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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1049/4/1/05

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

14<sup>th</sup> February 2005

Before:  
SIR CHRISTOPHER BELLAMY  
(The President)  
PROFESSOR PAUL STONEMAN  
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

**BETWEEN:**

UNICHEM LIMITED

Applicant

and

OFFICE OF FAIR TRADING

Respondent

supported by

PHOENIX HEALTHCARE DISTRIBUTION LIMITED

Intervener

Mr. Nicholas Green QC and Miss Maya Lester (instructed by Allen & Overy LLP) appeared for the Applicant

Mr. Peter Roth QC and Mr Daniel Beard (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent

Miss Kelyn Bacon, (instructed by CMS Cameron McKenna) appeared for the Intervener.

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**HEARING: DAY ONE**

1 THE PRESIDENT: Yes, Mr. Roth.

2 MR. ROTH: Sir, may I on behalf of my clients, the OFT, just reiterate the apology that had been  
3 given to the Tribunal in the letter last Tuesday about the late service of the witness statement  
4 and the skeleton. It of course was not deliberate, and I can say personally I know the solicitors  
5 and the officials worked late in the evening the week before, and indeed through the weekend,  
6 in an effort to get everything ready for the deadline on Monday, and indeed it was a succession  
7 of mishaps on Monday afternoon that prevented that, and my clients want to repeat, through  
8 me, their regret about this, and indeed the Director of Competition Enforcement from the  
9 Office in the Tribunal this morning to underline that they do take it very seriously and the  
10 regret they feel.

11 THE PRESIDENT: Yes, thank you, Mr. Roth; we understand. I think the important lesson is not to  
12 let communications break down. That is where the difficulty arises.

13 MR. ROTH: Yes, we appreciate that.

14 Secondly, may I just seek permission to hand in a very short one-and-a-half page  
15 witness statement from Mr. Priddis correcting some points in his witness statement, and indeed  
16 as a result of the speed with which it had to be prepared. [Document handed to the Tribunal]

17 THE PRESIDENT: Yes.

18 MR. ROTH: Thank you very much.

19 THE PRESIDENT: Yes, Mr. Green.

20 MR. GREEN: Good morning. Professor Stoneman, Mr. Mather, good morning. I appear today with  
21 Miss Maya Lester for UniChem, the Applicant, Mr. Peter Roth Q.C. and Mr. Daniel Beard  
22 appear for the Office of Fair Trading, and Miss Kelyn Bacon appears for Phoenix, the  
23 Intervener, and through Phoenix evidence from EAP has been put in.

24 As the Tribunal knows, this is an application for Judicial Review of the Decision of  
25 the 17<sup>th</sup> December approving the merger of Phoenix and EAP. We have set out in our grounds  
26 in the Notice of Appeal the nature of our challenge. These focused upon the content of the  
27 Decision in the context of the facts as UniChem knew them at that stage. Following the  
28 commencement of proceedings the OFT has disclosed the relevant documents relating to the  
29 procedure it applied, and this shows how the application for approval from confidential  
30 guidance application onwards developed. The OFT's investigation and the evolution of its  
31 belief as to SLC is set out in these documents, and that is supplemented in Mr. Priddis's  
32 statement.

1           What I would like to do for the first quarter of an hour or so is to set out what we say  
2 the gravamen of this case is, as now disclosed by the documents. We do not depart from the  
3 grounds set out in our Notice of Appeal, and at the end of my submissions I will pull  
4 everything together under our four grounds.

5           The starting point is that the OFT identified two possible product markets for analysis.  
6 The first was the supply to all retail outlets and dispensing doctors of pharmaceutical products  
7 at the wholesale level, and this product market included supermarkets, national chains,  
8 independent pharmacies, which the OFT came to define as “pharmacies with four outlets or  
9 less”, and dispensing doctors. The second product, which I shall refer to as “the contestable  
10 market”, identified only those outlets where the merging parties and, in particular, AAH and  
11 UniChem competed, and that was the independent pharmacy sector, which was four outlets or  
12 less, and dispensing doctors. Mr. Priddis explains in his witness statement at para.50 that at  
13 the end of the investigation the OFT left open the question whether there were one or two  
14 relevant product markets. In the contestable sector, which is a sector that the OFT devoted a  
15 great deal of its attention to, the merged entity would have a collective market share of 47.2 per  
16 cent. These are based upon Phoenix’s own figures and, for your reference, these are exhibited  
17 to Mr. Priddis’s statement at tab 12, and it is figure 4. Of this contestable market 40 per cent.  
18 approximately is accounted for by dispensing doctors and 60 per cent. by independent  
19 pharmacies; so, in the contestable sector, which is, on Phoenix’s figures, worth about a quarter  
20 of a billion pounds a year, £250 million per year, 40 per cent. is dispensing doctors,  
21 approximately £100 million, and 60 per cent. pharmacies, approximately £150 million. Of this  
22 contestable sector that 47.2 per cent. share is divided into 83 per cent. so far as dispensing  
23 doctors are concerned – that would be the combined market share of the merged entity – and a  
24 much smaller share, I think it is 23 per cent., for pharmacies, the combined being 47.2. The  
25 aggregate market shares for the parties concerned would have been the merged entity, 47.2,  
26 AAH 36.6, UniChem 13.9 and others 2.3. So on one product market analysis the merged  
27 entity was the largest, substantially larger than AAH by 10 per cent., approximately nearly four  
28 times as big as UniChem, and three companies would then have dominated.

29           If one took the wider market share, in other words for all outlets including  
30 supermarkets, national chains and so on, then AAH remained the largest in East Anglia, the  
31 relevant geographical region, with 44.83 per cent. The merged entity would then have 27.96  
32 per cent. and UniChem would have 25.87 per cent. Some of these figures are also set out in

1 the OFT's first confidential guidance letter of July 2004 (again for your reference, paras.27 and  
2 28 of that letter).

3 In these product markets, in both of them, the OFT found as fact that there were high  
4 barriers to entry, that there were high and substantial barriers to expansion, and that there was  
5 no buyer power, and that those conclusions apply whichever of the two product markets is  
6 taken as the proper product market in the final reckoning.

7 The merger between Phoenix and EAP is a horizontal merger, and the OFT found in  
8 its Decision that Phoenix and EAP were the two most direct rivals to each other.

9 With that context, I would like to identify how the OFT's belief, because that is what  
10 s.33 refers to, evolved and how a single key issue in the OFT's analysis emerged relatively  
11 early on in their appraisal of the facts. Phoenix applied to the OFT for clearance with EAP on  
12 a confidential guidance basis on the 28<sup>th</sup> April 2004, and they made a number of submissions,  
13 Phoenix say seven in their skeleton, between that date and the 14<sup>th</sup> July, when the OFT issued  
14 its adverse confidential guidance. But between those two dates, on the 29<sup>th</sup> June, the OFT  
15 issued an Issues Letter and they said that they had, and I am quoting from the letter,  
16 "concerns". They expressed the fact that they were concerned at the high market shares in the  
17 contestable sector, and the OFT was, according to that Issues Letter, worried that in the north  
18 and eastern areas of East Anglia if Phoenix and EAP merged they would have even greater  
19 market power, and the merged entity would not be subject to an effective competitive  
20 constraint from other full line wholesalers, namely AAH and UniChem. They also expressed  
21 the concern that the height of the entry barriers was not low enough to encourage new entry  
22 and spur competition. The OFT reiterated these concerns in its confidential guidance letter of  
23 14<sup>th</sup> July, and at the end of that confidential guidance letter they identified very explicitly a  
24 single issue which gave them greatest cause for concern relating to SLC. The question which  
25 the OFT posed in the final paragraph of their confidential guidance letter was whether other  
26 full line pharmaceutical wholesalers provide an effective competitive constraint on the merged  
27 entity. The OFT made clear further that any constraint posed by these other wholesalers had  
28 to be sufficient to remove the SLC. It is possible therefore to say that as of 14<sup>th</sup> July the OFT  
29 had formed a relatively refined view and had identified a single critical issue of fact. That  
30 issue of fact had two components to it which are as follows. First, did AAH and UniChem  
31 exert any competitive constraint on the merged entity in this particular area of East Anglia,  
32 which became known as "the area North of the A14" ultimately. So did AAH and UniChem  
33 exert any competitive constraint; and secondly, if they did was it sufficient to nullify the SLC.

1 THE PRESIDENT: Are we talking effectively in this case, Mr. Green, about the area North of the  
2 A14 which is a somewhat smaller geographical region than East Anglia?

3 MR. GREEN: Yes, that is I think a fair conclusion as to the way the argument developed in front of  
4 the OFT. As of 14<sup>th</sup> July, and indeed for the remainder of the OFT investigation the OFT's  
5 view was that this was "a" and, indeed, "the" pivotal issue, and that view never changed. It is  
6 important to note that this key issue, as identified by the OFT was an issue of fact which  
7 concerned in practical terms the logistical abilities of UniChem and AAH. The factual  
8 question concerned very specifically such matters as UniChem's distribution system, how it  
9 operated and whether it could be expanded to take on new outlets – whether, over time,  
10 UniChem had been successful in winning new business North of the A14. These were very  
11 specific questions which in truth only UniChem can answer since it concerns the internal  
12 workings of their distribution system – and the same applies so far as AAH is concerned.

13 That was the state of play as of 14<sup>th</sup> July. Between 14<sup>th</sup> July and 22<sup>nd</sup> October when  
14 Phoenix made its formal application that Phoenix submitted further documents to the OFT with  
15 a view to addressing, amongst other things, this single specific issue. In particular, and  
16 importantly on 22<sup>nd</sup> September Phoenix submitted a series of spreadsheets. These were  
17 designed to show that AAH and UniChem supplied outlets in the North and Eastern area of  
18 East Anglia (The area North of the A14), and that these outlets were in close proximity to  
19 outlets served by EAP and Phoenix.

20 The inference which the OFT was invited to draw was that AAH and Phoenix could  
21 both compete in the outlying areas and could exert constraints upon the merged entity, and this  
22 was, as the events unfolded, to become an important document. The documents were intended  
23 to constitute a reflection of the logistical capabilities of UniChem and AAH. They contained  
24 information about UniChem and AAH and they operated on the basis of an assumption about  
25 the logistical capabilities of those two companies. That document was submitted on 22<sup>nd</sup>  
26 September. A month later Phoenix made its formal submission thus triggering the public  
27 review process. So at this point in time the OFT had been investigating the merger for just a  
28 few days under six months. It was at this point in time in receipt of the preponderant part of all  
29 of the evidence that it was to receive from the merging parties, and it was in receipt of these  
30 spreadsheets which ultimately appear to have been important in the OFT's thinking and are  
31 referred to in para.35 of the Decision.

32 Just over five weeks later, on 30<sup>th</sup> November, the OFT issued a second Issues Letter  
33 which identified six key potential competition concerns about SLC, and I will take you to the

1 key documents later to identify the relevant parts. These concerns once again focused upon  
2 whether AAH and UniChem exerted a competitive constraint on the merged entity; and,  
3 secondly, if so whether it was sufficient to dispel and remove the SLC concerns. The OFT  
4 wanted to be satisfied still that both – and I emphasise the word “both” – AAH and UniChem  
5 could both exert a competitive constraint on the entirety of the Phoenix EAP customer base,  
6 North of the A14. In these five weeks, spanning the start of the public investigation process  
7 and the second Issues Letter, UniChem had made its submissions to the OFT, the OFT asked  
8 for these on 3<sup>rd</sup> November, and gave a seven day deadline, although as is explained in Mr.  
9 Johnson’s statement UniChem had approached the OFT and indicated to the OFT on 26<sup>th</sup>  
10 October that it would be making a submission and therefore began work a week or so earlier.  
11 But as of 30<sup>th</sup> November, more than seven months after the OFT had begun investigating, the  
12 OFT persisted in its view there was a single critical issue which remained of concern and, as of  
13 30<sup>th</sup> November, there was only a few days left before the 40 day period before the public  
14 review process ran out.

15 THE PRESIDENT: The public review process started on?

16 MR. GREEN: 22<sup>nd</sup> October – principal submission of Phoenix. On 2<sup>nd</sup> November, the OFT met  
17 with Phoenix for an issues’ meeting and the next day, 3<sup>rd</sup> November Phoenix made a further  
18 submission. Importantly on 9<sup>th</sup> November the OFT held its internal meeting at which they  
19 decided to approve the merger.

20 THE PRESIDENT: Sorry, the meeting with Phoenix was on what date?

21 MR. GREEN: The meeting with Phoenix was on 2<sup>nd</sup> November. On 3<sup>rd</sup> November Phoenix made a  
22 further submission, and on 9<sup>th</sup> December – I am sorry, I have been giving you November dates,  
23 it is December, 2<sup>nd</sup> December, 3<sup>rd</sup> December, and 9<sup>th</sup> December. The OFT held its internal  
24 meeting at which it decided to approve the merger. The staff were then instructed to draft a  
25 decision of approval which was issued on 17<sup>th</sup> and it went on to the website at some time after  
26 that.

27 The upshot is that the OFT’s concerns, as expressed in the second Issues’ Letter,  
28 which were discussed at the meeting on 2<sup>nd</sup> December, were dispelled in seven days. For  
29 seven months the OFT persisted in a very obvious concern that in this concentrated market  
30 with high entry and expansion barriers and low buyer power the merged entity would be free  
31 from adequate competitive constraint, and then in seven days those concerns, which had been  
32 spelled out in the detailed Issues Letter, evaporated to such an extent that the OFT was  
33 convinced that both UniChem and AAH were competitive constraints and that the extent of

1 that constraint was sufficient to negate, to use the words of the Court of Appeal dispel,  
2 eradicate, remove, any concern as to SLC in the key area of East Anglia identified by the OFT.

3 In order to dispel its concerns about SLC the OFT in law had to believe that both  
4 AAH and UniChem could constrain the merged entity across all of the customer base of the  
5 merged entity.

6 THE PRESIDENT: North of the A41.

7 MR. GREEN: North of the A14.

8 THE PRESIDENT: The A14, yes.

9 MR. GREEN: Yes. The key reasons which ultimately led the OFT to change its mind or consider  
10 that its concerns were alleviated are summarised very shortly in paras.34 to the 38 of the  
11 Decision, and I do not ask you to turn it up at this precise moment because I will come to it  
12 later. But it boils down to a belief that AAH and UniChem (a) had customers north of the A14,  
13 both in the general market and the narrow contestable market, and (b) that meant that they  
14 could simply add another customer onto the run. So far as the OFT was concerned, it  
15 ultimately boiled down to a fairly straightforward proposition that it is, and I am quoting from  
16 para.34:

17 "It should therefore be relatively easy and cost effective to add one or more drops to  
18 an existing round."

19 The OFT felt corroborated in its view by what they believed was the proof of the  
20 pudding being in the eating, that UniChem and AAH had independent customers, and indeed  
21 non-independent customers north of the A14, but it boiled down at the end of the day to a  
22 relatively, and indeed one might say very narrow, factual issue: could UniChem and AAH  
23 expand their distribution networks to capture sales north of the A14 and thereby either actually  
24 or potentially exert a sufficient constraint to eradicate the concern that otherwise the merged  
25 entity would have an exceptionally high market share in that area, and the OFT identified a  
26 consequence of having a very high unconstrained market share as being a risk of reduced  
27 quality of service and higher prices.

28 THE PRESIDENT: I am not sure we have actually got a market share for the area north of the A14,  
29 have we?

30 MR. GREEN: I do not think we do. We have the average market share for the whole of the East  
31 Anglia region. What one can say is that it will be much higher in the area north of the A14.

32 The reason that the OFT found that its concerns were alleviated or dispelled can only  
33 be because of Phoenix's and EAP's submissions about UniChem. However, at no point in the

1 investigative procedure did the OFT check or verify these assertions with UniChem. When  
2 UniChem submitted its documents to the OFT on the 10<sup>th</sup> November the OFT declined a  
3 meeting and the OFT gave the UniChem team the impression that it accepted its submissions,  
4 that the OFT had issued a limited ----

5 THE PRESIDENT: That meeting was when, Mr. Green?

6 MR. GREEN: There was no meeting. They declined a meeting.

7 THE PRESIDENT: They declined a meeting, yes.

8 MR. MATHER: Is that meeting Mr. Ainger's note referred to?

9 MR. GREEN: That is right.

10 MR. MATHER: Reading the note, did not the OFT offer a meeting because there were further issues  
11 to discuss?

12 MR. GREEN: Yes. It may be helpful just to look at Mr. Ainger's note of the meeting because it is  
13 quite important. Tab 7 of the Applicant's evidence. It is the small black file. This was on the  
14 19<sup>th</sup> November, 11 days before the OFT issued their second Issues Letter, which expressed the  
15 concerns that they had, and you will see from it that the OFT stated to UniChem that they  
16 thought the submission was very helpful and comprehensive, that the OFT did not envisage  
17 that it would be sending UniChem any further information requests. UniChem raised the  
18 question of a possible meeting but the OFT said they were running to a tight timetable, and  
19 from their perspective did not think a meeting would be necessary. It was reiterated the  
20 submission was comprehensive and did not require clarification, and it was stated that the OFT  
21 would consider a meeting if UniChem had any additional issues or concerns it wished to raise.  
22 And Mr. Ainger then says to his team:

23 "Does anyone have views on whether there are additional issues that we've not yet  
24 raised? If not, perhaps the best course of action is to wait for the OFT's Decision."

25 The clear impression which was given, and which is confirmed in the last two  
26 paragraphs of Mr. Johnson's statement, is that the UniChem thought that the OFT accepted  
27 their submission; in particular, that they were not an effective constraint in the outlying  
28 regions. The OFT did not put to UniChem the concerns which it apparently still had and  
29 which were reflected in the second Issues Letter. There were no questions raised, for example,  
30 on the 3<sup>rd</sup> November, and we will look at the request later – no questions raised as to how the  
31 distribution system operated, whether it was capacity constrained and so on. UniChem did not  
32 have put back to it the key aspects of Phoenix's submissions about it, in particular as of this  
33 stage the OFT had the spreadsheets, and had had them for over two months, since the 22<sup>nd</sup>



1 September. The net effect of this was that on a persistent and absolutely critical issue to the  
2 decision, the defining issue, the OFT came to a view at the very eleventh hour on the basis of  
3 submissions of fact from Phoenix and EAP about the capacity of UniChem and AAH. Those  
4 submissions of fact made by Phoenix were acutely wrong. They were never verified with  
5 UniChem or, so far as we understand to be the case, with AAH.

6 UniChem's evidence is that UniChem has failed miserably in its attempts to win  
7 business in the independent sector north of the A14. In 15 years it has won and retained five  
8 customers, eight new accounts but four of those are within the same group. It does not have a  
9 single dispensing doctor north of the A14. So the proof of the pudding is one of, as Mr.  
10 Johnson candidly expresses, miserable failure – a very poor record north of the A14 for  
11 logistical reasons, which are explained by Mr. Johnson as flowing from the characteristics of  
12 its distribution system, and I will come back to the details of that later. He explains that not  
13 only does UniChem have a poor record of winning sales in the independent sector but that its  
14 intrinsic ability to alter its distribution system to capture even small numbers of new customers  
15 is very limited. There is a problem in even catching in ones and twos and threes because the  
16 system is capacity constrained and has been for many years. But since the OFT's assumption  
17 is that the distribution system will enable UniChem to be a competitor of an effective nature  
18 across the entirety of this customer basis, the assumption must be that UniChem can radically  
19 restructure its distribution network with ease with no difficulty whatsoever. So it is not just a  
20 matter of adding on ones or twos but to satisfy the OFT's assumption it is implicit that  
21 UniChem had to be able to alter its distribution system with easy, very easily, at minimal cost,  
22 and be able to capture the entirety of the customer base.

23 The OFT could have unearthed these facts. They explode entirely the untested  
24 assumptions which underpin the key finding in the decision. That is, as it seems to us, the key  
25 issue in this case, what it boils down to having seen the documents.

26 What I would like to do now is go back to point A and start more methodically  
27 dealing with an issue which the Tribunal asked for submissions on at the CMC, namely the  
28 law, and there are three issues which I need to address in relation to the law. The first is the  
29 nature of the OFT's duty under s.33, and that involves an analysis of the issue of the extent to  
30 which the Tribunal should review issues of fact. The second is the intensity of the review  
31 process. Thirdly is an issue which the Tribunal has not had cause to examine in great detail  
32 before, the role of third parties, because it seems to us that is an important issue since we are  
33 saying that had we been asked specific enough questions, and had we been put on notice that

1 there were key issues which need to be explored, we would have put forward information  
2 which would have assisted the OFT, but we were not. So those are the three issues of law I  
3 wish to address.

4 In order to try and expedite matters we produced a speaking note and I am going to  
5 hand that up now. [Document handed to the Tribunal]

6 THE PRESIDENT: Has this gone to the other parties, Mr. Green?

7 MR. GREEN: It is just about to. I am afraid it was finished this morning.

8 THE PRESIDENT: What do you want us to do with this product of the midnight oil which must be  
9 running very low in your camp and perhaps other camps!

10 MR. GREEN: I am going to take you through it. It is not only midnight oil, it is early morning oil  
11 as well. I am just basically going to go through it.

12 THE PRESIDENT: Do you want us to break and read it or do you want to ----

13 MR. GREEN: I do not think that is necessary. It just so happens in this case – I think I will be until  
14 mid afternoon today. Mr. Roth will then start, and will then have three days in which to absorb  
15 and deal with it as they see fit before Friday, if they think that is appropriate, but I think it is  
16 probably better that I take you through it rather than use up time with people reading.

17 THE PRESIDENT: Yes. Let us see how we get on.

18 MR. GREEN: The three legal submissions which seem to us to be most relevant in this case are  
19 summarised in para.2, and the first of those is the duty to refer. We are taking our cue  
20 predominantly from the Court of Appeal's judgment in *IBA* which, in very substantial part,  
21 affirmed the analysis, indeed entirely the analysis, of the Tribunal, and particularly in relation  
22 to issues such as review of facts, but nonetheless we will take the language and the test as set  
23 out by the Court of Appeal.

24 The first point to note, and we say with respect to the OFT that they have  
25 misinterpreted the Court of Appeal in this regard, is that the OFT has no discretion in this case.  
26 This is not a case where the OFT has either a discretion nor is engaged in the formulation of  
27 policy. The OFT is subject to a statutory duty to make a reference when certain facts arise in  
28 its belief, and over those facts the Vice-Chancellor explained that the Court of Appeal has, and  
29 I am quoting from para.6 of the note:

30 "The OFT has a wide margin in which the OFT is required to exercise its judgment,  
31 but a very careful and important distinction was drawn between a wide margin over  
32 which the OFT exercises judgment and a case where there is either a discretion or  
33 policy formulation."

1 Mr. Roth's skeleton says, at para.6(b)(4), that the OFT has a wide margin of  
2 discretion on which the OFT must exercise its judgment, and what it is important to appreciate  
3 is that the Court of Appeal was careful in the way that it described the test because the Court of  
4 Appeal emphasised that the fact that there was no discretion involved and the fact that the OFT  
5 was not engaged in policy formulation were important in analysing the intensity of the review  
6 process by the Tribunal. You will recollect the relevant paragraph from the Vice-Chancellor's  
7 judgment and perhaps it is convenient ----

8 THE PRESIDENT: I think we ought to look at it, Mr. Green because you cannot necessarily assume  
9 we carry it in the forefront of our minds.

10 MR. GREEN: Tab 5 of our authorities bundle. Paragraphs 47 and 48 of the judgment, and para.93.  
11 What the Vice-Chancellor said at para.47 was to deal with the question of a probable SLC, and  
12 I think the important words for present purposes are in para.48:

13 "At the other end of the scale it is clear that the words 'may be the case' exclude the  
14 purely fanciful because the OFT acting reasonably is not going to believe that the  
15 fanciful may be the case. In between the fanciful and a degree of likelihood less than  
16 50% there is a wide margin in which the OFT is required to exercise its judgment. I  
17 do not consider that it is possible or appropriate to attempt any more exact  
18 mathematical formulation of the degree of likelihood which the OFT acting  
19 reasonably must require, as Lord Mustill observed in *South Yorkshire Transport*, the  
20 courts have repeatedly warned against the dangers of taking an inherently imprecise  
21 word and redefining it thrusting upon it a spurious degree of precision."

22 When the Vice-Chancellor was referring to a "wide margin in which the OFT is  
23 required to exercise its judgment", he was doing no more than identifying in broad descriptive  
24 terms what he was then eschewing, namely mathematical probability. He was in effect saying,  
25 to use the forbidden mathematical approach, the wide margin is something between, say, 25  
26 per cent. and, say, 45 per cent. That was the wide margin he was referring to, and over that  
27 broad range of probability he was saying the OFT exercised judgment.

28 If one looks at Lord Justice Carnwath's judgment at para.93 one sees that put in  
29 context. He says, and I should observe that Lord Justice Carnwath's judgment was part of the  
30 ratio because Lord Justice Mance agreed with both the Vice-Chancellor and Lord Justice  
31 Carnwath, so there was a unanimous view on this:

32 "The present case, as the Tribunal observed, in para.223 of its judgment, is not  
33 concerned with questions of policy or discretion, which are the normal subject-matter

1 of the *Wednesbury* test. Under the present regime, unlike the 1973 Act, the issue for  
2 the OFT is one of factual judgment. Although the question is expressed as depending  
3 on the subjective belief of the OFT, there is no doubt but that the court is entitled to  
4 inquire whether there was adequate material to support that conclusion. (see per Lord  
5 Wilberforce in *Tameside*.)”

6 He then goes on to put that in context of the intensity of the view.

7 So there is, as a starting point, an important distinction to be drawn between a case  
8 where there is a judgment to be exercised over facts and a case where there is a discretion for  
9 the formulation of policy, and where the law classifies a decision-makers task as one of ----

10 THE PRESIDENT: I think you need to go down to 100, do you, in Lord Justice Carnwath’s  
11 judgment. He goes through the various cases.

12 MR. GREEN: He does go through the various cases, yes indeed.

13 THE PRESIDENT: And reading the second half of para.100, he says the question was whether the  
14 material relied on by the OFT could reasonably be regarded as dispelling the uncertainties  
15 highlighted by the Issues Letter.

16 MR. GREEN: That question was wholly suitable.

17 THE PRESIDENT: Useful anyway – and involved no policy, etc., etc.

18 MR. GREEN: Yes.

19 THE PRESIDENT: Is that a reasonable way of looking at it?

20 MR. GREEN: That is right, yes, and that is an important paragraph, and it is one of the ones we do  
21 rely on.

22 So there is an important distinction between discretion – policy on the one hand which  
23 will generally necessitate a lighter ----

24 THE PRESIDENT: If I can just try to break down the analytical steps to understand your argument.  
25 On the question of whether something “may be the case” you are saying that on given facts the  
26 OFT has a margin, and one might loosely call it or perhaps better call it a margin of  
27 appreciation rather than “discretion”, which has other connotations, to determine whether a  
28 given set of facts gives rise to something that may be the case on the scale between fanciful  
29 and less than 50 per cent., wherever that is.

30 MR. GREEN: Yes.

31 THE PRESIDENT: Which is one question. But a quite different question is what the facts are to  
32 which that margin of appreciation is to be applied.

33 MR. GREEN: Yes.

1 THE PRESIDENT: And it is a question of what the facts are. The question for the Tribunal is  
2 whether the material relied on by the OFT supports the facts to which they applied the margin  
3 of appreciation; is that it?

4 MR. GREEN: Yes.

5 THE PRESIDENT: That is the submission.

6 MR. GREEN: That is the submission. There are a number of ways of putting it, and that is  
7 obviously a core way, but one might also say that, in so far as the OFT has any margin of  
8 appreciation, it must be upon the basis that they have reviewed the correct facts if you do not  
9 ask for the correct facts then you do not have them in front of you.

10 Can I jump, and then I will go back, to para.75 of my speaking note where we set out,  
11 largely by distillation of *IBA*, which itself distils and applies *Tameside* from the House of  
12 Lords, circumstances where an error of fact might arise, and we have tried to draw out of the  
13 Judgment the sorts of things that would lead to a review, and we have identified seven, and  
14 there are more examples given in the recent Court of Appeal case of *E v Secretary of State*, but  
15 by way of illustration it is proper for the Tribunal to inquire – and I am looking at 75(1) and  
16 onwards – whether the facts identified in the Decision actually existed, to determine whether  
17 the OFT has derived a proper inference or conclusion of law from the facts, to determine  
18 whether the OFT has ignored relevant facts, to determine whether there was adequate factual  
19 material to support the conclusions arrived at, to determine whether the OFT’s beliefs were  
20 reasonable and objectively justified by the evidence. That was, I think, the Vice-Chancellor’s  
21 formulation of Lord Justice Carnwath’s “adequate factual material to support the conclusion”.

22 THE PRESIDENT: Is 5 the appreciation of whether it may be the case, or is 5 the actual facts in  
23 themselves?

24 MR. GREEN: If you take the facts as found, or as they should have been found, whether the OFT’s  
25 beliefs, based upon those facts were reasonable and objectively justified. Then item 6, which  
26 flew directly from the facts of *IBA* to examine why, and on what basis the OFT changed its  
27 mind so rapidly after a cogent Issues’ Letter such that if the hypotheses were well founded  
28 there was a requirement for a reference. Then, to review the reasonableness of a belief formed  
29 by the OFT where there are two or more credible views as to the likelihood of an SLC.

30 I think it is also important that, as a matter of law, if the OFT exceeds its jurisdiction  
31 in its approach to facts the Court of Appeal treated that as the OFT having overstepped its  
32 statutory task and having acted in excess of jurisdiction. That is a point I will come back to  
33 later, because it is clear from the Court of Appeal’s Judgment that there is a limit to the

1 exercise that the OFT is entitled to conduct. That all flows from the distinction drawn by the  
2 Court of Appeal between the discretion and policy formulation on the one hand, and – to use  
3 the Vice-Chancellor’s language – “a wide margin in which the OFT is required to exercise its  
4 judgment”, and we respectfully submit that the OFT’s formulation in para.6(B)(4) that the OFT  
5 has a wide margin of discretion in which the OFT must exercise its judgment is not an entirely  
6 accurate description of the test set out in the Act and is explained by the Court of Appeal.

7 If I can jump now to para.10 of our submissions. These submissions concern  
8 alternative ways in which the Court of Appeal expressed the issue and identified circumstances  
9 in which there would be a Reference. The first is the OFT is under a duty to refer if there is a  
10 real issue as to SLC. This arose in the context of a submission made in the Court of Appeal  
11 that what the Tribunal had done in IBA was in effect to reverse the burden of proof. The  
12 Court of Appeal rejected that submission and said in its Judgment that what the Tribunal had  
13 done was to find a SLC which prima facie triggered a duty to refer such that if those were the  
14 correct findings it was then incumbent on the OFT with convincing evidence to rebut that  
15 presumption.

16 THE PRESIDENT: I think you had better take us through this bit.

17 MR. GREEN: It is easiest done through the Vice-Chancellor’s Judgment, starting at para.54. Here  
18 the Vice-Chancellor says as follows, under the heading “Reversal of the Burden of Proof”.

19 “It is common ground that the legal onus or burden of proof on an application for  
20 Judicial Review rests on the applicant ... CAT made observations which according to  
21 the Appellants indicate they failed to appreciate cardinal requirement.”

22 They then refer to three paragraphs in the Judgment, in which it is said that that was reflected.  
23 Then the Vice-Chancellor says:

24 “I do not accept this criticism of the CAT. All three statements were in the context of  
25 there being a real issue as to substantial lessening of competition. This had been  
26 dealt with by the CAT in paras. 168 to 177. In that section of their Judgment the  
27 CAT considered whether there was such an issue. If there was not, no question of the  
28 belief of the OFT being unreasonably held could arise. In paras. 169 to 174, the CAT  
29 said that there obviously was a real issue arising from the combined shares of Isoft  
30 and Torex, the existence of high barriers to entry, the lack of supply side  
31 substitutability and the relative smallness of the next competitor. The CAT then  
32 observed that it would be difficult to put the matter more cogently than the way it  
33 was put by the OFT in the Issues Letter.”

1 They then refer to the CAT Judgment 176, 177, and I think it is probably worth reading those  
2 two paragraphs:

3 “Nonetheless, the OFT decided, apparently at a Decision meeting on 8<sup>th</sup> October  
4 2003, just over a week after sending the Issues’ Letter, that it was under no duty to  
5 make a reference to the Commission under s.33 of the Act. That decision was taken  
6 following a meeting with the parties on 2<sup>nd</sup> October, and a submission made by the  
7 parties on 6<sup>th</sup> October. As appears from the Decision the basis of the OFT’s  
8 conclusion was in broad terms that the potential competition concerns did not after all  
9 arise as a result of the countervailing effect of the NP FIT interpreted by the OFT.  
10 We are not required to decide, and should not decide under s.120 whether the OFT’s  
11 Decision is correct on its merits. We do, however, have to decide whether the  
12 Decision was lawful.”

13 Then the Vice-Chancellor continues:

14 “The concept of a shifting onus is well known (e.g. Halsbury’s Laws) the onus will  
15 fluctuate from time to time in the course of a hearing such that if a prima facie case is  
16 made out by a claimant, the onus may shift to the defendant, but the onus which shifts  
17 to the defendant is only that unless he can displace the prima facie case by evidence or  
18 argument the claimant is likely to discharge the legal onus which rests on him. A  
19 good example in the field of Judicial Review is provided by *Padfield* to which I refer  
20 below at para.66. In my view it is clear beyond doubt that read in context this was all  
21 the CAT meant. Their comments are readily understandable in the light of the OFT’s  
22 apparent change of view in the course of the last few days if the hypotheses set out in  
23 the Issues’ Letter were well founded then the OFT was bound to refer. The CAT was  
24 entitled and bound to examine with care why such hypotheses were rejected in so  
25 short a time and whether their rejection was justified, particularly in view of the  
26 statutory duty to give reasons imposed by s.107. I would reject this criticism.”

27 So in the context of this argument about the reversal of the burden of proof, the Court of  
28 Appeal made clear and this was echoed also by Lord Justice Carnwath, that if the prima facie  
29 case was made out there was a duty to refer – the Vice-Chancellor uses the words “bound to  
30 refer”, and also the Tribunal was entitled and indeed bound to examine with care – and that is a  
31 reflection of the intensity of the Judicial Review, why such hypotheses were rejected in so  
32 short a time, and whether the rejection was justified.

1                   So there is a duty to refer under s.33 if an SLC prima facie is made out that duty is  
2 triggered and the question then arises “Why was the merger not referred?” You will see there  
3 is quite a strong parallel between the facts of IBA and the present case, just a few days before  
4 the approval Decision was taken a very cogent second Issues’ letter was published, setting out  
5 six quite substantial reasons why there were lingering concerns in the mind of the OFT.

6 THE PRESIDENT: So you say, picking up the Vice-Chancellor in para.57 that we are bound to  
7 examine with care why the hypothesis of an SLC was rejected and whether that rejection was  
8 justified?

9 MR. GREEN: Yes. And that is why in my opening submission I said that it does boil down to a  
10 relatively narrow issue. The whole thing condenses once one sees the full story.

11 THE PRESIDENT: I think somebody is going to have to take us to these spreadsheets and some of  
12 the evidence and all the rest of it.

13 MR. GREEN: Indeed. Yes. I will do that once I finish this section on law.

14 THE PRESIDENT: Yes.

15 MR. GREEN: Another way of putting the point is the way we put it in paras. 15 to 20, and I will, if  
16 can leave you to read that. Again the Court of Appeal made clear that there must be a  
17 reference when the OFT cannot exclude the likelihood of, or a real issue as to SLC, and I think  
18 that is really the obverse of the positive way in which we put the case on prima facie duty. I  
19 think it is worth considering for a moment what the Court of Appeal means by the word  
20 “dispel”. Once you have a prima facie case can that prima facie case be dispelled. “Dispel” in  
21 our submission means ----

22 THE PRESIDENT: Where does the word “dispel” come from? If somebody could tell us which  
23 paragraph it is? I am sure Miss Lester can turn it up in a moment or two.

24 MR. GREEN: We have here a reference to para.73 which is “remove” the requisite likelihood.

25 THE PRESIDENT: Do not worry, Mr. Green, you can tell us later.

26 MR. GREEN: Yes. I think the next way in which the matter is also put, the OFT must refer when  
27 there is some uncertainty in the OFT’s view is also really very much to the same effect. If  
28 there is an uncertainty objectively speaking, if one cannot exclude the likelihood of or a real  
29 issue as to SLC objectively speaking, then the duty to refer remains.

30 THE PRESIDENT: If you cannot exclude it, it “may be the case”?

31 MR. GREEN: You cannot exclude it, it may be the case, yes. In relation to the last proposition, the  
32 Court of Appeal emphasised that that was appropriate in context because the OFT was a first  
33 screen decision maker. Let me make one thing clear at the moment, we are not saying, because



1 the Court of Appeal made this very clear, that when you describe the OFT as a first screen  
2 decision maker that they are only entitled to conduct a preliminary review. The Court of  
3 Appeal and Lord Justice Carnwath made that very clear that that was not the case. They are  
4 entitled to engage in a more thorough review of the facts than that. So it is not just a  
5 preliminary view. In the present case they reviewed the facts for seven months, which on no  
6 basis could be said to be preliminary. Yet, at the end of seven months, there was, at the 11<sup>th</sup>  
7 hour still this burning issue to be resolved, which was critical.

8 THE PRESIDENT: That is longer than a CC reference would have taken, probably.

9 MR. GREEN: Longer than a CC reference. I would say this, I am cautious in saying that the OFT  
10 must do everything within 40 days, because the confidential guidance procedure plainly is of  
11 value to industry.

12 THE PRESIDENT: The 40 days did not start until 22<sup>nd</sup>, so the seven month period is slightly  
13 misleading in some respects.

14 MR. GREEN: It runs from the date of the first application, so as the OFT observed when it issued its  
15 confidential guidance letter, we cannot give you favourable treatment because one of the  
16 matters we need to investigate now is your factual assertions with third parties, and it is when  
17 the public review starts.

18 THE PRESIDENT: Sorry, yes, I think Professor Stoneman would like to ask a question?

19 PROFESSOR STONEMAN: I would like to go back to your para.20 - the OFT might refer when  
20 there is some uncertainty in the OFT's view. The President said that means it may be the case.  
21 It may be the case it is not frivolous – does that uncertainty include frivolous situations?

22 MR. GREEN: If the OFT can see there is a frivolous concern then they can simply reject it.

23 PROFESSOR STONEMAN: So there is no uncertainty.

24 MR. GREEN: There is no uncertainty. Then there is this margin which the Vice-Chancellor  
25 identified between something which is frivolous and something which is less than 50 per cent.  
26 and he said less than 50 per cent. advisedly because there was an argument in the Court of  
27 Appeal about whether the test was a significant prospect and the Court of Appeal said that was  
28 placing the bar too high. So we are looking at something between “frivolous” and “less than a  
29 significant prospect”. Again, one does not want to get into mathematical ----

30 PROFESSOR STONEMAN: Yes, but you stated “some uncertainty” and that does not rule out  
31 frivolous situations.

32 MR. GREEN: Well I would rule out frivolous.

1 PROFESSOR STONEMAN: I know you do not want to put a number on it, but I am asking you  
2 now, is it talking about “some” meaning greater than 25 per cent., greater than 20 per cent., or  
3 greater than 40 per cent.? Where were you thinking of? “Some” means to be greater than  
4 zero.

5 MR. GREEN: “Some” has to be greater than zero. In mathematical terms one probably is in the  
6 region of 20 to 25 per cent., but what that means in practical terms I am afraid I have no idea.

7 PROFESSOR STONEMAN: I think it is rather important in these circumstances, is it not? I mean,  
8 there can be some uncertainty, it is a matter of how much uncertainty?

9 MR. GREEN: I think one of the points we have made in our oral submission, thinking it through, is  
10 that there may be uncertainty about immaterial issues, and that uncertainty might be quite  
11 significant. I do not think we would be submitting that if there was uncertainty about a matter  
12 which was not that crucial to the Decision, we would say there has to be a reference. So there  
13 must be some materiality element to the uncertainty. If there is an uncertainty about a  
14 particular issue or a particular drug, or one particular customer, it may be a howling  
15 uncertainty, but that surely does not mean to say there has to be a reference because it is not  
16 that important to the overall scheme of things. So the uncertainty must relate to something  
17 which is material, in other words, not necessarily decisive to the OFT’s Decision, but has a  
18 significant bearing upon it.

19 THE PRESIDENT: It may well depend perhaps, Mr. Green, on the particular circumstances of the  
20 particular case. It may not be possible to be mathematical about it. One has at the back of  
21 one’s mind, for example – if I remember it rightly – a case like *BP/Kuwait* where the  
22 Monopolies & Mergers Commission said that the risk was pretty small, but the consequences  
23 of that small risk eventuating were so huge that you could not even take a small risk in that  
24 case, which was a special case, of course. But let us see how we get on, I think.

25 MR. GREEN: We would respectfully agree. We are reluctant to make submissions of broad and  
26 sweeping generalisation, because there are a number of important issues here which, for  
27 example, the extent to which the OFT might be required to show the Issues’ Letter to a third  
28 party which we say arise on the facts of this case, but we would not want to make broader  
29 submissions than that.

30 THE PRESIDENT: I think the Vice-Chancellor at some point, perhaps Lord Justice Carnwath as  
31 well, emphasises the risks of trying to go to far.

32 MR. GREEN: At 48. Yes.

1 THE PRESIDENT: “It is not possible or appropriate to attempt any more exact mathematical  
2 formulation.”

3 MR. GREEN: Yes. The next part of our submissions concerns an uncertainty in the process which  
4 is very relevant to the present case, which is where there is an unresolved issue of material fact,  
5 and this is para.24 of our submission. As I have said already, we accept that the OFT is not  
6 just engaging in a preliminary view, Lord Justice Carnwath made this very clear. The OFT is  
7 entitled to engage in a reasonably thorough investigation but there are limits. We submit that  
8 there are important limits. We submit that in law – and we think it is a legal constraint – there  
9 must come a point when the OFT is bound to say that the nature of the material dispute of fact  
10 is such that it is now for the Competition Commission. That is because the OFT is a first stage  
11 decision maker, and it has limited powers of investigation. We have attached to our outline  
12 submission a table, it is called “Annex 1”, which is a summary of key points of distinction  
13 between the OFT’s and CC’s relative powers on a sort of inch by inch, millimetre by  
14 millimetre level, what they can and cannot do with the statutory references. What one sees is  
15 a very obvious point, which is that the CC has far broader powers of investigation than does  
16 the OFT. Now, why has Parliament sought fit to introduce these limits on powers and duties?  
17 It is because, as the OFT itself acknowledges in its Guidance, it is the first stage. It is not the  
18 decision maker, it is the first stage, and the CC is the decision maker – a point which Lord  
19 Justice Carnwath emphasised was significant in understanding the statutory context. That is  
20 not to say the OFT does not have a proper role in reviewing the facts thoroughly but there is a  
21 limit, and one has to ask where in law this limit arises before the OFT has overstepped the  
22 mark and trespassed on to the proper statutory territory of the Competition Commission.

23 Again, it is almost certain, and one can only do this on a case by case basis, but we  
24 submit that one of the circumstances in which this would arise is where, at the end of the  
25 public review process, the OFT has a critical – as here – factual conundrum, and it only has  
26 time to collect the evidence of one party on that, so that there is a risk that it will have an  
27 unbalanced view of the facts. That is precisely what happened in this case. It accepted the  
28 evidence of Phoenix as to the capabilities of UniChem and AAH. Either it felt it unnecessary,  
29 or alternatively it simply did not have time to put that evidence to AAH and UniChem.

30 A similar point was observed to be relevant in IBA by the Vice-Chancellor at para.72  
31 in relation to the Issues Letter and the evidence. The Court of Appeal was implicitly critical  
32 of the fact that the OFT had not put either the Issues’ Letter or the responsive evidence of Isoft  
33 and Torex to IBA.

1 THE PRESIDENT: Where do we get that from?

2 MR. GREEN: 71 and 72. At 71 the Vice-Chancellor says:

3 “The Issues’ Letter set out 10 matters in respect of which a significant lessening of  
4 competition might be expected to result from the proposed merger. The Letter  
5 explained that they were hypotheses which the OFT were still evaluating in the light  
6 of evidence put before them by Isoft and Torex as well as by third parties. Seemingly  
7 some eight days later all these hypotheses had been rejected or discounted to such an  
8 extent that the OFT felt able reasonably to believe that there was no likelihood that  
9 the proposed merger would lead to a significant lessening of competition. Not only  
10 did IBA not see this letter, but they had no opportunity to comment on Isoft and  
11 Torex’s responses to it. Moreover the OFT did not apparently see the OBS to which  
12 I referred in para. 11 above.”

13 Then they say in each of paras. 29 to 32 in which the OFT expresses conclusions it does so in  
14 terms of unlikelihood. So the relevant point was that the Court of Appeal felt, and we submit  
15 that this is the only proper interpretation of the Vice-Chancellor’s Judgment, that IBA was  
16 entitled to see the Issues’ Letter and/or the evidence of the merging parties to it. The  
17 principle underlying that is that the third party, or at least an appropriate third party is entitled  
18 to see how the argument is developing and how the OFT’s belief is evolving, because only if  
19 they have knowledge of the OFT’s evolving belief can they make sensible submissions on key  
20 issues. Since in the present case the key issue specifically concerned the capability of  
21 UniChem and AAH from a logistical, practical level the only sensible course was to go to the  
22 horse’s mouth and ask, and the way in which proper evidence would have come out was to  
23 have either put the Issues’ Letter to UniChem and AAH, or to put the spreadsheets to UniChem  
24 and AAH, or Phoenix’s evidence about them, in a very specific way so that the third parties  
25 could say “This concerns me, I am the best source of information about me, these are the  
26 facts.”

27 We do not submit, and this is our case-by-case analysis, that in every case it is  
28 necessarily incumbent on the OFT to put an Issues’ Letter to third parties. It may depend on a  
29 case-by-case basis and we are not inviting the Tribunal to make a sweeping statement about the  
30 duty of the OFT in every case. If, however, it was the OFT’s position in this case that it simply  
31 did not put Issues’ Letters to third parties as a matter of procedure, regardless then we submit  
32 that is an error of law. We do not know why the Issues’ Letters were not put, because we  
33 submit it was perfectly possible for the OFT at the very early stage in the public investigatory

1 process to put to the material third parties the central facts. By the time the public  
2 investigation process started, they had been working on the case for nearly six months. They  
3 had the spreadsheets which apparently turned out to be important. They could either have  
4 synthesised them if there was any issue of confidentiality or summarised them, or in some way  
5 put to the third parties the crucial issues and told them about their concerns. All the third  
6 parties received was a very short letter on 3<sup>rd</sup> November, which I will take you to in due  
7 course, which began to nibble around the fringes of these issues but did not get to the heart of  
8 them.

9 One moves from there to the duty to give adequate reasons, which is para.36.  
10 UniChem has submitted also in our Notice of Application that there was inadequate reasoning  
11 in the decision, and the Court of Appeal has defined the scope of the duty as a duty to give  
12 clear, adequate, objective and justifiable reasons which meet the substance of the arguments  
13 advanced. The Court of Appeal made clear that the reasons do not have to replicate the sort of  
14 reasoning one finds in a judgment, and does not have to set out each and every bit of the  
15 evidence. We submit that on the facts of this case, when everything boils down at the end of  
16 the day to a fairly narrow issue, that the Decision should have addressed that narrow issue in  
17 detail, and it did not. We have identified in para.46 various circumstances in this case which  
18 we say heighten the duty to give reasons, and if I could take you straight to para.46 and  
19 summarise them.

20 In our submission, there are nine factors of relevance to the present case. The first is  
21 this is a decision not to refer, which of all the options open to the OFT is the one which has  
22 definitive legal consequences. It is not a decision to refer which is an interim stage, it is a  
23 definitive legal decision.

24 Secondly, we submit that the decision not to refer was taken in a case where there  
25 were, at least on a prima facie basis, very substantial reasons suggesting there should be a  
26 reference. There had been two Issues Letters served over the course of seven months and one  
27 negative confidential Guidance Letter. There had been two review meetings with Phoenix, two  
28 meetings at which the issues were discussed, and there were clearly serious issues which  
29 persisted until the last moment in a highly concentrated market, with high barriers to entry,  
30 expansion and no buyer power. OFT's concerns in a second Issues Letter were seemingly  
31 fully and comprehensively dispelled in the course of seven days, but the reason the OFT states  
32 it changed its mind in that week was an issue directly relating to third parties, in particular  
33 UniChem. UniChem made a submission under conditions of haste between the 3<sup>rd</sup> and 10<sup>th</sup>

1 November. That perhaps requires a slight qualification because they first started preparing on  
2 the 26<sup>th</sup> October. But in the submission UniChem explained it was not an effective competitor  
3 to the merged entity in many parts of the region. UniChem's evidence was sought to be  
4 rebutted by Phoenix who made submissions specifically about UniChem's capability to expand  
5 north of the A14, and submissions about its ability to expand runs, to add routes onto runs, and  
6 about the proximity of UniChem and AAH stores to outlets supplied by Phoenix and EAP.  
7 The OFT never put these particular points back to UniChem though they related directly to  
8 UniChem and were critical to its ultimate decision. The OFT itself recognises how critical the  
9 issue was. The OFT states this was the one issue of concern in the Decision, and that  
10 insufficient information on the point had been the reason for its decision in the *AAH* case and,  
11 for your note, that is para.34 of the *AAH* decision a year earlier, that says that the reason that  
12 they were bound to refer then was because they did not have adequate information on the  
13 extent to which there were effective constraints by the other four line wholesalers. So the OFT  
14 took a decision which resolved definitively a complex factual issue concerning the logistical  
15 capability of UniChem without putting the key facts to UniChem, and without putting to  
16 UniChem the points taken against it, and it took it on the basis of evidence submitted by  
17 Phoenix and EAP.

18 The other point we rely upon is that the OFT was departing from its previous  
19 decision, in particular the *AAH* case. This case therefore bears similarity to the *IBA* case,  
20 where the Court of Appeal said that the OFT's reasons in analogous circumstances had to be  
21 very compelling, and indeed that was a point which the Tribunal referred to in its own  
22 judgment in that case.

23 THE PRESIDENT: Where did the Court of Appeal talk about compelling reasons, Mr. Green?

24 Come back to it in a moment if you want to.

25 MR. GREEN: Yes. It is Lord Justice Carnwath's judgment, paras.102 through to 106. Perhaps I  
26 can come back to it.

27 The duty to give reasons in the circumstances of a case such as this one has to say  
28 begin to pale. There is a problem with the judicative reasons, for the reason that the Court of  
29 Appeal identified, which was that, whatever may be said in the Decision, it is accepted that the  
30 OFT can amplify its reasons before the Tribunal on an appeal and therefore the function of the  
31 Tribunal on the appeal is not just to look at the reasons per se but to look at them in the context  
32 of the explanations given by the OFT.

1           One comes now to the question which I have briefly dealt with already, which is the  
2 intensity of review, and I am going to take this reasonably quickly because in some respects I  
3 have summarised the ground already. The first point: what does an intense review mean? We  
4 submit it means, to use different language, a closer or detailed review of the reasons, factual  
5 and otherwise. That is what is meant by intense. The Court of Appeal, in particular Lord  
6 Justice Carnwath's judgment, reviewed the cases – paras.88 to 100 – and concluded that the  
7 intensity of review in the present case was on the intense side. It was to be contrasted with  
8 cases where there was a discretion on the part of the decision-maker, and cases where the  
9 decision-maker was formulating and applying policy. They have also referred to the fact that  
10 this was a specialist tribunal which was specifically set up to deal expeditiously and in an  
11 expert manner with the facts of particular cases.

12 THE PRESIDENT: I think we have now found dispelling, which is at para.100.

13 MR. GREEN: Lord Justice Carnwath disagreed with the Tribunal in one very limited way. Lord  
14 Justice Carnwath was of the same view as the Tribunal in *IBA*, that this was a detailed review,  
15 but he said that one did not have to move outside the realms of ordinary Judicial Review  
16 principles in order to come to that conclusion because Judicial Review was, by its very nature,  
17 a flexible set of principles and, as the Tribunal correctly observed in *IBA*, Judicial Review was  
18 governed by the particular context, and the context here was a statutory duty, no discretion, no  
19 formulation of policy, with a specialist Tribunal overseeing, and those factors meant a close  
20 detailed reviewed was in fact proper, and that is effectively what we say between paras.48 and  
21 59.

22           In 60 of our speaking note onwards we deal with the question of review of facts, and  
23 again I have briefly dealt with this already and I will not therefore repeat it, but we have set out  
24 the references from both the Vice-Chancellor and Lord Justice Carnwath's judgment on the  
25 nature of this Tribunal's exercise, and you have seen a couple of those paragraphs already. We  
26 have set out Lord Justice Carnwath, para.63. There are three quotes there, and you will note  
27 that the third quote is not in fact a quote from the Court of Appeal. That is just a formatting  
28 error. That should be a separate paragraph. That is referring to the *IBA* decision on costs,  
29 taking its cue from the Court of Appeal. And we set out in para.65 quotes from the Vice-  
30 Chancellor, in 66 from Lord Justice Carnwath, the Vice-Chancellor citing the House of Lords  
31 in *Tameside*, and we have cited *Tameside*, and the Court of Appeal's endorsement of it. Then  
32 in para.69 we have cited a very recent decision of the Court of Appeal in *E v. Secretary of*  
33 *State*. This is a decision which Mr. Roth relies upon his skeleton, seeking to suggest that in

1 some way it limits courts' powers of review in relation to facts. With respect, we disagree. If I  
2 may, I will wait and see how Mr. Roth develops the *E* case ----

3 THE PRESIDENT: Just before we talk about *E* I just want to pick up *Tameside* again in 67, and  
4 seeing just how it applies there, in the middle of the paragraph, although the evaluation of  
5 those facts is for the Secretary of State alone – transposed to this situation – the appreciation of  
6 the facts on the scale between fanciful and less than 50 per cent. is for the OFT, question  
7 whether that is a reasonable appreciation to which they arrived, but, as to the underlying facts,  
8 I think you are saying the Tribunal must inquire whether those facts exist, have been taken into  
9 account, proper self-direction, etc., etc.

10 MR. GREEN: Yes, and if you jump to para.75, that is where we try to dissect *Tameside*, and the  
11 other parts of *IBA* into, as it were, the relevant questions.

12 I think it is better for Mr. Roth to deal with ----

13 THE PRESIDENT: Let us see where we get to on that, yes.

14 MR. GREEN: We have set out, just so Mr. Roth knows – our submissions on *E* are set out at  
15 paras.71 onwards and he can see what we say about it. It plainly was not intended to alter  
16 previous law, it was intended indeed to expand the reviewing court's jurisdiction to review  
17 facts. The Court of Appeal say that on top of the previous law one has to insert an element of  
18 fairness. It is not entirely clear what the OFT understand that term to mean, but we have set  
19 out in para.73 why having a proper Decision is in fact a fair Decision. Plainly if there is, and  
20 we do not accept that it is necessarily to be understood in the way the OFT accept it to be  
21 understood – believe it to be understood, but if you are asking yourself the question, “We can  
22 only review facts, is it fair to do so?”, in the present case plainly third party competitors of a  
23 merged entity believe it would be fair so that a proper decision is made. Third parties who  
24 have attempted to acquire EAP in the past and who had a clear expectation of being treated  
25 consistently would obviously believe it to be fair. Consumers and purchasers, in other words  
26 pharmacists and dispensing doctors, would believe it to be fair because they risk the prejudice  
27 identified by the OFT of higher prices and lower quality if the Decision is wrong, and indeed  
28 the parties themselves, the merging parties, will want a fair Decision because they want  
29 decisions to be as robust as possible to withstand this Tribunal, and plainly the market as a  
30 whole needs a fair Decision. So it is hard to see why in a case such as the present almost every  
31 interest, every stakeholder, to use the jargon, would not want the Decision to be fair.

32 I will not go over that any further. I think we will wait and see what Mr. Roth says.



1           We have dealt with the different types of factual error which we have distilled from  
2 the case law, and we put that out in 75.

3           The third and final legal issue I want to address is the role of third parties. It is  
4 relevant not least because the Vice-Chancellor was of the view, as per para.72 of the judgment  
5 in *IBA*, that *IBA* as a third party should have seen both the Issues Letter and the merging  
6 parties' response thereto. In the present case UniChem saw none of those documents. We  
7 submit that the point has greater relevance now in the light of the documents disclosed by the  
8 OFT, demonstrating that UniChem was unaware of the way in which the OFT's belief was  
9 evolving, and the key factual issues which were thrown up by that evolution in its thought  
10 process.

11           Mr. Roth's skeleton makes clear, and I am quoting from para.30 of the skeleton,  
12 para.81 of our submission, that the OFT also thought that the view of third parties was crucial  
13 because the OFT itself believed that, in particular, it was important to obtain and consider the  
14 views of third parties after the confidential guidance. They themselves accepted and  
15 recognised the need for close involvement of third parties.

16           We make a number of submissions in para.83 about the views of third parties and the  
17 extent to which they should be brought into the process, and they are as follows: firstly, the  
18 OFT must base its Decision on all relevant factors, including relevant evidence from third  
19 parties. We say it is especially crucial for the OFT to take fully into account the views of third  
20 parties on key factual issues that directly concern those parties, and where there are conflicting  
21 views on the key points between the merging parties and the third parties. Thirdly, third  
22 parties must have an adequate chance to put their views to the OFT so that they can be  
23 properly concerned, and therefore if the OFT is minded to make a decision that contradicts the  
24 views or evidence of the third parties on material issues the OFT must at least give the third  
25 party a chance to comment on the key issues arising and afford it an opportunity to respond.  
26 This might, as the Court of Appeal observed in *IBA*, entail giving to third parties both a copy  
27 of the Issues Letter and any response thereto. If the OFT decides to reject the evidence of that  
28 third party on a material point the OFT must explain why it intends to do so, giving sufficient  
29 reasons to allow third parties to know why their views on key issues were accepted or rejected.  
30 This would be necessary in order also to permit the Tribunal to conduct a review process. If  
31 the OFT does not have time to consult third parties on material issues and they remain in  
32 dispute at the culmination of an investigation, the OFT has a duty to refer.

1 This then takes one to the question, what is the legal obligation of the OFT in relation  
2 to third parties, and in paras.84 onwards we have set out our submissions on the law, and we  
3 summarise what we say are the relevant legal propositions. We first rely upon the Vice-  
4 Chancellor's observation at para.72, in which he clearly contemplates that the OFT can, in an  
5 appropriate case, submit the Issues Letter and responses to third parties.

6 We rely also on the structure of the Enterprise Act, which requires the OFT to carry  
7 out its functions with a view to, amongst other things, ensuring that the OFT has sufficient  
8 information to take informed decisions, and we rely also on the OFT's own guidance to the  
9 effect that it will invite comments from interested third parties, in particular where adverse  
10 views raise significant competition issues. The parties proposing the merger are told of the  
11 nature of the concerns expressed and given an opportunity to respond. One of the first steps in  
12 the OFT's evaluation process is an invitation to comment. So the OFT accepted in principle  
13 that you have got to consult third parties.

14 MR. MATHER: Just at the start of the Vice-Chancellor's observations in para.72 you are relying on  
15 the sentence:

16 "Not only did IBA not see this letter but they had no opportunity to comment on iSoft  
17 and Torex's responses to it."

18 And then the Vice-Chancellor continues.

19 Are you saying that there is a clear inference that the Vice-Chancellor was critical of  
20 that and, if so, is there any further statement in his remarks which would help us with that?

21 MR. GREEN: We are saying that implicitly he was critical. There are no further other statements.  
22 But the context of para.72 is explaining why in the Vice-Chancellor's view the OFT fell into  
23 error. It did not obtain the views of third parties and, in particular, you will see the next  
24 sentence:

25 "The OFT did not apparently see a doc called the OBS."

26 And the OBS was a specification which is a key doc in that case, which both the Tribunal and  
27 the Court of Appeal thought the OFT should have seen before it came to a decision. So it is in  
28 a paragraph in which the Vice-Chancellor is criticising the OFT's approach to the evidence, so  
29 the context in which the paragraph occurs is one of criticism, but there is nothing else in the  
30 judgment that we can find which adds further guidance on the point. But what we would say at  
31 the very least is that the Court of Appeal did not say that in appropriate case third parties  
32 should see the Issues Letter and any responsive evidence.

1 THE PRESIDENT: What we have got in this case, Mr. Green, is that UniChem and other parties  
2 were consulted, and there is no doubt they were consulted.

3 MR. GREEN: Yes, as was IBA.

4 THE PRESIDENT: That was in submissions, quite detailed submissions. The OFT's guidance as  
5 recited in your para.86 requires the OFT effectively to tell the parties proposing the merger and  
6 the concerns expressed, but one of the things that sort of hangs in the air a bit is what about  
7 putting back to third parties ----

8 MR. GREEN: Yes, I agree.

9 THE PRESIDENT: ---- matters that are appropriate for them to comment on.

10 MR. GREEN: Yes, I agree, and that is why I think there is a significant issue arising in this case that  
11 perhaps did not arise so acutely in *IBA*. Of course IBA was consulted and did put in  
12 submissions, but nonetheless the criticism was that it did not see the Issues Letter and it did not  
13 see the evidential response.

14 THE PRESIDENT: In that case the Issues Letter, if I remember rightly, was a bit more remote from  
15 IBA itself directly, as it were.

16 MR. GREEN: It was, and that is why one might say that para.72 gives rise to an *a fortiori* inference  
17 in the present case. You will recollect that IBA's relationship was largely as part of a matrix  
18 ----

19 THE PRESIDENT: Do not assume we recollect anything.

20 MR. GREEN: No. IBA's connection with the merging parties and with the relevant facts was far  
21 less significant than in the present case. It was part of the matrix of fact because it had a  
22 contractual relationship with Torex, but that was about as far as it went. In the present case the  
23 crucial fact concerns UniChem and AAH, and the OFT itself said, after the AAH Decision, and  
24 after the confidential guidance, that it needed information on this specific point, in particular  
25 from third parties. So it was a recognition by the OFT itself that the third parties had to be  
26 consulted, because they had boiled down the issue to this one, of the logistical capability of  
27 these particular third parties.

28 MR. MATHER: Again just going back to the sequences of events and the habits of UniChem, would  
29 it be fair to say that they adopted a sort of proactive approach to making submissions?

30 MR. GREEN: All third parties, and particularly parties in these circumstances, will make  
31 submissions. You have seen the submissions UniChem put in. We do not know what AAH  
32 put it. But UniChem put in a six or seven page submission, plus a report on RBB, which had  
33 an isochrone analysis based upon a 90 minute drive time, and UniChem's submission was that

1 it is not an effective constraint outside of its 90 minute isochrone, and that was its factual  
2 experience, and the OFT did not come back and say “We do not believe you”, or “You have  
3 got it wrong”, or “We do not accept your 90 minute drive time”. So they started to address  
4 what they saw to be the relevant issue, but that will occur in every single case. What one has  
5 to look at on the facts of this case is what were the key factual matters concerning the OFT  
6 when push came to shove? How do you classify them? Are they facts relating to Unichem  
7 and AAH? If so, did they have sufficient notice to be able to make sensible submissions about  
8 them, and we say the answer to the latter is “no”.

9 MR. MATHER: I am still intrigued about the too-ing and fro-ing because in the exchange we had  
10 earlier about the opportunity if UniChem still had concerns to seek a meeting with the OFT, I  
11 am still a bit puzzled by “they were advised not to waive their decision”.

12 MR. GREEN: I do not think there is any mystery about it. First, they had been told that the  
13 submission was thorough and comprehensive, very helpful and comprehensive. They had  
14 been told that the OFT did not expect to put further questions back to them; the OFT did not  
15 think a meeting was necessary, but “If you want to put anything else in you can.” So the  
16 impression given was everything is “hunky-dory” and it is quite possible, when one thinks of  
17 the timing, that the OFT did think that. They did think that the submission was correct, and  
18 their concerns remained because 11 days later they issued the second Issues’ Letter, so it is  
19 possible, we do not know because it is not really addressing Mr. Priddis’s statement, that as of  
20 19<sup>th</sup> they did think that the UniChem submission was correct. They had no doubts about it and  
21 they were therefore going to refer unless the parties came up with something compelling.  
22 Now, if you have a problem at that point in time you would have expected the OFT to say  
23 “Your evidence is not helpful and comprehensive. It is good, but it does not address A, B, and  
24 C.” They did not say that.

25 If the OFT’s concerns arose later then at that point they should have come back and  
26 said “actually, we do not think your submissions are as helpful and comprehensive because  
27 you have not addressed A, B and C.” So what is UniChem expected to do at this point in time?  
28 We have been told submissions are very helpful and comprehensive, and no further  
29 information requests are going to come back from the OFT and they do not think a meeting  
30 will be useful. It does not preclude you from putting something else in, but you have no idea  
31 what to put information in about. We have not seen the Issues’ Letter, that came 11 days later.  
32 We have not seen Phoenix’s spreadsheet.

1 PROFESSOR STONEMAN: Can you clarify one or two points? The RBB isochrone analysis goes  
2 to the OFT when?

3 MR. GREEN: 10<sup>th</sup> November.

4 PROFESSOR STONEMAN: Do we know when Phoenix and BAPC claim that analysis claim that  
5 analysis is flawed?

6 MR. GREEN: No, I do not think so.

7 PROFESSOR STONEMAN: We do not know whether that date occurs before the Issues' Letter or  
8 after the Issues' Letter?

9 MISS BACON: Can I just clarify something? The first that Phoenix saw the isochrone analysis was  
10 when UniChem put in its status of application.

11 THE PRESIDENT: So you have not actually got their detailed workings?

12 MISS BACON: We had never seen the isochrone analysis, it was not our submission that the  
13 isochrone analysis was flawed. That submission was from the OFT and it reached that after  
14 consideration of our spreadsheets and of UniChem's own evidence on where its pharmacies  
15 were located.

16 THE PRESIDENT: So nobody had seen each other's evidence as it were?

17 MR. GREEN: That rather deepens the problem.

18 PROFESSOR STONEMAN: When did the spreadsheets go in?

19 MR. GREEN: 22<sup>nd</sup> September I think is the date.

20 PROFESSOR STONEMAN: Thank you.

21 MR. GREEN: I will come to it shortly, we have set out a chronology of the main events in the  
22 second part of our oral submission.

23 Sir, coming back to the law relating to third party rights, so far as the UK position is  
24 concerned, there is nothing in the law which prevents issues papers or relevant evidence being  
25 put to an appropriate third party. The statutory duty under the Act requires the OFT to be  
26 sufficiently informed. The Court of Appeal contemplated that appropriate third parties would  
27 have sufficient information. There are many ways that that can be catered for. It can be  
28 simply handing over the Issues' Letter or evidence, or it can be summarising the crucial points,  
29 or it can be providing redacted versions or de-confidentialised versions. But the underlying  
30 point is that an appropriate third party needs to be given sufficient notice of the key points,  
31 particularly concerning it, so that it can make submissions about itself.

32 THE PRESIDENT: Would you go as far as to submit that the OFT should have given Phoenix either  
33 the isochrone material itself or at least the gist of it?

1 MR. GREEN: Yes. If we were to be given the gist of the real issues it is inconceivable that the  
2 merging parties should also be denied the right to see the gist of the real issues.

3 THE PRESIDENT: They get the Issues' Letter, but they do not get the evidence that goes  
4 underneath the Issues' Letter.

5 MR. GREEN: The one thing one finds from the procedural guidance is that where adverse views  
6 raise significant competition issues the parties proposing the merger are told of the nature of  
7 the concerns expressed. That might not go to the full extent of showing the third party  
8 submission, but they are told the nature of the concerns expressed. Precisely how that is  
9 communicated is a matter for the OFT, but if one is trying to get to the truth of a particularly  
10 knotty factual problem, then it seems to me inconceivable that both parties should not be  
11 making proper submissions about the facts, otherwise, how can the OFT be sufficiently  
12 informed of that crucial factual issue?

13 Indeed, we draw some analogy from the EU procedure, which we have set out in  
14 para.89 onwards. We have summarised the relevant material from the EU documentation.  
15 We need to ask you to add just one document to the authorities' bundle behind the EU  
16 regulation. We seem to have mislaid the copies, but we will dig them out in a moment. The  
17 hearing officer regulation refers to involvement by third parties as being a fundamental right.  
18 That is set out in para.89 of our oral submissions. We accept that the procedure at the EC level  
19 is slightly different. At the EC level you have DG Comp. which runs both phases of an  
20 investigation, phase 1 and phase 2. Here the OFT are opening phase 1, and the CC is phase 2.  
21 But the underlying policy is exactly the same. The EU accepts that, as a matter of policy there  
22 should be a high degree of transparency between complainants, merging parties and the OFT,  
23 that they have in their best practice guidelines recognised that third parties should, in  
24 appropriate circumstances, see the Statement of Objections, that third parties should ----

25 THE PRESIDENT: This is all in the merger context?

26 MR. GREEN: It is all in the merger context. Third parties – this is para. 96 we have quoted from  
27 the Best Practice Guidelines, which are in the authorities' bundle.

28 “One of the aims of these Best Practices is to enhance transparency in the day to day handling  
29 of merger cases and in particular, to ensure good communication between DG Competition ,  
30 the merging parties and third parties. In that regard, DG Competition endeavours to give all  
31 parties involved in the proceedings ample opportunity for open and frank discussions as to  
32 make their points of view known throughout the procedure.”

33 THE PRESIDENT: This happens ----

1 MR. GREEN: A lot of this happens in second phase. We are looking for by way of guidance or  
2 inspiration from the EU material is what the underlying policy is. Is there an objection to  
3 showing a third party the Statement of Objections? Answer: No. Is there an objection to the  
4 Commission, as it puts it here, having an open and frank discussion about key issues? Answer;  
5 No. Here we have an OFT procedure which starts with confidential guidance and runs for  
6 seven months, in the course of which there was sufficient time for the OFT to put on an open  
7 and frank basis the key concerns to the third parties. I would accept that, if the OFT was so  
8 time constrained, that it was unable to do so that might be a reason for not doing so, but it  
9 might then militate in favour of a reference, because you could not resolve the facts. But here,  
10 it cannot be said that there would not have been a proper opportunity to put to UniChem and  
11 AAH the key issues about them for their comment.

12 MR. MATHER: Could I ask you about this putting back process, because the EU procedure I do not  
13 think extends to a sophisticated putting back of one party's evidence to another. My question  
14 is really how extensively do you think that putting back process should develop against the  
15 policy and division of responsibility background you describe?

16 MR. GREEN: I think one can answer that against the context of this case. There were a number of  
17 important factual matters in the case, such as entry barriers, expansion barriers, and buyer  
18 power. Come the opening of the public review process those had largely been resolved. They  
19 had been resolved against the merging parties and, therefore, by definition in favour of the  
20 third parties. So the OFT would not have needed to have put those issues to a third party,  
21 plainly you need to keep them open vis a vis the merging parties. So far as UniChem and  
22 AAH are concerned the OFT only needed to canvas their views on the single issue of their  
23 ability to exert an effective constraint. So I think that the facts of the case would govern the  
24 extent of the put back process. Every case will vary but there would not have been a need for  
25 the OFT to put back a wide variety of issues which frankly had already been decided in favour  
26 of the third parties on this hypothesis. The key issue which had been arrived at in this case  
27 was very simple: did AAH and UniChem exert a sufficient constraint? That is the only thing  
28 that in reality the OFT needed to put back. It would have been a relatively narrow compass.  
29 If they could not do it, and they could not therefore get a real handle on the facts then they  
30 should have referred, because it was the key issue.

31 MR. MATHER: Putting back potentially expands the timing, in a dynamic and realtime way,  
32 because one party will put back another party will respond, so does it not of itself generate a  
33 potentially infinite time period?

1 MR. GREEN: That is a matter of the OFT's management. If you say shortly after the public review  
2 process starts "These are the key issues, we want your submissions in seven days on these key  
3 issues, are you capacity constrained? This is the definition of independent pharmacists, which  
4 we were never given. How many do you have? How long have you had them? Is it easy to  
5 expand your runs by one, twos, dozens? Can you give us the diagrams of your runs and so  
6 on? If you concentrated on those key issues which should have been evident at that point in  
7 time, you give people 7 days then it can be done. We produced our evidence for this Tribunal  
8 in a matter of 3, 4 days.

9 MR. MATHER: That raises my last point, if I may, on the key issues which should have been  
10 obvious. Again, is it in general terms likely frequently to be easy to identify an issue on which  
11 this putting back process should start being generated or in the typical case might that be a bit  
12 obscure or cloudy?

13 MR. GREEN: I think it is very difficult to generalise. On the facts of this case the OFT had  
14 identified the key issue in the confidential guidance process in July – July 14<sup>th</sup> was confidential  
15 guidance letter, and the public review process started months later on October 22<sup>nd</sup>. So the  
16 OFT had in its mind for many months the issue which would govern this case – or might  
17 govern this case. So it would have been straightforward at that point to have begun to identify  
18 the crucial matters which needed to be investigated.

19 Secondly, since the OFT had the Phoenix spreadsheet on 22<sup>nd</sup> September, which was  
20 a month before the public review process started, they could then have sat down and said what  
21 are the inferences which we are invited to draw from these spreadsheets? What questions do  
22 we need to ask in order to test these hypotheses? Alternatively, can we take this spreadsheet  
23 and just hand it over to UniChem and AAH, or if we cannot do that can we split the UniChem  
24 and AAH material and hand over their material to them for verification, and simply say "This  
25 is what has been put against you, these are the inferences we are invited to draw, what do you  
26 say about it?" On the facts of this case there would have been no problem. One cannot really  
27 say anything about the facts of other cases, they were different.

28 THE PRESIDENT: But that would have been doing the sort of exercise that hitherto in broad terms  
29 has been broadly thought the CC would be doing?

30 MR. GREEN: That focuses therefore on an important point which is to what extent is the OFT  
31 entitled to go when it comes down to vexed, controversial and key factual issues? We are way  
32 beyond a preliminary view, such as was referred to by Lord Justice Carnwath, we are now into  
33 the nuts and bolts of the ultimate Decision. It may be said that if it can be resolved



1 definitively without any doubt at all then the OFT can take it forward, if not then it must refer.  
2 So it comes to the horns of a dilemma, they must either get the facts straight and be utterly  
3 confident that they are right, or they must refer, because we are talking about the pivotal issue  
4 in the case.

5 THE PRESIDENT: You would have to show, I would have thought, at a minimum by the time it got  
6 to the Tribunal, that on the material now available there was at least a reasonable doubt as to  
7 whether they had got it right on the facts, or that they might, had they put the facts back to  
8 UniChem, reached a different view. Would you have to go so far as that, I do not know?

9 MR. GREEN: You would probably have to look at the question in the light of the process which  
10 would arise before the CC. I do not think I dare put it in those terms, but you would  
11 reformulate it in terms of is there scope for some reasonable doubt as to the likelihood or  
12 prospect of an SLC?

13 THE PRESIDENT: It is true that if there is a procedural difficulty the administrative court does not  
14 very often try to say “It would not have mattered anyway”, but it may be that in this Tribunal  
15 we ought to look to see to what extent it might have mattered – we just do not know. We are  
16 thinking aloud, I think, Mr. Green.

17 MR. GREEN: Yes, I think that is a point which one will come back to once I have taken you to the  
18 actual evidence on this crucial issue.

19 I was taking you through the EC material, but it simply makes the point that at an  
20 appropriate stage there is nothing wrong in principle in bringing in a third party. Transposed to  
21 the present regime OFT is first phase. They accepted in this case they needed third party  
22 views. The third party views on the crucial issues, which one can see are now set out in Mr.  
23 Johnson’s witness statement were not obtained from UniChem, and our point is they should  
24 have been. There is nothing in law or policy which would have prevented them from being  
25 obtained.

26 Can I turn from that now to the question of what we have described in para.109 of our  
27 submission as the evolution of the key issue? We have set out from para.109 through to 1983  
28 a chronology and a summary of the main documents, and the main points which flow out of  
29 them, insofar as it focuses upon this issue. I am going to go through this fairly quickly, and  
30 then ask you to look simply to three or four documents.

31 I am going to start at para.118. Phoenix submitted its application for confidential  
32 guidance on 28<sup>th</sup> April 2004. At this stage there was nothing particularly specific about the

1 competitive constraint exerted by either UniChem or AAH. The nearest that Phoenix came to  
2 addressing this issue is para.21 where it stated:

3 “In view of the fact that the likely alternative to this transaction is the incremental loss  
4 of EAP business to the two market leaders, the acquisition of EAP by Phoenix will  
5 guarantee a choice of three wholesalers across East Anglia , in line with the situation  
6 across large areas of the UK instead of a reduction to two.”

7 Thereafter, the OFT issued an initial supplementary information request on 9<sup>th</sup> June, and at this  
8 point it was predominantly concerned with issues other than the effective constraint, and we  
9 have summarised the issues with which that document and information request was concerned.  
10 There was then a Phoenix reply to that information request on 16<sup>th</sup> June; two paragraphs are of  
11 importance – these were in response to questions from the OFT, and the first question was why  
12 dispensing doctors are reluctant to switch, and why they will prefer local wholesalers to distant  
13 wholesalers and whether Phoenix had any evidence to support the conclusion that the OFT  
14 should use the two hour drive time. Those were two factual matters which are relevant to the  
15 exercise of an effective constraint, because the OFT had identified the fact that dispensing  
16 doctors were reluctant to switch, in other words, the full line wholesalers, AAH and UniChem,  
17 had had little success in meeting demand from dispensing doctors and, so far as that question  
18 was concerned Phoenix replied as follows – this is para.122.

19 “Dispensing doctors by definition are in rural areas, and are more likely to support  
20 their local wholesale depot and prefer a more personal service. EAP satisfies these  
21 requirements, and if it is successful with the acquisition of EAP, Phoenix intends to  
22 maintain the personal level of service, as it has done with previous acquisitions.”

23 So their starting point is dispensing doctors are rural and prefer local wholesalers. They prefer  
24 a more personal service. So far as AAH was concerned, they submitted that:

25 “AAH had previously closed a local depot in Ipswich and lost local dispensing doctor  
26 business as a result.”

27 Phoenix said they were widely regarded as a pharmacy orientated wholesaler, largely due its  
28 roots as a pharmacy co-operative; they were referring to historical routes/

29 “The actual submission-market for dispensing doctors is only 5.42 per cent. of the  
30 total market.”

31 In fact it turns out it is about 40 per cent., according to Phoenix’s own figures.

1 “Both AAH and UniChem have achieved market domination in all other customer  
2 types through national distribution vertical integration, hospital contracts and  
3 traditional origins.

4 Because of the reasons stated above, it is logical that AAH and UniChem should have  
5 concentrated on the much larger market segments of the other customer types.”

6 So when the OFT said, “Well, what about dispensing doctors”, which turn out to be  
7 40 per cent. of the contestable sector, Phoenix’s submission was, “They’re rural, they prefer  
8 local wholesalers, and AAH does not have a local depot and therefore loses business, and  
9 UniChem is not regarded as a viable competitor because they have these roots in pharmacies  
10 and they’ve never concentrated on dispensing doctors”. They then give a figure of 5.42 per  
11 cent., and I do not criticise Phoenix ----

12 MISS BACON: Just a point on the chronology. Mr. Green has not taken the Tribunal to the Phoenix  
13 response to the 6<sup>th</sup> May information request, which was on the 2<sup>nd</sup> June. For the Tribunal’s  
14 note, it was in Phoenix’s bundle at tab B, and I believe it is also in the OFT’s bundle. But that  
15 is a relevant document. It was in fact what we call the second confidential guidance  
16 submission, and we made submissions on a number of these issues, including dispensing  
17 doctors, and multiple pharmacies as well.

18 THE PRESIDENT: Thank you.

19 MR. GREEN: As to average drive time, the OFT was contemplating working on a two hour drive  
20 time, and you will understand that a drive time is the distance from the depot to, as it were, the  
21 furthest customer, so it might involve a run of a lot longer, because if it is two hours from A to  
22 B you have still got to get back from B to A, and you may actually have customers on the way  
23 back from B to A. So it may be a four or a five hour round drive, but it is in fact a two hour  
24 stretch from A, which is one part of the circle, to B, to the other part of the circle, or one end of  
25 the line to the other end of the line. In relation to two hours, which the OFT apparently  
26 accepted, Phoenix said the parties have no formal data for average drive time from a depot to a  
27 customer. However, given the necessity that most customer receives a twice daily deliver, a  
28 return van route should be concluded within half a day. The statistic of two hours out and three  
29 hours delivery drive back is used a generality. There can be a difference between dispensing  
30 doctors and pharmacy customers as dispensing doctors are generally located in more rural  
31 areas, and this can in some cases involve a longer drive time. However, the delivery is carried  
32 on the same route as for the pharmacy customers. Full line wholesalers tend to utilise their  
33 own van fleet and drivers to make deliveries due to the complexity of the daily schedules.

1 Short liners mostly use carriers as they usually offer next day delivery. In this context, they can  
2 deliver over a wider area.

3 So Phoenix and EAP had no data and no formal evidence in relation to drive time, and  
4 they seem to use it as a generality. Now, you have seen that UniChem's evidence was that they  
5 operate a 90 minute drive time; in other words, their catchment area is smaller and, from  
6 UniChem's perspective, that was important. That is a fact about their distribution capacity;  
7 they do 90 minutes and that encompasses a very, very high percentage of their customers. So  
8 for UniChem that is their reality. Drive time can vary across the country depending upon what  
9 region you are in and what the road networks are like, but that was relevant for UniChem, and  
10 one will see that the OFT apparently used the two hour drive time and seemingly included  
11 UniChem within that confine. That was an early response from Phoenix.

12 There were further requests for information on the 28<sup>th</sup> June, and then the issues paper  
13 of the 29<sup>th</sup> June, and this is a doc I will invite you to look at it. This was an issues paper during  
14 the confidential guidance stage. It is annexed at two places. It is in Miss Bacon's bundle but it  
15 is also at SJP1, tab 5. It is an annex to Mr. Priddis's statement. The covering letter at tab 5  
16 refers to Mr. Marks at Cameron McKenna. It states that it encloses the issues paper, that:

17 "... the case team proposes to discuss with you at a meeting on the 2<sup>nd</sup> July."

18 And then in the second paragraph it stated as follows:

19 "Our assessment so far indicates that the proposed merger may raise Competition  
20 concern which warrants discussion at a case review meeting [CRM]. At that stage it  
21 is anticipated that the CRM will take place on Wednesday, 7<sup>th</sup> July. Therefore you  
22 should consider our meeting as your client's last opportunity to make representations  
23 to the case team prior to the CRM. The issues paper is based on the case team's  
24 analysis so far. The analysis is based upon fact and opinions provided by your client  
25 over the past few weeks. It is important to note that the case team has not reached a  
26 firm conclusion on any of the issues contained in the issues paper. The paper is  
27 intended to invite your client to consider the issues further and to supply additional  
28 information and argument where necessary. In this case please provide a written  
29 response to the issues paper by 9.30 on Monday, 5<sup>th</sup> July so that your response can be  
30 circulated in advance of the CRM. You will be able to raise further arguments in  
31 addition to your written response at our meeting.

1 The outline decision which is put to the CRM for discussion does not take a view as  
2 to the nature of the guidance to be given, and will fully reflect alternative views on the  
3 effects of a proposed transaction.”

4 Then the issues paper, and I want to particularly draw attention to the last two full  
5 pages, but you will see on the first page OFT identify issues in relation to the product market,  
6 but they state that the parties overlap in the supply of branded and generic ethicals to  
7 independent pharmacies and dispensing doctors, together known as customers. So that is their  
8 reference to the independent contestable sector.

9 There is then a section on demand side substitutability, supply side substitutability,  
10 and then relevant frame of reference, and you will see this is the other alternative product  
11 market.

12 “The above factors would suggest that for the purposes of assessing the potential  
13 Competition issues in this case the appropriate frame of reference appears to be the  
14 supply by full liners of ethicals to pharmacies and dispensing doctors.”

15 So there is a difference between the first paragraph, which is independent pharmacies, the  
16 contestable ones, and here all pharmacies, which would include supermarkets, chains, where  
17 EAP and Phoenix do not compete.

18 Then you have got the geographic market and could you look at the third bullet point  
19 down:

20 “It would appear that all customers typically require and expect to receive from their  
21 full liners twice daily deliveries or urgent deliveries at short notice. Therefore full  
22 liners can only meet the needs of customers located within the catchment area of their  
23 depots. Given the features of the road network and volume of traffic particular to the  
24 locality of the parties’ depots, it would appear that they can only provide an effective  
25 service within a two hour drive time from their depots. In geographical terms  
26 therefore this suggests that in this particular case the parties compete in the East  
27 Anglia region extending to parts of the East Midlands and South East of England.  
28 Additionally as the distance from the full liner’s depot increases the quality of service  
29 that can be offered decreases ...”

30 Can I pause there and say that that conclusion is the opposite to the conclusion they  
31 reached in the Decision on the basis apparently of the spreadsheets.

1           “... as order cut off times must be later and products take longer to arrive. The OFT’s  
2           previous knowledge of this sector suggests that customer consider cut off times to be  
3           an important consideration when selecting their supplier.”

4           Then under the heading “Market Entry”, you need only observe that the concluded the  
5           barriers to entry and expansion appear to be high. New entry into the market other than  
6           through acquisition of an existing business appears to be unlikely because of cost and time  
7           required to invest in facilities, and then the last sentence:

8           “No new entry has occurred in the last five years other than through the acquisition of  
9           existing depots.”

10          Then the next bullet point:

11          “There is impediment to expansion of delivery routes given the critical mass of  
12          customers required to make such expansion profitable. It takes approximately five to  
13          six new customers to make a new van route viable.”

14          And then buyer power appears to be limited.

15          Then the OFT identify five principal competition concerns. The first is that the data  
16          provided by the parties suggests that the merger will reduce from four to three the number of  
17          full liners in the East Anglia region. This change in market structure will not only result in a  
18          loss of competition between the parties but will also contribute to reduced incentives for the  
19          remaining players to compete as strongly as before. There is therefore the risk that the merger  
20          will lead to a lessening in competition in which all firms find it profitable individually to offer  
21          less favourable terms or lower their level of services. That is I think one of the first references  
22          to the risk of co-ordinating effects, or what is sometimes called tacit collusion; in other words,  
23          not formal cartels but sort of oligopoly pricing leading to a reduction in price or lowering in  
24          quality of service, and that became an issue which was referred to in the second issues letter as  
25          well.

26          The next Competition concern was as follows: the data also shows that the parties are  
27          the strongest competitive constraints on each other because they are each other’s closest  
28          competitor both in terms of geographical location and their respective customer bases. In terms  
29          of depot location, the closest depot to EAP’s Norwich depot is the Phoenix depot in  
30          Cambridge; therefore, in terms of the level of service offered, particularly cut off times for  
31          twice daily deliveries, the offering provided by EAP is likely to be the next best alternative for  
32          a Phoenix customer and vice versa. In terms of customer base, both parties tend to mainly  
33          supply independent pharmacies and dispensing doctors and so compete for the same customers.

1 In the East Anglia region the parties will have a combined share of supply of 21 per cent. to  
2 independent pharmacies and 83 per cent. to dispensing doctors. That is for the whole region,  
3 not for the area north of the A14, where it will be higher. AAH and UniChem by contrast  
4 compete more actively in the supply to multiple pharmacies and supermarkets, therefore for  
5 independent pharmacies and dispensing doctors the parties represent each other's next best  
6 alternative. AAH and UniChem are at a disadvantage geographically and have a different  
7 customer focus, and they therefore do not provide a stronger competitive constraint on the  
8 parties as do the parties on each other.

9 Thirdly, of the depots currently supply the East Anglia region, the parties' depots are  
10 located further east than AAH's depot at Romford and UniChem's depot at Letchworth. It is  
11 therefore difficult for AAH and UniChem to offer competitive service levels to independent  
12 pharmacies and dispensing doctors located in the far east of the East Anglian region. For these  
13 customers the transaction will therefore reduce their choice to one effective full liner.

14 Given the above concerns, barriers to entry may not be low enough to allay the  
15 prospect of a substantial lessening of competition, namely lowering or removal of discounts,  
16 lower service levels or offering less favourable terms in the supply of ethicals to customers in  
17 the East Anglia region.

18 The OFT then in item 4 come back to the risk of tacit co-ordination. Post merger the  
19 remaining three full liners in the East Anglia region ----

20 THE PRESIDENT: I think we can probably read it to ourselves. I think we have already read it.

21 This point seems to drop out of it as the analysis proceeds.

22 MR. GREEN: No. It then comes back again in the second Issues Letter. The parties you will see  
23 were invited to address the above issues, and this is under the heading "Factual information".  
24 So that was the first Issues Letter. The parties then did make submissions, which is in the next  
25 tab, in SJB1, but I would like to go straight to the end of the confidential guidance letter of the  
26 14<sup>th</sup> July. The letter is at tab 8, and the points to be made about this letter are, first, the second  
27 paragraph of the letter, which makes it clear that the OFT viewed the conclusions as  
28 confidential. They say they cannot be sure that they know enough about the facts to make a  
29 final decision and then, in particular:

30 "We cannot take account of the views of other than the parties involved who may  
31 have an interest in the proposed merger. We are unable therefore to express a  
32 definitive view on the question of reference to the Competition Commission at this  
33 stage."

1 So they contemplate that they need the views of third parties. Then they say:

2 “We can tell you on the evidence presently available it is likely that the merger would  
3 be referred. At the public stage we may come to a different view.”

4 And then they identify two key facts. First:

5 “If there is sufficient evidence that other full line pharmaceutical wholesalers provide  
6 an effective competitive constraint within the regional market in which the parties  
7 operate, suggesting that no substantial lessening of competition arises ...”

8 So that is it, the key fact, the key factual issue. And then the “or”, which is:

9 “In the event we do believe there is a realistic prospect that a merger will lessen  
10 competition if there is clear and compelling evidence that the merger will result in ...”

11 THE PRESIDENT: That point is not pursued further effectively. It is not relied on in the Decision.

12 MR. GREEN: In the Decision the OFT say that they did not have sufficient evidence of such  
13 benefits. But that was not about SLC, that is on the assumption there is. So that is the issue  
14 identified on the 14<sup>th</sup> July: this is what was going to affect the OFT’s Decision.

15 If you go back to the confidential guidance letter itself, and perhaps I can ask you to  
16 read paras.27 to 30.

17 MR. ROTH: This is the letter itself?

18 MR. GREEN: Yes – the guidance annexed to the letter, which is at tab 7.

19 MR. ROTH: I am sorry, there seems to be a slight misunderstanding. This is the letter that went to  
20 Phoenix or their solicitors. The document at tab 7 is an internal document of the OFT that has  
21 been disclosed in these proceedings, and Mr. Priddis explains it fully in his witness statement,  
22 which is the result of their internal deliberations and records the decision by the executive  
23 direction. If you look at the conclusions at para.40:

24 “On these grounds guidance should be given.”

25 And what she says there in fact is they are mirrored in the letter that Mr. Green has just read to  
26 you.

27 THE PRESIDENT: Yes. It is the last sentence of para.36 in tab 7 which I think is one of the  
28 relevant sentences. “It is unclear at this stage whether other full liners ...” etc.

29 MR. GREEN: Mr. Roth, I should have said this was the basis for the OFT’s confidential guidance  
30 letter. That would have been more accurate.

31 MR. ROTH: Yes. It was not attached.

32 MR. GREEN: Yes. The relevant paragraphs which deal with the issue are paras.27 to 30, and then  
33 34 through to 37 and the conclusion, which reiterate the points made in the Issues Letter, and in



1 greater depth, and they identify, I think it is correct to say, that there was a real concern about  
2 the ability of AAH and UniChem to exert an effective competitive constraint.

3 It is our submission therefore that as of the 14<sup>th</sup> July the key issue was identified, and  
4 I can take you back to the speaking note. I have probably slightly misdescribed that document.  
5 Instead of saying the basis of the confidential guide in para.136, but that is the basis of it rather  
6 than the confidential guidance. What happened thereafter was that Phoenix had their meeting  
7 with the OFT and made further submissions and one can go right to para. 143, and I am only  
8 going to take you to a small selection of the relevant documents. Phoenix submitted a draft  
9 submission on 22<sup>nd</sup> September and this included the spreadsheet. The Spreadsheet was  
10 described as a major new document. It is tab 17 of SJB 1. For present purposes I think it  
11 suffices to examine its broad nature. It is tab 17 attached to Mr. Priddis's statement.

12 MR. ROTH: There is, in fact, a much clearer version in the exhibit to the witness statement from the  
13 Phoenix witness, because this is a large document, it has been chopped up, which is tab 8 of  
14 the bundle of evidence put in by Phoenix. The Tribunal might find it rather easier to follow  
15 that.

16 THE PRESIDENT: Tab 8 does not look to us to be particularly difficult, I would not have thought,  
17 Mr. Roth.

18 MR. ROTH: It's only the pages, I am only trying to be helpful, Sir. The pages are chopped up and  
19 have to be put alongside each other.

20 THE PRESIDENT: Tab 8 in the Phoenix.

21 MR. GREEN: I think the most helpful thing I can say is I do not intend to analyse it at this moment  
22 [Laughter] which will be a relief to everybody! The only point I wished to make about it at  
23 this stage was that Phoenix said it was a major new piece of evidence, it provided statistical  
24 evidence which, as you see, sought to establish that there was an AAH or a UniChem outlet  
25 close to a Phoenix or an EAP outlet in East Anglia and in particular North of the A14, which  
26 was the area the OFT was beginning to focus upon.

27 MISS BACON: I am very sorry to stand up again. Mr. Green said that this was directed at  
28 establishing that there was a UniChem outlet, that is not the case. This was directed to  
29 establishing where the nearest independent outlets were because we had been told by the OFT  
30 that this is what it was concentrating on. So for the avoidance of any doubt this does not  
31 include Moss and this does not include Boots either, it is only the independent pharmacies, and  
32 dispensing doctors that we knew of.

1 MR. GREEN: Yes, certainly, it is an attempt to examine the contestable market, if you like. In this  
2 contestable market, and in the submission which was attached to the spreadsheet, or perhaps it  
3 was vice versa, the spreadsheets were attached to the submission ----

4 THE PRESIDENT: Could I just ask, perhaps I should ask Miss Bacon this, on the front page of this  
5 spreadsheet, there are various little tables which say “distance miles to customer” “supplied  
6 by” and then there is a postcode, and then it goes “UniChem AH Maltby’s closest”, and then it  
7 says “Dispensing Doctor” and then “Closest or Dispensing Doctor”. I have not quite followed  
8 what the “Dispensing Doctor” column is doing there? Are some dispensing doctors supplying  
9 other dispensing doctors?

10 MISS BACON: The reason for this is if you look at the spreadsheets and the multi-colour version in  
11 our bundle is the best, you can see the first three columns are independent pharmacy  
12 customers, and then the fourth column is the dispensing doctor column, and if you look at the  
13 averages they have been broken down to firstly looking at the averages of the pharmacy  
14 customers and then the averages including the dispensing doctor customers, and all of those  
15 still exclude the large retail chains such as Sainsbury’s and Boots and Moss.

16 THE PRESIDENT: Thank you.

17 MR. GREEN: I am going to take this from our oral speaking note, para. 145, the submission which  
18 was sent in on 22<sup>nd</sup> December gave the following market shares, which we have included in the  
19 box, and when you add Phoenix and EAP you will see that that is 47.2 per cent. So in the  
20 contestable sector Phoenix’s evidence was they had 47.2 per cent. of the market. Then they  
21 made a submission in relation to the spreadsheets and the principal conclusions they drew from  
22 it, which we have set out in para. 147. In the area north of the A14 EAP’s 114 first-line  
23 customers (i.e. customers from whom EAP is the primary wholesaler) lie on average just 6.2  
24 miles from another independent sector customer currently supplied on a first line basis by  
25 UniChem, AAH, or Maltby’s. Phoenix’s 33 first-line customers lie on average just 8.2 miles  
26 from another independent sector customer currently supplied on a first line basis by UniChem,  
27 AAH or Maltby. Within the Norwich postcode region the average distance falls to 4.6 miles  
28 for EAP and 1.2 miles for Phoenix.

29 To put these statistics into context the average van run is over 100 miles and involves  
30 many such diversions. Therefore it is clear that the opportunity exists for both EAP and  
31 Phoenix customers to switch to one of three alternative suppliers. As such, a change would  
32 require only minor adjustments to the new supplier’s existing van route.

1           So there was squarely put in front of the OFT a submission about the capability of the  
2 other forward line wholesalers, and a submission was made to the effect that any of those  
3 customers could easily switch. In other words, they were contestable, AAH and UniChem  
4 could compete.

5           The OFT issued a request for information on 12<sup>th</sup> October, which I have referred to at  
6 para. 149 and then there were principal submissions made by Phoenix and EAP on 22<sup>nd</sup>  
7 October, which we have referred to at para.150 and 151. A press release was issued by  
8 Phoenix on the same day, which we refer to in para. 152. The OFT made a public  
9 announcement that it was considering the merger on 26<sup>th</sup> October. It invited written  
10 representations. UniChem started preparing its submission on 26<sup>th</sup> October. The OFT made a  
11 request for comments on 3<sup>rd</sup> November. This is tab 9 of the Notice of Application. This is  
12 the full extent of the questioning which the OFT posed to UniChem. The covering letter says  
13 that the OFT is considering the transaction. It is seeking comments from customers and  
14 competitors. “This is your opportunity to raise with the OFT any concerns you may have”, and  
15 they attach questions and they would ask for a response by Wednesday, 10<sup>th</sup> November, in  
16 other words, seven days. The questions are on the next page and they are as follows. They  
17 ask first as to the nature of the UniChem business and its relationship with the merging parties.  
18 Whether they have any customers in the northern and eastern parts of East Anglia, North of the  
19 A14, list them, explaining whether they are tied or independent . You will see that no  
20 definition is given of independent pharmacies, and of course that was important because the  
21 OFT define it as four or less. What cut off and delivery times is one able to offer those  
22 customers? How many deliveries a day do they receive? Does it differ between tied and  
23 independent – again no definition of independent. Do discounts vary with distance? For  
24 example do customers located further away receive in general larger or smaller discounts to  
25 those who are located nearby. How far away from your depot are your furthest independent  
26 customers? Do you have competition concerns in relation to the merger, specifically in relation  
27 to price discounts, level of service, your ability to compete with the merged entity?

28           The only question which was specific, was 6(c) which general, your ability to  
29 compete. They were asked a series of relatively narrowly confined factual questions about  
30 where their customers were but it was not stated that they were looking at a particular type of  
31 independent customer. They were not asked about the mechanics or economics of their  
32 distribution system, in particular that the OFT did not put to them the information in any form  
33 whatsoever, set out in the spreadsheets. So there was no ability to comment on either the

1 spreadsheets or the conclusions which Phoenix and EAP invited the OFT to draw from the  
2 spreadsheets.

3 The submission of UniChem is attached to the Notice of Application. It starts at tab  
4 10, which is the specific response to the questions, and it goes on at tab 11. The questions  
5 were dealt with fairly briefly in respect of the total number of customers north of the A14.  
6 Paragraph 2.1 – UniChem said they had 30 branches of Moss Chemists, that is tied so it is  
7 outside the independent contestable sector; 39 independent retail pharmacies and because we  
8 were not looking at 4 or less we just simply gave independent retail pharmacies, including  
9 large ones, so that included Boots branches; two dispensing doctors, so two in total here, and it  
10 turns out that once UniChem had a greater opportunity to investigate they turn out not, in fact,  
11 to be correctly defined, and three hospitals.

12 In section 3, in relation to cut off and delivery times, there is a brief section, but this is  
13 elaborated upon in great detail in the RBB analysis. They say that they deliver twice a day.  
14 No difference between cut off times for tied and independent customers. At 3.2 the key issue  
15 for the customers is the cut off time by which it is required to place an order for same day/next  
16 day delivery, and the time at which delivery is made. UniChem's cut off times for same day  
17 delivery to the north of the A14 vary, but tend to be an early 11.15 cut off for a late afternoon  
18 delivery, and an evening cut off time of 1900 hrs. for a late morning delivery the following  
19 day. Then they deal with discounts, and say that they do not generally vary and then in relation  
20 to how far away from your depots are your furthest independent customers, UniChem's  
21 furthest independent customers are located in the north Walsham area around 80 miles from  
22 UniChem's Letchworth warehouse by road. The vast majority of UniChem's independent  
23 customers lie closer to its depots. However, for the reasons explained above of the 786  
24 independent customers served by UniChem's Letchworth warehouse 705 lie within a 90-  
25 minute non-stop drive of the depot – around 90 per cent. While the distance associated with a  
26 particular non-stop drive time will vary according to local road networks, 90 per cent. of  
27 independent customers lie within around 60 miles of the warehouse. UniChem considers  
28 drive times that affected delivery ranges an essential element of the pharmaceutical wholesale  
29 industry. These issues are discussed further in the briefing paper.

30 Then as to specific concerns, these are referred to as being dealt with in the briefing  
31 paper. The short point being that the competition issues arising are said to be identical in the  
32 AAH case. The more detailed submission is at tab 11. This is a submission based not with  
33 any knowledge of the OFT's concerns, or of the spreadsheet. The summary, in 1.2, points out

1 in particular at paras. B through to E, that the merger would reduce the number of wholesale  
2 full line suppliers in the region from four to three. The merged entity will become the leading  
3 supplier to retail pharmacies and dispensing doctors, with an estimated market share excluding  
4 self-supply of almost 60 per cent. Focusing on the supply of prescription medicines, ethicals,  
5 to dispensing doctors, the merger involves the combination of the largest and second largest  
6 full-time supplier. They say the merger will have an estimated share of 82.5 per cent., which  
7 is very similar to the parties' own assessment. The only remaining credible competitor is AAH  
8 with approximately 12.9 - again, very similar to the merging parties' assessment. When  
9 viewed in terms of the actual catchment area of individual warehouses, the competitive effect  
10 of the proposed merger in certain areas will be even greater than is suggested by the overall  
11 post-merger shares in the region. Phoenix's full line warehouse in Cambridge is the closest to  
12 EAP's warehouse in Norwich. The combination of the two parties will effectively eliminate  
13 competition in large swathes of Norfolk, and parts of Suffolk (see the RBB paper).

14 In some areas the proposed merger will lead to an effective monopoly, in other areas  
15 an effective duopoly. In some areas there will be reduction in the number of effective  
16 competitors from 4 to 3, or 5 to 4. This is likely to lead to higher prices and/or less favourable  
17 terms of supply and/or reduction in level of service. Little prospect of new entry, low returns  
18 acknowledged by the OFT.

19 For present purposes, it suffices finally just to look at footnote 6 on p.326 of the  
20 bundle. A point which, having seen the OFT's disclosure, has a greater significance than  
21 appeared to be the case at the time. It says:

22 "Despite having devoted substantial efforts over recent years to growing its share of the  
23 dispensing doctors' market, UniChem has found it remarkably difficult to make inroads across  
24 the UK, including in East Anglia where EAP and AAH have entrenched positions, based on a  
25 long history of operating in that region. UniChem has set up a new business unit specifically  
26 to target dispensing doctors. It plainly has the experience and resources to be a credible  
27 competitor across the UK as well as in East Anglia, yet it failed to penetrate the market. As a  
28 result its market share in East Anglia is still only 1.5 per cent."

29 So Unichem was saying, just in relation to dispensing doctors, which are 40 per cent. of the  
30 contestable sector, "We are a good company, we have devoted resources to securing contracts,  
31 but we have failed. We have 1.5 per cent. and, in fact, as Mr. Johnson now explains, they have  
32 no dispensing doctors north of the A14. What that might have said to the OFT is well why?  
33 Is it something to do with your ability to expand your distribution network or why do you have

1 such a miserable record for such an effective large company in relation to dispensing doctors  
2 north of the A14? UniChem did not quite appreciate the significance of what it was saying at  
3 the time, and it seems that the OFT did not either.

4 Then one comes to the second Issues' Letter.

5 PROFESSOR STONEMAN: Can I cross refer to something you said earlier about Unichem being  
6 capacity constrained from this depot?

7 MR. GREEN: Yes.

8 PROFESSOR STONEMAN: Why should it be trying to expand into a market if it is already  
9 capacity constrained?

10 MR. GREEN: Sorry, why?

11 PROFESSOR STONEMAN: Why should it be trying to expand into this market if it is in fact  
12 capacity constrained?

13 MR. GREEN: Because you will do this sort of investigation, as Mr. Johnson explains, to see  
14 whether or not you can raise a sufficient economic customer base to warrant the very  
15 substantial investment to reorganise. You are not going to actually reorganise unless you can  
16 be quite confident that you are going to generate a very substantial amount of business. So you  
17 are going to make the effort to see whether it is worthwhile, and the effort was expended, and  
18 it was not worthwhile. In a sense, the proof of the pudding in this case was in the eating.  
19 Efforts were made to see whether or not it was viable – it was not viable. The OFT should  
20 have deduced from that, not that you should redouble your efforts, but that you have tried and  
21 failed, and that must raise a real question as to whether you are an effective competitive  
22 constraint.

23 PROFESSOR STONEMAN: I just felt you were trying to have it both ways, you were trying to be  
24 competitive constrained at the depot, and I think at the same time trying to get into the market  
25 and then you are actually saying “no, we could not get into the market”. If you cannot get into  
26 the markets competitive constraint at the depot either does not exist or does not matter.

27 MR. GREEN: Remember first of all the OFT says there are barriers to expansion and they will not  
28 -- they accept that it is difficult. You either need to be able to have a new route. You are  
29 looking at £150,000-worth of turnover a month, that is for a new route. If you are then going  
30 to completely reorganise in order to catch an entirely new area you would probably have to  
31 invest in a new depot, so one is talking about millions. UniChem has investigated this issue  
32 and has failed. If you ask yourself if a company – and as Mr. Johnson says, since the 1990s,  
33 since they have got effectively five new customers in 15 years, and for a company of

1 UniChem's size what does that indicate about their ability to exercise an effective constraint?  
2 It is as simple as that. If over many years you have got a lousy record and the OFT's case in  
3 the decision is, "Oh, you've got lots of customers, you've got them on the north Norfolk  
4 coast", well, 15 years worth of miserable failure does not indicate an effective constraint

5 PROFESSOR STONEMAN: Could you say a word on this topic about trunking? Does that affect  
6 the economics of starting new depots. Is trunking approximately to a sort of submission-depot,  
7 because it seems to have appeared rather late in the chain of evidence.

8 MR. GREEN: Yes. I will deal with it now but I will come to it properly after lunch Trunking is  
9 part of the manner in which product is got from the Letchworth depot to a distribution point at  
10 Thetford, for Suffolk and Norfolk, and that has to be built into the time constraints that  
11 UniChem operates under. You have to get your van out of Letchworth at a particular point in  
12 time for the drugs to be picked up at Thetford, for them to then set off in time to do a round  
13 circle to get back before lunch so you can then reload, get the statutory rest period, and get the  
14 van off again in the afternoon. So the trunking is simply one leg which takes up time which  
15 has to be catered for, and the 90 minute drive time takes account of the trunking, and that is  
16 already built into the 90 minute constraint that UniChem operates under. So it does not  
17 actually affect the ability to expand operations at all, it is simply a part of that constraint.

18 PROFESSOR STONEMAN: You could not ease entry by adjusting the location of the trunking drop  
19 off point?

20 MR. GREEN: No, because Thetford is the most logical place for the customers that you are serving  
21 just south of the A14 border. If you were going to try and meet those customers' demands and  
22 expand you would probably have to set up an entirely new trunking arrangement which means  
23 more vans, different vans, different trunking point. The short point about constraint to  
24 distribution is that the entire system is optimally configured to meet the demand which is  
25 already there, and it that has been the case for years, and that has never permitted UniChem to  
26 expand north of the A14. It just has not been able to do that. The OFT's case is, boiled down  
27 to its barest essentially, it is easy to add another drop onto the run, but it may be if you are  
28 going along the A12 you can just whip off to Wickham Market for 20 minutes, but it does not  
29 mean to say you can add five or six or seven, and even if you add one on and it takes you 20  
30 minutes you have then got your time constraint. You have got to get back to Thetford in time  
31 to give your drivers a statutory rest so then can pick up material to go off again in the  
32 afternoon. Everything is configured very precisely to meet the demand efficiently that already  
33 exists. The moment you require a reconfiguration, and even one, you begin to prejudice your

1 ability to serve your existing customers. If you reconfigure to meet demands for five, or 10, or  
2 15, then it just is not possible and at the same time to meet demand from your existing  
3 customers. The more you add on the more fundamental has got to be the reconfiguration of  
4 your distribution network, and you cannot just take supply capacity away from your existing  
5 routes because you are supplying customers on them. Every new customer means extra  
6 capacity has got to be put on, and that means an entirely new investment decision.

7 THE PRESIDENT: Is that a convenient moment, Mr. Green?

8 MR. GREEN: Yes.

9 THE PRESIDENT: Five past two.

10 (Adjourned for a short time)

11 MR. GREEN: I have effectively three things left to do. The first is to revert to Professor  
12 Stoneman's point about routes, which I want to address briefly; second, I want to take you to  
13 the second Issues Letter; and, thirdly and finally, I am going to take you through the evidence,  
14 and then I will just simply conclude by drawing the strands together under our grounds. But I  
15 want to revert to the point that was addressing before lunch, because thinking about it over  
16 lunch it appears to me that there is a very important point flowing out of the OFT's Decision,  
17 which is that the OFT assumes that the way in which AAH and UniChem can expand is by  
18 adding customers to new routes, not by creating new routes.

19 THE PRESIDENT: Customers to existing routes.

20 MR. GREEN: Customers to existing routes, and there is a distinction drawn in the Decision  
21 explicitly between customers to existing routes and new routes.

22 So far as new routes are concerned, the OFT accepts that there is a barrier to  
23 expansion, and they explicitly set out such facts as they believe are relevant in paras.42 and 43,  
24 and I will take you to them in one moment, and they make it clear in those paragraphs that  
25 what they are talking about is expansion through adding customers to existing routes, and they  
26 set out the cost in their terms of introducing a new route, and they say that there is a high  
27 barrier to expansion. So it is not an explicit assumption, it is an explicit assumption in paras.34  
28 and 38, which is that expansion is by adding customers to existing routes.

29 I would like to show you those paragraphs because this is the mechanism the OFT  
30 contemplates in the Decision as being the mechanism for exerting the competitive constraint,  
31 and the four relevant paragraphs are 34, 38, 42 and 43. In para.34 the Decision says:

32 "Regarding the question of whether AAH and UniChem are effective competitors in  
33 the outlying north and eastern areas of East Anglia, both competitors deliver to ...



1 chains and supermarkets in these areas already. It should therefore be relatively easy  
2 and cost-effective to add one or more drops to an existing round.”

3 And if we can just read on for the same of completeness, in relation to dispensing doctors  
4 para.38 says much the same thing.

5 “In terms of the supply of ethicals to dispensing doctors there are no particular  
6 barriers on either the demand or supply side between pharmacies and dispensing  
7 doctors. A dispensing doctor is essentially another drop on the route.”

8 So if AAH and UniChem are supplying pharmacists in the region there appears to be  
9 no reason why they should not be able to add dispensing doctors to their existing route network,  
10 and then they talk about switching.

11 Then if you would go to paras.42 and 43:

12 “Barriers to entry in full line wholesaling were considered to be high. This is because  
13 of the high cost of establishing and stocking the depot ...”

14 See footnote 6, 12 million:

15 “... and therefore low returns would be expected, difficulty of achieving a critical  
16 mass of customers to make a depot viable – little entry in the past five years.”

17 And then this in 43:

18 “Further barriers exist at the route level where the parties estimate that in order to  
19 make a new route in a new geographic area viable the route needs to carry a turnover  
20 of approximately £150,000 per month, equivalent to five to six customers ...”

21 So that is 1.8 million per year. My clients say that is approximately eight to 10 customers, but  
22 that probably does not matter:

23 “... in order to break even. However, the parties that maintain that all full liners use  
24 sophisticated routing software to optimise their networks. As a result the addition of  
25 a new customer to the network will typically be followed by a reorganisation of the  
26 entire route network. The marginal cost of supplying a new customer where existing  
27 customer drops are nearby should therefore be very low. However, opening a new  
28 route in an area where full liners has no pre-existing drops even within the two hour  
29 drive time radius is likely to carry a higher incremental cost.”

30 The OFT’s therefore critical assessment in paras.34 to 38 is based upon expansion of  
31 existing networks. So far as anything beyond that, i.e. a new route or a new depot, the OFT  
32 assumes there are barriers to expansion.

33 THE PRESIDENT: So it turns on adding another drop or drops onto an existing route.

1 MR. GREEN: Yes, that is the logic of the decision, and that is the analysis which is addressed, and I  
2 will come to it shortly, in Mr. Johnson's witness statement, and he comes back to the point  
3 about whether or not my client is having its cake and eating it. If in fact they wish to expand  
4 north of the A14 they need to out and canvass demand, which is equivalent to approximately  
5 £150,000-worth of turnover per month. We accept that is a broadly accurate figure. For us we  
6 think that is eight, nine, 10 customers – it may be more, it may be less, but that does not matter.  
7 If you go out and canvass successfully two or three customers that will not justify the  
8 investment because that will not be 150. You have got to be able to canvass successfully the  
9 critical mass to justify a new route. There may be circumstances where exceptionally you can  
10 add on a customer to an existing route. In fact Mr. Johnson gives as an example of that three  
11 Ministry of Defence contracts which they have lost recently after the decision, which means  
12 that you may suddenly have unexpectedly a gap on your existing route which you can use to  
13 fill and supply a new customer, but that is an entirely different scale of activity to being able to  
14 tweak your existing routes so as to be able to capture, on the OFT's hypothesis, the entirety of  
15 the merged entities' customer base.

16           If the OFT's case was that UniChem and AAH could completely reorganise and  
17 justify the investment then it would have said so in the Decision, but that is not what is in the  
18 Decision.

19 THE PRESIDENT: I think their case is, at least by implication, that there is likely to be sufficient  
20 flexibility within existing routes to enable UniChem and AAH to be or at least be perceived to  
21 be an effective constraint on ----

22 MR. GREEN: Yes, I think that is right; that is as we understand it. It is based upon the flexibility of  
23 the existing routes, and that is as we understand the logic of the decision. I will come back to  
24 Mr. Johnson's evidence in a little while.

25           Can I move from that, please, to the second Issues Letter, which is in the exhibits to  
26 Mr. Priddis's statement at tab 30. The relevant part of the covering letter is the second  
27 paragraph.

28           “Our assessment so far indicates the proposed merger may raise competition concerns  
29 which warrant discussion at a CRM.”

30 And they then identify the CRM as taking place on the 9<sup>th</sup> December, and then they add the  
31 normal caveats in the second paragraph which I think are standard form for this sort of letter,  
32 but the important point is that of the 30<sup>th</sup> November the OFT's assessment indicated that a  
33 proposed merger may raise competition concerns.

1 If one looks at the Issues Letter itself, there are pretty similar listed issues in relation  
2 to product market, demand side, substitutability, supply side, substitutability, relevant, frame of  
3 reference to the first Issues Letter, but the key competition concerns are there enumerated as  
4 six in total. I am sure you have read them, but if I can just summarise them.

5 Issue No.1 is that there will be a reduction of four to three full liners serving the East  
6 Anglian region. This may result in loss of competition between the parties, contribute to  
7 reduced incentives, and therefore a risk the merger may lead to lessening of competition which  
8 will impact on quality of service and less favourable terms. So basic reduction in numbers  
9 reduces competitive incentives, may impact in terms of price and quality of service.

10 Then in item No.2 there is an analysis of the merged parties' position in the  
11 contestable sector, and they say that they have got 21 per cent. of independent pharmacies and  
12 83 per cent. of dispensing doctors, and they contrast that position with AAH and UniChem,  
13 who compete more actively in the supply to multiple pharmacies and supermarkets, and  
14 therefore for dispensing doctors at least the pharmacies may represent each other's next best  
15 alternative.

16 They then say in 3 that the merger may create a monopoly in certain parts of East  
17 Anglia where neither AAH nor UniChem can provide an effective service. I think one is really  
18 dealing with the position north of the A14 in para.3, and they persist in the view that AAH and  
19 UniChem are at a disadvantage geographically and have a different customer base and, as a  
20 result, they may not provide a stronger competitive constraint on the parties as the parties do to  
21 each other, and in terms of level of service offered, particularly cut off times for twice daily  
22 deliveries, the offering provided by EAP may be likely to be the next best alternative for a  
23 Phoenix customer and vice versa. They then state in para.4:

24 "EAP is a very efficient flexible operator and the large national wholesalers do not  
25 tend to have the customer focus on small independent pharmacies that a regional  
26 wholesaler will, and some customers were apparently concerned that there would be a  
27 deterioration in quality after the merger."

28 Then item 5, "Tacit Co-Ordination":

29 "The merger may increase the prospect of the remaining three full liners tacitly or  
30 explicitly co-ordinating behaviour either through geographic market showing co-  
31 ordination on level of discount."

32 So co-ordinated effects, in other words, non-cartel impact on price and quality, was still an  
33 issue. Then in summary:

1 “Concerns arise that a merger may create a substantial lessening of competition in the  
2 supply of ethicals to customers in the East Anglian region resulting in an impact on  
3 discounts, service levels and less favourable terms.”

4 So that was the position as of the 30<sup>th</sup> November. Concentration is still on the role of AAH and  
5 UniChem exerting a competitive restraint.

6 The CRM was on the 9<sup>th</sup> December, and as of the CRM we know that the OFT  
7 changed its view.

8 It is possible, maybe even probable, that the OFT had accepted the thrust of  
9 UniChem’s submissions on the 10<sup>th</sup> November, because they are reflected in these concerns,  
10 but some time after the 30<sup>th</sup> November and before the meeting on the 9<sup>th</sup> those concerns were  
11 dispelled, removed, eradicated, and this brings us to the next part of our submissions, which  
12 start at para.184 of the note. This sets out UniChem’s evidence, evidence which it says it  
13 would or could have put to the OFT had these issues been raised squarely with it, and which  
14 address this key issue.

15 THE PRESIDENT: Just before we go to that, Mr. Green, we have got the Issues Letter on the 30<sup>th</sup>  
16 November at tab 30. Then at tab 31 we have got Phoenix’s submission before the meeting on  
17 the 2<sup>nd</sup> December, and annexed to that there are the annexes and spreadsheets and so forth.

18 MR. GREEN: Can I explain what happened. The document at 31 is a document submitted by  
19 Phoenix comparing the AAH and EAP Decision. The more important document submitted by  
20 the parties is the document at 32, which deals with the issues, pulls together all the previous  
21 submissions, and then in italicised text adds new comments. If you look at our submissions at  
22 paras.171 and 172, we have done an analysis of this document, because it may well be relevant  
23 to ask what Phoenix said and did after the issues meeting before the 9<sup>th</sup> December. They  
24 submitted this document, which was, as to 80 per cent., replication of old material. The  
25 italicised material is referred to in para.172, and it related for the most part to issues which do  
26 not bear upon ----

27 THE PRESIDENT: Yes, it is your 174.

28 MR. GREEN: 174, yes, the re-putting of previous submissions in this document, and we have tried  
29 to identify in 172 those parts of the italicised text which were new, but when one goes through  
30 them there is no new evidence, it is simply commentary or argument.

31 THE PRESIDENT: Yes.

32 MR. GREEN: So if you were to trace through the page numbers in 172, that refers to the italicised  
33 text in Phoenix’s submission, and that was intended to convey to the OFT that that was new

1 comment, which leads us to make the submission that no new evidence and nothing that we can  
2 see in the italicised text constituted a materially argument was put to the OFT following the  
3 Issues Letter.

4 Perhaps if it is convenient now to deal with the evidence. It is I think helpful to have  
5 at the same time, side by side, the Decision, and we have stripped out of the Decision the  
6 relevant paragraphs on this point and summarised them at para.183 of our note. The crucial  
7 paragraphs are 34 to 38, and the points which one finds set out in those paragraphs are  
8 identified in the bullet points in our para.183, and I will just run through them.

9 First, AAH and UniChem delivered to tied chains and supermarkets in the outlying  
10 north and eastern areas of East Anglia – that is correct. It should therefore be relatively easy  
11 and cost-effective to add one or more drops to an existing round, to which we say that is  
12 nonsense. Thirdly, the parties have shown that both AAH and UniChem are serving  
13 independent customers in these areas; that is correct, but only so far as UniChem is concerned  
14 to a very limited extent. Fourthly, even though both AAH and UniChem submit that they are  
15 unable to offer a good enough service, it remains the cast that it was good enough for some  
16 customers and for the national supermarkets. I suppose, taken at face value, that is correct; it  
17 is good enough for those that we do serve, the question is, is it good enough for the  
18 preponderant part of the merged entities’ customer base? The answer is “No”.

19 Fifthly, the detailed spreadsheets suggest, and the OFT here use very tentative  
20 language, that the service levels of all suppliers do not necessarily deteriorate significantly in  
21 response to distance and the spreadsheets undermine the suggestion that suppliers cannot  
22 effectively compete in parts of East Anglia since they clearly do provide services for all types  
23 of customer in the area. That means one has got to look at the spreadsheet because that was  
24 obviously important evidence for the OFT.

25 Next, AAH and UniChem are relatively well placed to compete for business  
26 throughout East Anglia by virtue of their full sized depots and network benefits they gain from  
27 existing customer density. That is true for certain parts of East Anglia but not north of the A14.  
28 Then it therefore seems that any customer of the merged entity could switch to AAH or  
29 UniChem, to which we say nonsense.

30 Next, customer responses indicate that cut off and delivery times are important  
31 aspects of competition. We agree, but when one thinks through the implications of that, that is  
32 inconsistent with the OFT’s other findings.

1 Then dispensing doctors are essentially another drop on the route, so if AAH and  
2 UniChem are supplying pharmacists in the region, there appears to be no reason why they  
3 should not be able to add dispensing doctors to their existing route networks.

4 As Mr. Johnson explains, we have no dispensing doctors north of the A14. That is the  
5 distillation of the OFT's reasoning. One then says was that remotely sound? To which our  
6 answer is "no". We have dealt with this in the next section, and this is an attempt just to  
7 summarise the evidence that we have put in in response to Mr. Priddis's witness statement in a  
8 response to what we now know was the OFT's thinking. If you could take the black bundle,  
9 please,

10 THE PRESIDENT: Mr. Priddis's ----

11 MR. GREEN: No, the UniChem small black bundle. I am going to do this by a combination of our  
12 note and the evidence. I am starting now at 184. Between 184 of our note and 187 we simply  
13 reiterate there was a key issue which we do not think is in doubt. The first heading in this  
14 section of our submissions is "The failure of the OFT to put back to UniChem key assertions  
15 about UniChem's ability to expand its sales capacity." The point we make is simply this, that  
16 UniChem's ability to expand its sales capacity in its existing networks was key to the OFT's  
17 ultimate Decision, but the OFT never asked us about that particular factual issue. They should  
18 have done so because had they done so then they would have seen the evidence which is  
19 presently in Mr. Johnson's witness statement, and I would like to pick that up, please, at  
20 para.3. For the sake of convenience, we provided a summary of the basic propositions in  
21 para.194 – the square bracketed number is a reference to Mr. Johnson's witness statement. In  
22 the middle of para. 3 Mr. Johnson says:

23 "I comment on the evidence produced by the OFT and by Phoenix in response to the  
24 Notice. The new evidence submitted by the OFT makes it clear that the principal  
25 issue on which the OFT based its Decision was whether other full line wholesalers are  
26 effective competitors in the outlying north and eastern areas of East Anglia."

27 He then says he addresses two other relevant issues which are, I think, subsidiary to that. He  
28 then addresses first of all the question whether other full line wholesalers are effective  
29 competitors from para. 4 onwards. If you jump to the middle of the next page, he has recited  
30 first para.34 of the Decision, and then Mr. Priddis's para. 109:

31 "In the OFT's evidence, the OFT explains that its conclusion on the competitive  
32 constraint posed by AAH and UniChem was based in particular on AAH's and

1 UniChem's existing pattern of success in these parts of the region and on the ease  
2 with which AAH and UniChem could expand their existing customer base".

3 So that is consistent with the language of the Decision. He then says:

4 "As I explain below the OFT's conclusion is based on an incomplete assessment of  
5 the facts, it is incorrect. UniChem finds it very difficult to compete for the business of  
6 independent pharmacies in much of the outlying north and eastern areas of East  
7 Anglia, ("the outlying areas") as a result of which it has very few such customers in  
8 those outlying areas."

9 I make the assumption, because it is not clear from the text of the Decision, that the area the  
10 OFT is referring to as the outlying north and eastern areas of East Anglia, is the area of East  
11 Anglia north of the A14, bounded to the west by the A141. He then states what that  
12 includes.

13 "It includes parts of East Anglia that fall within a 90 minute isochrone centred on  
14 UniChem's depot at Letchworth. However, the greater part of the area north of the  
15 A14 lies beyond UniChem's 90 minute isochrone.

16 6. The small number of independent pharmacies that UniChem has in the outlying  
17 areas [13 in total] are in many instances a legacy from the days when UniChem was a  
18 pharmacists' co-operative, and should not therefore be taken as an indication of  
19 UniChem's ability to win new business from independent pharmacies."

20 As an aside I should explain that for the purpose of this statement I adopt the same definition  
21 of "independent pharmacies" as that used by the OFT in para. 8 of the Decision – those  
22 businesses with less than five outlets. I point out that the data on UniChem's independent  
23 pharmacy customers supplied to the OFT in the context of the AAH merger, November 2003,  
24 included pharmacies that are parts of chains with five or more. In addition it included  
25 pharmacies that in some distances lie south of the A14. The customers in that list were  
26 identified on the basis that they are located outside UniChem's 90 minute isochrone. Similarly  
27 the list of independent pharmacy customers north of the A14 provided to the OFT on 10<sup>th</sup>  
28 November, which showed 18 independent pharmacy customers other than Boots, which was  
29 based on postcode areas corresponding to the area north of the A14 inadvertently included two  
30 hospital accounts, one supermarket, one dispensing doctor whose surgery is at Hintlesham, to  
31 the west of the A14, two pharmacies belonging to a chain of more than four outlets, and it  
32 admitted one independent pharmacy in Wisbech and another in March, Cambridge. Since

1 then, and indeed since the date of the OFT Decision we have purchased one of the pharmacies  
2 (see exhibit MJP 1 for current details of UniChem’s independent pharmacies).”

3 Then importantly, in para.7:

4 “It can be seen from exhibit MPJ1 that the number of independent pharmacy that we have won  
5 and retained in the outlying areas over the last five years is only three. Indeed, since the date of  
6 UniChem’s flotation in 1990 we have won and retained new contracts to supply only seven  
7 independent pharmacies in the outlying areas, three of which belonged to the same chain.

8 So that is five in total, five businesses in the course of 15 years.

9 “This is not indicative of a dynamic competitor winning new business and  
10 constraining Phoenix and EAP, rather it is indicative of a failed attempt to grow our  
11 share of business in East Anglia. The OFT omitted to ask us for information on the  
12 dates when our customers in the outlying areas became customers of UniChem and  
13 consequently drew inferences about UniChem’s ability to compete for the new  
14 business, but is simply not justified by the facts.”

15 Quotes Mr. Priddis: “It is quite clear that UniChem has won independent pharmacy accounts  
16 on the far Norfolk coast. ...”

17 And he goes on to say he explains that later.

18 THE PRESIDENT: Yes.

19 MR. GREEN: Returning to the note. The next issue that we deal with in the note at para.196 is

20 “Failure to enquire about the ease with which extra drops can be added to runs:  
21 capacity constraints and the difference between tied and independent retailers.”

22 The OFT formed a definitive view on the ability of UniChem to add drops on to runs. The  
23 OFT accepted without demur the evidence of Phoenix which was in substance to the effect  
24 that it was very easy to add a customer on to a run. The ability to add customers on to runs,  
25 and the logistics of runs was hence a key factual issue. The OFT did not ask Unichem about  
26 this, nor AAH. Now, had the OFT asked, Mr. Johnson explains, that they would have given  
27 the OFT evidence about capacity constraints, and how this actually operated as a matter of  
28 fact.

29 The evidence which Mr. Johnson gives is summarised in para. 201, which addresses  
30 the contents of his statement between paras. 10 and 20 and I will take it by way of a summary  
31 in para. 201. I would like you to read the explanation of the distribution system so you  
32 understand the factual context.



1 UniChem currently operates 9 delivery routes covering Norfolk and Suffolk, and a  
2 further 7 for Essex (para .10) The routes for Southern Suffolk and Essex use a trunking  
3 system connecting Letchworth to Marks Tey near Colchester (para.10). The routes to  
4 Norfolk and North Suffolk use a trunking system from Letchworth to Thetford. To expand  
5 sales into the area north of the A14 it would therefore be the Letchworth/Thetford system that  
6 would be relevant. The details of the timings of the route (paras.11 and 12)”. I am just going  
7 to read from the middle of 12 and then go back to 11. This s the middle of para . 12 of Mr.  
8 Johnson’s statement:

9 “The routes are currently organised so that there is very little time for unforeseen  
10 delays. Any significant delays would mean that the last drop on the round would not  
11 receive its afternoon delivery. An important consequence of the way the delivery  
12 routes are organised is that there is very little capacity to add an extra drop whilst  
13 ensuring that the last customer receives its order by 5.30.”

14 So that is the gist of the system, so they are capacity constrained, but they are only capacity  
15 constrained because they are efficiently organised.

16 Just so that you have the facts in mind, it may be helpful if you read paras. 11 and 12  
17 because that explains the logistics and how it operates.

18 THE PRESIDENT: We will just have a glance at them, we have already read them but we will read  
19 them again. (After a pause): Yes.

20 MR. GREEN: Mr. Johnson goes on to say, and I am reverting back to our summary of his evidence  
21 in 201, that the OFT never requested information from UniChem about the practical logistical  
22 difficulties entailed, and in fact UniChem did not have any perception that the OFT had these  
23 views until it saw the Decision, and that is para. 13.

24 So far as AAH is concerned, I would make the following observation. We have not  
25 seen the AAH documentation. The OFT has not produced it. We did ask for it and we asked  
26 them to ask AAH for consent. We have not got it, we took the decision that there was no way  
27 we were going to be able to deal with it in time and make an application to the Tribunal –  
28 there just was not time in the two or three days that we had to prepare – but you are entitled  
29 to make this assumption that AAH is an efficient operator and will have more or less the  
30 same capacity constraints that UniChem does, we would say that is an inevitable conclusion  
31 that it operates in the same efficient way and that if we are capacity constrained then one  
32 assumes that AAH is going to be pretty much in the same boat.

1           Then in para. 14 Mr. Johnson just takes issue with Mr. Priddis’s statement at 95G  
2 about the marginal cost of adding one drop to an existing round being low – it is a statement  
3 made by Mr. Priddis in his statement and it is in the Decision. Then he says at the end of  
4 para. 14 there is no indication in the Decision that the OFT gave any thought to the issue of  
5 whether UniChem had spare capacity within its routes “enabling us to accommodate  
6 additional customers.”

7           Then in para.15 he talks about the practical effect of adding even one more run. But  
8 he says the very simple point is that the addition of a new customer on any of the routes  
9 requires a reorganisation of the route, and he says that is true even of one new customer, and  
10 he gives the example of a detour of, say, five miles, which may add 20 minutes to get from  
11 customer A to customer B, but then the driver has to make a further detour to get to the next  
12 customer. He makes the point that the roads in that part of Norfolk and Suffolk are slow,  
13 often secondary roads and very narrow country lanes, and if UniChem were to succeed in  
14 winning more than a handful of new accounts it would need to set up a new route and he  
15 accepts and acknowledges that the costs of doing so are significant, and that is the point I  
16 made a few moments ago.

17           Then he deals with the question of the spreadsheet, which we had never seen until this  
18 case but which, in para. 35 of the Decision, appears to be a relevant consideration in the  
19 OFT’s mind. The OFT did not test with UniChem Phoenix’s arguments based on proximity  
20 of Phoenix and EAP customers to customers of other full line wholesalers. Had it done so,  
21 UniChem would have explained that inferences based on average distances do not tell the full  
22 story. What ultimately counts is the question of whether a new customer can be  
23 accommodated within an existing route having regard to the capacity of trucks, vans on the  
24 route and the schedule of deliveries. There is no indication in the Decision or in the evidence  
25 put forward by the OFT that the OFT considered this point. Indeed, the entirety of the  
26 spreadsheets is based upon an assumption that it is easy to add an extra customer to a run. If  
27 that assumption is incorrect, the entire validity of the spreadsheets falls away, and it is a  
28 complete knock-out to the spreadsheets, because however close you are to one or more of the  
29 EAP Phoenix customers, you cannot add them on. It does not make any difference. What  
30 one sees, for example, from the spreadsheets is that Phoenix took some of the UniChem  
31 outlets and they happened to be closest to 10, 15 or 20 Phoenix EAP outlets – setting aside  
32 average miles – so the assumption in the spreadsheet was that if you have one UniChem or  
33 one AAH outlet, which is close to 10, 15, 20, or in one case 44 merged entity outlets that

1 means you can serve each and everyone of those 44 or 10 or 15.. It is just a complete  
2 nonsense. Once you accept that capacity constraint is a real issue then the spreadsheet is an  
3 irrelevance, which is the point which Mr. Johnson is making here.

4 In paras. 17 to 19, Mr. Johnson explains because of the capacity constraint issue that  
5 UniChem can only offer cut-off times, in other words the last point in time when UniChem  
6 can accept an order and promise to deliver it, which are earlier than those of Phoenix and  
7 EAP. The OFT accepts in the Decision that cut-off points are important. The Phoenix data  
8 shows that our cut-off point is much earlier than a Phoenix EAP cut-off point. If the OFT is  
9 right, which they are, that customers value later cut-off points because it gives them greater  
10 flexibility to place an order and have it delivered, then that obviously is relevant, but the OFT  
11 did not run that point through the rest of its logic.

12 He points out also that AAH on the basis of Phoenix's evidence seemed to be  
13 in the same position so far as the cut-off time is concerned.

14 PROFESSOR STONEMAN: Just before we leave para.17, where we were this morning, this issue –  
15 I will accept that UniChem is a very efficient, properly run organisation and therefore does not  
16 waste its resources and you have been convincing us that you could not possibly add any drops  
17 to the existing runs, existing routes. Paragraph 17 at the beginning though says:

18 “We have a full-time salesman responsible for prospecting in the East Anglian  
19 region”.

20 Either that is a waste of expenditure, or there is capacity.

21 MR. GREEN: No, that is East Anglia as a whole.

22 PROFESSOR STONEMAN: Ah, so that is out of the A14.

23 MR. GREEN: It is the whole area, and it includes – UniChem and no doubt AAH are interested if it  
24 is economically viable, in expanding. But that then comes back to the question of new  
25 routes. There is a chicken and egg here. It is a bit of a catch 22. If you have a very small  
26 number of customers, it makes it very difficult to get the critical mass, and justify a new  
27 route, but to get the new route you have to get a particular number of customers, so you do  
28 not just give up. But the salesmen are devoted to the whole of East Anglia, but the greatest  
29 effort is devoted to the areas where they are going to be more profitable, which is within the  
30 90 minute isochrone of the Letchworth depot.

31 I am sure the shareholders would have a bit of a problem if they said “We are just  
32 going to give up on the north of the A14”. You are always looking to see if it is possible, but  
33 over 15 years they have been singularly unsuccessful.

1           The bottom line has to be that in an investigation by the OFT if you are confronted  
2 with evidence by a company who says “Look, we have been miserable failures for 15 years”  
3 that at least raises a credible issue about whether or not you can be an effective constraint. It  
4 may be poor management. It may be you need better software, there may be many reasons for  
5 it but it does raise a serious question about constraint, because you have 15 years worth of  
6 track record.

7           Next one comes to the question of the spreadsheet. This is dealt with briefly  
8 by Mr. Johnson, but in greater detail by Mr. Baker, and if you turn to the last tab in the black  
9 bundle, Mr. Baker, who is an economist employed by RBB exhibits a short report, based  
10 upon having the spreadsheet for a few days, and being able to make some comments and run  
11 a little bit of analysis about it. We have set out a summary of his evidence for the sake of  
12 convenience in paras. 211 onwards. The first part of our oral submissions addresses the  
13 question why the OFT did not provide this evidence in some proper form to us beforehand so  
14 we could comment upon it. We pick up the point in para.209, but it is explained in Phoenix’s  
15 evidence, (para.26 of Mr. Cole) that the spreadsheets were based upon incomplete  
16 information, and I quote here from the Phoenix witness statement, Mr. Cole’s statement:

17           “Phoenix now explains in Cole witness statement para.26 and 28 that the document is  
18 based upon incomplete information and that the information which is contained in the  
19 spreadsheet was based upon a mixture of existing knowledge of Phoenix staff, direct  
20 questioning of the relevant pharmacy dispensing doctor, observation of competitor  
21 vans making deliveries and discussions with locum pharmacists who had worked at  
22 the relevant premises.”

23 In other words, Phoenix was never going to be able to guarantee complete accuracy of its  
24 spreadsheets, but we presume the OFT must have been told this and we do not know why that  
25 did not spur them further to verify the data with my client. The first issue which Mr. Baker  
26 addresses is the use of minimum distances. What Phoenix gave was minimum distances  
27 between an EAP Phoenix outlet and another independent outlet supplied by another  
28 wholesaler. The points that Mr. Baker makes about that are summarised in 2.11 of our note.  
29 The first issue concerns the use of minimum distances. As to this (1) the data operates upon  
30 the basis of a minimum distance where an independent pharmacy supplied by EAP is four  
31 miles for the nearest UniChem customer, two miles for the nearest AAH customer, 10 miles  
32 for the nearest Maltby customer, and six miles from the nearest dispensing doctor, the  
33 spreadsheet would record that an alternative wholesaler was two miles away. That is of course

1 factually correct, but if you use a minimum and it turns out that the nearest is capacity  
2 constrained, it does not tell you about whether Nos.2, 3 or 4 can exercise an effective  
3 competitive constraint.

4 Then he says that using the minimum distance in this way assumes that the nearest  
5 wholesaler is not capacity constrained, but this is a false assumption since if it is constrained,  
6 which may be the case, the next nearest may be considerably further away and unable to  
7 supply for similar or additional time constraint reasons.

8 Then he says that if you were to exclude the independent pharmacists, because of  
9 course they have over 80 per cent. of that segment, and they tend to be rural and inaccessible or  
10 more so, then the distances and the averages become very different. If one were to exclude  
11 independent pharmacists from the calculation, upon the basis that the merged entity would  
12 have over 80 per cent. of their sales ----

13 THE PRESIDENT: Do you mean the dispensing doctors from the calculation.

14 MR. GREEN: I am sorry, dispensing doctors, yes – the average distance increases from 3.7 to 5.2  
15 miles, which is the average given, from 5.2 to 8.6. There is no analysis in the spreadsheets, but  
16 whether it is feasible to, let us say, take someone at seven miles away and build it onto a run,  
17 how long does it take to get off the road, the country lane you are on, go to the dispensing  
18 doctor in the village, unload and come back, which is a distance of 14 miles, which may add  
19 20-25 minutes. What impact does that have on the rest of the round? It is meaningless to  
20 simply give distances without actually analysing that in the context of topography and  
21 logistics.

22 The second point Mr. Baker makes concerns the use of average distances. The simple  
23 point which is made by Mr. Baker is that averages conceal a very wide distribution of actual  
24 distances, and he sets out this in section 3 of his report at p.3. He says in the second paragraph  
25 of that:

26 “The figures presented to the OFT relied on averages across all of Phoenix and EAP  
27 customers. The average hides a very wide distribution of actual distances. In many  
28 cases the independent pharmacies supplied by the nearest competing wholesaler are a  
29 significant distance from the EAP/Phoenix customer. The charts below present the  
30 distribution of minimum distances of Phoenix (Fig.1) and EAP (Fig.2) customers  
31 from independent pharmacies and dispensing doctors supplied by completing  
32 wholesalers.”

33 Then the text follows on on p.4, where he says:

1 “Figure 1 above shows that the average distance of 3.7 miles quoted for Phoenix  
2 customers disguises the fact that almost one-third of these customers were five miles  
3 or more from independent pharmacies and dispensing doctors supplied by competing  
4 wholesalers, 10 out of 33. Figure 2 shows that the average distance of 5.2 miles cited  
5 by EAP also hides a spread of distances. Over half of the sample, 66 of 114, was five  
6 or more miles from a pharmacy supplied by a competing wholesaler or dispensing  
7 doctor. Using the average distances, when the distribution is broad, as it is here, the  
8 analysis has masked competition concerns which might be expected to arise in a  
9 significant number of cases.”

10 The third criticism he makes is the reliance on a small number of customers, and this  
11 is quite an important point, and taking it from our speaking note, the third issue concerns  
12 reliance on small numbers of customers. (This is para.213) For example, the data relies upon  
13 just 12 UniChem customers and it is hence upon this basis that the OFT conclude that  
14 UniChem is able to compete across the entirety of the merged company customer base. For  
15 Maltby the total number of customer referred to is two. Mr. Baker states:

16 “This creates a distorted picture as it is implicit in the analysis that the route covering  
17 a delivery at a single UniChem outlet could be reconfigured to accommodate several  
18 EAP or Phoenix outlets. For example the UniChem customer most heavily relied  
19 upon in the analysis is located in Great Yarmouth and is cited on 44 occasions as the  
20 closest UniChem pharmacy to an EAP or Phoenix customer. For AAH, W.A. Hall &  
21 Co. located near Kings Lynn is cited 22 times.”

22 The assumption is, in relation to the Great Yarmouth outlet, that because we can  
23 supply Great Yarmouth we can supply 44 other outlets on the same network.

24 Then in para.214 ----

25 THE PRESIDENT: Mr. Green, just to pick that point up, at some point I would like to be taken back  
26 to the spreadsheets and just see if we can identify these 12 UniChem customers you are talking  
27 about here. Do not me take you out of your stride. It can be done at some convenient point.

28 MR. GREEN: Yes. The fourth point that Mr. Baker picks up in his section 5 is apparent errors in  
29 the spreadsheet. The data supplied by Phoenix refers to 12 UniChem customers. UniChem  
30 has now checked the customers against its own records and has found a number of material  
31 errors. For example, the Phoenix reliance upon Day Lewis in Great Yarmouth has been the  
32 closest UniChem customer to 44 EAP or Phoenix customers. Mr. Baker points out that this  
33 pharmacy is part of a larger retail chain and does not fall within the definition of an

1 independent pharmacy, and he then gives, by way of example, five out of the 12 customers are  
2 not recognised by UniChem as even being in the area because they lie west of the A141, and  
3 these customers are a significant distance from the primary area of concern and cannot  
4 realistically be considered to be of material importance in the assessment of constraint, and he  
5 identifies a number of other errors. One does not necessarily blame Phoenix; they have put  
6 together this information on the basis of whatever information they had. With respect, we  
7 blame the OFT for not verifying it.

8 The fifth concern concerns the importance to UniChem of the results, and this is  
9 section 6 of Mr. Baker's report, and I will take it again from para.215 of our written  
10 submission. Mr. Baker points out that in very man of the cases referred to in the data, and  
11 upon the assumption the data is correct, the nearest outline to a Phoenix EAP outlet is not a  
12 UniChem customer. The details are set out in table 1 on p.6 of the report. UniChem is closest  
13 to an EAP customer in just 19.5 per cent. of cases in the spreadsheet – that is 26 out of 133 –  
14 but only 15.8 when the data is corrected to eradicate false entries. UniChem is closest to  
15 Phoenix outlets on 14 per cent. of cases. Baker concludes:

16 “UniChem is not the main driver of the results obtained by EAP/Phoenix in their  
17 spreadsheet. Similar results would have been obtained even if UniChem had been  
18 omitted from the analysis entirely. Contract to the conclusion that was apparently  
19 drawn from this spreadsheet, when the impact of UniChem alone is considered it  
20 tends to show that UniChem a marginal competitive influence in the area under  
21 review and that the results largely arise from alleged proximity of EAP and Phoenix  
22 customers to AAH customers and dispensing doctors.”

23 If I can pause there and just ask this question: assume that that is correct, which it is,  
24 and you have to then strip UniChem out of the equation, you cannot assume that the OFT's  
25 Decision would have been the same if Phoenix had been absolutely correct to say that AAH  
26 was a constraint but not UniChem; then you would be looking at a potential duopoly market  
27 that than a triopoly. So the economic analysis would have been very different if you had  
28 stripped UniChem out of the equation, and that is assuming of course that it is correct in  
29 relation to AAH, and AAH is not capacity constrained, and it is not being used 100 times in  
30 relation to one AAH outlet for 10 or 15 or 20 EAP or Phoenix outlets.

31 Then the final point that Mr. Baker makes, in section 7 on p.8 of his report, is the  
32 ability to extend delivery routes, and he makes the overarching point here, which is that even if  
33 everything that was said was correct it really does not address the key concern, which is

1 however close you are to an EAP or Phoenix customer you can only catch that customer if you  
2 can extend your network, your existing routes, and he says in section 7:

3 “Finally the spreadsheet analysis assumes that as independent pharmacies currently  
4 supplied by competing wholesalers are on average just 3.7 miles from Phoenix  
5 customers and 5.2 miles from EAP, it would be possible for competing wholesalers to  
6 supply these customers easily within their existing delivery routes. This is not  
7 necessarily true. Where Phoenix/EAP pharmacies are located off the delivery route  
8 that the detour required to supply these customers may add significantly to the total  
9 journey time of the delivery van. Two of the UniChem pharmacies that were reported  
10 as the closest outlets to EAP/Phoenix customers are located on delivery route 404.  
11 For example, S & S Chemists Ltd. of Burnham Market, Kings Lynn, was listed as the  
12 closest UniChem pharmacy 12 times. Due to redactions in the spreadsheet it is not  
13 possible to verify the exact location of the EAP/Phoenix pharmacies for which these  
14 are closest UniChem pharmacies. I cannot therefore determine where these  
15 pharmacies are in the context of delivery route 404, and am therefore unable to fully  
16 examine the ability of UniChem to supply these customers. However, the last drop  
17 off on route 404 is made at 1724 and the latest possible time for this delivery is six  
18 o’clock in the evening. Some of the EAP/Phoenix pharmacies for which this is the  
19 closest UniChem pharmacy are located more than 10 miles away. A substantial  
20 detour from the delivery route may therefore be necessary to accommodate these  
21 customers where they do not naturally fall on the existing delivery route. Even if they  
22 were on the route it is possible that they could not be accommodated within the  
23 existing delivery pattern, where there is just 36 minutes leeway for the last delivery.  
24 Where any kind of meaningful detour is required it would clearly not be possible to  
25 accommodate even one such customer.”

26 Mr. Baker was able to set out these conclusions in the space of three days. There is  
27 no reason why information of this nature, even if it was broken up to just concentrate on the  
28 UniChem conclusions, should not have been put to us at the beginning of the public review  
29 process. If that had happened these sorts of submissions would have been made probably in  
30 greater detail, with greater refinement, because there would have been more time. Had that  
31 occurred it seems to us that the OFT could not have concluded that there was not at the very  
32 least a very serious issue as to whether the spreadsheet proved what Phoenix said it proved.



1           The final factual matter which I wish to address, and then I will very briefly pull  
2 together our conclusions under the grounds, and I have probably got no more than, for Mr.  
3 Roth's disbenefit, another quarter of an hour or 20 minutes, is whether UniChem is an effective  
4 competitor to dispensing doctors. We deal with this in para.218 and onwards of our  
5 submission.

6           The OFT, as you have seen, takes the view that it is just a matter of adding the  
7 dispensing doctor onto the end of the run, which is para.38, second sentence. With respect,  
8 this is just wrong for the reasons we have already given. At the very least, there is a really  
9 serious issue about this. Mr. Johnson gives evidence that they have not got a single customer  
10 north of the A14 – dispensing doctor. We have one hospital/dispensing doctor pharmacy,  
11 which is a Boot's, and that is just about on the border, but that is about the extent of it and that  
12 does not fall within the definition of dispensing doctor. There is plainly something odd about  
13 this market because EAP and Phoenix together have 83 per cent. of the market, and they  
14 submitted right the way back in the early part of the investigation that the reason they had such  
15 a preponderant control over dispensing doctors was that doctors were, for the most part, in out  
16 of the way rural areas and they liked and preferred local wholesalers, and they had, according  
17 to Phoenix, a propensity not to take business from others.

18           The figures which Phoenix give for the share, and I probably ought to show you this,  
19 the share of dispensing doctors – there is a useful table provided to us by Phoenix, which is in  
20 the Phoenix bundle, and it is numbered tab 1 about halfway through the bundle. You will see  
21 there it says "Phoenix market share", and if you go to figure 4 there is ethical pharmaceuticals  
22 in East Anglia region by full line wholesaler only. The independent contestable sector is made  
23 up of columns 1 and 3, which is independent pharmacy and dispensing doctor, and you will see  
24 the total value of sales for the independent pharmacy sector is 147 million and for the  
25 dispensing doctor sector is just over 100 million, which gives you roughly proportions of 40  
26 per cent. and 60 per cent. in the contestable market sector. So dispensing doctors are an  
27 important part if one takes the OFT's product market as being the independent contestable  
28 sector, or even if you take the broader market and ask where are the most important  
29 competitive concerns, they are in the contestable sector of course. So, either way, the  
30 dispensing doctor is a very important source of business, and it is a source of business that – it  
31 would be putting it too high so say that UniChem has been singularly unsuccessful in  
32 achieving sales to no doctors north of the A14. But why do they have no doctors north of the

1 A14? For all the reasons that their success is more limited in relation to pharmacies,  
2 independent pharmacies.

3 THE PRESIDENT: Has somebody got a map that will quickly show us where post codes PE, NR,  
4 IP, CO, CB and CM are? If NR is Norwich and IP is Ipswich ----

5 MR. GREEN: We have been trying in all sorts of ways to produce some digestible maps.

6 THE PRESIDENT: We have got lots of maps but some of them are not that easy to read for various  
7 reasons. [Document handed to the Tribunal] That is very helpful. Let me just see what we are  
8 talking about. I will just say it out loud so people know what we are talking about. PE is the  
9 area that is broadly south and west of Kings Lynn, includes Kings Lynn; NR is Norwich and  
10 the north-east coast of Norfolk; IP is Ipswich, directly south of NR; CO is Colchester, directly  
11 south of Ipswich, by the look of it. CB is Cambridge, to the west of the latter two; and CM is  
12 south again, south of what I imagine is Colchester, going down to the Thames, as far as one  
13 can see.

14 MR. GREEN: It is Chelmsford I think.

15 THE PRESIDENT: Chelmsford, that is right. And PE is going to be Peterborough, so it goes down  
16 as far as Peterborough. Thank you very much.

17 So we have got quite a big area of East Anglia included in this table in figure 4.

18 MR. GREEN: Yes.

19 THE PRESIDENT: I do not know quite where this comes from.

20 MR. GREEN: I am afraid that is an internal ----

21 THE PRESIDENT: Perhaps someone could photocopy that at some point. Yes, Miss Bacon?

22 MISS BACON: There is a post code map at the back of one of our submissions, and this is at tab A  
23 in the Phoenix bundle. I think I should also give the OFT bundle reference, which is ----

24 THE PRESIDENT: Let us find tab A of your bundle.

25 MISS BACON: Yes, it is tab A in the Phoenix bundle, and you get number of pages 8, and after p.8  
26 there is an annex, and it is the first page of the annex, and the reference to that in the OFT  
27 bundle is tab No.1.

28 THE PRESIDENT: Thank you very much. Just while we are on these maps, so we can all get it  
29 clear in our heads, broadly speaking the A14 runs west-east to Ipswich, roughly speaking in a  
30 sort of more or less straight line on the latitude of Ipswich.

31 MR. GREEN: That is right, yes.

32 THE PRESIDENT: And the A141, which is the western boundary, comes more or less down from  
33 the southern corner of The Wash, does it not?

1 MR. GREEN: That is right, so this region covers the whole of the Norwich conurbation, plus all the  
2 towns on the coast, Kings Lynn, a number of fairly sizeable conurbations.

3 THE PRESIDENT: Yes.

4 MR. GREEN: So far as the homework is concerned about identifying the customers on the  
5 spreadsheet, can I leave that for someone cleverer than I to work out, and we will let you  
6 know.

7 THE PRESIDENT: Yes, absolutely.

8 MR. GREEN: It will be marked up in some way.

9 The only thing I have now got left to do is to pull the strands together. We have set  
10 out the strand-pulling exercise in part IV, paras.227 and following, of our speaking note, and  
11 this takes us back to the grounds in the Notice of Application, and I will just summarise the  
12 points we wish to make under each of the grounds.

13 The first one, ground 1, is duty to refer. We say that on the facts as found in the OFT  
14 Decision the OFT had a duty to refer, and there are additional facts which now arise out of the  
15 documents we have seen which entrench that duty. We have identified eight factors in  
16 para.229. The first six are found in the Decision, the seventh and eighth come out of the  
17 documents we have subsequently seen. The submission goes, in essence, like this: underlying  
18 it there is a basic legal point, which is there is a limit to which the OFT is entitled to go under  
19 the Act. It does not mean to say they – as the Court of Appeal recognised, there has to be a  
20 preliminary view, but there must come a limit because otherwise you serve the Competition  
21 Commission’s function. Quite where you place the cut-off point is extremely difficult and may  
22 vary from case to case. But in the present case we do submit that the OFT simply overstepped  
23 its jurisdiction, and it did trespass into the terrain reserved for the Competition Commission.  
24 Put at its most simplest form, at the end of the day, after a lengthy inquiry, the OFT had  
25 identified a single issue and was only able, for whatever reason, be it time or otherwise, to  
26 collect the evidence of one party. It should therefore have said, “This is a critical issue. Upon  
27 this issue turns whether to refer or not. We’ve got the evidence of Phoenix. It might be correct  
28 but we cannot assume it is inevitably correct. We don’t have any more time and therefore we  
29 should refer.” You cannot ignore in that analysis that they had issued two Issues Letter and  
30 one negative confidential guidance. One cannot ignore also the facts found in the decision – a  
31 market dominated by a small number of firms, high market shares for the three, whichever way  
32 you look at it, whether it is the broader product market or the contestable product market. Pre-  
33 merger the two merging companies were their closest competitors, so found the OFT; barriers

1 to entry, so found the OFT; expansion barriers, so found the OFT; no buyer power, so found  
2 the OFT; and insufficient evidence of any countervailing benefit, so found the OFT. On those  
3 facts, when the OFT came to the conclusion that everything turned on a single issue and they  
4 could not get the evidence from the two crucial parties, they should have said, “This is for the  
5 CC”. Those are our paras.(1) to (6).

6 Paragraphs (7) and (8): (7) is something which was not obvious to us until we saw  
7 the disclosed documents, which was the OFT identified the risk of co-ordinated (tacit) effects  
8 in a market as concentrated as this. They first raised the issue in the Issues Letter of the 29<sup>th</sup>  
9 June. They repeated it in the confidential guidance, and that is the internal reasoning which  
10 related to the confidential guidance letter, to be more precise. They then raised it again in the  
11 second Issues Letter, and there is no explanation of how this concern was eradicated regardless  
12 of the position that they arrived at in relation to competitive constraint, because if you have got  
13 three competitors in an area and you have identified a risk of co-ordinated effects even if you  
14 are right that there are potential competitive constraints you have still got a risk of oligopoly or  
15 co-ordinated effect pricing.

16 Finally, the OFT’s decision identifies the contestable segment as a potential product  
17 market, as Mr. Priddis says in his witness statement. The OFT’s ultimate conclusion in the  
18 decision was that the merged entity did not create a No.1, but plainly if Mr. Priddis is right and  
19 alternative product market is the contestable sector then on Phoenix’s own market share figures  
20 they were the No.1. The market share would have created a 47.2 share for the merged entity,  
21 which was over 10 percentage points bigger than AAH, and was almost four times as large as  
22 UniChem. So that is our ground 1: they were under a duty to refer on the basis of the evidence  
23 which was before them prior to the taking of the decision.

24 Ground 2 is inadequate reasons for not referring. We dealt with this in some measure  
25 in relation to the Court of Appeal’s judgment in *IBA*, and the question of the reversal of the  
26 burden of proof. If one concludes, as is the case here, that there was at the very least a prima  
27 facie SLC, because there were two Issues Letters and the negative confidential guidance and all  
28 the factors, common ground factors, at least so far as we and the OFT are concerned, then that  
29 was sufficient to create the prima facie reason, and the Court of Appeal were quite clear that, in  
30 those circumstances, there was really quite a high duty on the OFT to explain with detailed  
31 reasons why it does not refer. There is an inverse sliding scale: the higher the prima face case  
32 the greater the requirement for reasons on the key issues. But the reasons set out in paras.34 to  
33 38 of the Decision just do not come anywhere close to enabling the Tribunal to understand

1 what was the OFT's understanding of the market place or why they came to the conclusion  
2 they did, and why apparently they changed their view in seven days, and those are the matters  
3 we refer to in 236 to 241.

4 Ground 3 of our Notice of Appeal was the failure to refer unresolved key issues of  
5 fact, and the Tribunal will recall Lord Justice Carnwath's observations in *IBA* that it is not the  
6 function of the OFT to decide the cases, that is for the Competition Commission. There were  
7 unresolved issues of fact at the end of the day in this case. They were unresolved not least  
8 because the OFT had not got to the bottom of these crucial issues, and, at the very least, Mr.  
9 Johnson's evidence and Mr. Baker's evidence show there were credible and serious issues  
10 which were unresolved and should have been unresolved. The OFT should have referred,  
11 because at the end of the process there were irresolvable issues of fact and they erred in  
12 resolving them.

13 The final ground, ground 4, failure to take into account previous decisions is a short  
14 point. We accept of course that if the AAH decision is materially different and can be  
15 distinguished in a sensible and material way then it would not bind the OFT or have legal  
16 repercussions in this case. Our submission is that AAH is materially similar as a decision, and  
17 therefore the OFT should have taken a similar position. But there is another way of looking at  
18 it, that if you have a long history of investigation where you have got disappointed suitors and  
19 you have got a frustrated vendor you are going to have all sorts of repercussions in the market  
20 place if there is an inconsistent position which is not explained fully. In the present case AAH  
21 and UniChem were entitled to know precisely why they are different to Phoenix. Phoenix is an  
22 international player, one of the top two or three wholesalers in Europe. It is a very, very large  
23 and substantial organisation. Why, when it comes into the UK and acquires a significant  
24 market share in a very small period of years is it said that it is entitled to merge with a company  
25 which means that it will have 83 per cent. of the dispensing doctor sector, and 23 per cent. of  
26 the pharmacy sector, giving it 47.2 per cent. of the contestable market, making it number one,  
27 when AAH was not allowed to merge with EAP. So either consistency is required, or these  
28 facts play upon the duty to give reasons and increase the duty to give reasons.

29 Those are our submissions, unless I can at this stage assist the Tribunal further?

30 PROFESSOR STONEMAN: Can I go back to the question of whether UniChem can in fact contest  
31 the market? You said at one stage, and I assumed it was an important point, that you want to  
32 talk of UniChem being able to compete for the entirety of the customer base of the merged  
33 parties and I think a lot of your discussion was in terms of the entirety of the customer base.

1 Now, I am just wondering to what extent that is the issue we ought to be looking at, or if we  
2 ought to be looking at just that part of the customer base of the merged unit that is less  
3 competitive than it was prior to the merger. So if there are certain parts of the East Anglian  
4 region which at the moment are not “EAP” the merger will not make any difference, and we  
5 really just ought to be concentrating on that bit of the market where the merger will make a  
6 difference?

7 MR. GREEN: I think that the OFT focused the attention on the area north of the A14 because that  
8 was a very substantial area where the merger was going to make a big difference. The  
9 isochrone analysis submitted as part of UniChem’s submission on 10<sup>th</sup> November, shows that  
10 there are other areas where there is a lessening of competition as a result of the merger, and you  
11 will have seen there is an A, B, C, D region, and there are differing levels of reduction in  
12 competition. One takes the OFT Decision and they say “It is that northern area that we must  
13 concentrate on, and that is the crux of this Decision.” They did not go down the route of  
14 following our isochrone analysis into different subdivided regions. They concentrated on what  
15 they saw as the key region north of the A14, and that is what we have concentrated upon in our  
16 evidence, because that is the logic of the OFT Decision.

17 PROFESSOR STONEMAN: You have given one or two examples such as King’s Lynn or north  
18 Norfolk as if that is typical, whereas south of Norfolk then perhaps that might be an area in  
19 which it is easier for UniChem and AAH to compete, but it is also the area which gets the  
20 greatest reduction in competition between EAP and Phoenix. If you cannot answer it now ----

21 MR. GREEN: Can I think about it, because there are certain points we made in the submission of  
22 10<sup>th</sup> November, which address the geographical diminution of competition on a more refined  
23 basis, but for the purpose of the Appeal we have concentrated on the findings in the OFT  
24 Decision, which is the area north of the A14, and we have said also in our Notice of  
25 Application that they failed to take account of the isochrone analysis, that they simply rejected  
26 the assumptions underlying it, so we have not abandoned the more refined view, but we have  
27 concentrated on the OFT’s core issue, which is that area north of the A14.

28 PROFESSOR STONEMAN: Can I ask that they address the question in a slightly different way?

29 Again, you have emphasised the entirety of the market. Do we want competition in the  
30 entirety ----

31 MR. GREEN: When I said “entirety” I was probably meaning the entirety of the area north of the  
32 A14.

1 PROFESSOR STONEMAN: That is fair enough, taking that geographical distinction, would  
2 competition at the margins of the market not be sufficient? You would want to be able to  
3 compete for every shop, every dispensing doctor. It is not sufficient to just compete at the  
4 margins and thereby limit the potential behaviour of the merged entity?

5 MR. GREEN: The OFT's Decision is clearly on the basis that UniChem and AAH constitute a  
6 constraint over the word, they use the word "entirety" but one would probably qualify it and  
7 say the preponderant part. It has to be a sufficient constraint to protect the consumers in that  
8 whole area. If you are just nibbling around the fringes of northern Ipswich you are not going  
9 to provide any benefit to someone in Norwich. It has to be a sufficient constraint across a  
10 sufficiently large part of that area north of the A14. The OFT says "all", so we take them at  
11 face value, but even if you reduce it or dilute it to a preponderant part the conclusion is still  
12 the same.

13 THE PRESIDENT: Thank you, Mr. Green. Yes, Mr. Roth?

14 MR. ROTH: Good afternoon. Sir, this Decision of the OFT's that is being challenged is a somewhat  
15 unusual case. Phoenix notified the proposed bid for EAP on 22<sup>nd</sup> October of last year, but the  
16 issue of pharmaceutical wholesaling in East Anglia was not a new one for the OFT, in  
17 investigating this matter they were not starting from scratch – far from it. They had of  
18 course Phoenix's application for confidential guidance in late April 2004 – Mr. Green fairly  
19 said seven months' investigation. But that is not the whole of it, they had the background,  
20 first of all, of UniChem's notification for confidential guidance in 2000, of its contemplated  
21 bid for EAP. That is of limited assistance to the outcome of this investigation but it gave the  
22 OFT a base of knowledge of this market. Then much more significantly there was AAH's  
23 proposal to acquire EAP notified almost exactly 12 months before in October 2003. So the  
24 OFT were starting with a considerable understanding of what was the main focus of the  
25 investigation, where the problems were likely to lie. So indeed did Phoenix and EAP and  
26 their advisers, because of course they had read the AAH decision to refer; and so indeed did  
27 third parties, and their advisers such as UniChem, who had made submissions to the OFT on  
28 the AAH proposed bid and, indeed, in the submissions that they made to the OFT on this  
29 proposed merger incorporated by reference to their earlier submissions. Mr. Green read to  
30 you part of UniChem's submission to the OFT. He did not refer you to the paragraph which  
31 brings in expressly its previous submission (para.1.3) which the OFT of course then looked  
32 at. So they looked at the totality.

1           So that important feature of this case gives a context to the investigation, and the final  
2 decision not to make a reference, and it gives a contest to what UniChem said, and what it  
3 knew the key issues were going to be and what submissions it should make, and it is against  
4 that background, Sir, that I turn to where one must start the s.33 test for a reference as  
5 explained in the IBA case.

6           We have set out in our skeleton argument at paras. 4 to 6 a series of short propositions  
7 which we have sought to distil from the IBA case in part in answer to the Tribunal's question at  
8 the CMC, what actually does it establish? And also because, of course it is important. We  
9 have said first of all one must apply the words in accordance with their statutory meaning, but  
10 nonetheless it can be set out in a series of propositions – that is the Vice-Chancellor's express  
11 statement.

12           We have said as regards 33(1) both paragraphs of it, that the OFT has a duty to refer  
13 but that arises when it has a positive belief that it is or maybe the case that the merger fulfils the  
14 two conditions of that subsection. That test is lower than the test applied by the Competition  
15 Commission for deciding a merger in fact fulfils those certain conditions, and that belief must  
16 be reasonable and objectively justified by relevant facts. None of that, I believe, is at all  
17 contentious. As regards s.33(1)(b) specifically, whether the merger may be expected to result  
18 in a substantial lessening of competition is a question of whether it will probably result in SLC.  
19 In other words “may be expected to result” means more than a 50 per cent. chance. That was, I  
20 think, a holding of this Tribunal, accepted and endorsed by the Court of Appeal.

21           Therefore, plugging that in, as it were, to the section 33 test, the OFT must refer if it  
22 forms the positive belief that it is or may be the case that there is a more than 50 per cent.  
23 chance the merger will result in SLC. That is what it boils down to. Therefore, if the OFT  
24 forms the belief that there is a more than 50 per cent. chance that the merger will result in SLC  
25 it must refer. If the OFT believes the chance of that result is fanciful it should not refer – both  
26 Judgments in the Court of Appeal. Then as between the fanciful and a degree of likelihood less  
27 than 50 per cent. there is a wide margin, we say there “of discretion”. Mr. Green says well that  
28 brings in a whole area of law that is not relevant. You can delete “of discretion” and say “of  
29 appreciation”, “of evaluation”, or just a wide margin, it does not matter – a wide margin in  
30 which the OFT must exercise its judgment.

31 THE PRESIDENT: It might be useful to get rid of the word “discretion” which has other  
32 connotations from other parts of the law.



1 MR. ROTH: I fully accept that, and it was not intended to bring those other parts of the law in. A  
2 wide margin, is I think what the Vice-Chancellor actually says, but it must be a wide margin of  
3 judgment in which it exercises its judgment.

4 THE PRESIDENT: A wide margin in which it exercises judgment will probably do.

5 MR. ROTH: In particular, and importantly, there is no room for a further qualification should refer  
6 only if it believes there is a significant prospect, that was the error the OFT made in its previous  
7 approach, and equally there is no requirement the OFT must refer any case raising an arguable  
8 issue SLC.

9 The fourth point, where the investigation carried out by the OFT did not justify any  
10 positive view but left some uncertainty, and the OFT therefore believed SLC might prove to be  
11 likely on further and full examination, that might be a situation where the OFT should refer.  
12 That certainly could arise if you did not have time to carry out in the 40 days, if it was a 40 day  
13 investigation. So we do take issue, with respect, with UniChem in their Notice of Application,  
14 at para. 64 when in summarising and concluding on ground one, their Notice of Application at  
15 para. 64. which is on p.19, where they set out various arguments and then conclude “the fact  
16 that so many of these factors are present in this case strongly indicates there is more than a  
17 fanciful risk of a substantial lessening of competition.” If that is meant, as it appears to be  
18 saying, “therefore duty to refer”, that is wrong.

19 THE PRESIDENT: Because?

20 MR. ROTH: Because that takes one into the area where there is the margin in which it must exercise  
21 its judgment. The threshold is not ----

22 THE PRESIDENT: Fanciful.

23 MR. ROTH: -- fanciful, and that we say is absolutely clear from the Judgment. Below fanciful no  
24 reference, but the converse above fanciful, automatic reference does apply. That is clearly  
25 where we are in this case. It is a case where we of course accept the risk that SLC cannot be  
26 dismissed as fanciful. I would have thought that is obvious to everyone. It is just the sort of  
27 case that falls within that broad margin, as the Vice-Chancellor put it. That being so the issues  
28 received a very careful and thorough evaluation by the OFT. There was no cavalier or  
29 immediate approach that the arguments against the merger could be rapidly dismissed, you can  
30 see that from the negative confidential guidance that was given to Phoenix at the confidential  
31 stage. You can see that from the fact that several of the arguments raised by Phoenix and EAP,  
32 and persisted in, were not regarded by the OFT as sufficiently robust and convincing that they  
33 could point against a reference. There was the argument that short liners should be in the same

1 market as the full liners. You see in the Decision at paras. 14 and 16 how that was dealt with.  
2 Paragraph 12 was the argument, the parties maintain that they should be included in the same  
3 market, that was the submission being made, and para.16 is the conclusion of the OFT,  
4 although there is some evidence of the strength and it is increasing, we recognise the potential  
5 constraint for some product lines, but we think the frame of reference should be full line. One  
6 sees that also from the argument that was put and persisted in about pro-competitive benefits  
7 would result from the merger, which would therefore counterbalance any possible SLC.  
8 (Paragraphs 40 and 41 of the Decision) Paragraph. 40:

9 “The parties submit this transaction will in fact increase rivalry between full line  
10 wholesalers, because it will increase the coverage of Phoenix from the much larger  
11 EAP depot.”

12 And the expertise, and customers and so on. The OFT will say that argument seems  
13 plausible, however, due to the information asymmetries the OFT is generally sceptical  
14 about efficiency gains, specifically the OFT requires clear and compelling evidence  
15 that the benefits would indeed arise in this particular case, the OFT does not consider  
16 the parties have provided sufficiently clear and compelling evidence to warrant the  
17 inclusion of rivalry and enhanced efficiencies within its analysis (para.41 of the  
18 Decision).

19 So the issues, the arguments, all of them received a discriminating evaluation by the  
20 OFT, the arguments put by the merging parties as they should, and indeed, it is because  
21 UniChem in fact agrees with so much of the reasoning in the Decision that the focus of this  
22 challenge has come down to this narrow area on which the OFT found that the evidence was  
23 clear, namely, the independent pharmacies and dispensing doctors in the further areas of East  
24 Anglia, described for convenience as “north of the A14” – there are various ways you can  
25 describe it, postcodes, zones on a map with isochrones, but “north of the A14” is the simplest.

26 Before turning to the facts, which are so important then, in this case, there is the  
27 preliminary question of how this Tribunal should now approach the challenge in the framework  
28 of Judicial Review, with the guidance given by the Court of Appeal in IBA, and we address  
29 that in a skeleton argument at paras. 11-16, looking at trying to deal with it having regard to the  
30 various grounds in the application, which is all we had to work on. “Unreasonableness” is a  
31 term of art in administrative law, and one is concerned with legal reasonableness or what is  
32 often called “Wednesbury” unreasonableness, because of the *Wednesbury* case and we refer to  
33 the very new edition of **Wade and Forsyth**, and Sir, you have that extract – it is the extract that

1 Lord Justice Carnwath referred to, the earlier edition – at tab 7. Can I hand up a punched copy  
2 to go into the beginning of tab 7. [Document handed to the Tribunal] It is the section headed  
3 “The standard of reasonableness”.

4 “The doctrine that powers must be exercised reasonably has to be reconciled with the  
5 no less important doctrine that the court must not usurp the discretion of the public  
6 authority which Parliament appointed to take the decision. Within the bounds of legal  
7 reasonableness is the area in which the deciding authorities has genuinely free  
8 discretion. If it passes those bounds, it acts ultra vires. The court must therefore  
9 resist the temptation to draw the bounds too tightly merely according to its own  
10 opinion. When a Divisional Court yielded to that temptation by invalidating the  
11 Secretary of State’s decision to postpone publication of a report by company  
12 inspectors the House of Lords held judgments ‘illustrate the danger of Judges wrongly  
13 though unconsciously substituting their own views for the views of the decision-  
14 maker who alone is charged and authorised by Parliament to exercise a discretion.  
15 The court must strive to apply an objective standard which leaves to the deciding  
16 authority the full range of choices which the legislature is presumed to have intended.  
17 Decisions which are extravagant or capricious cannot be legitimate. But if the  
18 decision is within the confines of reasonableness, it is no part of the court ‘s function  
19 to look further into its merits. With the question whether a particular policy is wise  
20 or foolish the court is not concerned; it can only interfere if to pursue it is beyond the  
21 powers of the authorities. As Lord Hailsham said, two reasonable persons can  
22 perfectly reasonably come to opposite conclusions on the same set of facts without  
23 forfeiting their title to be regarded as reasonable.

24 This is not therefore the standard of the man on the Clapham omnibus. It is the  
25 standard indicated by a true construction of the Act which distinguishes between what  
26 the statutory authority may or may not be authorised to do. It distinguishes between  
27 proper use and improper abuse of power. It is often expressed by saying the decision  
28 is unlawful and it is one to which no reasonable authority could have come. This is  
29 the essence of what is now commonly called ‘*Wednesbury*’ unreasonableness’ after  
30 the now famous case in which Lord Greene MR expounded it as follows.”

31 THE PRESIDENT: I do not think we need to read the famous passage, Mr. Roth.

32 MR. ROTH: I think that will be familiar.

1 THE PRESIDENT: Can I just ask – leaving aside the fact that a lot of this is talking about  
2 administrative discretion in the strict sense that we were mentioning a moment ago – how do  
3 we approach in this case the remark of Lord Hailsham that two perfectly reasonable people can  
4 come to opposite conclusions on the same set of facts which seems to pre-suppose that you  
5 have got a set of facts, and then you are applying to that set of facts some kind of appreciation  
6 or evaluation. Here one of the issues seems to be what facts should we assume? Perhaps  
7 related to that as the Appellants’ submissions unfolded by what process should those facts be  
8 established?

9 MR. ROTH: I think there were three issues. One is fact, second is evaluation of the fact, third is  
10 process.

11 THE PRESIDENT: Yes, I think that is right.

12 MR. ROTH: On the facts issues, and I will come to that – you are jumping ahead of me.

13 THE PRESIDENT: Mr. Green, I think was distinguishing – or at least I understood him to be  
14 distinguishing between the evaluation of the facts which is in the sphere somewhere between  
15 the fanciful and less than the 50 per cent. and the facts themselves. He seems to be placing a  
16 certain amount of reliance on what he says are the disputed facts.

17 MR. ROTH: Yes, and I think there we have all been helped, if I may put it that way by the recent  
18 Judgment in “*E*” which I will come to in a moment, because although previously error of fact  
19 was not only much discussed by academic writers, but there was sort of intellectual gymnastics  
20 to try and squeeze it into a reasonableness challenge and saying “you can have an error of fact  
21 that goes to jurisdiction” etc. Now, thankfully, the Court of Appeal has grasped the nettle and  
22 said “No”, material error of fact can be an independent ground for review, but subject to certain  
23 conditions.

24 THE PRESIDENT: How does that fit with *Tameside* where the House of Lords says, fine, it is for  
25 the Secretary of State’s decision as to how the policy should work on the facts, but the facts are  
26 for the court.

27 MR. ROTH: “*E*” is of course based on *Tameside* and brings in *Tameside* as the root of its analysis. I  
28 do not think “*E*” is in anyway inconsistent with *Tameside*.

29 THE PRESIDENT: It always seemed, at least to some of us, that if a decision maker is required to  
30 exercise a margin of appreciation on the facts and it turns out that he has actually  
31 misunderstood the facts or had an incomplete presentation of the facts, or overlooked some fact  
32 that was material you could say, without necessarily even going down the *Re E* route, I suppose

1 to put it in traditional terms that not all relevant considerations have been taken into account  
2 because the factual substratum of the exercise was lacking.

3 MR. ROTH: If the factual substratum is lacking that is one thing.

4 THE PRESIDENT: Incomplete or defective – defective in some material respect.

5 MR. ROTH: I think he addresses the point, how you deal with the fact where it is alleged to be  
6 wrong, and it is of course an important point because on the one hand there is Judicial Review  
7 for material error of fact, but on the other hand it is not the same in the full breadth of dispute  
8 that arises on a trial at First Instance, where the court is the fact finder, which you are not.

9 THE PRESIDENT: This Tribunal, at least so far as we can see at the moment, is not going to  
10 actually find any facts as to what the underlying facts are in this case. The question – or one of  
11 the questions might be whether the factual basis upon which this Decision proceeded may well  
12 be a proper and adequate basis for the evaluation that was made on the basis of that factual  
13 basis.

14 MR. ROTH: Yes, I fully accept that, and if certain facts were not found that should have been, well  
15 that is classic *Wednesbury*.

16 THE PRESIDENT: Or something.

17 MR. ROTH: But if facts were found and were got wrong, important material facts, that is I think  
18 what *Re E* is addressing.

19 THE PRESIDENT: Yes, well never mind, you unfold your argument, I think that is the best course.

20 MR. MATHER: Can I just follow the President on that. The exact quote from *Thameside* and *IBA*  
21 explores the fact that what we are looking at is the issue for the OFT is one of factual judgment.  
22 Although the question is expressed as depending on the subjective belief of the OFT, “there is  
23 no doubt that the court is entitled to inquire whether there was adequate material to support that  
24 conclusion”. Can you help us at some point on that sentence, and what constitutes a proper  
25 inquiry as to whether there was adequate material to support the conclusion?

26 MR. ROTH: Perhaps what I might do is slightly change the order of what I was going to do. We  
27 suggest it comes down then to four questions that the Tribunal can ask. I was going to go to  
28 the authorities first, but I will give you the questions first. The first is, has the OFT made a  
29 material error as regards established facts within the grounds set out by the Court of Appeal  
30 in *E*? Secondly, are the conclusions of the OFT on the facts found insofar as the  
31 conclusions are now challenged within the range of conclusions that the OFT could  
32 reasonably arrive at?

33 THE PRESIDENT: That is on the basis the facts are not challenged?

1 MR. ROTH: That is on the basis that the facts are not challenged, or no material error, yes. On the  
2 basis of the facts found.

3 THE PRESIDENT: Assuming that there is no material error. If that was in the range of reasonable  
4 responses you could have found on those facts, yes.

5 MR. ROTH: Thirdly, do the reasons for not making a reference set out in the Decision as amplified  
6 by Mr. Priddis's witness statement, stack up – I put it colloquially, that is what it boils down to.  
7 Do they give a sufficient logical foundation for the Decision?

8 THE PRESIDENT: Yes.

9 MR. ROTH: Quite where you put the boundary of that question, which I can see is always a difficult  
10 thing to be more precise about, but there is a sort of feel that this hangs together, no this does  
11 not, because some very important thing has been overlooked, or because the basis for that  
12 conclusion there just does not exist, and it brings in that sort of consideration.

13 THE PRESIDENT: Yes.

14 MR. ROTH: Fourthly, of course, in the light of all that is the decision not to refer this bid a decision  
15 that the OFT could reasonably arrive at?

16 THE PRESIDENT: Yes.

17 MR. ROTH: So that brings in both error of fact and leaving out important facts, or misunderstanding  
18 facts – the logic does not stack up. I formulated that over the weekend, I think there is now a  
19 fifth question arising out of the submissions we have heard this morning, which is has there  
20 been a failure to put matters to UniChem such that the procedure leading to the Decision was  
21 unfair. I think that is effectively a new point; it is not in the grounds. It is said to arise from  
22 the spreadsheets. Having seen the spreadsheets I do not quite follow that. The spreadsheets  
23 are referred to in the Decision. This point could have been taken at the outset but it is being  
24 taken now.

25 THE PRESIDENT: I think behind that last point is probably a point of some importance about what  
26 the process is at this stage.

27 MR. ROTH: Yes.

28 THE PRESIDENT: Neither party has actually had sight of the evidence as far as I can make out, i.e.  
29 Phoenix does not see what UniChem puts in, and UniChem does not see what Phoenix puts in,  
30 so we see where that all gets to.

31 MR. ROTH: That is right, and when one says UniChem does not see, the case has been put to the  
32 Tribunal at some points as if there are only three or four parties here, UniChem, AAH and the  
33 two – that is a fundamental misconception about this whole process. The third parties who are

1 particularly important are the customers. They are the pharmacies, they are dispensing  
2 doctors.

3 THE PRESIDENT: Yes, a large number of parties.

4 MR. ROTH: There are a very large number of third parties, and we get submissions from a large  
5 number of third parties, and we seek submissions from a large number, and I have to say that  
6 although of course competitors are important, if competitors when consulted say, "There is  
7 nothing we want to say about this merger, we've no problems", that is the kind of thing which  
8 actually gets the OFT a little bit worried.

9 THE PRESIDENT: Yes, quite.

10 MR. ROTH: It is when the competitors say, "No, no, this is a terrible thing", but the customers are  
11 very important. We do not put UniChem's submissions to the pharmacies. It is true they have  
12 not got expensive lawyers helping them with great sophistication, but they are also a very  
13 important interest, to be fair ----

14 THE PRESIDENT: That is right.

15 MR. ROTH: And there are a very large number of them, and when one thinks about process I do ask  
16 the Tribunal to ----

17 THE PRESIDENT: Absolutely. That is why we are asking the questions, so we can understand  
18 what the process is or should be.

19 MR. ROTH: Yes, and of course we do not put the customers' submissions as such, pass them over  
20 to UniChem, or indeed to Phoenix, and the customers if they heard that they were going to be  
21 passed over the source of information would quickly dry up. What we do is to seek to put or  
22 make the parties aware of what is the essence of the concerns so that they can have an  
23 opportunity to address them.

24 THE PRESIDENT: The merging parties?

25 MR. ROTH: The merging parties and also third parties are told what are the areas of concern in  
26 general terms so they can address them, saying what UniChem did say when I come to deal  
27 with process. I would rather not get into process this afternoon ----

28 THE PRESIDENT: No, no, fine. I am sorry, I am taking you out of your stride.

29 MR. ROTH: Perhaps as one dealing with facts, one should look at E, because Mr. Green said that  
30 we are submitting that E has narrowed the ground for Judicial Review, and this is a fact. We  
31 do not suggest that at all. It has not narrowed the ground, it has done two things: first, it has  
32 held that an appeal for error of law is the same as Judicial Review. There is no difference  
33 between the two tests. Secondly, a material error of fact in certain circumstances can be an

1 error of law or a ground for Judicial Review, which was previously not quite so clear. So one  
2 can say, “No, if you’ve found that fact for the Decision, it is quite clear it’s wrong”.

3 THE PRESIDENT: So we are basically back to where the explanatory notes to the 2002 Act said we  
4 were.

5 MR. ROTH: I think that is right, yes.

6 THE PRESIDENT: Which was a point that was hotly contested on the last occasion when we  
7 discussed this matter.

8 MR. ROTH: Apparently it was Mr. Beard who was involved on the last occasion. The note said “It  
9 may be” and I think actually it is. There are too many “maybes” in this area of law anyway.  
10 But that is right, Sir, yes, absolutely.

11 Going therefore ahead to that, we refer to it in our skeleton at para.41, which was  
12 decided by the Court of Appeal just before the *IBA* case in fact. It was made clear that  
13 although error of law is a ground for review, it is only a ground for review insofar as it gives  
14 rise to unfairness, and in limited circumstances. It is in your authorities bundle. I think for  
15 some reason the transcript has been put in. It has been reported. Can I hand up a substitute  
16 perhaps for tab 6, the transcript, the official law report. [Document handed to the Tribunal] I  
17 think it is a very different context to the *Simon* case. It is a single judgment of the court.  
18 Picking it up in the headnote, just above letter G:

19 “Held, allowing the appeals, that a mistake of fact giving rise to unfairness was a  
20 separate head of challenge on an appeal on a point of law at least in statutory contexts  
21 where the parties shared an interest in co-operating to achieve the correct result. In  
22 order for a court to make a finding of such unfairness it would have to be shown that  
23 the Tribunal whose decision was under appeal had made a mistake as to an  
24 established fact which was uncontentious and objectively verifiable, including a  
25 mistake as to the availability of evidence on a particular matter, that the Appellant or  
26 his advisers had not been responsible for the mistake and that the mistake had played  
27 a material although not necessarily decisive part in the Tribunal’s reasoning, and that  
28 accordingly if the new evidence were admitted the court would be entitled to consider  
29 whether the Tribunal had made a mistake of fact giving rise to unfairness so as to  
30 amount to an error of law.”

31 And I think that summarises or perhaps reproduces what is, after a long discussion of the  
32 authorities, and the way this has evolved in the law, para.66 of the judgment on p.1071. And  
33 they say this area of law is unclear, and the Enterprise Act is such an area.



1 Then they say in para.69:

2 “Whether this is a material issue of course depends on the nature of the mistake. It  
3 may not be relevant if a mistake arises purely from the Tribunal’s consideration of the  
4 evidence. However, it may be material where the complaint is of ignorance of  
5 evidence which was available before the decision was made, in which case it  
6 inevitably overlaps with the question of unfairness. If you are the Claimant you have  
7 the opportunity to produce evidence and if you fail to take it he may not be able to say  
8 that he has not had a fair crack of the whip ...”

9 and so on.

10 Mr. Beard helpfully suggests that we look at para.63. It takes one through unfairness  
11 and how that arises in mistake of fact, drawing on the *Criminal Injuries Compensation Board*  
12 case.

13 “On analysis, the unfairness arose from a combination of five factors;

- 14 i) erroneous impression created by a mistake as to, or ignorance of, a relevant  
15 fact (the availability of reliable evidence to support her case)  
16 ii) the fact was “established”, in the sense that, if attention had been drawn to the  
17 point the correct position could have been shown by objective and uncontentious  
18 evidence  
19 iii) the claimant could not fairly be held responsible for the error;  
20 iv) although there was no duty on the Board itself, or the police, to do the  
21 claimant’s work of proving her case, all the participants had a shared interest in co-  
22 operating to achieve the correct result;  
23 v) the mistaken impression played a material part in the reasoning.”

24 So that helps a little bit on the meaning of “material” and “establish”. And there is the  
25 reference to *Tameside* being taken into account in the next paragraph.

26 THE PRESIDENT: I think a possibly relevant remark is in the following paragraph, para.64,  
27 referring to *Tameside*:

28 “The Council and the Secretary of State, notwithstanding their policy differences, had  
29 a shared interest in decisions being made on correct information as to the  
30 practicalities.”

31 And correct information as to the practicalities is possibly part of the issue in this case.

32 MR. ROTH: Yes, so that is error of fact.

1           Going back to the reasonableness point and the question is it within the range of  
2 conclusions that the OFT could reasonably arrive at, I probably should refer, because it was  
3 highlighted by I think Lord Justice Carnwath in *IBA*, to the speech of Lord Lowry in the *Brind*  
4 case, which *IBA* drew particular attention to, and that is at tab 3 of the same bundle of our  
5 authorities, which has the blue spine. The *E* case should be at tab 6, which was the case about  
6 the broadcasting restriction on the IRA, and Lord Lowry gave the last speech, and it is at  
7 p.764, and I pick it up at the bottom of the page, p.764, letter G, where he says:

8           “I will mention just two points, which are closely related, the test of unreasonableness  
9 in judicial review and the doctrine of proportionality.

10          The kind of unreasonableness for which a court can set aside an administrative act or  
11 decision is popularly called “*Wednesbury* unreasonableness” from the name of the  
12 famous case ... in which Lord Greene M.R. spoke of a decision ‘so absurd that no  
13 sensible person could ever dream that it lay within the powers of the authority.’ In  
14 *Secretary of State for Education and Science v Tameside Metropolitan Borough*  
15 *Council* Lord Denning M.R. referred to decisions ‘so wrong that no reasonable  
16 person could sensibly take that view.’ In *Council of Civil Service Unions v Minister*  
17 *for the Civil Service* Lord Diplock, having used irrationality as a synonym of  
18 *Wednesbury* unreasonableness, said that “it applies to a decision which is so  
19 outrageous in its defiance of logic or of accepted moral standards that no sensible  
20 person who has applied his mind to the question to be decided could have arrived at it,  
21 while in *Reg. v Secretary of State for the Environment, Ex parte Nottinghamshire*  
22 *County Council* Lord Scarman, when invited to examine the detail and consequences  
23 of guidance given by the Secretary of State, said:

24           “Such an examination by a court would be justified only if a prima facie case  
25 were to be shown for holding that the Secretary of State had acted in bad faith,  
26 or for an improper motive, or that the consequences of his guidance were so  
27 absurd that he must have taken leave of his senses.”

28          “These colourful statements emphasise the legal principle that judicial review of  
29 administrative action is a supervisory and not an appellate jurisdiction. I recall that in  
30 *Rex v. Nat Bell Liquors Ltd.* Lord Sumner, admittedly speaking of an attempted  
31 challenge to the validity of court proceedings, said that the superior court’s  
32 jurisdiction was one “of supervision, not of review.”

1 I believe that the subject is nowhere better discussed than by Sir William Wade in  
2 Chapter 12, "Abuse of Discretion," of his authoritative textbook *Administrative Law*.  
3 The author, with the aid of examples covering more than a century, clearly  
4 demonstrates that what we are accustomed to call *Wednesbury* unreasonableness is a  
5 branch of the abuse, or misuse, of power: the court's duty is not to interfere with a  
6 discretion which Parliament has entrusted to a statutory body or an individual but to  
7 maintain a check on excesses in the exercise of discretion. That is why it is not  
8 enough if a judge feels able to say, like a juror or like a dissenting member of the  
9 Cabinet or fellow-councillor, "I think that is unreasonable; that is not what I would  
10 have done." It also explains the emphatic language which judges have used in order  
11 to drive home the message and the necessity, as judges have seen it, for the act to be  
12 so unreasonable that no reasonable minister etc. would have done it. In that strong,  
13 and necessary, emphasis lies the danger. The seductive voice of counsel will suggest  
14 (I am not thinking specifically of the present case) that, for example, ministers, who  
15 are far from irrational and indeed are reasonable people, may occasionally be guilty of  
16 an abuse of power by going too far. And then the court is in danger of turning its  
17 back not only on the vigorous language but on the principles which it was intended to  
18 support. A less emotive but, subject to one qualification, reliable test is to ask,  
19 "Could a decision-maker acting reasonably have reached this decision?" The  
20 qualification is that the supervising court must bear in mind that it is not sitting on  
21 appeal, but satisfying itself as to whether the decision-maker has acted within the  
22 bounds of his discretion. For that reason it is fallacious for those seeking to quash  
23 administrative acts and decisions to call in aid decisions of a Court of Appeal  
24 reversing a judge's finding, it may be on a question of what is reasonable. To say  
25 what is reasonable was the judge's task in the first place and the duty of the Court of  
26 Appeal, after giving due weight to the judge's opinion, is to say whether they agree  
27 with him. In judicial review, on the other hand, the task of the High Court is as  
28 described above, and the task of the Court of Appeal and, when necessary, this House  
29 is to decide whether the High Court has correctly exercised its *supervisory*  
30 jurisdiction.  
31 Of course, whichever kind of jurisdiction is being exercised on the subject of  
32 reasonableness, there is bound to be a subjective element in the decision. There is no

1 objective standard in either case which would allow the result to be foretold with  
2 certainty. The first requirement, however, is to ask the right question.”

3 And I can stop there. We are not concerned with proportionality.

4 From that I turn to the area where I think the error of fact or the failure to appreciate  
5 the fact is said to arise, which is whether UniChem and indeed AAH could act as a competitive  
6 constraint in the area north of the A14, and that is dealt with in Mr. Priddis’s witness  
7 statement, in particular at para.91 and following, in the section at p.51 headed “2”:

8 “The next part of the competitive assessment was therefore to understand what other  
9 competitive alternatives there might be to Phoenix and EAP in East Anglia, especially  
10 in those parts of the region where they would appear to overlap most significantly.”

11 THE PRESIDENT: Do you want us to read this to ourselves, or how far do you want to go?

12 MR. ROTH: Just for the moment para.92. Perhaps if you could read down to the end of para.94;  
13 that would be very helpful.

14 THE PRESIDENT: At the end of para.92:

15 “By way of a quick proxy, Phoenix and EAP noted the A14 trunk road across East  
16 Anglia represented a line close to the northern bound of the UniChem isochrones.”

17 Would that not be the southern bound? I thought their isochrones were all north of the A14.

18 MR. ROTH: I think they are saying that UniChem could not deliver -- its 90 minute delivery time  
19 stopped at the A14.

20 THE PRESIDENT: I see, to the north.

21 MR. ROTH: To the north of it, yes.

22 THE PRESIDENT: When they were coming up from Letchworth.

23 MR. ROTH: Exactly.

24 THE PRESIDENT: I see, not that the A14 was to the north. Yes, I follow. (After a pause): Yes.

25 MR. ROTH: And then he goes on. But pausing there, to develop the four reasons, and he goes into  
26 detail and explains the four reasons, but there are two fundamental points to make: first of all,  
27 while in terms of the contestable market it is the independent pharmacies and dispensing  
28 doctors that are important, but when you are looking at delivering that work it is the totality of  
29 the customers of the wholesaler that are relevant, including the tied customers, because they  
30 use the same vans to deliver to the supermarket or the wholly owned pharmacy as they do to  
31 the independents. The routeing network includes the lot.

32 Secondly, the delivery routes are not fixed, and that indeed might be thought to be an  
33 obvious point, but Phoenix and EAP said they changed their routes to take account of new

1 accounts, so it is not just an additional drop on an existing route, the point that Mr. Green came  
2 back to again and again. These are not railway lines, these are vans going along the road, and  
3 they will all plan their route in the most efficient way to take account of all the drops, tied,  
4 independent, supermarkets, etc. In fact the evidence of Mr. Johnson, to which I will take you  
5 in a moment, bears this out. It actually shows what the routes are and where they drop.

6 The Decision at para.43 makes this very clear. This is a paragraph in which Mr.  
7 Green said, yes, UniChem agrees with the 150,000, and it is more customers.

8 “However, the parties maintain that all full-liners use sophisticated routeing software  
9 to optimise their networks. As a result, the addition of a new customer to the network  
10 will typically be followed by a reorganisation of the entire route network. The  
11 marginal cost of supplying a new customer, where existing customer drops are  
12 nearby, should therefore be very low. However opening a route in an area where the  
13 full-liner has no pre-existing drops (even within the 2-hour drive time radius) is likely  
14 to carry a higher incremental cost.”

15 So it is not just is there another drop on an existing fixed route ----

16 THE PRESIDENT: I do not think anyone is suggesting that it is.

17 MR. ROTH: And therefore what you are looking at is the network and not just the route.

18 MR. MATHER: So, to be clear, you are suggesting that the couple of references in the Decision to  
19 adding another drop should in fact be taken to mean that where another drop is added there is  
20 an automatic or semi-automatic reconfiguration of routes with quite far-reaching  
21 consequences. Is that what you are saying?

22 MR. ROTH: It will entirely depend where the new customer is. If it is somewhere that is very close  
23 to an existing route there probably will not be; if it is somewhere rather different then they  
24 look at the route planning and say, “We can configure our routes in a different way”, just as  
25 now they have lost we have heard since the Decision they have lost three accounts. They will  
26 no doubt look at those routes and say, “Oh, they’re the most economic route”. As Mr. Green  
27 said shortly before lunch, the entire system is optimally configured to meet the demand that is  
28 already there. These are sophisticated operators with their vans. We are not talking about the  
29 whole of Europe, we are talking about a certain part of East Anglia.

30 THE PRESIDENT: Would you not need to look at what the existing routes were and then see how  
31 easy or not it was to add one of the relevant customers to one of the existing routes?

32 MR. ROTH: With respect, no, because you do not have to stick to the same route. You look where  
33 the customers are.

1 THE PRESIDENT: Yes, exactly.

2 MR. ROTH: But you do not have to actually look at which road the van takes.

3 THE PRESIDENT: No, but you would have to see where the customer is, all the existing customers  
4 plus the new customer, and then work out if the new customer could be accommodated on that  
5 route within the drop off times presumably, or on a contiguous route.

6 MR. ROTH: The point is you look at where are the existing customers, how broad is the network,  
7 those are the facts to look at, and then say, "Is it a network that embraces this area such that  
8 any efficient operator can absorb new customers".

9 PROFESSOR STONEMAN: And are you saying that the responsibility of the Office of Fair  
10 Trading was establish that such a machinery or mechanistic process existed and then it could  
11 be more or less confident that it was possible to add customers and to reconfigure the routes up  
12 to the point where a whole new route had to be opened? Is that the distinction you are talking  
13 about, because at the point where a whole new route has to be opened there is a higher  
14 incremental cost.

15 MR. ROTH: It will depend on the number of customers you have in that area, yes. What I am  
16 saying is that what the OFT have to do and did, and was finally able to do, though not  
17 previously, is to look at where UniChem's customers in this area. Are they being served? Are  
18 there few or many? Knowing that the full liners, the large full liners, and perhaps even the  
19 smaller ones, organised their route networks in the most efficient way, and if they do not they  
20 should, and should be presumed to if they are efficient, such that independent pharmacies,  
21 dispensing doctors, in fact quite a possibility and were being – either were or had the  
22 possibility of being so.

23 THE PRESIDENT: But if you find, as you do, that it should be relatively easy and cost-effective to  
24 add one or more drops to an existing round, for "round" read "route", do you not need to have  
25 some idea what the existing routes are in order to arrive at that conclusion?

26 MR. ROTH: I do not think you need to go that far on the basis of a customer spread in the network,  
27 otherwise you get down to a sort of detailed micro-management of how the competitors  
28 actually deal with X Pharmacy in Diss, and whether X Pharmacy in Diss can be added to this  
29 route and, if not, can you devise another route. It does not have to get down to that degree.  
30 What you look at is to see where actually is UniChem, and you can follow – it might help if we  
31 follow through the process of reasoning that was adopted to deal with this and to come to that  
32 conclusion, because then I think you will see how we get to that point rather than my talking  
33 ----

1 THE PRESIDENT: Yes, that is why I was asking for the map where the 12 customers were to see  
2 how it worked, or 18 or whatever it was.

3 MR. ROTH: Ninety actually when we come down to it. That is the whole point. The issue was this,  
4 and one sees the way it evolved. At the confidential guidance stage when Phoenix sought to  
5 persuade the OFT of this – if I could ask you to take Mr. Priddis’s exhibits – what has been  
6 referred to as the OFT bundle, the exhibits to his witness statement. At tab 15 you will find  
7 two maps. The first one, which has blue and green dots, if you could go to that, and first of all  
8 just identify where one is. That area there is Cambridge. On my map the town names are not  
9 very easy to read.

10 THE PRESIDENT: No, the entire map is not easy to read, but that is not a criticism of anyone.

11 MR. ROTH: So there is Cambridge and the A14 is the road running along there from just north of  
12 Cambridge.

13 THE PRESIDENT: East of Cambridge.

14 MR. ROTH: East of Cambridge.

15 THE PRESIDENT: And leads to Ipswich. It goes round Bury and down to Ipswich; is that right?

16 MR. ROTH: Exactly. The blue dots, as you see from the legend, are Phoenix customers. The green  
17 dots, the fork is EAP, the code for EAP at the confidential stage. So this shows you purely the  
18 two merging parties, and it shows you the relative lack of spread of Phoenix outside Norwich,  
19 but up at the very top there is not a lot of Phoenix but there is quite a bit of EAP. I think  
20 Professor Stoneman’s question, are there areas where in fact Phoenix cannot get to either, so it  
21 does not make much difference. That is one of the two maps.

22 The other map adds to what we have just seen. Sorry, it does not add, it is the same  
23 area, the same basic map, but this puts on – here the green dots are Moss pharmacies, that is to  
24 say those are the UniChem tied pharmacies.

25 THE PRESIDENT: These are maps produced by Phoenix?

26 MR. ROTH: By Phoenix. So this shows where the Moss pharmacies are, which are the UniChem  
27 tied pharmacies. I do not quite know how to describe the next one, the sort of khaki colour,  
28 they are Lloyds Pharmacy. Those are the AAH type pharmacies. The Co-op is blue, which is  
29 supplied by AAH, and the others are the yellow, which are non-Phoenix, non-EAP. But at that  
30 point, looking at this point, the OFT could not tell what all these yellow dots are. They could  
31 not tell whether they are UniChem or AAH or someone else, or whether they are supermarkets,  
32 whether they are independent pharmacies, they just did not have the information to see. All

1 they could see is the yellow dots are spreading up to the north and east coast – Lowestoft on  
2 the far right, Great Yarmouth, have yellow dots, and similarly Norwich of course up at the top.

3 THE PRESIDENT: Do the yellow dots include Phoenix and EAP?

4 MR. ROTH: No, those are all non-Phoenix, non-EAP. There are no Phoenix and EAP on the second  
5 map, they are all on the first map.

6 THE PRESIDENT: If we put the two maps side by side, just to get the very broad visual impression  
7 of what has happened, and we remember that the green on one is EAP and the green on the  
8 other is Moss, so we will try not to get confused in that respect.

9 MR. ROTH: So the yellow dots span right out and so do the green dots which are Moss, which are  
10 also served by UniChem deliveries. But we also of course could not at that point see which of  
11 the independents are served by UniChem or where exactly they are and be sure about what is  
12 being said.

13 THE PRESIDENT: Has this got the dispensing doctors on it, the second map?

14 MR. ROTH: No, this does not have dispensing doctors, this is purely pharmacies. I think that is  
15 right.

16 MISS BACON: It has just been brought to my attention that the key at the bottom is imprecise in  
17 one respect, that the yellow dots do include dispensing doctors. It should include dispensing  
18 doctors I am told ----

19 THE PRESIDENT: No, Mr. Roth has just said that is not the case.

20 MR. ROTH: I have based myself on the legend on the map, but I have just been told that – well, it  
21 says “other pharmacies”. I do not think it matters because this map was produced at  
22 confidential guidance and it did not persuade the OFT that the problem is overcome.

23 THE PRESIDENT: So on the basis of these maps ----

24 MR. ROTH: We were not ----

25 THE PRESIDENT: Not over-impressed with these ----

26 MR. ROTH: I would not say not over-impressed, but we were not sufficiently convinced that this  
27 dealt with the problem.

28 So two things then happened subsequently. One is that at the next stage Phoenix and  
29 EAP produced a further set of maps which are much easier to read thankfully, which are at the  
30 next tab. I think there are four of them.

31 THE PRESIDENT: Yes.

32 MR. ROTH: With various colours.

33 THE PRESIDENT: And these are produced when, Mr. Roth?



1 MR. ROTH: These are produced after the confidential guidance. They were produced just before  
2 notification. They came to see the OFT pre-notification with I think a draft just before  
3 notification.

4 THE PRESIDENT: They came with a draft.

5 MR. ROTH: Yes, and again just explaining what they show, if one takes the one that has only green  
6 and blue dots first and no writing in the middle of the map, no little boxes, the bold line is the  
7 A14, the green is EAP and the blue is Phoenix, and again you can see where Phoenix has got to  
8 in this important area. Each of the other three maps add two things: (1) they add red dots for  
9 dispensing doctors ----

10 THE PRESIDENT: This is pharmacies only, is it, this first map you are taking us to?

11 MR. ROTH: I think it is pharmacies only.

12 THE PRESIDENT: Can we be absolutely sure each time what we are talking about.

13 MR. ROTH: That is pharmacies only, and on the other maps you also have red dots.

14 THE PRESIDENT: That is right, is it, Miss Bacon?

15 MISS BACON: As far as I am able to ascertain, the blue and the green dots do include dispensing  
16 doctors. The red dots are the dispensing doctors for whom we do not know the supplier.

17 THE PRESIDENT: Map 1, green and blue, includes dispensing doctors. It is terribly important to  
18 get this right, Mr. Roth, to know what on earth we are talking about.

19 MISS BACON: On all of the other maps there are additionally red and yellow. The red dots, as far  
20 as I am able to ascertain, are dispensing doctors where we do not know the supplier.

21 THE PRESIDENT: Let us see which map we need to go to next.

22 MISS BACON: They are all the same in respect of the blobs.

23 THE PRESIDENT: So the blobs are the same.

24 MISS BACON: Yes. The blobs are the same on all of the other maps. The red blobs are the  
25 dispensing doctors for whom we do not know the supplier, so it is not us, it could be AAH, it  
26 could be UniChem, it could be Maltbys, but it is the dispensing doctor's supplier unknown,  
27 and the yellow blobs are independent sector customers for whom we do know the supplier, so  
28 that includes both pharmacies and dispensing doctors, and then the three maps then segment  
29 this.

30 THE PRESIDENT: The yellow dots can be either pharmacies or dispensing doctors; is that right?  
31 One would have thought that everyone would have had this at their fingertips by now.

32 MISS BACON: I am sorry, I have actually attempted to ascertain this over the weekend. The  
33 yellow blobs certainly include the pharmacies. They seem to include one or two dispensing

1 doctors, and the fact is that UniChem has now said it does not have any dispensing doctors  
2 north of the A14, but then they are broken down according to who is actually supplying them  
3 on the three maps. I have asked whether the yellow dots do include overall dispensing doctors  
4 ----

5 THE PRESIDENT: Is there no written explanation of these maps anywhere saying what they show  
6 and they do not show? Surely the OFT must have a file somewhere saying what all these dots  
7 mean.

8 MR. ROTH: They were put together and explained at a meeting.

9 THE PRESIDENT: There must be a note of the meeting which explains what the dots are.

10 MR. ROTH: Yes, I will clarify about the dispensing doctors. But the short point is that the yellow  
11 dots on the other three maps – I mean, they are all the same on all the maps, but in each of the  
12 three maps there are identified on one of them which is supplied by UniChem in those little  
13 boxes with the arrows, on the next one ----

14 THE PRESIDENT: These are maps that were produced at a meeting?

15 MR. ROTH: They were produced and annexed to a submission and then discussed and explained at  
16 the meeting.

17 THE PRESIDENT: Presumably there is another set of maps identifying AAH and ----

18 MR. ROTH: That is the reason why there are three. One is UniChem, one is AAH and the third is  
19 Maltbys, I think probably because you cannot get all the boxes on one map.

20 THE PRESIDENT: So there are some dispensing doctors you do not know, then the yellow are  
21 independent sector where we do know the suppliers, and when that supplier is UniChem that is  
22 so identified on the map that refers to UniChem.

23 MR. ROTH: That is right, and when we know it is AAH it is identified on the map where the  
24 reference is to AAH, and where it is Maltbys, who are another full line wholesaler, but much  
25 smaller, that is identified on the map where you have references to Maltbys.

26 THE PRESIDENT: So in UniChem's case – let us see if we can understand it – there are some  
27 customers in Great Yarmouth and Lowestoft, and there is a customer out near Holkham, and  
28 then we have got Kings Lynn, and somewhere in the Fens where I cannot quite see what the  
29 name of the place is. We have got March, we have got Haddenham, Warboys, just outside  
30 Peterborough, and St. Neots.

31 MR. ROTH: Going up to Boston at the top.

32 THE PRESIDENT: So it seems to be UniChem, Maltbys, and they use more than one ----

1 MR. ROTH: Yes. But all of these three where they are identified, that does not include the tied  
2 pharmacies. It does not include Moss, it does not include Lloyds. These are all independent  
3 pharmacies. It does not include Co-ops. So if you look at the UniChem map, what you can  
4 see is that UniChem are supplying in Lowestoft, in Great Yarmouth, up at the top, and in  
5 Kings Lynn and so on, to independent pharmacies, to a significant number of independent  
6 pharmacies.

7 THE PRESIDENT: Yes, you have got 16 north of the A14. I cannot quite make out where the A141  
8 is on this map. Is the A141 to the east or west of Peterborough?

9 MR. ROTH: If you follow the black line to the left of Cambridge and then find Warboys I think you  
10 see the A141. It is marked. It goes east of Peterborough up to The Wash.

11 THE PRESIDENT: So if we include Warboys, we have got Warboys, we have got March, we have  
12 got somewhere I cannot see, and we have got Kings Lynn, and we have got one in Haddenham  
13 and one near Haddenham, then we have got one up at Whitton and then we have the  
14 pharmacies in Great Yarmouth and Lowestoft.

15 MR. ROTH: Yes, and that is excluding tied.

16 THE PRESIDENT: As far as the independents are concerned.

17 MR. ROTH: Yes, and that shows that in fact UniChem is serving independent pharmacies in this  
18 areas who are taking their service from UniChem although they are outside the 90 minute drive  
19 time.

20 THE PRESIDENT: Well, Haddenham cannot be outside the 90 minute drive time from Letchworth  
21 surely? Letchworth is only just at the bottom there. I doubt whether Warboys or March would  
22 be either, but no doubt somebody went into all this.

23 MR. ROTH: I think it is on the isochrone, the UniChem isochrone. The other piece of information  
24 ----

25 THE PRESIDENT: Do you want to take us to the UniChem isochrone just to see what is outside 90  
26 minutes and what is not?

27 MR. ROTH: I think it is a little bit small in scale, but that is in the Applicant's bundle at tab 11,  
28 which is p.337.

29 THE PRESIDENT: So where is zone B?

30 MR. ROTH: I think that is right, Sir, that Warboys is not in zone A, so Warboys is not outside the  
31 90 minutes.

32 THE PRESIDENT: I am not sure I have picked actually where – zone A on this is the zone round  
33 Norwich.

1 MR. ROTH: Yes, where Norwich is at the northern bit, and the coast is above the shaded part. You  
2 see where it says “Norwich” ----

3 THE PRESIDENT: Yes.

4 MR. ROTH: And then above that, which is white, is an area where, on the submission that UniChem  
5 made, Phoenix could not compete either, and therefore it was only EAP, and therefore the  
6 merger made no difference so they focused on zone A was the argument they put. If you look  
7 below the map, the middle paragraph, zone A represents the area that is within 90 minutes  
8 direct drive time of Phoenix and EAP only.

9 “Customers in this zone, which includes Norwich and Kings Lynn, therefore face only  
10 one realistic choice of wholesaler ...”

11 That is after the merger of course.

12 “... the merged entities’ competitors being unable to offer a competitive service in this  
13 zone.”

14 That was the submission put to us, and that was looked at against the map that you have just  
15 seen showing that in zone A, and indeed beyond zone A, even further away than zone A, there  
16 are a number of UniChem independent pharmacy customers.

17 THE PRESIDENT: There seems to be one in Kings Lynn and one in Whitton.

18 MR. ROTH: And in Great Yarmouth ----

19 THE PRESIDENT: Is Great Yarmouth in zone A? Maybe it is.

20 MR. ROTH: It is even further away. It is on the coast. Are you with me? I am sorry if I am making  
21 heavy weather of this.

22 THE PRESIDENT: I think I am sort of with you. It is rather difficult to compare these maps, but  
23 I think we are with you.

24 MR. ROTH: In fact Norwich is there put in zone A and to the east of Norwich Great Yarmouth is on  
25 the coast, therefore even beyond zone A in the white area. Lowestoft is a little further down  
26 the coast. So the independent pharmacies are being served by UniChem both within zone A  
27 and beyond.

28 THE PRESIDENT: So its Kings Lynn, Whitton, Great Yarmouth and Lowestoft; is that right? That  
29 is what that seems to show?

30 MR. ROTH: I think that is right. It is difficult to see exactly where the boundary of zone A is on the  
31 west.

32 THE PRESIDENT: In the text it says that zone A includes Norwich and Kings Lynn, so I sort of  
33 mentioned it put Kings Lynn in. It is not quite clear which zone Lowestoft falls within, but it

1 looks as though it is in the white bit just beyond the southern bit of zone A, but no doubt  
2 somebody can tell me where Lowestoft is.

3 MR. ROTH: It is either just beyond the southern bit or in the eastern bit, beyond zone A.

4 THE PRESIDENT: Yes, I mean the eastern bit, yes.

5 MR. ROTH: It is not in zone C.

6 THE PRESIDENT: They do not seem to be supplying anyone in zone C, but maybe they are.

7 MR. ROTH: Well they say it is within AAH's delivery area. Unlike the others, these are the  
8 independent pharmacies, these do not include the tied pharmacies. The point being that  
9 therefore independent pharmacies outside the area we were told UniChem could not serve, are  
10 in fact being served. UniChem said "We can only effectively serve customers up to zone B,  
11 and not in zone A". The map shows that zone A and even further are independent pharmacies  
12 being served by UniChem.

13 THE PRESIDENT: Actually, I am not sure, just looking at the map that there actually is anything in  
14 zone A, it all looks slightly beyond zone A to me. It is very, very difficult to work out.

15 MR. ROTH: There is also a list given of pharmacies on p.345 in zone A, which helps one see the  
16 boundaries of it.

17 THE PRESIDENT: Which ones of those are served by UniChem?

18 MR. ROTH: These are not pharmacies I think being served by UniChem, these are pharmacies  
19 which it is said are served by Phoenix or EAP which will go down two to one.

20 THE PRESIDENT: Mr. Roth, I am beginning to notice the time.

21 MR. ROTH: I am sorry, I did not notice the time at all. Perhaps I can come back to that on Friday.

22 THE PRESIDENT: Would it not be sensible to try and sort this out in a bit more detail. I am not  
23 criticising anyone but it is a bit difficult for us to follow all this at the moment as to where all  
24 these boundaries are, who has done what, and all the rest of it.

25 MISS BACON: Could I just say that we will either overnight, or by Wednesday produce a detailed  
26 statement explaining what all these blobs are, certainly the colour of the blobs. Just to answer  
27 your question, Sir, regarding the pharmacies listed in zone A, who they go to, this table is  
28 reproduced in the witness statement of Mr. Cole, with an explanation by each of those  
29 pharmacies, who they are served by. It is certainly not the case that they are Phoenix and EAP  
30 pharmacies, in fact most of them are AAH or UniChem.

31 THE PRESIDENT: Yes, we will read that with care, thank you, Miss Bacon. Now, Mr. Roth, if  
32 there is any further material you need us to consider before Friday it should be in by  
33 Wednesday evening, if at all possible.

1 | MR. ROTH: Yes, Sir.

2 | THE PRESIDENT: We will adjourn now. Thank you very much.

3 | (Adjourned until 10.30 a.m. on Friday, 18<sup>th</sup> February 2005)

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