a regulator] the Chief  
25      Pharmaceutical Officers for NHS England, NHS Scotland

1           and NHS Wales did not consider that the off-label use of  
2           skinny label hydrocortisone tablets created any risks to  
3           patient safety that would justify taking any action to  
4           limit or prevent off-label use."

5           Then in the following paragraph we have some  
6           evidence for why -- both the fact of and why the MHRA  
7           was unconcerned.

8           A. Yes.

9           Q. I just ask you to focus and remind yourself quickly of  
10          (a) first of all, that they wrote to Auden who had  
11          written to them trying to draw their position out, but  
12          they did not get the answer they wanted. The MHRA was  
13          quite happy to make clear to Auden that there was no  
14          patient safety issue and no need for them to require  
15          altering of the packaging.

16          "(b) ... MHRA explored with MA holders of skinny  
17          label tablets whether they might voluntarily include  
18          some text [over the page] that reflected" ...

19          A. As we wait, I will just make a quick comment.

20          Q. Yes.

21          A. You have not made your question, yes, of course. I just  
22          clarify, I am in agreement with what is written there.  
23          I just clarify the point at 239 about the incentives of  
24          the pharmacy. They should be incentivised to procure  
25          the cheaper drug, which is true. I am just adding

1 a tweak, which is this incentive, though, is diluted by  
2 the fact that typically their profitability is being  
3 capped. This is a very complicated mechanism so it is  
4 not just purely by price.

5 Q. That is where it starts getting complicated. But in  
6 broad --

7 A. I just want to clarify. But in broad terms I agree.

8 Q. Yes, you do not disagree with what is said.

9 THE PRESIDENT: So this is the general profitability of  
10 the --

11 A. Of the pharmacy.

12 THE PRESIDENT: I see.

13 A. So if you obtain a considerably better deal because it  
14 is much cheaper, you may have a clawback clause, so that  
15 you may have to return part of that to -- into other  
16 cheaper -- it is a like a price cap mechanism with  
17 a basket of goods.

18 MR PALMER: Do you have a hard copy with you? Perhaps we  
19 can make some progress.

20 A. Unfortunately no. I do not have -- no, 14, I do not  
21 have either A12. But if somebody provides me. I only  
22 have --

23 THE PRESIDENT: Is help on its way regarding the problem, or  
24 is there ...

25 MR PALMER: This is intended to be largely uncontroversial,

1           and so I am not too fussed about having the document on  
2           the page.

3       THE PRESIDENT: Let us carry on and see how we go.

4       A. Absolutely, I am very happy. In case I misunderstand  
5           something I will let you know, but so far so good.

6       MR PALMER: Yes, so far so good, all right. So the point at  
7           (b) was:

8           "... the MHRA explored with MA holders of [skinnies]  
9           whether they might voluntarily include some text ..."

10           Which was modelled, like, on the guidance, on usage  
11           patterns but explicitly acknowledging that the product  
12           can be used for other indications from those listed on  
13           the SmPC, so that a patient who was an adult who had  
14           been given that skinny product and was carefully reading  
15           the patient leaflet would understand --

16       A. -- what skinny meant.

17       Q. -- that it can be given and prescribed for other  
18           conditions, other than for those indicated on that  
19           leaflet. So some reassurance there.

20       A. So that is A12, you said?

21       Q. Yes, so I am on paragraph 3.241, we should be on  
22           page 114, now {A/12/114}. So let us skip to (d):

23           "The MHRA decided not to issue any guidance on  
24           dispensing hydrocortisone tablets as there were no  
25           public health concerns. [They] to the CMA that it would

1           only have intervened ... where there was a public health  
2           concern ..."

3           You remember the point that they do not put out  
4           guidance saying actively there is no public health  
5           concern with these products because they see that as  
6           interfering with the commercial matters. But if you  
7           like an absence is like a clean bill of health.

8           At (f) when asked, they advised the Chief  
9           Pharmaceutical Officer for NHS England that there was no  
10          patient safety issue arising because they were  
11          bioequivalent to full label tablets, and that  
12          communication arose as a result of Auden contacting  
13          NHS England.

14          You remember that, that both NHS England and MHRA  
15          were more than happy to advise anyone who actually asked  
16          them in the absence of guidance what the position was,  
17          they had no problem writing to say so?

18          Then at the following paragraph, 3.242, the Chief  
19          Pharmaceutical Officer relayed to Auden that there were  
20          no material differences, and:

21          "... 'based on the advice ... I do not see any risks  
22          to patient safety that warrant any communication to  
23          senior pharmacists ...'"

24          And NHSEI, that is NHS England, essentially:

25          "... explained to the CMA that it did not consider



1           it necessary to issue any guidance [either] as  
2           'pharmacists would have understood that [AM's] full  
3           label ... tablets are bioequivalent to [skinnies],  
4           meaning that they are pharmaceutically equivalent and  
5           therefore dispensing them did not present any threat to  
6           patient safety'."

7           And Scotland and Wales took the same position, so  
8           that is the review of evidence there.

9           If we go on, it is page 327 {IR-A/12/327} to the  
10          conclusions in section 4, paragraph 4.88. We are back  
11          on the screen. So please do use either.

12         A. Yes.

13         Q. But there is the CMA's conclusions arising from that  
14          evidence as I understand it, which again really goes  
15          over much of the same territory, the bioequivalence, the  
16          identical effects in the body, used to treat the same  
17          conditions. They are the same product.

18                 The only difference is what is on the leaflet,  
19                 effectively, for regulatory reasons arising from the  
20                 orphan designation status given to Plenadren and the  
21                 final sentence there:

22                         "A skinny label MA therefore does not represent  
23                         a genuine 'clinical' distinction, but rather arises as  
24                         a result of regulatory circumstance."

25                         4.89:

1            "... evidence demonstrates that prescribers [didn't]  
2            ... draw [any] distinction ..."

3            In fact, open prescriptions. And Professor John  
4            Wass, who was a consultant endocrinologist wasn't even  
5            aware of the difference, it didn't make any difference  
6            to him and you remember he actually wrote to Auden as  
7            well, didn't he? They asked him, tried to get him --

8            A. Yes.

9            Q. -- and he was concerned that they were only writing for  
10            commercial reasons rather than any genuine concern for  
11            patient safety arising from the point.

12            And (b):

13            "None of the GP software providers contacted by the  
14            CMA had flags or warnings [related to this] ... or  
15            [preventing] or [cautioning] against ... writing an open  
16            prescription."

17            And at 4.90:

18            "... no material distinction can be drawn between  
19            full and skinny label hydrocortisone tablets."

20            At 4.93, the next page:

21            "Upon receipt of an open prescription ... pharmacies  
22            are unable to substitute a medicine other than  
23            hydrocortisone tablets ... [but they] can choose between  
24            different suppliers of hydrocortisone..."

25            And 4.94:

1            "That means that ... the decision of whether to  
2            dispense ... full or skinny ... and to choose which  
3            manufacturer's [and] supplier's hydrocortisone tablets  
4            to dispense, falls to the pharmacy."

5            And:

6            "As set out ... above [they] can and do dispense  
7            off-label ... and in the case of full and skinny label  
8            hydrocortisone tablets, there would not be expected to  
9            be any clinical impact."

10           And lastly, 4.95, (a):

11           "The Drug Tariff [didn't] distinguish ...  
12           [indicating] that both full and skinny label  
13           hydrocortisone tablets were treated as the same medicine  
14           by the [Department of Health]."

15           So that is a very rapid run through what the CMA's  
16           findings were, which I ask you to bear in mind and I am  
17           going to ask you to assume that is all correct. There  
18           are some who are disputing the regulatory treatment,  
19           apparently departing from the MHRA's view, but for the  
20           purposes of my questions I just want you to assume that  
21           the CMA's findings on this are correct and that is  
22           presumably the basis upon which you approached your  
23           report as well?

24           A. Yes, I understand.

25           Q. But, as you acknowledge and in that paragraph we went

1 to, at various times some perceptions in the marketplace  
2 remained to the contrary, some belief that there was  
3 risk related to those matters and that is the point you  
4 fairly make in your paragraph which leads to the  
5 differentiation in the market.

6 Now, perceptions can change over time. That is the  
7 first point, isn't it?

8 A. Yes.

9 Q. Yes, and they are more likely to change when the  
10 perception you have turns out to be incorrect than if  
11 they are not, if it is objectively established that  
12 someone's perception is wrong that means more vulnerable  
13 to changing when someone comes along and says no, no,  
14 you have got that wrong. Here is why.

15 A. You revise your priors into proceedings.

16 Q. It might be because someone takes advice from  
17 a solicitor on something or approaches the MHRA and says  
18 well, hold on, that notice you have not issued any  
19 guidance on this. Can I take it that you are content?  
20 Something like that, whether informed or just a reaction  
21 to what the market is doing or the fact that NHS  
22 England, Scotland and Wales are all running procurement  
23 exercises for hydrocortisone tablets without  
24 distinguishing the two at all and awarding the contracts  
25 to skinny tablets. At some point someone wakes up to

1           this and says well, hold on, my view might be wrong. If  
2           they have a reason to revisit the question from whenever  
3           they last looked at it. Is that fair?

4       A. Yes, as a general statement, I am in agreement.

5       Q. Yes, and there was no -- all those conclusions which  
6           I took you through just now, there was no sense in which  
7           any of that was sort of shrouded in mystery. If anyone  
8           had wanted clarity they could have asked at any point if  
9           they were in doubt. Is that right?

10      A. Yes, if I may just make a comment on the discussion,  
11         which is a very relevant discussion indeed, is about the  
12         clinical and medical characteristics of these products,  
13         which probably are relevant consideration for experts.  
14         When you come to customers' decisions, I am not sure  
15         whether they would have the same information as those  
16         very well-informed people. I am just drawing  
17         a distinction.

18      Q. But like Auden, you could ask for it if you felt you  
19         lacked relevant information. This goes to your point  
20         that you were making very eloquently if I may say so  
21         yesterday, that in answer to the suggestion that someone  
22         said well, price is not a factor. Well, it may become  
23         a factor if the price goes up enough. It may cause you  
24         to look again and to check, well, is there something we  
25         can do about this or not? You might be prompted?

1 A. Again, as a general principle, I am agreement of course.

2 Q. It might well be that before you did that you would need

3 a reason, pharmacies no doubt are staffed by very busy

4 people dealing with plenty of medicines apart from

5 hydrocortisone tablets, plenty of issues, no doubt.

6 They might need a reason to look at an issue. They

7 obviously did look at it following market entry.

8 A. It is a possibility, but not the only one but yes, it is

9 a possibility.

10 Q. We will see the evidence that they were looking at it

11 after market entry, are we going to take this product or

12 not, but of course if prices, if they suddenly find that

13 their margins were not the same, that they were not

14 getting a margin, that the price was not leaving them

15 enough room between the drug tariff and the price they

16 are being charged to cover their own costs or their main

17 own margin, they might start looking at this question

18 again. It might prompt them into reviewing their

19 position. Is that fair?

20 A. Yes, you are describing some plausible scenarios,

21 I cannot agree on their relevance, but on the general

22 proposition I cannot disagree with, of course.

23 Q. Well, let's now look at the actual evidence as to how

24 the market did respond and I am going to start with the

25 wholesalers, because as you know suppliers like

1 Accord-UK, who you know I represent for the Intas  
2 period, chiefly provide their medicines to wholesalers,  
3 so you have got to get the wholesalers on board first,  
4 haven't you?

5 It is fair to say that the evidence as to  
6 wholesalers, like AAH and Alliance in particular, the  
7 full-line wholesalers shows increasing acceptance across  
8 the market of skinny products over time?

9 A. Yes, I mentioned some. The Decision says it was 10 and  
10 then 20% in 2016 and 2017. I looked above that period.  
11 It increases to 13% if I remember correctly, the amount  
12 of skinny that AAH is actually supplying.

13 Q. Well, you mentioned this yesterday. You referred in  
14 table 3.9. If we can just take a quick look at that.  
15 {IR-A/12/142}, please. And that table --

16 A. Yes, this is precisely the table I was trying to  
17 remember from.

18 Q. Yes, that's right, well you don't have to remember. You  
19 can look at that.

20 A. 10, 20%, yes.

21 Q. And I think in particular you drew attention to the row,  
22 the third substantive row at "AAH: to customers other  
23 than Lloyds" was 18% in the penultimate column for  
24 skinny labels in 2016, rose to 38% in 2017.

25 A. Yes, those customers represented roughly 30% of the

1 customer base of those retailers -- of those  
2 wholesalers, apologies.

3 Q. Alliance even more dramatic, 35% for non-Boots customers  
4 in 2016 going up to 60% in 2017. Those are averages for  
5 the year. We can get some more details on the actual  
6 trend if we look at {IR-N/27/2}.

7 EPE OPERATOR: I am sorry, it has stopped again.

8 MR PALMER: It's stopped again. We will need this document  
9 so I will wait. (Pause) It is small at the top of the  
10 page, so we will need to enlarge the top. It's still  
11 a little small. I do not know whether it is possible  
12 to -- it is the top line I want for the purposes of this  
13 question. That is better. Thank you.

14 So this is that same data, but broken down --

15 A. By month.

16 Q. -- by month, from March 2016 through to the end of 2017.

17 In fact, it is not the top line. It is the middle  
18 box if you like "AAH sales to customers other than  
19 Lloyds" and you can see there starting in March 2016,  
20 that for the first four months of the year it was 0%,  
21 tiny 4% in May, but then AAH was obviously responding to  
22 a new perception of skinny in the market because we see  
23 22% rising to 33% in 2016. That is all before the Intas  
24 period. If we can skip to --

25 A. I see until July 2017, but I do see the trends of



1 course. It is not disputed.

2 Q. And if we just go rightwards on that same table to catch  
3 the end of the year I think we will see in 2017, which  
4 is when we get to the Intas period, it goes up to 53%.  
5 That is AAH. Let us wait for that, there we go. Do you  
6 see 53% in September goes down to 40? Significantly  
7 higher percentages even in that 38% average for the year  
8 and same with Alliance. Now their monthly figures are  
9 marked in blue which is technically confidential, but  
10 you can see high levels already from March 16 in their  
11 case for non-Boots customers at the bottom of the page  
12 there. And in 2017 a continuing up trend going upwards.  
13 If you go right through to November 2017, do you see  
14 that figure there? I will not read it out loud.

15 A. Yes.

16 Q. You can make it out. Again, a considerably higher  
17 figure again as to what they are doing for their  
18 non-Boots customers. But what I am interested in is not  
19 those absolute percentages necessarily, but also the  
20 trend over time is pretty marked, isn't it, in both  
21 cases?

22 A. Yes.

23 Q. Now, full-line wholesalers --

24 A. Sorry, excluding Lloyds, excluding Boots.

25 Q. Excluding Boots, yes, and of course we can look at the

1 figures including them as well and that obviously brings  
2 those numbers down because we know that Boots and Lloyds  
3 were not purchasing skinnies in increasing proportions.

4 A. Yes, and it has not changed much over that period.

5 Q. Well, we will be coming to the pharmacies individually,  
6 but I just want to look at the wholesalers to start  
7 with. Because it tells us something about the market,  
8 does it not? We are still on full-line wholesalers at  
9 the moment. We know they considered a number of factors  
10 in deciding what they wanted to stock.

11 If we go to the Decision again at {IR-A/12/142},  
12 3.290 at the bottom of the page. Now, we see they  
13 explained, that is AAH and Alliance again, that when  
14 deciding which hydrocortisone tablets to stock, they  
15 considered --

16 A. I'm sorry, which paragraph?

17 Q. 3.290, bottom of the page. Do you see that?

18 A. Yes.

19 Q. So that is two largest full-line wholesalers explaining  
20 and this is specific to hydrocortisone tablets not just  
21 general policy, but they say that:

22 "... when deciding which ... tablets to stock, they  
23 considered factors including:"

24 You can see:

25 "customer demand;"

1           You see right at the top of the list there:

2           "customer preferences, cost price and market selling  
3 price,"

4           So that is their margin -- that is the wholesalers'  
5 margin that they are looking at there:

6           "product characteristics and suitability (including  
7 what indications the product was licensed for);"

8           That is something that they considered themselves.

9           "product interchangeability; supplier service  
10 levels/reliability; and availability of product."

11          And they then go on to explain that:

12          "Customer demand and preferences, and product  
13 characteristics and suitability were the most important  
14 factors [which they] considered, followed by product [on  
15 the next page] interchangeability and [the]  
16 'commercials' (including but not limited to purchase  
17 price) for AAH and pricing and service level  
18 considerations for Alliance."

19          So I am guessing that none of that surprises you at  
20 all as an economist?

21       A. No, I would simply observe -- I would simply say that  
22 some of these factors are observable by us in the data,  
23 some are obviously not. The pharmacist will know, the  
24 wholesalers would know, but we do not. We can just see  
25 what the consequences are in terms of market observables

1           which, when we are limited of course, it is typically  
2           prices and quantities. That is what we can see.

3       Q.   So a wide range of different things which can be  
4           important to them and to which they may attach value.  
5           That is what they are considering. Obviously not just  
6           price although that is a factor. They have an eye on  
7           their margin. But demand side factors, supply side  
8           factors, they are all included in their consideration in  
9           deciding what to stock. As I said, they include those  
10          product characteristics and suitability and indications.

11               We know that when AAH went, you will remember from  
12           0% skinny or close to 0 by May 2016 to supplying much  
13           higher levels thereafter, Alliance even more so, by that  
14           time suitability and indications licensed for was not  
15           a reason not to stock those skinny products by then.  
16           You agree with that?

17       A.   There was no medical dispute, but we know that is a grey  
18           area for some which again I cannot observe because I do  
19           not have any direct evidence about that. There were  
20           some questions around it. So as I said a grey area.

21       Q.   I do not know whether you were here for the evidence or  
22           have read the evidence of Mr Sully and Mr Beighton on  
23           behalf of Advanz who used to work for AMCo. They gave  
24           evidence that they had reached out both to the Alliance  
25           and AAH as recently as December 2015 before that and

1 received, they said, zero interest in response to their  
2 enquiry as to whether they would accept a skinny product  
3 at that point, but you can see that changing within  
4 a matter of months at a time which was not eminently  
5 predictable by them.

6 A. Yes, the time they mentioned, but this can change of  
7 course.

8 Q. It can change, exactly. So, for example, let us look at  
9 the position of AAH. If we go to {IR-H/863/1}. I am  
10 not sure you have seen this document. The Tribunal has  
11 done. And it is that top email beginning "Hi  
12 gentlemen". This is an internal AMCo email indicating  
13 a change, this is the date you see 26 April 2016,  
14 a change in interest in the market in skinny products  
15 following a meeting from DE Pharmaceuticals and their MD  
16 who of course is a short line wholesaler, but you will  
17 see at the final sentence of that paragraph:

18 "Kit and Sue have picked up similar feedback from  
19 Lexon and AAH in the last 48-hours."

20 Which tallies with that data we just saw in fact,  
21 does not it?

22 A. So Mr Palmer, I am all in agreement with this. These  
23 are possibility cases which are even plausible ones, but  
24 I will stop there. So this is also entirely consistent  
25 with preferences that were very sticky at the beginning

1 of the period, but very heterogeneous so people made  
2 choices and they were staggered because they had to  
3 purchase at different points in time and preferences may  
4 not change at all, so I am not sure yet whether -- So  
5 I am not saying that necessarily preferences are  
6 changing. They may be changing or may not be changing.

7 Q. I am not trying to over-generalise. I am looking very  
8 specifically --

9 A. Possibly.

10 Q. -- very specifically at AAH and Alliance. We can see  
11 here the moment really, both in the data and in the  
12 contemporaneous emails, where AAH start changing their  
13 attitude. April 2016 was 0% for them. It was 4% in May  
14 and then upwards and that is reflected in this email, is  
15 it not?

16 A. Yes, it is a consistent story. Let me say it again. It  
17 is a possibility result.

18 Q. Well, it is more than a possibility. To the extent that  
19 they had considered lack of indications to be an  
20 absolute obstacle before, no longer now?

21 MR HOLMES: Sir, I am slightly concerned that these  
22 questions appear to be inviting Professor Valletti who  
23 is obviously an expert witness addressing matters of  
24 economics to comment on the factual position. Now, when  
25 I was cross-examining Mr Bishop the position was

1 different because he had opined based on certain  
2 assumptions of facts which he had set out in his report  
3 which needed to be considered with him, but I am not  
4 clear really what the foundation is on which a series of  
5 factual propositions and documents, large swathes of the  
6 Decision, are being put to this witness for comment  
7 because it does not appear to relate really to economic  
8 questions at all.

9 MR PALMER: Well, it does not yet, but it will.

10 THE PRESIDENT: Mr Holmes, I do not think you need worry  
11 that we are under any misapprehension as to the extent  
12 to which Professor Valletti can assist us on points and  
13 I am minded to give Mr Palmer his head, but if we are  
14 looking for answers to questions of fact as opposed to  
15 economic opinion, well, with great respect to you,  
16 Professor, we will not be looking to you.

17 MR HOLMES: I am grateful, sir.

18 A. And I will not take it personally.

19 MR PALMER: The witness was taken to a series of documents  
20 by Mr O'Donoghue yesterday on a somewhat selective and  
21 it is important that the factual -- the witness was very  
22 clear yesterday he is concerned with the factual  
23 position on which to base his economic --

24 THE PRESIDENT: That is how I am taking your questions,  
25 Mr Palmer.

1 MR PALMER: That is how they are intended to be.

2 THE PRESIDENT: We are all making the same assumptions or  
3 have the same understanding of the material. So that  
4 the witness, when you come to his area of expertise, can  
5 say on the basis of what he has seen, his opinion is  
6 whatever.

7 MR PALMER: The point that I am showing -- dealing with at  
8 the moment, Professor, is that at this wholesaler level  
9 at the moment, this full-line wholesaler level at the  
10 moment, there were changing perceptions it seems of the  
11 importance or otherwise of licence indications. That is  
12 what I am putting to you as a factual basis by way of  
13 illustration of the point that I make about the  
14 changeable nature of the perceptions that you identified  
15 in your report when one views them over time.

16 A. I do not know if the word change in perception, I can  
17 see in the data increasingly they had the wholesalers,  
18 they had downstream customers, the pharmacy, that were  
19 increasingly interested in being supplied from skinny  
20 label products. Whether that was a change in perception  
21 is a bit more of an esoteric discussion which depends on  
22 many factors because we cannot obviously assess or  
23 measure perception.

24 Q. Right. But also as they were very clear in that  
25 response, what they stock is also driven -- is very



1 important factor of course, by demand from their  
2 customers, the pharmacies and at page -- Decision  
3 page 142, so that's {IR-A/12/142} --

4 A. As we wait, we may also, I may also provide a comment.

5 So the perception of the wholesaler which in my opinion  
6 is very likely to be informed by medical considerations,  
7 because they are experts, may still be very different  
8 from the perception of the pharmacies in the following  
9 sense: the pharmacies at the end of a line will have  
10 a person in front, the pharmacies may also be informed  
11 may say, look, there is this new product it may even be  
12 cheaper although you may or may not pay for the  
13 prescription itself. But imagine you are facing  
14 a customer patient who is fairly old, who has been on  
15 full for their entire life, you can say take this new  
16 one, it is actually cheaper, it is good for the NHS,  
17 they are going to save money which is a great thing for  
18 the country, but they may say I have been for many years  
19 on this one. I do not want to change. Try to convince  
20 this person. So you may be personally informed. What  
21 I am saying is that the perception that matters, it is  
22 a combination of all of them, but the perception of the  
23 customer is quite important and this is something we do  
24 not observe.

25 Q. So we do not observe it separately of course. So the

1 point you are making is that patients may attach value  
2 to the continuity of --

3 A. Some patients, yes.

4 Q Some patients --

5 A But that is what the pharmacists will know and they may  
6 have a certain perception about the medical equivalence,  
7 the biological equivalence, the pharmaceutical  
8 equivalence, which may not be the same perception,  
9 they're able to supply further down to the customers.

10 Q. But in terms of perception of regulatory risk that is  
11 a matter for the pharmacist?

12 A. Yes, that is a matter for the pharmacist.

13 Q. But, yes, okay. I will put the point to you, it hasn't  
14 come up yet, but it is paragraph 3.291 of the Decision.  
15 You may remember it, Alliance told the CMA that only  
16 Boots and Morrisons had expressly requested a full label  
17 product and in AAH's case they told the CMA that only  
18 Lloyds had expressly requested a full label product. Do  
19 you remember that?

20 A. Yes, roughly, yes.

21 Q. It is not coming up, but I will move on. For the  
22 Tribunal's note it is paragraph 3.291.

23 When we come to short-line wholesalers of course we  
24 know they overwhelmingly buy skinny products,  
25 principally for the independents who are driven by

1 price, but they would also have to satisfy themselves  
2 that dispensing hydrocortisone tablets off-label was  
3 consistent with the regulatory obligations on them as  
4 pharmacists. Those independents, wouldn't they?

5 A. Yes.

6 Q. Even for the price-sensitive you would expect that it  
7 would be short-sighted for them to dispense a product  
8 off label if they actively thought that would put them  
9 at regulatory risk?

10 A. Yes, they make commercial decisions and they thought  
11 that was the best they could do, yes.

12 Q. Now, the CMA did not interview any independents, did it?  
13 It just interviewed the short-line wholesalers to  
14 understand their changing perception of risk over time.  
15 But we can gather something from the data again at  
16 {IR-N/27/2} again. If we can blow that up again and  
17 this time look at the short-line wholesalers which are  
18 the third and fourth rows, you see "DE Pharma" and  
19 "Sigma" there. Again, you see growing shares of supply  
20 of skinny label products from March 2016 begins at 32%  
21 and 41% for those two short-line wholesalers and that  
22 grows up to 73% and 100% by the start of the Intas  
23 period and thereafter stays up in the high 90s for both.  
24 And that gives us a good picture of what the  
25 independents wanted and to what extent.

1 A. Yes, so all this is describing what we knew, that the  
2 markets at some stage basically separated somehow into  
3 two fairly different equally sized segments, the more  
4 price-sensitive, the less price-sensitive.

5 Q. Well, just looking at those trends, the point I want to  
6 draw out is that it was not instantaneous even in the  
7 case of the independents. It was relatively quick  
8 compared to others, but it was not instantaneous. It  
9 starts March 2016 as I say 32%, 41% and then they grow  
10 --

11 A. Yes, I accept that.

12 Q. -- and one can imagine there may be many explanations  
13 for that. One of them may have been a change in  
14 perception of regulatory risk as those independents  
15 satisfied themselves that this was an appropriate thing  
16 to do.

17 A. Another explanation which is also fairly natural to me  
18 as an economist is that over this period a further entry  
19 happened, a more skinny, the price of skinny became  
20 cheaper --

21 Q -- and the price was coming cheaper at the same time,  
22 a very fair point. Again, another development in the  
23 market --

24 A. Yes.

25 Q. -- happening over time, and certainly well established

- 1           by the beginning of the Intas period.
- 2       A.   The Intas period, when does the Intas period start?
- 3       Q.   January 2017.
- 4       A.   Right, yes.   So I do not know if I am pre-empting
- 5           a question and I do not want to, because of course it is
- 6           your job, but I have not analysed the Intas period in
- 7           isolation.
- 8       Q.   I know, yes.
- 9       A.   Because I believe the overall evidence has to be taken
- 10           into account.   It seems to me this is a single and
- 11           continuous infringement, so I would --
- 12       Q.   I will ask --
- 13       A.   I would prefer, but it is up to you, of course, to avoid
- 14           having to respond what I call the slicing in this way,
- 15           of two months (overspeaking) --
- 16       Q.   (Overspeaking) I will ask you some questions about that
- 17           a bit later on, but I will not interrupt this flow if
- 18           I may.
- 19       A.   Yes.
- 20       Q    Let us come on to pharmacy.   I am going to start --
- 21       A    Just for clarity, I did not know that you are working
- 22           for a particular company, so I am very naive.   I am
- 23           an economist so (overspeaking) --
- 24       Q.   (Overspeaking) No, I am afraid --
- 25       A    (Overspeaking)

1 Q (Overspeaking) line of mugs in front of you to stare at  
2 all day. We are all from different companies. I am for  
3 Intas and that means Accord-UK as Auden/Actavis became  
4 Accord-UK?

5 A. Many companies in this case start with A.

6 Q. I am going to refer quite a lot to Accord-UK by which  
7 I mean it changed its name, but the Auden-Actavis entity  
8 in the Intas period. I hope that is clear?

9 A. Thank you for the clarification, I appreciate that.

10 Q. Right, so let us go to supermarket pharmacies first of  
11 all. You will remember, let us start with Asda. It is  
12 identified by the CMA as having no choice but to  
13 purchase full label products and as forming part of  
14 an assured base for Auden/Actavis. If we just go to the  
15 previous page, so that is {IR-N/27/1}, so that is one  
16 page previously, and again focus in on the top line,  
17 which will be Asda.

18 A. Yes, I remember Asda initially does not buy them, buys  
19 a lot and then goes back --

20 Q. That is right.

21 A. -- and then starts again towards the end.

22 Q. That is right. First of all, starting from 0% there is  
23 a big spike in June/July 2016. Do you see that? 40,  
24 41% and then back down again?

25 A. Yes, yes.

1 Q. Then lower until May 2017, it goes up to 14%, 12/14 in  
2 September 17/18, so it is up in that range, 14/18  
3 thereafter from May 2017. That is what we know they in  
4 fact bought.

5 A. Yes.

6 Q. If we go to the Decision {IR-A/12/137}. I am sorry,  
7 136. A bad reference. {IR-A/12/136}. Do you see at  
8 the bottom of the page, (a) deals with Asda:

9 "...delegated the decision as to which of skinny or  
10 full label would be purchased to AAH or Alliance."

11 Do you see that?

12 A. Yes.

13 Q. And:

14 "Given AAH's and Alliance's approach to full and  
15 skinny label tablets at the time ..."

16 Can I ask you mentally to underline those words:

17 "... this meant that Asda purchased and used mostly  
18 full label hydrocortisone tablets."

19 Do you see that?

20 A. Yes.

21 Q. Do you see the footnote which is given for that is 393,  
22 and if we focus on that footnote we see that this is  
23 taken from Asda's response to the CMA's notice dated  
24 16 June 2016. So "at the time" means before June 2016,  
25 where we saw it very low but then a huge spike and then

1 down again, and then growing again, because in fact, as  
2 we have just seen, AAH and Alliance, this was precisely  
3 the time after May/June 2016 when they changed their  
4 view and started supplying skinny label tablets to their  
5 non-Lloyds and Boots customers such as Asda in  
6 relatively high quantities.

7 A. Again, you are focusing on this change in perception,  
8 change in views. These are very plausible terms for  
9 a lay person. In economic terms I just do not know  
10 because I cannot observe your view, I cannot observe  
11 your perception. I can observe your actual choices --

12 Q I just ask you --

13 A -- which will be affected by all of the factors.

14 Q. I am just drawing attention to a different point at the  
15 moment, because you quite fairly said in your report  
16 when you referred to this point about regulatory risk  
17 and perception, to the references in the Decision and  
18 had not been supplied with the underlying documents,  
19 least of all the data I have just shown you, I believe.  
20 The point I am putting to you is, and it may be it is  
21 a matter of fact, but I will certainly be advancing the  
22 proposition that in fact the CMA here is plain wrong to  
23 say that this evidence reveals that Asda had no choice  
24 because they delegated their decision to AAH and  
25 Alliance. Now, it may be that you do not have any view



1 on that.

2 A. So, I think this is totally consistent with what I said  
3 in the context of very different questions about these  
4 terms, highly charged terms like "totally captive",  
5 not -- what did you say, no alternative choice, no  
6 choice.

7 Q. No choice? It is what the CMA says.

8 A. As an economist, as I was saying through hypothetical  
9 examples, sooner or later there will be trade-offs as  
10 you start increasing the price higher and higher for  
11 a lower quality product, higher quality product, you  
12 will perhaps revise your choice, not necessarily your  
13 perceptions, but it is about making trade-offs between  
14 prices.

15 Q. Making trade-offs. Now, I certainly accept that. Just  
16 for the record so we can see this, if we go to  
17 {IR-H/1109/1}. This is one of two further Section 26  
18 notices which Asda provided to the CMA which are omitted  
19 from the Decision completely, so you had no hope of  
20 picking this one up in your review of the facts. If you  
21 look at -- sorry, it is {IR-H/1109/1}. This is an Asda  
22 response. If you go to question 2 down at the bottom,  
23 in answer to the question:

24 "If you have switched suppliers ... since  
25 1 June 2017, please explain your reasons for doing so.

1           ... Asda buys its generic ... products from three  
2 preferred supplies through a relationship with [AAH].  
3 Asda has not changed ..."

4           Then the next question:

5           "In the last response [the one that the CMA does not  
6 include] ... you indicated that Teva was your preferred  
7 supplier of all generic products including  
8 Hydrocortisone Tablets."

9           That is skinny:

10          "However, your purchase data shows that Teva's  
11 product accounted for only approximately 8% of all your  
12 purchases ..."

13          And the answer to that is please see 3(c) below. So  
14 let us turn the page if we can, and look first of all at  
15 3 (a) and then 3(c). 3(a):

16          "Asda chose Teva as its preferred generic product  
17 supplier based on the commercial terms negotiated with  
18 Teva. Asda considers a supplier's overall terms rather  
19 than individual generic prices when determining the  
20 preferred generic supplier."

21          Then at (c):

22          "Asda chose Teva as its preferred generic product  
23 supplier based on the commercial terms negotiated ...  
24 Asda is aware of Teva having availability issues in  
25 2017. This resulted in an increase in the purchase of

1 relevant products from other suppliers as per the  
2 attached spreadsheet."

3 So just pausing there, we have to be very careful,  
4 do we not, about selective quotes in the Decision from  
5 which the conclusion is drawn that Asda in this case had  
6 no choice but to buy full label products because of  
7 their perception of a regulatory risk. We have to be  
8 very careful of that indeed, do we not, and acknowledge  
9 that they had a full commercial choice?

10 A. We always have to be careful.

11 Q. That matters really when we come to -- we will come to  
12 others in a moment, but just pausing there, that is the  
13 end of Asda. But you see the theme here that will  
14 affect the economic analysis when we come to consider  
15 the direct constraints on Accord-UK, the degree to which  
16 purchasers such as Asda are or are not in fact willing  
17 to buy a skinny product.

18 A. Yes, it is one of the elements I would consider in the  
19 assessment of market definition, yes.

20 Q. So the next supermarket is Sainsbury's. Now, there is  
21 no monthly data at all in that table I showed you, so  
22 I will not take you to that. But if we go back to the  
23 Decision at page {IR-A/12/138}.

24 A. Mr Palmer, we have been here for over an hour, I --

25 Q. Would you like a break?

1 A. No, it is just I do not think I have received  
2 an economic question yet, if I may just point it out.  
3 It is fine.

4 THE PRESIDENT: Professor, let counsel develop their case.  
5 We will come to it.

6 A. Absolutely. I was waiting for counsel. Apologies,  
7 I apologise.

8 MR PALMER: I will set your mind at rest, and I think it may  
9 be a good time for a transcriber break before I move on.  
10 But to set your mind at rest I will be asking you in  
11 some detail about the direct constraints and the  
12 indirect constraints, and I think you explained  
13 yesterday very clearly, if I may say so, that you have  
14 to consider those against a proper understanding of the  
15 facts and --

16 A. Always the facts.

17 Q. -- to that extent, of course you will appreciate the  
18 position taken in the Decision and the position taken by  
19 two of my co-appellants is that half of the market had  
20 no choice and that minimised the effectiveness of those  
21 constraints. You understand that is the background on  
22 which we are working?

23 A. I do understand, thank you.

24 Q. So I just need to take you through this in order for you  
25 to be able to give your view on that question in the

1 light of the facts as they actually are.

2 THE PRESIDENT: I think Professor, the way this is going to  
3 work is you are being taken through various factual  
4 documents so that you and I and my colleagues understand  
5 them, and once we have got a foundation for the economic  
6 points they will come, but we will not want to be  
7 retreading all of the factual points that have been laid  
8 down. So all that has happened is that Mr Palmer is  
9 setting out his store and we will be able to judge your  
10 answers against the facts which, to be clear, we will be  
11 not investigating the truth of, we will be assuming  
12 them. We will want to hear your opinion on that basis.  
13 So that is where we are going.

14 MR PALMER: That is precisely where we are going. I am very  
15 grateful to you, sir.

16 THE PRESIDENT: We will rise in that case until just before  
17 half past. Thank you.

18 (3.18 pm)

19 (A short break)

20 (3.28 pm)

21 MR PALMER: Professor Valletti, we were about to look at  
22 Sainsbury's, the next of the supermarkets. We have on  
23 the screen, happily, do you see at the bottom (f)  
24 {A/12/138}:

25 "Similar to Asda, Sainsbury's delegated the decision

1 as to which of skinny or full label would be purchased  
2 to its wholesalers [again] (AAH and Alliance). Given  
3 [their] approach to full and skinny label tablets at the  
4 time ... this meant that Sainsbury's purchased and used  
5 mostly full label hydrocortisone tablets."

6 We see again that the footnote there is to  
7 footnote 410, which you will have noted.

8 A. Apologies to interrupt you, but I do not see anything on  
9 my screen, yet.

10 Q. Nothing on your screen?

11 A. Nothing. On my screen, I do not know. On the other  
12 screens I cannot say. It is information I do remember  
13 from the screen. It is my screen. I did not touch  
14 anything. You know. (Pause)

15 THE PRESIDENT: We do not have an alternative machine that  
16 we could -- I suppose ... Right, what we will do is we  
17 will rise for five minutes to see if this can be sorted  
18 out.

19 (3.35 pm)

20 (A short break)

21 (3.40 pm)

22 MR PALMER: Thank you, Professor Valletti. I was trying to  
23 direct your attention to (f), which I hope you now see  
24 on the screen in front of you. Just take a moment to  
25 read that paragraph (f) {IR-A/12/138}.

1       A. Yes, I have read it.

2       Q. And also footnote 410, you can see it is derived from

3       a Section 26 notice dated June 2016 again.

4       A. Yes.

5       Q. It captures the position as it stood then but not later.

6       There was another Section 26 notice given to Sainsbury's

7       not referred to in the Decision. If we look at that, it

8       is {IR-H/1039/1}. You can see that is dated June 2017.

9       Do you see that, a year later?

10      A. I do.

11      Q. And at question 4, do you see the answer:

12                "Sainsbury's cannot be certain of the exact generic

13                supplied by AAH as the majority of the volume was

14                ordered via the Hillcross Generic Scheme. The data

15                supplied is from reports provided by AAH and no further

16                data exists post May 2016 ..."

17                Do you see that?

18      A. Yes.

19      Q. That position is -- Sainsbury's at this point find

20      themselves in something of a difficulty because

21      Sainsbury's had, of course, by this time exited the

22      market had not they? They sold their pharmacies'

23      business in September 2016. Were you aware of that?

24      A. I do not remember at this moment. Sorry, the question 4

25      is about the scenario applied in question 2, so you will

1           also have to let me read what is that scenario.

2       Q. Do you want to read it to yourself. (Pause)

3       A. Okay. It is saying, if I understand, that AAH is buying  
4           from Teva, from another scheme and Sainsbury's cannot  
5           tell exactly where the generics are coming from. Is  
6           that --

7       Q. They have not kept their records, and if you see just  
8           above the numbered paragraphs, do you see the paragraph  
9           beginning "Please note"?

10      A. "Please note, as mentioned before, we sold our pharmacy  
11          business to Lloyd's in September ..."?

12      Q. "... and so have limited data available to us.  
13          Nevertheless, we have tried to respond to the best of  
14          our ability."

15                So the short point is there is no data after  
16                May 2016 from Sainsbury's at all, just at the very  
17                beginning of the period when AAH and Alliance were  
18                beginning to supply the skinnies. They shortly after  
19                exit the market. They cannot say what happened from May  
20                to September 2016, they do not have the data. This is  
21                long before the Intas period, of course. But I am going  
22                to ask you for your agreement, you cannot derive from  
23                that, that there was some sort of structural reason in  
24                the market why Sainsbury's could not buy skinnies and  
25                had no choice but to buy full label?



1       A. "Structure" is a word which can have many  
2       interpretations. We are in agreement that there was no  
3       medical reason, we have asserted that, and I do see that  
4       a lot of pharmacies precisely followed that view and  
5       they decided to go for skinny. But we also know from  
6       other evidence, of course you presented me some cases  
7       which are very clear, but some other cases instead they  
8       said that they did not want to, so another example that  
9       was presented to me, was it earlier in the day or --  
10      yesterday, it was Morrisons, and Morrisons, they did try  
11      and they said, no, no, we do not want, let us go back,  
12      so --

13     Q. In fact they are here explaining that Hillcross scheme  
14     was out of stock. They take Teva scheme followed by the  
15     Actavis scheme, so it looks like skinny is preferred to  
16     Actavis so far as one can tell, if anything. Yes, is  
17     that fair?

18     A. Yes, so my view generally is that in this market that is  
19     being clear, is that there are -- the demand happens at  
20     the downstream level and then the wholesalers will  
21     supply that demand. So it is a derived demand. So what  
22     matters ultimately is what the final customers are  
23     demanding, and we have seen very clearly that some  
24     customers are very much interested in the cheapest drug  
25     when available, and some others are less interested. So

1           there is a differentiator, and there is -- so my opinion  
2           from what I have seen is that there are some larger  
3           players, by larger I mean the national supermarkets,  
4           etc, that -- and again, this is coming just from my  
5           informed opinion about the market I know, that they  
6           perceive market risk sometime beyond the pure medical  
7           point of view, because they care a lot about what they  
8           call brand safety. So imagine --

9       Q. This is the thing, Professor Valletti --

10      A. -- something goes wrong --

11      Q. Just to interrupt you there?

12      A. Yes, please.

13      Q. Because you perfectly accurately said based on the  
14           market you know, and the point I put to you earlier is  
15           the market you know was informed by what the CMA gave  
16           you, what they footnoted in their Decision, and not by  
17           the underlying documents which in fact cast a different  
18           light on that market situation which they did not  
19           reference at all.

20      A. So I have seen -- so all the documents which are  
21           referenced in my report I have seen, of course. I have  
22           asked the CMA to provide me access to those documents.

23      Q. Yes. One has read it in your report.

24      A. And some other documents as well, obviously, I reference  
25           to those which I think are important for --

1 Q. We need not turn it up but you have very helpfully  
2 listed both in your annexes B and C to your report.

3 A. Yes.

4 Q. You have listed in B all the documents you refer to and  
5 you have listed in C all the other documents that you  
6 were provided with by the CMA but which you have not  
7 referred to in your report?

8 A. That is a correct description.

9 Q. It is fair to say that none of this data or information  
10 about what the pharmacies were actually buying was  
11 amongst those documents that you were provided with?

12 A. Thank you for telling me, and in fact I do not recall  
13 having seen those, yes.

14 Q. In fact there were no documents in the Intas period  
15 listed in annex C, apart from that exchange of letters  
16 that you remember Intas had with the Department of  
17 Health. There was one exchange of letters about the  
18 workings of the drug tariff; do you remember that?

19 A. I take your word for that.

20 Q. Apart from that there were no documents from the Intas  
21 period in annex C at all, was there?

22 A. I have not analysed the Intas period in isolation.  
23 I have not.

24 Q. No. So just to complete the market you know on the  
25 supermarket front, Tesco, we can deal with it quickly,

1           overwhelmingly bought skinny products. We have covered  
2           that. We do not need to look at the detail of that, we  
3           know the percentages are very, very high. Then  
4           Morrisons was the last one, and you mentioned that  
5           yesterday, and you were asked some questions about it by  
6           Mr O'Donoghue. So I want to just go back to some of the  
7           documents there to put Mr O'Donoghue's documents in some  
8           context.

9           Let us just look at the figures first of all.  
10          {IR-N/27/1}, again, please. Because we have trouble  
11          seeing it on the screen and you may as well, we have had  
12          this blown up now into A3. I have enough for me to keep  
13          one for myself. Could I keep one and then pass the  
14          others around, certainly to the Tribunal and to the  
15          witness and to anyone else who finds it easier to see on  
16          paper than on the screen. This way you can --

17       A. I appreciate, thank you.

18       Q. This way you can look at the whole row at once as well.

19       A. Yes, absolutely. (Handed)

20       Q. For anybody else who would find that helpful. I am just  
21       going to take you to the Morrisons row. Do you have  
22       that?

23       A. Yes, I do.

24       Q. It starts off in March 2016. Very low indeed, not  
25       unusually, but then going up from July/August/September

1           until November, much higher, then hits its peak in  
2           December 2016, so 65%; do you see that?

3       A.   Yes.   The peak is in March 2017 actually, but that is  
4           okay.

5       Q.   You are right, sorry, you are quite right.

6       A.   It goes down --

7       Q.   Down to 12 then 51, 67 and then there is a real change  
8           in March 2017, from April 2017 it goes back down to very  
9           low numbers.

10      A.   Yes, we had some emails about that where Morrisons said  
11         we do not want it, please.

12      Q.   Yes.   We will just look at --

13      A.   The Morrisons person said that we do not want it.

14      Q.   Yes, well, we will just look at that because you were  
15         shown that yesterday.   But these figures, I think it was  
16         suggested by Mr Holmes when he was looking at -- he did  
17         not look at these figures in fact, but he put to  
18         Mr Bishop that in the case of Morrisons it was best to  
19         look at the annual average rather than the breakdown,  
20         because ordering patterns are lumpy and it was perfectly  
21         possible, he said, that they were buying for six months.  
22         But we see a fairly consistent run of higher percentages  
23         from November 2016 through to March 2017, do we not, and  
24         then a consistent change from April 2017 onwards.   Do  
25         you see that?   I think that is explicable by the

1           correspondence that Mr O'Donoghue showed you, and I will  
2           just remind you of that. It is {H/1058/1}. We need not  
3           go through this because you went through it yesterday,  
4           and I think you will recall and the Tribunal will recall  
5           as well, do you remember that top email there that you  
6           see, "Once the superintendent"?

7           A. Yes.

8           Q. "Was fully" --

9           A. I perfectly remember, yes.

10          Q. Do you see, applied to all purchases since April 2017,  
11          which we can see squares with the data.

12          A. Yes.

13          Q. "Once [he] was fully aware of the situation, Full Label  
14          was his preference ..."

15          A. Yes.

16          Q. I just want you to see precisely what he was made fully  
17          aware of and what he was not. It is {H/1152/1}. This  
18          is another Section 26 notice response, this one from  
19          Morrisons and it is dated October 2018. Again, not  
20          mentioned in the Decision so it may well be you have not  
21          come across this one.

22          A. Yes. I have not.

23          Q. Question 1 reveals the circumstances in which the  
24          superintendent pharmacist at Morrisons believed that he  
25          had become fully aware of the situation. Do you see the

1 answer:

2 "It came to attention in March 2017 that we were  
3 purchasing some 'skinny label' hydrocortisone products  
4 so we instructed our wholesaler ... to restrict supply  
5 to only 'full label' product. Please see emails below  
6 and 'information flyer' attached."

7 If we just look below you see there is an email  
8 which is dated, do you see the right-hand corner there,  
9 21 March 2017?

10 A. 2017.

11 Q. Do you have that?

12 A. Yes.

13 Q. This, if we go to the next page, we will see is an email  
14 from the Alliance account manager to the Morrisons  
15 superintendent pharmacist with a flyer. Do you see the  
16 words:

17 "I have attached a flyer which explains that the  
18 Actavis variant is the only immediate release  
19 hydrocortisone tablet licensed for use in adults with  
20 primary, secondary, or acute adrenal insufficiency.

21 Options:

22 1. We can put a cascade in place to replace any  
23 Alissa [that is the skinny that they were ordering at  
24 the time] ... [to be replaced] with Actavis/Almus ..."

25 That is the Alliance, Boots Alliance product which

1           is made by Actavis but it is under an Almus brand. It  
2           is a white label operation, the Almus in-house brand, do  
3           you see that?

4       A. I do.

5       Q. "... or you can send the message out to your teams for  
6           information."

7           Or secondly:

8           "2. We can put a cascade to only move to  
9           Actavis ... if the Alissa is out of stock."

10      A. What is --

11      Q. So that is the becoming fully --

12      A. I am sorry, what is PIP, Actavis PIP?

13      Q. Actavis PIP, I think that is -- I do not know what PIP  
14           stands for, but I think it is the reference that you see  
15           above, do you see that:

16           "You are currently ordering the Alissa variant, but  
17           little of the Actavis:"

18           And there are two code numbers with the different  
19           products, "Hydrocortisone Tab (Alissa) and  
20           Hydrocortisone Tab (Actavis - was Auden)."

21           Do you see that?

22      A. I am asking because I do not fully understand this  
23           context, and again this is a document I have not seen  
24           before, but --

25      Q. I am sure I will be corrected if I am wrong, but I had



1           understood it as meaning, the second option as will only  
2           move to Actavis product --

3       A. -- if the Alissa is out of stock.

4       Q. If the Alissa is out --

5       A. Yes, but that, in economics, may be interpreted as the  
6           following: Either we change completely our procurement  
7           entirely from Alissa to Actavis and we have a single  
8           supplier, or we do a source a little bit from Alissa and  
9           then when it goes out of stock we can go to Actavis, and  
10          single sourcing, dual sourcing are complicated choices  
11          which involve costs. So yes, I was just trying to  
12          understand what this is.

13       Q. Yes, I do not dispute any of what you have just said,  
14          and it is very helpful. Thank you.

15                If we go to the next page, {IR-H/1152/3}, do you see  
16          that short response in the second half of the page:

17                "From what you have said here -- let's default to  
18          the Actavis please -- Thanks."

19       A. Yes.

20       Q. That is what is described as becoming fully aware of the  
21          situation, but you will note no discussion of  
22          bioequivalence, no discussion or drawing to the  
23          attention of any of the matters that we looked at  
24          earlier, the MHRA's attitude or anything like that.  
25          Nothing of that kind there?

1 A. But by your previous arguments, by that time people  
2 should have known, especially these people should have  
3 known about all those considerations.

4 Q. Yes, that is right. But just taking that lead --

5 A. It does not say anything, to be honest. It just --  
6 it --

7 Q. Let us see the further email at page 5 {H/1152/5}

8 A. This is Morrison, is it not?

9 Q. This is still Morrisons, yes, and do you see at the  
10 bottom half of that page, the date is now 19 July 2017  
11 and if we go to the next page, the substance of that  
12 email {H/1152/6}, you see there is a paragraph  
13 beginning:

14 "This is the current set up:

15 There was a force set up on the 31/03/2017 so that  
16 the ..."

17 A. Force means what a team? A team, a force?

18 Q. No, I think it is a selection of what product to order.  
19 Just read it through for context.

20 A. Thank you.

21 Q. So that the Actavis, Teva, AMCo and Alissa drugs will  
22 force to the Almus version, that is the Alliance own  
23 brand one.

24 A. What is -- it is generic I am not very familiar with.  
25 The force, what does it mean? Can you explain it?

1 Q. I think the effect of it is when they receive an order  
2 from a Morrisons pharmacy for Actavis, Teva, AMCo or  
3 Alissa product, the system will instead substitute  
4 forcefully the Almus version, which is the  
5 Alliance/Boots own label. Do you see that?

6 A. That is what it means. Thank you for explaining.

7 Q. That is my understanding, and so that is -- there is  
8 also, I am not sure, a "BOH force" whereby if the ALM is  
9 out of stock the order will be forced to Teva, and that  
10 was set up even earlier although it cannot have been by  
11 reference specifically to the Hydrocortisone tablet back  
12 in 2011.

13 What we have seen is, if I can put it this way,  
14 something of a cheeky move from the Alliance account  
15 manager. We can look at it if you like, it is on the  
16 second page of this double sheet, but at that time, as  
17 you say, when the position was well understood,  
18 Alliance -- we will have to look, it is a confidential  
19 figure. Can I just ask you to look at Alliance on the  
20 second page of this big handout. If you look in the  
21 Alliance 10mg row and go across to -- so this is  
22 Alliance -- sorry, to customers other than Boots. So  
23 the bottom row, Alliance --

24 A. So it is the second page, you said, Alliance?

25 Q. The second page {IR-N/27/2}. Wholesalers, bottom row,

1           which is the Alliance sales to customers other than  
2           Boots, do you see that?

3       A.   Yes.

4       Q.   Such as Morrisons, and if you go across on the 10mg row  
5           to April 2017, March/April 2017.

6       A.   I see those.

7       Q.   Do you see those figures?

8       A.   Yes, I do.

9       Q.   Yes, that is what they were doing across the market but  
10          an account manager has contacted Morrisons at this point  
11          and given some perhaps rather incomplete information  
12          arguably, and someone said, well, in that case let us  
13          just do the full. Do you see that?

14      A.   Yes.

15      Q.   Of course what was being forced to by Alliance was its  
16          own brand full label product, which we do not have any  
17          details on, but one would expect influenced by the  
18          difference between the cost price and the market selling  
19          price for Alliance. That is the purpose of their own  
20          brand label. You would expect them to be making  
21          a greater margin on their own brand?

22      A.   It is a possibility. I have no information about it, to  
23          be frank.

24      Q.   No, we do not. This had not been investigated at all,  
25          in fact, had it? So a change of this nature, going in

1 the direction from skinny to full, in March 2017 was, as  
2 you have put it, unusual, it was swinging against the  
3 flow at this point in the development of the market.

4 A. So there is a lot of factors that you are telling me  
5 about which are super interesting. On the same page,  
6 can we go to the Alliance as a wholesaler, as a whole.  
7 Not selecting only to Boots, only to this, as a whole.  
8 And we see that Alliance as a whole is typically  
9 supplying full, so your own brand, this is Alliance,  
10 right, you said, or AAH?

11 Q. Alliance.

12 A. Alliance, thank you, sorry. I did not want to mix up.  
13 So as you can see it is 15%, goes down to 7, 10, 11,  
14 goes up to 10 again, then it goes to 20, 25 and it  
15 reaches a maximum of 30%, which means whoever is in the  
16 30% it may include own label but that is also saying  
17 that 70% is on the full label. That is what it says.

18 Q. That is the Almus own label is full label, it is.

19 A. Oh, it is the full label?

20 Q. It is the full label product. It is just put in  
21 a different branded, different liveried box,  
22 essentially.

23 A. Okay, thank you.

24 Q. Yes. So that is what is happening there. The position  
25 of -- the provision of --

1       A. If anything -- so, if they want to promote their own  
2       full label this is a little bit -- I will not say  
3       inconsistent, but there is at least there is an opposite  
4       trend.

5       Q. But now you see this picture, is this a position where  
6       we should approach, from an economic point of view,  
7       Morrisons as having no choice but to buy full label  
8       tablets?

9       A. So, these are words -- I saw very explicitly what the  
10      Morrison person said earlier and he had very strong  
11      views. As you said, they did something that you define  
12      yourself, I think, cheeky, which is dangerous in  
13      commercial terms and if they are being discovered these  
14      might have consequences. So I would not want to opine  
15      on cheeky attempts by -- or what they are. So this is,  
16      it is a description of some facts which I found  
17      interesting, but I would not make too much out of them.

18      Q. You will recall that none of Alliance's other non-Boots  
19      customers expressed a clear preference for full label,  
20      but there we are. That is the supermarkets.

21             Let us come on to the pharmacies, pure pharmacies,  
22      if you like. There are six of them. Five of six are  
23      said by the CMA to have had no choice, but not  
24      Day Lewis, let us deal with that first. We know that  
25      they started ordering skinny products. We can see on

1           this table, on the first page they are ordering skinny  
2           products from March 2016. Now we have to remember, we  
3           can look at table 3.8 if you like, you might remember  
4           there is a footnote underneath table 3.8 explaining that  
5           Day Lewis had a short line wholesaler business as well  
6           as its own chain of pharmacies. Do you remember that?

7           A. Yes, I do.

8           Q. So the volumes they ordered do not match up with the  
9           orders that their pharmacies dispensed. We can remind  
10          you of that, but do you remember the point?

11          A. I think I do, yes.

12          Q. Concentrating on pharmacy dispensing now rather than  
13          that wholesaling side of Day Lewis, can we go to  
14          {H/1053/1}. I do not know if you have seen this  
15          document before, this is Day Lewis's dispensing data.  
16          Have you seen this before?

17          A. Not that I can recall in this moment.

18          Q. The Tribunal have done, but do you see there are two  
19          rows, the full product and "other", which is skinny.  
20          You see there volumes of dispensing in April to July 16  
21          there is almost all full label. Do you see that?

22          A. Yes, this is Day Lewis, yes?

23          Q. Day Lewis.

24          A. Thank you. These are monthly sales in those months,  
25          thanks.

1 Q. Yes. Then the next page, please, continuing that  
2 {H/1053/2}. In August 2016 it is still almost all full  
3 label --

4 A. -- and then it switches.

5 Q. Then it switches. Now, that switch happens to come in  
6 in September 2016, so we do not know precisely why at  
7 that point. But that is when it happens, some kind of  
8 decision was made --

9 A. Yes.

10 Q. -- at that point, and we know from other evidence that  
11 at some point earlier they had taken the view that there  
12 were regulatory obstacles to dispensing skinny and had  
13 refused to do so when AMCo approached them. That was in  
14 May 2014. I will not go back over all of that evidence,  
15 it is all factual stuff I do not need to ask you about.  
16 But just to set it in context.

17 So, at some point we know that there was a change of  
18 perception as to regulatory risk, and I think all we can  
19 draw from this, that change had happened by  
20 September 2016.

21 A. Yes, there is a point in time where a significant switch  
22 happens for that particular buyer.

23 Q. So far as Accord-UK could know, in relation to any one  
24 pharmacist such a switch could happen at any point. It  
25 is not in a position to know any pharmacist's internal



1 deliberations and thinking about whether they are going  
2 to go, make a similar switch from full to skinny; is  
3 that fair?

4 A. As a general principle, yes.

5 Q. Now, the remaining five pure pharmacies we are told took  
6 the view that there was a regulatory or clinical risk to  
7 dispensing skinny products. I just want to look now  
8 briefly at those pharmacies starting with Boots. Again,  
9 you were asked some questions yesterday about Boots by  
10 Mr O'Donoghue, and I am concerned again to have your  
11 answers on the economic questions based on a full set of  
12 facts.

13 Now, the document -- can we look, actually, at the  
14 answer that you gave. I think that would be the  
15 quickest way of recalling where we got to on this.  
16 Yesterday's transcript, so it is {Day8/54:21}. Just  
17 remind yourself of the answer you gave about Boots's  
18 decision to purchase full label rather than skinny  
19 label. Just say when you have got to the end of that  
20 page. (Pause)

21 A. Yes.

22 Q. Given the price levels at that point, is the point you  
23 are making. Go over the page and continue reading on  
24 down to line 10, please, and 16-25 again {Day8/55:16}.  
25 (Pause)

1       A. Yes, I remember that.

2       Q. You remember that?

3       A. So if you are keeping the price --

4       Q. We do not need to go through it all, I just want to put

5       the next question in context. Perhaps we can go to

6       page 56 as well {Day8/56:1}.

7       A. Obviously I said the price of food, but I meant the

8       price of full in the -- that is okay, we understand.

9       Q. You were asked some questions about a document to which

10      we will go to in a moment. Do you see that you were

11      asking, from line 12 in fact {Day8/56:12}, at which

12      point in time was this conversation happening? And it

13      was said April 2021. Do you see that?

14      A. Yes.

15      Q. And you went on and said at line 20 you were surprised

16      because by then everybody knew there were no medical

17      restriction at all, so they were referring probably to

18      2016, to early 2016.

19             Do you remember those answers?

20      A. Yes, I do.

21      Q. So let us just have a look at the document that was put

22      before you, it was {IR-H/810/1}, which is, as you

23      rightly noted, that is a document dated 11 January 2016,

24      so very early on. You were taken in particular to the

25      answer at question 4(a):

1 "Full preferred product switch -- not possible ..."

2 Do you remember that:

3 "... as alternative product does not have all  
4 licensed indications and would only be acceptable  
5 clinically and ethically for 5% ..."

6 A. For 5%.

7 Q. So clinically and ethically were the points being put  
8 for 5%. You noted that yesterday. You said that was  
9 wrong, but you also said that was not uncommon at this  
10 early stage of the market development. That is what led  
11 to the President's question about perception; do you  
12 remember?

13 A. From their point of view. That was their own perception  
14 on risk, yes.

15 Q. Do you remember you also noted there was active  
16 consideration, at least, of dual stocking which they  
17 decided against at that point.

18 Can we go to {IR-H/1097/1}, which is a response from  
19 Boots to the CMA, not the 2021 note of call that you  
20 were taken to yesterday, it is something a bit closer in  
21 time that you were taken to. If you go to page 2 of  
22 that document and look at the last two paragraphs in  
23 answer to question (b).

24 A. In relation to --

25 Q. "In relation to hydrocortisone 10mg tablets, a review

1           was undertaken in January 2016 ..."

2           Do you see that?

3       A.   Mm-hm.

4       Q.   That is when the review took place, when we saw that  
5           email --

6       A.   Yes.

7       Q.   -- after Boots were informed there was a new entrant  
8           from Alissa. So that is a point, the new entry prompted  
9           that consideration of whether or not to order skinny and  
10          the answer was no at the time, as we saw:

11               "... an internal Boots discussion took place [it  
12           explains] to establish whether the new product would be  
13           suitable to be dispensed by Boots based on professional,  
14           and clinical and operational aspects. No further review  
15           has been requested since that time."

16          Do you see that?

17       A.   Yes, I do.

18       Q.   I will be putting to the Tribunal as a question of fact  
19           at a later stage, not with you, that that 2021 note of  
20           call was simply referring back to exactly the same time,  
21           exactly the same review, and the point was there had not  
22           been a re-examination of that initial decision at any  
23           point since. There is no evidence of it, anyway. That  
24           is a matter of fact for the Tribunal, I am not asking  
25           your view on that.

1           But firstly, are you aware of any evidence  
2           suggesting that Boots re-examined its January 2016  
3           decision actively at any point since then? Anything you  
4           want to know?

5       A. I am not aware.

6       Q. Right. Even when its initial assessment as to clinical  
7           and ethical risk was known to be incorrect. But I think  
8           we can agree that there was nothing to stop it from  
9           doing such a review if it chose to look into the matter?

10      A. Sure, there was no legal impediment to it.

11      Q. I think the point that you were making in the first  
12           paragraphs that I took you to a moment ago in the  
13           transcript was, well, if the price differential grew  
14           enough that might be a reason why that could change.  
15           They say price was not a factor, but actually that is  
16           capable of change if the price differential grows.

17      A. Yes, vis à vis their own preferences, their own  
18           perception of risks, right or wrong, I am not going  
19           to --

20      Q. Preferences can change, and again I put to you --

21      A. Yes, okay, "preferences can change" is really  
22           a difficult concept in economics, to be honest. So  
23           people have preferences and with the same preferences  
24           you may make different decisions at different points in  
25           time, because in economic terms there is different

1 trade-offs. For instance, I have the same preference of  
2 the characteristics, the car, the 15,000 or the  
3 Rolls-Royce. Of course the Rolls-Royce is unaffordable  
4 to a poor academic professor but in the price of --  
5 I have preferences for those characteristics, I am not  
6 changing, but if the price of the Rolls-Royce comes down  
7 I might consider it.

8 Q. So the trade-offs --

9 A. Or if you keep employing me after this --

10 Q. The trade-offs may change, even if the preferences do  
11 not the trade-offs might as the market develops, or  
12 there are, for example, fresh entry, fresh developments  
13 in the price. So, if for example, and we will come to  
14 the nature of the constraints later, I think, by  
15 tomorrow by the looking of it, but if for example Accord  
16 had sought to put the price up to the drug tariff level  
17 or too close to it, so that Boots or whoever else were  
18 not covering their costs of selling it in their  
19 pharmacies, well, that would be something that might  
20 cause them in principle, in economic theory at least, to  
21 re-evaluate the trade-offs?

22 A. Absolutely, but this is not because of a change of  
23 preferences but because of a change in economic  
24 arrangements overall.

25 Q. So it is something of an oversimplification to say that

1           they had no choice but to buy full label?

2           A. I agree. Then an empirical matter is to see whether  
3           people react to reasonable price changes. The example  
4           I was given, for instance where unreasonably the price  
5           reaches £200, that is unreasonable in this market but  
6           that is a relevant economic question, yes.

7           Q. Given that trade offs can change over time and Accord  
8           would know that and indeed would know what the rest of  
9           the market was doing, large parts of the rest of the  
10          market was doing, they would not be able to count Boots  
11          as being assured?

12          A. I think I had already a discussion about this in  
13          a different interrogation, of course. "Assured" is  
14          again one of those terms which are highly charged,  
15          which -- I understand in everyday language what that  
16          means, and I said that indicates in economic terms  
17          a fairly inelastic demand. Inelastic, it means that for  
18          reasonable price changes you would expect moderate  
19          changes, moderate changes in demand. But that is what  
20          it means. It does not mean that for any price change  
21          they will never change their own views.

22          Q. Lloyds. Can we just look back at the table. Again, for  
23          those on the screen it is {IR-N/27/1} but it is easier  
24          on the page if you have it, as you do. If you could  
25          just look at the Lloyds row and just look at the

1 percentages there. Again, all we had in the Decision  
2 was the annual averages which rather masked this, but  
3 you can see it is 0 or pretty close to 0 or 1% all the  
4 way through to July 2017.

5 A. Yes.

6 Q. But then there is something of a change from August  
7 through to the end of the year in the range 10 to 13%.  
8 Do you see that being a change from at least what had  
9 gone before?

10 A. Yes, it goes -- sure. Lots of reasons for that, but  
11 I do see that from almost nothing they go to about 10%.

12 Q. Yes. So let us just look at --

13 A. Meaning 90% are still on full.

14 Q. Now, this document has been seen by the Tribunal before  
15 but again it is not referenced in the Decision --

16 A. Okay.

17 Q. -- so you may not have done. It is {H/844/1}, and the  
18 email you see at the bottom half of the page --

19 A. "Wind down for Christmas", that is quite appropriate,  
20 yes.

21 Q. Have you seen this document before?

22 A. No, no.

23 Q. In this case I will set it in context for you. Can we  
24 go to the next page {H/844/2}. The Tribunal know this  
25 but if you have not seen it, I just want you to see the



1 context. This is, first of all, Focus who as you know  
2 are making a skinny product for AMCo. 9 December 2015,  
3 do you see that? Writing to Lloyds -- sorry, writing to  
4 Celesio, in fact, which is the parent company of Lloyds:

5 "I just wanted to check what your Superintendent  
6 Pharmacist's view was on the Hydrocortisone Tablets  
7 Indication issue, I assume that you cannot use a product  
8 unless it has the full indications?"

9 Please confirm, "Have a great Christmas."

10 Then back to page 1, and you can see that is the  
11 context. "Your assumptions", you have that, second  
12 paragraph of the bottom email:

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

15 For sure independent pharmacies won't care but just  
16 not worth the hassle for us at the moment.

17 That may change if the price differential grows."

18 Which I think is consistent with the points. As  
19 I say, the facts -- you know, the CMA accepts the word  
20 "us" means Lloyds Pharmacies, that is what is being  
21 referred to. So we do not want it at the moment, but  
22 "that may change if the price differential grows." Does  
23 that chime with the point that you have just made to the  
24 Tribunal?

25 A. I have not seen this document, so -- and you are very

1 happy to show me more and more. This is telling me that  
2 in this case, for instance, this is an example of  
3 somebody who had some preferences for full over skinny  
4 given the price differential. I do not see any change  
5 in the preferences, because they are not preferences.

6 Q. No, no.

7 A. They are simply saying given the current price  
8 difference it is not worth the hassle.

9 Q. This is December 2015 --

10 A. That is what it says.

11 Q. -- and saying look, no knowledge at the moment, but if  
12 the price --

13 A. At that time, by the way, skinny was cheaper but  
14 the prices were still fairly high.

15 Q. Now, that is the only internal document we have from  
16 Lloyds. All the other documents, the Section 26  
17 responses, we do not have anyone from Lloyds to speak to  
18 them. But I think you were shown {H/1105/1}, which is  
19 that response. If we go to page 2 of that document,  
20 question 4 {H/1105/4}.

21 A. Question 4?

22 Q. No, sorry, we need to get to page 2 first. We are just  
23 waiting for that, but there it is. Now question 4.  
24 I think you were shown the paragraph at the bottom of  
25 that page, do you see that:

1 "Lloyds Pharmacy Limited's position is that use of  
2 a skinny label product outside of its therapeutic  
3 indications, and licence, when a licensed product is  
4 available, is contrary to the principles of the UK  
5 medicines licensing system."

6 Do you see that?

7 A. Yes. When was that, when was the date?

8 Q. The date of that document is 17 January 2018.

9 A. 2018, thank you.

10 Q. That is the response.

11 A. Yes, it is on the top of the page.

12 Q. You will see there, there is no reference in that  
13 paragraph to Hydrocortisone tablets at all. It appears  
14 to be a general --

15 A. Skinny label, yes, it says. Yes.

16 Q. Use of skinny label products.

17 A. The question is about Hydrocortisone tablets.

18 Q. The question is, that is why the CMA are asking it. But  
19 the answer does not engage with anything specific about  
20 Hydrocortisone; do you see that? It is just  
21 a general --

22 A. But they answered the question about the Hydrocortisone.  
23 Why would they answer to something else?

24 Q. No, no, but in general their position is that the use of  
25 a skinny label product --

1 A. That is your interpretation, fine.

2 Q. No, I am just reading the words. I am just asking you  
3 to --

4 A. But they are answering specifically to a question 4,  
5 which is in.

6 Q. Yes.

7 A. -- the drug tariff of Hydrocortisone (overspeaking).

8 Q. (Overspeaking) I am not suggesting their answer does not  
9 apply to Hydrocortisone tablets, I am seeking you to  
10 notice at this point that they are not engaging with any  
11 specific characteristics of Hydrocortisone other than it  
12 is skinny. Do you see that?

13 A. Yes, which is as a characteristic very strong, yes,  
14 associated -- I had never encountered the word "skinny"  
15 in my life prior to this case, no.

16 Q. Well, not in this context, no. I might have encountered  
17 it almost all of my life?

18 A. Do not go to the pharmacist and ask for  
19 Hydrocortisone --

20 Q. It is the principles of the UK medicines licensing  
21 system, all right? Do you see this document is  
22 headed -- if we just go back to page 1 of it {H/1105/1}.  
23 Do you see it is headed:

24 "Project Silver -- Response of Lloyds's Pharmacy to  
25 Questions 1 & 4 -- 17 January 2018."

1           Do you see that heading?

2       A.   Yes.

3       Q.   Can we go next to {H/1104/1}. Do you see it is headed  
4           in a similar way:

5           "Project Silver -- Response of AAH to Questions  
6           6-10."

7           It is the same answer, and it begins from  
8           question 6. So it appears to be the same document  
9           because it is submitted by AHH/Lloyds, which are the  
10          same company, but one from the perspective of  
11          Lloyds Pharmacies, the retail operation, one from the  
12          perspective of AAH, wholesaler operation; do you see  
13          that?

14       A.   Yes, maybe, yes. I do read "Project Silver" on both  
15          documents for sure.

16       Q.   It just continues on. Just have a look at question 6  
17          there which is the first question on that page. We can  
18          see that they are still labouring under the  
19          misapprehension on the CMA's findings. Do you see in  
20          the third line:

21          "We understand that 10mg product, depending on the  
22          supplier from whom it is procured, may have different  
23          product characteristics from a clinical perspective.

24          "This has resulted in availability of a skinny label  
25          product and a full label product."

1           That is plain wrong, is it not, on the findings?

2       A. From a medical point of view we know, from a regulatory  
3       point of view this is not the correct interpretation but  
4       that is what we know now and -- yes, sure.

5       Q. But do you see under the next question, still part of  
6       question 6:

7           "How do you expect customer demand will develop over  
8       the first two quarters of 2018?"

9           "Customers may review their position on whether they  
10       continue to buy the full label product or whether they  
11       buy the skinny label product given that the latter is  
12       generally available at a cheaper price."

13       A. Sorry, can you remind me, whose answer this is.

14       Q. AAH.

15       A. So customers or pharmacies?

16       Q. It's customers would be pharmacy, yes?

17       A. So different pharmacies may react differently, yes.

18       Q. And that is how they anticipate the market developing?

19       A. Yes, different pharmacies may react differently to this  
20       interpretation.

21       Q. So again, that chimes, directly with the Celesio  
22       response from much earlier, three years earlier is that  
23       as price differentials will affect customers' responses?

24       A. It can match, yes.

25       Q. We can see that the understanding of AAH/Lloyds here is

1           informing that position that is inconsistent with the  
2           value of the UK's licensing system, the understanding  
3           from a clinical perspective that the products have  
4           different characteristics?

5       A.   From a clinical perspective.

6       Q.   That misapprehension is something that could easily  
7           change if they discovered, as NHS England expected them  
8           to know, that in fact they were bioequivalent?

9       A.   That is not what you expect other people to know. That  
10          is again one of those very vague concepts. I cannot  
11          answer to that.

12      Q.   That is Lloyds. Well, virtually no purchases of skinny  
13          at all. We can go to the Decision at {IR-A/12/139} and  
14          look at paragraph (h) there. That is the last of that  
15          run. And you can see that:

16               "... it determined its purchasing decisions ... and  
17               whether the product was fully indicated" -- that is what  
18               is said.

19               "Well purchased only full label tablets because ..."

20               Then there is a quote set out. Again it revolves  
21               around having all the indications and so:

22               "... we can dispense that product against 100% of  
23               scripts simplifying the process for our teams."

24      A.   Can you tell me what scripts is.

25      Q.   Prescription. It is jargon for prescription?

1 A. Thank you.

2 Q. Footnote 413 is referenced and 414 and you can see at  
3 the bottom of the page, let us focus on those two  
4 footnotes. 413 is a June 2016 notice and so is 414.  
5 That is taken from the position as it stood June 2016.  
6 Do you see that?

7 A. Yes. They do not buy skinny, they do not.

8 Q. But even before the Intas period further consideration  
9 was given to that position. The position did not  
10 change. We know that they only bought full label, but  
11 can I just take you to {H/992/1}. Again, a document not  
12 referred to in the Decision. So I expect you will not  
13 have seen.

14 This is an internal email for Well Pharmacy dated  
15 16 December 2016. So just before the Intas period and  
16 it is from its purchasing manager and it shows Well  
17 actively considering the possibility of switching away  
18 from what became Accord-UK. Do you see under "Points to  
19 consider"?

20 A. Yes.

21 Q. First of all, just above that, in fact, let us put in  
22 context. It is believed their working assumption is  
23 that 92% of all scripts are for adults. There is  
24 a large price difference, setting that out. They set  
25 out there the number of prescriptions they have per



1 month. It is marked as confidential.

2 "Therefore if we move to the non-indicated product  
3 we would generate [that sum there] additional profit per  
4 month."

5 Then they go on to consider that, and of course they  
6 consider, amongst other things, would our branches be  
7 compliant? They ask themselves would our own branches  
8 report us? They come to the conclusion ultimately that  
9 they are not going to switch but you can see there the  
10 active process.

11 MR HOLMES: Can you show the witness the second page of  
12 this.

13 MR PALMER: Yes, of course, go on to the second page, the  
14 recommendation:

15 "I believe the use or not of the non-indicated  
16 product is a clinical decision, but it should be noted  
17 that there is almost [that sum] additional profit in  
18 this.

19 "We could use the non-indicated product for all  
20 scripts for children ..."

21 And that percentage of their monthly demand:

22 "Even just using that would generate [another  
23 confidential figure, a month] additional profit."

24 So that was the recommendation at that point. We  
25 know they did not act on any recommendation to switch.

1           It is not clear quite what the recommendation was, to  
2           switch or not, but the clinical decision, so in other  
3           words for pharmacists appeared to have been --

4       A.   Quite interesting also to see that they were  
5           benchmarking themselves against what the other big  
6           pharmacies in the market were doing, so they would look  
7           at each other a little bit.

8       Q.   And again that changes over time.   This  
9           is December 2016.

10      A.   This is competition.   Pharmacists do compete against  
11           each other.

12      Q.   Just three months after Day Lewis had made that precise  
13           change, possibly, we do not know, having weighed up  
14           similar factors and they have come out the other way.  
15           Do you see that, that balancing of the factors?

16      A.   Yes, they are different.

17      Q.   Which I think is consistent with what you are saying  
18           about the trade offs, consideration of the trade offs.  
19           I think again you agree it is not right to say that  
20           there is no choice as far as they are concerned.   It is  
21           a consideration of the trade offs?

22      A.   I have already said that is a very strong statement,  
23           yes.

24      Q.   Rowland, we have only got two section 26 responses from  
25           them.   {H/1047/1}.

1       A. Again, I want to make sure there is no disagreement  
2       between us. When I say I find that no choice a strong  
3       statement is, as an economist, when I assess the  
4       decision of trade offs against any price increase. No  
5       choice to me sounds like extreme. But people in  
6       everyday language may see no choice when they are  
7       describing how they behave in practice, vis-a-vis what  
8       they think the actual choices at those prices are  
9       available at the time. That is what I mean.

10      Q. It is loose language really, particularly from an  
11      economist's point of view. To say I have no choice to  
12      do that but you may have.

13      A. So that is why we try to assess price changes,  
14      quantitative changes and see what do you mean, let us  
15      see the elasticity.

16      Q. You have to look at it in the round?

17      A. Yes.

18      Q. We only have two more counts. We can do this by the end  
19      of the day and then tomorrow we can get on to the  
20      economic analysis that fits around this you will be  
21      relieved to hear.

22      A. That is very exciting.

23      Q. If we get this done. Almost there. Rowland {H/1047/1}  
24      we just turned to. If we turn to page 2 of that  
25      document {H/1047/2} and look at question 5. Do you see:

1           "Very little skinny label product is used. This is  
2           because the use of skinny label product is discouraged  
3           in the pharmacy to prevent adult patients with ...  
4           receiving a product which is not licensed for their  
5           condition."

6       A. Again, when was that again? That question was answered,  
7           it says after 2016 today. Just to understand when that  
8           question was asked. Early on or? It must be during the  
9           Intas period otherwise you would not ask me.

10      Q. The date of that -- probably if we just go back one page  
11           we will have it. It was in response to a notice sent  
12           in June 2016.

13      A. Thank you.

14      Q. So it is at or around June 2016. So page 2, you see it  
15           is discouraged, again relatively early stage but the  
16           given reason was to prevent adult patients receiving  
17           a product which is not licensed for their condition?

18      A. Just to put it in context this answer was given over  
19           a period -- in that period there had been skinny entry  
20           for about six months.

21      Q. Yes, that is right. That was the perception at the  
22           time: not licensed for their condition. Of course we  
23           know from NHS England that if the prescription is open  
24           then giving a licenced skinny product is giving  
25           a licensed product. That was their --

1       A. From a medical point of view, yes.

2       Q. A different understanding at this point and they explain  
3       in answer 6, again, it effectively amounts to the same  
4       thing just said in a different way. It is the same  
5       point again.

6               But again, it is notable, is it not, that there is  
7       no consideration of the reasons why and whether it does  
8       amount to a risk when we have got a bioequivalent  
9       product. There is no sort of understanding of that,  
10      attention to it or anything of that kind; is that fair?

11      A. There is a mention here that they say, they would not  
12      because -- but anyway, they would not dispense  
13      because -- anyway, but, yes, there is no extensive  
14      discussion.

15      Q. There is nothing in the orphan designation and the  
16      bioequivalence or any reaction between the two. I think  
17      your evidence would be that if the price differential  
18      went up that position could come under pressure, the  
19      trade offs could change?

20      A. They could, yes, without change of preferences.

21      Q. Superdrug is the last one. Let us look at the numbers  
22      here. The numbers are marked on the screen, you can  
23      see, as is confidential but the shading has not come out  
24      on this. Just to warn you the Superdrug figures are  
25      marked as confidential.

1 A. Sorry, the first page?

2 Q. First page, yes. It is the last pharmacist. Been to

3 them all now. 10mg. Do you see those percentages, so

4 I will not say the numbers but you can see the trend

5 going up to August 16?

6 A. Yes.

7 Q. Do you see that?

8 A. Then going down to very little.

9 Q. Down a little bit?

10 A. Almost nothing.

11 Q. Quite a lot and --

12 A. Sorry, I do not see. They basically go down to a very

13 small number.

14 Q. Yes, effectively a switch to full label?

15 A. For 10mg. For 20 they have a more sizeable share.

16 Q. Yes, they do. Of course the same regulatory

17 considerations would apply to both, would not they?

18 A. Yes.

19 Q. But just concentrating on 10. You see there is

20 effectively a switch to full label after September 2016;

21 is that fair?

22 A. Superdrug?

23 Q. Yes, Superdrug.

24 A. Yes, after November I would say, yes.

25 Q. I said September.

1 A. September 16, Superdrug, they still had a sizeable --  
2 after.

3 Q. So afterwards?

4 A. So again, those numbers which I cannot say, we can  
5 debate it, and the number, you know, in October is  
6 sizeable or not afterwards.

7 Q. So rather like Morrisons they have switched to skinny in  
8 large proportions and then switched back to full. Is  
9 that a fair summary of Superdrug's --

10 A. Like Morrison, similar to Morrison but not for 20.

11 Q. And you can have an insight into what is going on there.

12 A. Do we agree that is not true for 20mgs? We do agree,  
13 yes?

14 Q. Yes.

15 A. Thank you.

16 Q. No, the percentage remains solid for 20mgs, but  
17 {H/906/1} is the position as at 16 June 2016 again. You  
18 can see from page 2 the response to question 1 is:

19 "Superdrug has purchased Hydrocortisone tablets from  
20 Alliance and AAH and sourced them from Actavis,  
21 Auden McKenzie, Teva, Alissa, Almus and Hillcross.  
22 Superdrug has also purchased Hydrocortone."

23 So you can see at this point they have purchased  
24 from a large range of suppliers, skinny and full; is  
25 that fair?

1 A. It is fair.

2 Q. Then question 2, you can see that arrangement, how it  
3 operates. They have got a fully centralised purchasing  
4 system and pharmacies are encouraged to use that  
5 facility.

6 "Superdrug employs a cascade system which works as  
7 follows: Almus from Alliance then Actavis from Alliance,  
8 then Teva from Alliance, then AAH/Hillcross from AAH,  
9 then Actavis from AAH, then Teva from AAH."

10 So we can see that there is a mixture there between  
11 full and skinny products. They do not prefer all the  
12 full products first and foremost. They start with  
13 a full, then go to skinny, then go back to full. So  
14 there are other commercial considerations at play there  
15 informing that cascade?

16 A. It looks like, yes.

17 Q. Question 5 is over the page, {H/906/3}. The question  
18 is:

19 "What do you when faced with an open prescription?

20 "Other than checking that the dose is clinically  
21 safe, our pharmacists would not undertake any checks.  
22 Pharmaceutically the Hydrocortisone tablets produced by  
23 different manufactures are bioequivalent and therefore  
24 it is not considered to be essential that patients stay  
25 on the same brand of tablet. Doctors generally do not



1 specify the brand of tablet so pharmacists dispense  
2 according to the stock we have which is determined by  
3 our cascade system as described in 2..."

4 Do you see that?

5 That is the position as of June 2016. There is  
6 a subsequent change. We have the final document I am  
7 taking you to which is {IR-H/1054/1} which is a year  
8 later. It is 19 June 2017.

9 Question 2(a), the foot of that page, there has been  
10 a change of position:

11 "We now see that they will purchase a full label  
12 product in preference to a skinny label product. [they  
13 say] in accordance with the MHRA guidance ..."

14 A. Which part of the page?

15 Q. It is the red writing at the foot of the page, yes?

16 A. I have not found it yes.

17 "Superdrug will purchase a full label ... in  
18 preference to a skinny label."

19 Q. "... in accordance with the MHRA guidance relating to  
20 the use of licensed products..."

21 A. Yes.

22 Q. Therefore, they decided that "skinny label products  
23 would only be purchased in the event", and then there  
24 are three circumstances set out there. Do you see that?

25 A. Mm-hm.

1 Q. Which is what the CMA relied on in their Decision, not  
2 referencing that earlier position or that change of  
3 position.

4 Page 2, question 2(b) goes on:

5 "... a fully centralised purchasing system. [And]  
6 Superdrug pharmacies are encouraged to use this  
7 facility."

8 Again, it moves down the cascade as there set out.  
9 Then at page 3, {IR-H/1054/3}, the final paragraph:

10 "We do not have any specific policies or guidance  
11 regarding the dispensing of Hydrocortisone tablets other  
12 than our standard operating procedures in regards to  
13 dispensing prescriptions generally."

14 So taking this as a whole, Superdrug indicates the  
15 making of a choice between full and skinny label  
16 products is based on a number of factors including  
17 indication but not exclusively so?

18 A. Yes.

19 Q. Is that fair? So that is --

20 A. The indication seems to be an important driver. Their  
21 perception of what it is etc but it is otherwise we  
22 would not be discussing about this.

23 Q. So this is the upshot, just to bring this section of the  
24 topic to a close so we know where we are to begin with  
25 tomorrow on the economics as they apply to this factual

1 position. The upshot of all this first of all is  
2 firstly, a changing picture over time; is that fair?

3 A. Changing picture of?

4 Q. Of different pharmacies, different preferences and trade  
5 offs?

6 A. It is not -- heteroginating, it is heteroginating.  
7 Different pharmacies making different decisions at  
8 different points in time, yes.

9 Q. Accord-UK cannot be certain as to when, or if, any  
10 pharmacy would switch at any one particular time?

11 A. Yes, potentially that is true.

12 Q. And indeed they may switch at any time if they take  
13 a different view. As we saw Day Lewis switching in one  
14 way, Morrison, Superdrug switching the other way because  
15 they have taken a different view at different times; is  
16 that right?

17 A. There is lots of noise in markets for sure.

18 Q. So there was in fact switching from full to skinny and  
19 skinny to full?

20 A. There was some switching, yes. We know the bulk of  
21 switching happened in the first few months.

22 Q. You have to look at those internal documents and  
23 responses to the CMA of course after the event to  
24 identify the rationale, the differences, the extent to  
25 which they thought about it or not. You made the point

1           yesterday that Sainsbury's and Tesco or Morrisons all  
2           look similar to us from the outside but they made very  
3           different choices. That is a point you made yesterday?

4       A. Correct.

5       Q. So too one could say the same as between pharmacies.  
6           From the outside they may look the same but they can  
7           make different choices at different times. Again,  
8           suppliers do not have that information in real time at  
9           the time that these price negotiations that we are going  
10          to come to tomorrow are going on; is that fair?

11      A. We do not have that information for sure. We do not.

12      Q. No. Good. That is a suitable point.

13               Perhaps -- sorry, just turn the page. One or two  
14               more questions just about this.

15               So far as Accord-UK, bearing in mind what I have  
16               just said, the greater the differential in margin  
17               available to the pharmacy, the greater the incentive  
18               from buying skinny, I should say, the greater the  
19               incentive to re-evaluate their view of regulatory risk  
20               or indeed any other matters which affect their decision?

21      A. So you showed one piece of evidence that would go in  
22               that direction, yes.

23      Q. As a matter of principle as well. I mean --

24      A. As a matter of general principle but in terms -- since  
25               we were talking about facts, the facts represented was

1           one pharmacy, very interesting, they made up  
2           calculations, whether they are correct or not I do not  
3           know. They calculated the price differential and they  
4           said if we do switch economical -- the savings, the  
5           financial savings would be this much if we do that, and  
6           then they consider other implications that they would  
7           have on their own demand and they made a choice.

8       Q. There was more than that but I will go back in  
9           submissions to the Tribunal later. The question I am  
10          asking you though is related to the point you made  
11          yesterday which is as the differential goes up there is  
12          more reason to re-evaluate those trade offs?

13       A. There is -- a differential goes up -- yes, okay.

14       Q. And the incentives may change?

15       A. Absolutely. General statements I agree with.

16       Q. By the time of the Intas period, so January 2017, if  
17          they did re-evaluate the risk from any point thereon,  
18          they would be doing that with the benefit of 15 months  
19          of post-entry experience of the regulatory treatment of  
20          off label dispensing of Hydrocortisone tablets. That is  
21          available to them to inform that decision?

22       A. Yes, so I have not, as you said, as I said earlier,  
23          analysed the Intas period in isolation.

24       Q. No, understood. So the uncertainty they face --

25       A. They being Intas.

1 Q. -- Intas/Accord-UK would be relevant to its pricing  
2 decisions, that level of uncertainty; is that fair?

3 A. The level of -- for -- so I thought I am not looking at  
4 Intas's decisions. I thought that we were looking at  
5 the market definition, I thought so where Intas decision  
6 is one --

7 Q. I am not doing market definition, dominance at this  
8 stage. I am just trying to understand the constraint.  
9 We will come back to constraints tomorrow. Perhaps  
10 I can seek your agreement to this --

11 A. The only statement I can make that is of any help is  
12 that Intas will make their own decisions driven by their  
13 own profitability expectations, will be taking into  
14 account their expectation on how customers switch. It  
15 is a very simple proposition.

16 Q. They have to respond to competitor pricing, I think you  
17 agree, and in the knowledge they need to preserve for  
18 their customers sufficient margins under the drug tariff  
19 to discourage?

20 A. So you are putting to me that I agree that Intas was  
21 under a lot of uncertainty. I do not know. I do not  
22 know what information Intas has at the time for sure.  
23 From my point of view I have learnt a lot by going  
24 through the documents and this information we would not  
25 be able by definition have been able to have because we

1 cannot go back in time. So Intas would make their own  
2 decisions according to the best information available to  
3 them as --

4 Q. They would be interested in retaining their customer  
5 base through their own competitive responses?

6 A. They would be interested in maximising their profits.  
7 Not just retaining. They would maximise their profits  
8 given the demand that they faced for their own products,  
9 yes, absolutely.

10 Q. That is where I am going to leave it today and we will  
11 pick up the nature of those constraints on them tomorrow  
12 morning.

13 Thank you very much for your evidence today.

14 THE PRESIDENT: Thank you. Just to sharpen that last point,  
15 clearly no one is asking you to give any evidence as to  
16 what Intas may or may not have thought. I think you are  
17 being asked a slightly more general question which is  
18 the effect on a profit maximising entity, whatever it  
19 might be, of uncertainty in the market. In other words,  
20 you are selling product to a market which you have gone  
21 through very thoroughly. What you have seen is that  
22 there is an ability to select, subject to certain  
23 constraints, between two different products and we see  
24 various entities going in different ways.

25 I think the point that you are being asked as

1           a round off to this evening is: you as a vendor of  
2           product do not know, you may have ideas but you do not  
3           know which way your market is going to jump when there  
4           is a choice and that is an uncertainty which is going to  
5           feature in your thinking as to how you price product?

6       A. I accept that though let us -- don't push it too far  
7       because saying that firms sell in the unknown that is  
8       also a bit of a stretch. Firms have repeated  
9       interaction with their customers. Some are reporting  
10      documents, some are not and I cannot observe -- we  
11      cannot observe all of them, so I would not say that  
12      firms are operating in the unknown.

13      THE PRESIDENT: Well, that is entirely fair and I certainly  
14      was not postulating as a parameter in the market a state  
15      of perfect ignorance. What I was postulating was  
16      a state of uncertainty which of course will vary from  
17      case to case.

18      A. Absolutely, we agree that there is uncertainty in the  
19      markets of course.

20      THE PRESIDENT: Nothing more out of that.

21      MR PALMER: Nothing further until tomorrow.

22      THE PRESIDENT: Professor, thank you very much. Please feel  
23      free to go. I have a couple of housekeeping points.

24           Mr Holmes are you about to rise?

25      MR HOLMES: It was only to say that Professor Valletti



1 informed me during the lunch adjournment that he has  
2 a fixed appointment that will be very difficult for him  
3 to shift at 2 pm tomorrow but I think we will be done by  
4 then.

5 MR PALMER: We are making good progress. Subject to  
6 a lengthy re-examination we will be fine.

7 MR HOLMES: That will not happen.

8 THE PRESIDENT: Professor, we will make sure you are out  
9 before the end of the morning session.

10 MR JOHNSTON: Sir, I am very glad to hear that. Mr Stewart  
11 is not going to be available on Friday.

12 THE PRESIDENT: It looks like we are going to be ready for  
13 Mr Stewart at the latest at 2 o'clock.

14 MR JOHNSTON: I am grateful.

15 THE PRESIDENT: Mr Palmer --

16 MR PALMER: I hope earlier than that. We are making good  
17 progress.

18 THE PRESIDENT: Indeed. I was just thinking we should have  
19 2 o'clock so that Mr Stewart has a degree of certainty  
20 as to when to turn up.

21 MR JOHNSTON: I have been told by Mr Bailey that he  
22 anticipates being between two and a half and three  
23 hours, so it may be better --

24 THE PRESIDENT: We had better make it.

25 MR JOHNSTON: -- if he attends in the morning and we can use

1           that time.

2       THE PRESIDENT: That is very helpful.

3       MR JOHNSTON: Maybe 12.

4       THE PRESIDENT: Very good. Mr Palmer, I do not want you or

5           indeed Professor Valletti to feel under any time

6           pressure in you asking questions and he giving answers.

7           10 o'clock is okay for you?

8       MR PALMER: 10 o'clock, thank you.

9       THE PRESIDENT: Very good. 10 o'clock. Professor, I do not

10           want to keep you when I have got to housekeeping matters

11           which do not affect you. Please feel free to absent

12           yourself or if you wish stay, but it is very boring.

13           We know we have got rail strikes next week. The

14           Tribunal is making steps to ensure we have enough staff

15           to run an in-person hearing. I would be very reluctant

16           to go into remote session because it would mean

17           basically spending the week remotely and we are not

18           really very inclined to do that.

19           I note in the timetable, that I am looking at that

20           we have got 10 o'clock starts for the submissions next

21           week or at least some of them with 10 o'clock starts.

22           I am told that that is possible but it would be easier

23           for our logistical arrangements to have a 10.30 start.

24           I wonder if the parties could think about this overnight

25           and we can reach a view tomorrow as to what we do next

1 week.

2 I do not want anyone, as I have said, a number of  
3 times, to feel under any pressure. I know that the  
4 closing submissions are of acute importance to all of  
5 the parties but I need to give the staff a firm steer  
6 and what I have been told is that 10.30 makes things  
7 a bit easier for us, but at the end of the day you need  
8 to have the time you need.

9 That is the first point. The second point is simply  
10 by way of disclosure I have a meeting with BEIS and the  
11 CMA on Monday which has been in the diary for some time.  
12 It had been moving around a bit but obviously this is  
13 a matter that I will not be discussing and I know that  
14 those attending will know the ground rules, but I think  
15 you are all entitled to know that that meeting is taking  
16 place. If you want any further details about what is  
17 being discussed we will take it off-line because there  
18 are elements of confidentiality in it but you are  
19 entitled to know more if you wish to know but I hope you  
20 will expect and trust all of the participants to know  
21 what they can and what they cannot discuss.

22 Again, any problems with that do let me know  
23 tomorrow.

24 MR HOLMES: Just one very quick question on the first point  
25 in case it affects our discussions. Will the Tribunal

1           be amenable to sitting later if need be during the  
2           course of next week or is that going to present  
3           difficulties?

4       THE PRESIDENT: I will take that -- I think you can take it  
5           that the flexibility of the support staff in the CAT is  
6           less flexible next week than it ordinarily would be.  
7           For ourselves we are making arrangements to ensure that  
8           actually we will be in London and without train  
9           distance, within walking distance of the Tribunal but  
10          that is not true, I am afraid, of those people who keep  
11          the show on the road. So I will make enquiries as to  
12          the degree of flexibility but I anticipate the answer  
13          will be we will be operating rather more strict  
14          timetables apart from going into the lunch break which  
15          we can do without any inconvenience.

16                So really what I am looking for is a sort of  
17           sensitivity of the parties to timing questions because  
18           unless we get the parameters sorted out this week so  
19           that I can make clear what they are, we may have  
20           difficulties next week in stretching.

21       MR O'DONOGHUE: Sorry, at the risk of getting my retaliation  
22           in first. As a weary commuter, the issue is the trains  
23           start late and leave early which is why there is a lack  
24           of flexibility at both ends.

25       THE PRESIDENT: That is exactly the problem, Mr O'Donoghue,

1 exactly right. The fact is we are arranging alternative  
2 transport but that involves its own difficulties. Very  
3 good.

4 MR BREALEY: Any assistance, I think I am due to start on  
5 Friday 16th and we can certainly start at 10.30 on that  
6 day. I think it is Ms Ford and --

7 THE PRESIDENT: That is very helpful. I will leave it to  
8 the parties to take it off-line and the reason I raise  
9 it now is because logistics are what they are and I do  
10 not want there to be a problem which we can't correct  
11 for next week, so tomorrow morning we will take it any  
12 further.

13 But thank you all very much.

14 Professor, thank you. I hope you have a less  
15 cluttered evening this evening. I will see you tomorrow  
16 at 10 o'clock. Thank you very much.

17 (4.51 pm)

18 (The hearing adjourned until Thursday, 8 December at  
19 10.00 am)

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