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IN THE COMPETITION
APPEAL TRIBUNAL

Case No 1059/4/1/06

Victoria House,
Bloomsbury Place,
London WC1A 2EB

28th March 2006

Before:
MARION SIMMONS QC (Chairman)
PROFESSOR ANDREW BAIN
VIVIEN ROSE

Sitting as a Tribunal in England and Wales

BETWEEN:

CELESIO AG

Applicant

and

OFFICE OF FAIR TRADING

Respondent

Supported by

ALLIANCE UNICHEM PLC

and

BOOTS PLC

Interveners

Mr. Mark Hoskins and Miss Kelyn Bacon (instructed by Linklaters) 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.

Mr. Nicholas Green QC and Miss Maya Lester (instructed by Slaughter & May and Allen & Overy) appeared for the Interveners

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CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good afternoon. It may be helpful if I made some opening remarks. First, can I
2 thank you all for the succinct submissions for this CMC. The matters which I think we need to
3 decide today appear to be:

- 4 (i) the evidence to be provided by the OFT,
- 5 (ii) the confidentiality issue in relation to that evidence,
- 6 (iii) whether the Interveners can produce expert evidence; and
- 7 (iv) the timetable.

8 Can I start by indicating the timetable which, of course, is subject to further submissions but
9 this is how we are thinking about it at the moment. We have sympathy with the submissions of
10 the Applicant that the OFT has had some considerable time, in relation to the urgency of this,
11 to prepare their defence of their Decision. We would suggest that the OFT should be able to
12 provide any further evidence and their submissions by either Friday of this week, or Monday,
13 3rd April, and we would then suggest that the Interveners would be able to submit their written
14 submissions and any evidence by Wednesday, 5th April; that any reply by the Applicants could
15 then be served by Friday, 7th April and that would allow a hearing to take place on Tuesday
16 11th April. We are presently minded to limit that hearing to one day, although we note that
17 there has been some suggestion to two days, and to timetable that hearing very carefully so that
18 it only takes one day.

19 We are concerned to ensure that there is no duplication between the OFT and the
20 Interveners, and it is for that reason that we have suggested a two day gap between the
21 submissions of the OFT and the Interveners. We note that the OFT is intending to serve
22 witness evidence. We assume that this refers to the evidence relied upon in its Decision and
23 we refer in particular to the mention of evidence, as to para.46 of the Decision. We would
24 refer, in relation to evidence to be provided by the OFT, to what the Tribunal said on paras.67
25 to 69 of its recent Decision in the *Somerfield* Appeal.

26 The next issue is confidentiality, and it seems to us there are really two aspects to
27 confidentiality, namely, the Boots/Unichem confidentiality, and there is third party
28 confidentiality. There may also be some question as to the confidentiality of the Applicants – I
29 do not know if that arises. We would like to be addressed in relation to any confidential
30 question which arises in relation to third party confidentiality. In relation to the
31 Boots/Unichem confidentiality the Applicants have suggested a confidentiality ring which
32 seems to us, subject to any submissions by the parties, a sensible way forward.

33 Turning to the issue of expert evidence, it seems to the Tribunal that if Dr. Padilla's
34 evidence is admissible then its relevance relates to the principles which he refers to rather than
35 the factual details regarding market shares and pricing. Subject to further submissions, it

1 would seem to us that any expert evidence which the Interveners wished to adduce should be
2 limited to those principles and the experts should not enter into a factual debate. This
3 restriction is important having regard to the timetable and to the nature of Judicial Review; we
4 remind the parties of what is written in para.6.57 of the Tribunal Guidelines.

5 We note the reference to interim relief in the Applicant's skeleton of 27th March – I
6 think it is dated 27th April, but I do not think we have got there yet! There is no application
7 before us today and, having regard to the timetable, we are a little concerned that the parties
8 should not be deflected from preparing for the hearing by peripheral issues, so we hope that
9 that may have been resolved. Those are the points that we wanted to mention.

10 MR. HOSKINS: Ma'am, in relation to the timetable – if I can begin with that – I think generally we
11 are very happy with it. The only submission I would like to make is in relation to the gap
12 between the OFT's evidence and the Intervener's evidence. I am obviously at a slight
13 disadvantage because I do not know what the Interveners are going to give us. Their skeleton
14 argument suggests they are planning to give us quite a lot, and that is certainly the tone of that
15 document. Obviously, if they are prepared to play a purely Intervener's role, by which I mean
16 they are supporting the OFT's Decision, and not trying to open up new issues, new facts, etc.
17 then there should not be a particularly large problem. But there is still a degree of difficulty, if
18 we were to get their submissions at close of play on 5th April and we had only two days to
19 finalise dealing with the OFT's material and to take in what they have said, I think it is quite
20 tight for us. Could I make an alternative suggestion, which is you suggest the OFT might
21 produce its evidence and submissions on Friday or Monday. If they were to produce them on
22 Friday by 5 p.m., and if the Interveners were to produce their materials by, say, 5 p.m. on
23 Tuesday that would still give a weekend plus a day – I appreciate weekends are precious but
24 that is the sort of timetable we have probably got here – that would give them three days to
25 avoid duplication and would give us sufficient time to actually deal with anything the
26 Intervener has put in. That is what I would suggest in relation to the timetable, but the rest we
27 are very happy with.

28 In relation to confidentiality and third parties, it is probably sensible for Mr. Roth to
29 take that first because again I am not entirely sure how big an issue that is going to be, and it is
30 probably best I leave that to Mr. Roth to develop and ----

31 THE CHAIRMAN: You have not managed to resolve that between yourselves?

32 MR. HOSKINS: We have not, no. You have obviously seen our suggestion for the confidentiality
33 for Boots/Unichem.

34 THE CHAIRMAN: Yes.

1 MR. HOSKINS: I think we are pretty well there in relation to our material, there is just one
2 outstanding issue Mr. Roth and I have been discussing, but I am hoping we can simply agree
3 that between us but it has not been raised with me as an issue, third party confidentiality. I just
4 simply do not know how big an issue it is at this stage. Obviously all I can say is we will need
5 to see anything that is relevant, but I do not see how the OFT sees that issue.

6 In relation to expert evidence, the comments in relation to how our expert's report
7 should be seen are how exactly how we intended it to be seen – going to the principles of the
8 matter and not trying to open up issues of factual debate – and obviously we are very grateful
9 for that indication, and we strongly support the indication that has been given to the Intervener
10 if it is minded to put in any expert evidence it should be limited in that way. One asks the
11 question, given that it is the Office's Decision that has been challenged, given that the Office
12 has not indicated desire to put in expert evidence, is it really appropriate or necessary for the
13 Intervener to put in expert evidence? Not surprisingly we would say "no", but I think that is
14 probably a prior question, I was not sure if that was tied up in the opening comments of the
15 Tribunal. So our starting position would be if the OFT do not want expert evidence, we do not
16 really see why the Intervener should put in expert evidence.

17 In relation to interim relief, Mr. Roth and I have discussed that. I am hoping he is
18 going to say something about that today that may give us some comfort. We do not want to
19 waste everyone's time, so I am hoping it will not matter, but you will understand that we have
20 a certain concern that things should not be done on the basis of a decision, the legality of which
21 is currently being challenged.

22 I think, unless there is anything I can particularly help you on, that is all I can say at
23 the moment.

24 THE CHAIRMAN: Shall we hear from Mr. Roth?

25 MR. HOSKINS: Thank you.

26 MR. ROTH: Thank you very much. First, as regards evidence on the timetable you suggested for us
27 of either Friday or Monday, I gather the problem that Mr. Hoskins outlined related to the
28 Interveners. As far as we are concerned, we are in great difficulties putting in anything before
29 the end of Friday because Simon Pritchard (the Director of Mergers Branch) is in the United
30 States this week, not on holiday, on official OFT business – he is coming back now especially
31 for the weekend because of this case – but we can do 5 p.m. on Monday. But I have told Mr.
32 Hoskins that to assist them any documents that would be relied on and exhibited to the witness
33 statement we will provide to the Applicants by close of business on Friday, if not before; some
34 of them (subject to sorting out confidentiality) they can have before then.

1 With regard to the witness statement and skeleton argument, which I do not think
2 have been mentioned, we would respectfully suggest given the timetable that, rather than
3 having a Defence and separately a skeleton argument which tend to just repeat each other as
4 you know, the skeleton argument stands as the Defence and we have one document.

5 THE CHAIRMAN: That is what we were hoping.

6 MR. ROTH: I think we all feel that is sensible.

7 THE CHAIRMAN: Mr. Green feels that as well, does he? You are happy with that?

8 MR. GREEN: Yes, ma'am.

9 THE CHAIRMAN: Yes, so we are talking about a written submission.

10 MR. ROTH: Yes, the one rather than having two repetitive submissions. So we can do that for
11 5 p.m. on Monday, but we really do, please, need that time, but they will get any documents
12 beforehand.

13 THE CHAIRMAN: Shall we just see if Mr. Hoskins is happy with that suggestion, that it is divided?

14 MR. HOSKINS: I think we will probably live with 5 p.m. from the OFT, it is then what happens
15 with the Intervener because if there is to be a gap where the Intervener avoids duplication that
16 eats into our time and that is why I suggested the Friday. It was to build in some time for the
17 Intervener to review what it is putting in to avoid duplication.

18 THE CHAIRMAN: I just wanted to know, I think you have answered that so shall we just let Mr.
19 Roth continue?

20 MR. HOSKINS: Yes.

21 MR. ROTH: Then the response on Friday on the basis of a hearing on Tuesday. Yes, we would
22 hope that it could be heard in a day. It may be prudent to allow an extra half day if necessary,
23 but it would ----

24 THE CHAIRMAN: The difficulty is that the Tribunal diary does not allow an extra half day. It
25 would have to be done in the day in order to do it next week, or to do it the week of the 10th.

26 MR. ROTH: Well then it will be done in a day.

27 THE CHAIRMAN: So I am afraid it has to be done in the day, yes. Otherwise it would have to go
28 over to the following week, which is not very satisfactory.

29 MR. ROTH: Which is the Easter week which is a problem, I think, for a lot of people.

30 THE CHAIRMAN: Yes, we are prepared to sit the Easter week, but ----

31 MR. ROTH: I think a lot of people at the Bar have a problem from what I gather that week, various
32 parties so I think we are all anxious it should be heard if possible on the 11th. Evidence, yes we
33 of course have regard to what you say, and much of it is either the run-up to this Decision or,
34 as you saw from the Decision, immediately previous Decisions in this field that were relied on
35 as part of the knowledge on retail pharmacies.

1 THE CHAIRMAN: Some of the materials have already been provided to us?

2 MR. ROTH: A little has been provided, some has not been provided. Some of it indeed comes from
3 the Applicants, because the Applicants bid for a chain of retail pharmacies, was cleared very
4 shortly before this transaction.

5 THE CHAIRMAN: Yes. In relation to the witness statement, one has the evidence – whatever the
6 evidence was before you ----

7 MR. ROTH: Yes.

8 THE CHAIRMAN: -- one has your written submissions; one does not want a witness statement
9 which contains submissions because that just is another set of duplication. What do you
10 envisage will be in the witness statement itself?

11 MR. ROTH: An explanation filling out, and the reasons for the Decision taken, and explanation of
12 the Decision making process that is involved in analysing submissions for mergers and the
13 position why the conclusions were as they were filling out to a limited extent what is in the
14 Decision itself, and how we thought about it. We will have to now, of course, also respond to
15 the particular points made in the application.

16 THE CHAIRMAN: Right, and that will be referenced to the paragraphs in the Decision, so that one
17 knows exactly what you are addressing, so it is addressed to the Decision?

18 MR. ROTH: Either paragraphs in the Decision or paragraphs in the Application.

19 THE CHAIRMAN: Right, thank you.

20 MR. ROTH: On confidentiality, I think we are almost there. It can perhaps be broken into three
21 parts: first, the Decision itself where, as you saw, there are as usual passages redacted. Some
22 of the redactions relate to two areas that were conceded by the OFT but are not the subject of
23 this application for review, namely, wholesaling and contract manufacturing. It seems to us
24 therefore that those redactions should remain because they are not pertinent to the challenge.
25 As regards other areas we are, as you will appreciate, bound by our statutory obligations and
26 restrictions, so we are not free to waive confidentiality – I can take you to the section in the
27 Statute but I think you are familiar with them. We can only do so either by consent or by order
28 of the Tribunal. We have been trying to act as a sort of broker to achieve consent and I think
29 we are there, subject to what Mr. Green and Mr. Hoskins may say in terms of the
30 confidentiality right. As I say, the OFT has no position on this, we can do it either if there is
31 consent or if there is an order, and we hope that that will deal with the Decision such that it
32 can be disclosed really very quickly.

33 The second of the three categories are the Boots/Unichem submissions in this case.
34 We understand from Mr. Green that his clients are working on a redaction for relevance and

1 that again he will address you on confidentiality ring. I understand that can be sorted out this
2 week, indeed, before the end of the week.

3 The third category is what has been referred to as “third party material”. At the
4 moment, and I would ask you not to hold me to that because we obviously have not finished
5 our submissions. Really the only third party material concerned is that from the Applicants
6 themselves either in this case or in the *Lloyds/Cohen* case just beforehand. Clearly, there is no
7 problem about disclosing that to the Applicants because it comes from them, and the issue
8 there is disclosure to the Interveners, or more generally, and we are waiting for a response to a
9 letter that seems to have gone astray because Mr. Hoskins told me his clients did not get it, and
10 again I would hope either generally or, because that is a completed transaction, certainly within
11 a confidentiality ring of the Interveners that can be dealt with, but I do not think that will affect
12 the Applicants particularly. Beyond that, we do not at the moment see that we would be
13 wishing to disclose third party submissions. That does, as you know from the previous cases,
14 present problems because the third party who is concerned about the confidentiality is not here
15 to address you. But in the past in these cases one has managed to avoid having to do that.

16 I do not know if you would like me to stop there, or perhaps I should deal with the
17 interim relief?

18 THE CHAIRMAN: Yes.

19 MR. ROTH: The position is this: the consultation on the undertakings is in process at the moment.

20 The closing date for submissions from third parties is 29th March. It is then for the OFT to
21 consider, in the light of observations received, whether the undertakings that have been offered
22 are adequate and they would take a decision by Easter, but almost certainly not before the
23 actual hearing of this case. Obviously we cannot guarantee what the outcome of that would be,
24 because we wait to see what the observations are in the consultation process. But the situation
25 there is clearly if the observations are such that the undertakings proposed that have gone out
26 for consultation are satisfactory, then those undertakings would be accepted, in which case –
27 subject to your Judgment – there would not be a reference. But if your Decision in this case
28 quashes the primary Decision then it clearly would go back to the OFT for re-examination in
29 the light of your Judgment, and that may result in either more extensive undertakings being
30 sought or a reference to the Competition Commission. We note that the terms of the merger
31 that have been agreed between Boots and Unichem are such that it will not proceed while the
32 matter is before the CAT. So in the light of that we do not see that there is a need for interim
33 relief in this case.

34 THE CHAIRMAN: Shall we see if that satisfies Mr. Hoskins? Is that what you were expecting?

1 MR. HOSKINS: It is probably just a technical worry on our part, which is there are actually
2 probably two Decisions which technically could be challenged looking ahead. There is the
3 Decision we are currently challenging and if the OFT accepts undertakings, that is another
4 Decision. Now if the OFT's position is that if we ----

5 THE CHAIRMAN: There may be another Decision but the subject matter of that Decision would be
6 the same as the subject matter of **this** one, would it not, it does not raise any other problem?

7 MR. HOSKINS: That is what I was going to say, as long as everyone is clear that if we win this
8 Appeal, and this Decision is quashed, it means that the Decision to accept undertakings must
9 also fall, then there is not a problem, but I do not want anyone to raise a technical argument
10 against us later in the day saying that we do not have power to withdraw this Decision, or
11 something like that. If they stand and fall together there is no problem, but that is the concern
12 we have.

13 MR. ROTH: Yes, I hoped that I had made it clear that if the Decision in this case does quash the
14 Decision that is before you, and the matter goes back to the OFT to reconsider the matter
15 afresh in the light of your Decision, and clearly the scope of the undertakings would have been
16 too narrow and become irrelevant, so I do not think there is a worry.

17 THE CHAIRMAN: The undertakings would stand in the air; there would be no foundation for them.

18 MR. ROTH: Yes, so I think Mr. Hoskins' concern, as articulated, should not be a worry and
19 certainly we would not suggest "Oh, because we have now accepted undertakings your
20 Judgment is meaningless" – clearly not.

21 The other matter you raise, a somewhat separate point of the expert evidence, do you
22 want me to deal with that, or do you want to hear Mr. Green on the matters we have been
23 discussing?

24 THE CHAIRMAN: Maybe you ought to deal with it because Mr. Hoskins has raised the point about
25 whether Mr. Green or the Intervener should be allowed to put in expert evidence if you are
26 not?

27 MR. ROTH: Yes, well let me make it clear we are not, of course, putting in an expert report, or
28 seeking to do so. As we have stated in our letter, we will contend that it is inadmissible on the
29 part of the Applicants on a Judicial Review. This was never submitted during the consultation
30 in which Celesio made full representations repeatedly over a period. There is, as you would
31 expect, authority on the question of fresh evidence in Judicial Review. But we are not asking
32 you to rule today but suggest that you follow the usual approach now when these matters arise
33 in a Judicial Review, which is that you can certainly read the evidence *de bene esse*. We are
34 told we should not use Latin these days; I have been trying to think what is the vernacular
35 equivalent of *de bene esse* and I have not quite come up with one – in this case one is tempted

1 to say 'for what little it is worth' – but in any event you can read it (you have probably read it
2 already). We deal with admissibility in our skeleton argument and at the hearing and then
3 invite you to rule in your Judgment, because otherwise we get into a long legal argument
4 today, and indeed you will have to start looking at what happened in the consultation and that
5 is clearly not appropriate. So that is our position on that. I think those are the four heads,
6 ma'am that you raised.

7 THE CHAIRMAN: Thank you very much. Mr. Green?

8 MR. GREEN: Can I deal first of all with the question of timetable. As far as that is concerned, we
9 are content with Wednesday 5th, we can manage that. As for the evidence we propose to put in
10 we are preparing as we speak, we are working on it at the moment, a witness statement which
11 simply deals with the process that Boots and Alliance Unichem went through in relation to the
12 OFT, so you have chronologically the evidence before you demonstrating that the issues raised
13 in the Notices of Appeal were raised in the course of discussions with the OFT. It concentrates
14 on process, this being a Judicial Review, and that is obviously something which you will have
15 to grapple with. We cannot, of course, put in evidence emanating from third parties because
16 we have not seen that evidence – that was a dialogue between other people and the OFT not
17 ourselves, so we cannot address that.

18 THE CHAIRMAN: But is there not going to be duplication in that way between your evidence and
19 the OFT?

20 MR. GREEN: Unlikely, because as I understand matters from Mr. Roth, he is not going to be
21 annexing to his witness statements materials that we are going to be producing and we are
22 going to be producing evidence demonstrating the matters that we put to the OFT – I do not
23 know what is going to be in his witness statement. My experience from previous merger cases
24 is that the Interveners and the OFT do not necessarily put in the same material addressing the
25 same issues and, with the greatest respect to the OFT, we obviously are protecting our own
26 legal and commercial interests and we want to explain to the Tribunal that we, as parties, put
27 full evidence into the OFT on the issues that arise in the Notices of Appeal. Once we have
28 seen the OFT's witness statements of course, we will do what we can to avoid duplication. But
29 we have to be working on our evidence now so that we are in a position to put it in next
30 Wednesday. But of course we understand there is a one day hearing, we will ensure that it is
31 finished in one day and we will seek to minimise duplication as much as we possibly can. That
32 is the witness statement evidence. It will probably come primarily from Boots, but there may
33 be a short statement from Alliance Unichem simply dealing with those matters which are
34 particularly within its own knowledge, as opposed to someone from Boots rendering that
35 evidence.

1 We have already instructed economists to address Dr. Padilla's report at the level of
2 principle. With respect to my friend, Mr. Hoskins, it simply is not correct to say that Dr.
3 Padilla does not address evidence. As he said it I was skimming through his report and in the
4 first five pages I found at least eight references to evidence, but we have already taken the view
5 we will address it at the level of principle. It is simply not open to him to put in new evidence
6 at this stage. We are putting in a short report addressing the principle issues not the factual
7 issues. Again, we are quite confident we can do that by next Wednesday, and we will put in
8 our skeleton submissions along with those two documents drawing all the threads together on
9 Wednesday, so you will have our full case by then.

10 So far as the suggestion that there is a point of principle as to whether an Intervener
11 can put in expert evidence, certainly in all the cases that have come before the Tribunal
12 Interveners in some cases have, and in other cases have not put in expert evidence. The
13 overriding principle is whether or not we act relevantly and proportionately which we propose
14 to do and I very much hope that what we produce will assist you in deciding this Judicial
15 Review. That is what we propose to do and, if it is satisfactory to the Tribunal, that is by 5
16 p.m.

17 Can I deal next with confidentiality? First, as between my clients and the Applicant,
18 we have managed to discuss this with the Office of Fair Trading. We have not had a chance,
19 given time constraints to deal with the Applicants. What we are proposing to do is as follows:
20 we have agreed with the OFT that the Decision in its confidential form can go into the ring,
21 plainly the Applicants need to see that. So far as our evidence is concerned, we have begun
22 already the exercise of redacting all our submissions to the OFT for irrelevance. In other
23 words, we are not going to disclose irrelevant material, that is going to leave relevant and
24 incredibly highly confidential commercial material, which we will permit to go into a ring of
25 legal advisers. We do not think that this should encompass external economists since they are
26 addressing this case at the level of principle and not fact. We will be producing, for example,
27 some of our internal business documents – board minutes and that sort of thing – but we are
28 happy for Linklaters and the Applicant's counsel to see that. So insofar as they need to they
29 can make submissions on the basis of those documents, and either Slaughter & May or Allen &
30 Overy will produce a draft confidentiality agreement so that the parties can agree terms, and
31 we would invite the court then to endorse an order – we would like it in a court order –
32 endorsing the agreement. We would hope to be able to do that by Thursday – in other words,
33 the day after tomorrow – we have already started on the process and we would hope to produce
34 a set of documents certainly by close of play on Thursday if not before, we will use best
35 endeavours to do it as fast as we can, realising the constraints which the Tribunal have and the

1 parties have. That should mean that the documents will proceed our evidence, and the
2 Applicants will thereby obtain our documents before, hopefully, close of play on Thursday.

3 THE CHAIRMAN: When you say “evidence” you mean witness evidence?

4 MR. GREEN: Witness evidence, yes. As I say, we are redacting simply for irrelevance at this stage
5 because, for example, the wholesale and vertical issues are not in issue. We are dealing with
6 horizontal retail issues and that is what we will provide. If Linklaters or counsel have any
7 problems they will just simply need to come back to us. Of course, if we then find other
8 relevant documents which we are going to use we will disclose them immediately and not wait
9 for our witness statement evidence, so we will have rolling disclosure if and insofar as it
10 become relevant.

11 So far as the Lloyds/Cohen material is concerned you may have gathered that this is
12 relevant because, as we understand it, the Applicants are advancing one argument for their own
13 case and another argument for this case. Again, we are happy for that to go into a legal
14 adviser’s ring. It is a matter for short legal argument. I think the point will be self-evident
15 once we have seen the document, and will not take up much time in front of the Tribunal.

16 THE CHAIRMAN: That is something the OFT are putting in, not you.

17 MR. GREEN: I think that is something the OFT are putting in.

18 THE CHAIRMAN: That is nothing to do with you.

19 MR. GREEN: But because it concerns historical submissions by the Applicant, and we are happy for
20 that simply to go into the legal advisers’ ring, and hopefully that should not cause any
21 difficulty.

22 THE CHAIRMAN: No, but does that concern any evidence from your clients?

23 MR. GREEN: It would have some relevance in that one of the points that both our factual witnesses
24 and our economists immediately asked, in terms of deciding what is a reasonable or
25 proportionate approach for the Regulator to take, the position adopted by the Applicant in its
26 own merger case may provide a benchmark against which you assess the reasonableness of the
27 OFT’s approach and the economist is locking horns with Dr. Padilla and saying that “such and
28 such an approach is reasonable and within the bounds of permissible options for a Regulator”
29 then precisely what happens in other cases ----

30 THE CHAIRMAN: I understand that. You would be making submissions on it which will go into
31 your written submissions.

32 MR. GREEN: Yes.

33 THE CHAIRMAN: I understand the OFT are putting into the ring some of the evidence in relation
34 to the Lloyds/Cohen case, but is there any evidence from your clients which is going into the
35 ring in relation to the Lloyds ----

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

2 THE CHAIRMAN: Right.

3 MR. GREEN: I think the only point is at this stage we are happy for it to go into the ring of legal
4 advisers. The only other matter I would like to mention at this stage is interim relief. We
5 obviously hear what everybody said; we doubt it is going to be an issue in practice. Plainly if
6 it were, even theoretically to become an issue it would rather depend upon the terms of any
7 Tribunal Judgment and/or second OFT Decision, but I think that is most unlikely and the
8 practical reality is it is unlikely to be an issue for anybody.

9 THE CHAIRMAN: Yes. I mean you agree that if a Decision is made on the conditions or the
10 undertakings, and the Tribunal quashed the Decision then that Decision is quashed equally?

11 MR. GREEN: Yes. Well the undertakings address the Decision.

12 THE CHAIRMAN: I think that is all that Mr. Hoskins was worried about. Thank you.

13 MR. GREEN: Unless there is anything else I can assist you with?

14 THE CHAIRMAN: No, thank you.

15 MR. HOSKINS: Can I just respond to a couple of points?

16 THE CHAIRMAN: Yes.

17 MR. HOSKINS: It seems to me – I will have to be careful how I frame this – one of the outstanding
18 issues, and maybe the only main one left, is still on the timetabling.

19 THE CHAIRMAN: Yes.

20 MR. HOSKINS: Mr. Roth indicated that the Office’s problem with Friday is that the Director of the
21 Mergers’ Branch is in the States ----

22 THE CHAIRMAN: Therefore they cannot get their written submissions out, they can get the
23 documents out.

24 MR. HOSKINS: Exactly. But it seems to me that if he is in the States you can email the States if
25 there really is going to be a timing issue, and I think there is and I will come back to the
26 Interveners in a minute – I am just analysing where there is potential ----

27 THE CHAIRMAN: Yes, I think I will put words into Mr. Roth’s mouth, but he did say that he was
28 on official business and I suspect therefore he is doing other work at the time – he said he was
29 not on holiday – he was making a specific point there that it was not that he could forego some
30 of his holiday and do it, he is on official business.

31 MR. HOSKINS: I was not suggesting that, but ma'am I think we have all been in the situation where
32 we have to do two things at once. (Laughter) The other point in relation to it, I am just not sure
33 what role we need him to play because we are perfectly happy for there to be a different
34 deponent from the OFT, we do not need to have the Director of the Mergers’ Branch. There
35 will be a team that has worked on this and it is perfectly possible for that team to put the

1 information together; we are quite happy with that. I would rather have the material on Friday
2 than have it on Monday for the sake of having the Head of the Branch as opposed to someone
3 else as the deponent. So unless there is a real issue about input being required from Mr.
4 Pritchard, and unless there is a real issue that they cannot get input from him in order to allow
5 this to happen before Friday then I would prefer Friday. The reason I prefer Friday is to deal
6 with the Interveners. I know Mr. Green said that they are going to be proportionate there is
7 clearly quite a lot of material coming from them. There is a witness statement dealing with all
8 their submissions to the OFT, there is another Alliance Unichem statement and then there is
9 their expert's report and if we get that on Wednesday and have to reply by Friday when we are
10 dealing with the OFT case it is a very tight timetable. That is why I would suggest if we can
11 put the OFT on Friday, Interveners on Monday or Tuesday that give us leeway. If the OFT has
12 to go on the Monday I would ask for the Interveners' on Tuesday. I think Wednesday is a real
13 problem for us, you can see our position.

14 THE CHAIRMAN: Let us see what the OFT can do about that? You can understand the problem?

15 MR. ROTH: Yes, I appreciate Mr. Hoskins' suggestion as to who we should choose as our
16 deponent, but the OFT does take these cases very seriously and the Director of Mergers'
17 Branch does exercise a view of how the case should be put and is the appropriate person to
18 explain the policy issues involved, they have always been the deponent in the previous Judicial
19 Reviews and we do feel somewhat unfortunate that an arrangement that would be acceptable to Mr.
20 Hoskins is now sought to put the OFT into difficulties because what is really a problem for him with
21 regard to the Interveners' evidence not our evidence. It does seem to us that the solution therefore
22 should not be to cause great difficulties for the OFT but for the Interveners to put in their evidence by
23 the end of Tuesday, which solves the Applicant's problem. It means that the OFT is not put into
24 difficulties and it gives a day for the Interveners to make sure there is no unnecessarily duplication.
25 Obviously they are preparing their evidence this week, as we are working on it, the team is working on
26 it this week, and they will have a day just to make sure there is no unnecessary overlap which is the
27 only concern, and then Mr. Hoskins' problem is solved, because his problem arises from the
28 Interveners, not from us.

29 THE CHAIRMAN: All the documents are actually going to be available this week, as I understand it.

30 MR. ROTH: They will all be available this week, so he will have everything else, it is only duplication of
31 explanation.

32 THE CHAIRMAN: It is only the submissions and the expert's report.

33 MR. ROTH: I do not think the expert's report will duplicate what we are doing, because we are not putting
34 one in.

1 THE CHAIRMAN: No, but it is getting the expert's report early enough. There are two thoughts going
2 through my mind. One, there is the weekend, as to whether a compromise working over the weekend –
3 I do not know when the Director of the Mergers' Branch is coming back?
4 MR. ROTH: He has re-arranged to come back for the weekend, so he will arrive on Saturday morning, so he
5 will work on it on Sunday, but we still feel 5 o'clock on Monday – people will be no doubt working in
6 the evening so they will have Monday evening to consider it.
7 THE CHAIRMAN: The other thing as to whether it actually is necessary for him to do it or whether the chief
8 executive could do it, or someone?
9 MR. ROTH: Well he is the person who has responsibility for these decisions. People from the team are, of
10 course, working on drafts, gathering material this week.
11 THE CHAIRMAN: He was actually involved, was he?
12 MR. ROTH: Yes, he was involved throughout, and he chaired the Decision meeting.
13 THE CHAIRMAN: It is not going to be a witness statement that says "X has told me, and Y has told me"?
14 MR. ROTH: No.
15 THE CHAIRMAN: Because then it would be unfortunate if we were waiting for him and then it turns out that
16 it is not really within his own knowledge.
17 MR. ROTH: But if the concern is to avoid duplication, that is why there is delay, the written documentary
18 evidence is all there this week, the day's delay will take care of duplication, what happens about the
19 expert report seems unrelated to the position of the OFT.
20 THE CHAIRMAN: But actually, if you are not getting it in until 5 o'clock on Monday, then if the Interveners
21 are going to have an opportunity to prepare their material so that there is no duplication, and so that it is
22 complementary, to expect them to do it by 5 o'clock on Tuesday becomes a little unrealistic because
23 they have to print it all out, so they would have only a very limited time to do it.
24 MR. ROTH: What I am expecting is that they will prepare it before Tuesday and they will then check and
25 they see a witness statement, is there any duplication that can be removed? We are only talking about
26 witness statements here, not about documents.
27 THE CHAIRMAN: No, and the expert's report.
28 MR. ROTH: Well the expert's report seems to be in a different category because I do not think that is going
29 to duplicate, I am not quite sure what it is going to do, but Mr. Green has that clear; that is an
30 independent production which is not going to be affected by our evidence.
31 THE CHAIRMAN: Let us see what Mr. Green says?
32 MR. GREEN: We can probably move our evidence back by half a day if that assists.
33 THE CHAIRMAN: Wednesday lunch time.
34 MR. GREEN: There is going to be a limit to the extent to which we can avoid duplication in this sense, that
35 we are simply putting in evidence – it is not going to be a terribly long statement – which sets out our
36 perception of the information we provided to the OFT and the process we went through with them.
37 Whether they address it skeletally or at great length we simply do not know. We are obviously
38 conscious of the fact that we are not going to duplicate, but I suspect there is going to be a limit to the

1 amount we are going to find we can avoid saying in a relatively short series of factual witness
2 statements, and if the applicants need more time it is probably better that we bring back our timing a
3 little bit and give them an extra half a day or so because I do not think any exercise in pruning is really
4 going to add or subtract very much to the evidence we are going to put in, or to the time taken at a
5 ultimate hearing.

6 THE CHAIRMAN: Well if that is right we can bring it back to Tuesday night.

7 MR. GREEN: If that is right I have no real objection to it. If what you are saying is we need to compare, put
8 the two statements side by side and go through one and agonise whether what the OFT has said covers
9 the point I doubt it is going to be terribly fruitful. I prefer to bring it back, and we are conscious of the
10 fact that we are dealing with a focused exercise of our perception of what went on during the
11 administrative process. It would be easier if we would bring ours back until close of play Tuesday,
12 certainly for the witness statement, and we can probably do that if we do not go through a horizontal
13 exercise of compare and contrast.

14 (The Tribunal confer)

15 THE CHAIRMAN: Right, Tuesday. Is that all right?

16 MR. HOSKINS: I just wanted to check, because Monday the OFT is going to provide us with written
17 submissions, and a witness statement.

18 THE CHAIRMAN: Tuesday evening the Interveners are going to provide you with written submissions, and
19 Friday you are going to provide your responses.

20 MR. HOSKINS: Yes, but everything that the Interveners are providing us is coming on Tuesday, so that is
21 expert's report, witness statement and written submissions.

22 THE CHAIRMAN: But the documents are going to come ----

23 MR. HOSKINS: Come earlier, I understand that, yes.

24 THE CHAIRMAN: -- this week, so you will have all the basic materials. What you are not going to have is
25 their explanation of what was going on. You are just going to be able to have to see it from the
26 documents.

27 MR. HOSKINS: I understand, I think that is sensible compromise and I am grateful to my friends for that.

28 THE CHAIRMAN: Thank you very much.

29 MR. GREEN: If I can just put down one marker, which is something which arose in the last

30 *Phoenix/Unichem* case, that after there was reply evidence there then arose on a very narrow factual
31 issue need for further evidence. I just put down a marker that it is not impossible that either ourselves or
32 the OFT are going to put something in over the weekend once we have seen the Intervener's evidence.

33 THE CHAIRMAN: Well let us see what happens.

34 MR. GREEN: Exactly.

35 MR. HOSKINS: The only other matter I had to reply to related to confidentiality. I think we are okay with
36 the Decision; as I understand it the Decision is going to go into a ring with lawyers and economists.

37 THE CHAIRMAN: Is that right, the ring is lawyers and economists?

38 MR. GREEN: No, we do not see why the economists should have ----

1 MR. HOSKINS: For the Decision?

2 MR. GREEN: Well we may take a different view for the evidence, but we have no problem with the
3 Decision.

4 MR. HOSKINS: That is what I had understood, I am grateful for that. In relation to the Boots/Unichem
5 submissions, the suggestion is that they are redacted for irrelevance, which is understandable.

6 THE CHAIRMAN: The documents?

7 MR. HOSKINS: The documents, yes. Then Mr. Green said “highly confidential material” will then be
8 restricted to a ring of lawyers. Our position on our material, we are not claiming any confidentiality in
9 relation to the material that we submitted to the OFT as part of this investigation. I had to take
10 instructions on the position in the Lloyds/Cohen investigation – that is the one where the letter had gone
11 astray.

12 THE CHAIRMAN: So you think there is no confidentiality at all in relation to the material which you
13 submitted to the OFT?

14 MR. HOSKINS: We are not claiming any in this case. The concern we have is that Mr. Green’s economists
15 are going to see all our material and it just seems slightly odd that there should then be an imbalance,
16 that our economist should not see their information, and realistically it is perfectly common practice in
17 a confidentiality ring before the Tribunal for it to include external lawyers and external economists.
18 Mr. Green has not come up with a reason why an expert economist should not actually see that
19 material, he says it is highly confidential but it does not matter because the economists are external and
20 would be bound by the undertakings of the confidentiality ring. So in order to avoid an imbalance,
21 which we say would be unfair, and in the absence of any real explanation by Mr. Green why there is a
22 problem in our external economists seeing that material subject to confidentiality undertakings, we say
23 that that is not good enough; there is no reason for it.

24 (The Tribunal confer)

25 THE CHAIRMAN: Mr. Hoskins, in relation to the other inquiry, what is your position on that?

26 MR. HOSKINS: I am still taking instructions. Unfortunately, the letter from the OFT, which was sent
27 yesterday, went astray, and so I only discovered about this particular issue two minutes before we came
28 into the hearing. I could always take instructions but I think I would probably need a few minutes to
29 talk it through with my solicitors and my client, obviously before committing on that.

30 THE CHAIRMAN: Let us just see what Mr. Green says, and then we will ----

31 MR. GREEN: They are not claiming confidentiality, we are. We have fundamentally confidential
32 documents. There is pricing data, there are documents in relation to the merger as planned and as
33 consummated, and so on. They are highly confidential data. If the economists are to be kept properly
34 within their due boxes, then it is important that they do not get over excited and stimulated by the
35 production of documents. They are going to deal with this at the level of principle, and so be it. We
36 are just opening Pandora’s box and further rounds of economists’ tirades.

37 THE CHAIRMAN: Are you suggesting that you are not going to show your economist the confidential
38 material that is ----

1 MR. GREEN: Well if it is non-confidential then of course we can. There is no inequality. If it is not
2 confidential it is fine. If it is confidential then we do not want their economists to see it.

3 THE CHAIRMAN: There is the question of relevance, and what you are saying is it is not relevant and
4 therefore they do not need to be shown it in any event.

5 MR. GREEN: Well the documents we are producing will be redacted for irrelevance, so documents ----

6 THE CHAIRMAN: No, no, sorry, what I thought you were saying was that this material may be relevant to
7 the lawyers for submissions but is not relevant to the evidence of the economist. If it is not relevant to
8 the evidence of the economist, because the economist is only dealing with principle, they may not be
9 claiming confidentiality for it but it would not be relevant to show your expert that evidence.

10 MR. GREEN: That may be so, but that is not a reason for our economist not to see non-confidential material.
11 If it is non-confidential it does not matter whether they see or not. If they then discover some relevance
12 out of it they may opine on it, but if it is not confidential there is no sense in not disclosing it to them if
13 it has some relevance. The question is: should their economists (who are now being limited to points of
14 principle as opposed to the numerous points of fact which they have raised) see what is highly
15 confidential information? Economists are quintessentially creatures who use this sort of information as
16 their stock in trade – it is what economists do, it is why they are involved in cases such as this. This is
17 not a stale merger, like the Lloyds/Cohen case, this is a highly sensitive ongoing merger and we do not
18 see why anyone other than the legal advisers should see this material. It is their case, they have already
19 crafted their case, it is in the Notice of Appeal, and it is drafted at a relatively high level of abstraction.
20 It is only the economist who seeks to descend into the facts, and if that is now rising above the facts
21 again then all to the good, but my clients' documents contain incredibly confidential information and
22 we do draw a material distinction between the lawyers and the economists here, and there has really got
23 to be a very good reason why they should be entitled to see it – these are as between competitors,
24 intense competitors.

25 MR. ROTH: I only intervene as an interested observer in this little spat! (Laughter) We have no position as
26 to whether the ring should include the economist or not, it is a matter for the parties or, indeed, your
27 decision. I would make only one observation – we do feel it is important – there is a complete
28 difference between the sort of material that is put in by the merging parties, who have to disclose a lot
29 about their business to get clearance – and the observations that are put in by a third party objector.
30 They cannot be equated as it as sought to do, and we ask you perhaps to bear that in mind.

31 The second point, I understand that Mr. Hoskins needs on the Lloyds/Cohen matter to take
32 instructions, we would be grateful if that could be dealt with today even if it does involve him taking
33 instructions, because if we do not get consent, whether in the confidentiality ring or whatever, it may be
34 you will have to make an order about it and we hope that consent can be given in some form or other.

35 (The Tribunal confer)

36 THE CHAIRMAN: I think you need an opportunity to go and get some instructions on the Lloyds/Cohen
37 materials. We are a little concerned – we have not thought it out properly and may need submissions –
38 about the idea that some of what maybe confidential but which you say is not confidential, will go to

1 your economist, and therefore they will have an opportunity to comment on it, and yet other
2 information is not being shown to the economists. So it does not seem to be (or may not be) a level
3 playing field. But, on the other hand, we have to remember this is Judicial Review and wonder whether
4 that evidence is relevant to the economists in any event?

5 MR. HOSKINS: Ma'am, can I put it this way, I put it as an imbalance point but there is another way of
6 actually looking at this which is simply a fairness point. Boots/Unichem are going to go through their
7 documents and redact for relevance. One has to presume therefore that any information that remains in
8 is relevant. They claim confidentiality. The matter in which confidentiality is routinely dealt with in
9 front of the Tribunal is a confidentiality ring, and it invariably includes economists. Mr. Green has not
10 identified a problem with an independent economist seeing that information, and the fairness problem is
11 this: it is not necessarily that we want to go and produce another expert's report, it is that we, as lawyers
12 want to be able to have an economist who has seen this material and say to them "Here is an issue, can
13 you help us with it?" Or, having seen this material "Are there any issues we should be aware of?" So it
14 is that fairness issue, it is having our team, which is a legal team and an economists' team being able to
15 communicate and deal with problems. There is obviously always a balance to be made between
16 fairness, i.e. us seeing all the material that is relevant, and confidentiality, protecting business secrets,
17 etc. The balance is invariably struck at the level of lawyers and economists. We are already not able to
18 show it to our clients, and that may be a disadvantage for us. But really there is no point of principle
19 that Mr. Green has raised as to why an economist – an independent economist – who gives suitable
20 confidentiality undertakings should not see this material, and be involved in the team in helping us
21 prepare. I think that is probably the strongest way I can put the case.

22 THE CHAIRMAN: Well if you take instructions as to what is going to happen to the other materials, and
23 possibly you can see whether, you having said that, what the position is between you?

24 MR. HOSKINS: Certainly.

25 THE CHAIRMAN: Then we will adjourn – how long will that take you, five, ten minutes?

26 MR. HOSKINS: I am told five minutes.

27 THE CHAIRMAN: Five minutes, so if we give you ten ----

28 MR. HOSKINS: That is probably safer.

29 THE CHAIRMAN: -- you can have some discussion and see whether you can see what the issue between you
30 is in relation to that and then we will come back.

31 MR. HOSKINS: Thank you very much.

32 (The hearing adjourned at 3.00 p.m. and resumed at 3.10 p.m.)

33 MR. HOSKINS: On the Lloyds/Cohen material, in the letter that went astray but I now have a copy of, there
34 are two particular documents that the OFT refer to. We will need to review them just to see if there is
35 any confidentiality in them, but we are happy for the two documents in their entirety to go into the
36 confidentiality ring with lawyers and, it will not surprise you to hear, economists as well, and by 5 p.m.
37 tomorrow we will just go through those documents and produce redacted versions which can then be
38 put to clients, etc. So if there is a confidentiality issue completely unredacted documents will go into

1 the ring – lawyers and economists – if there are confidentiality issues then unredacted versions will be
2 prepared as well.

3 THE CHAIRMAN: So you do not know if there are confidentiality issues or not yet?

4 MR. HOSKINS: It has not been reviewed simply because we only got this two minutes before we started.

5 That seems to us is the quickest way to get the material out there. If there are no confidentiality issues
6 then obviously it just comes out of the ring because it will be fully available, not a problem. We do not
7 have copies of the documents with us, we cannot even do that exercise here and now, I am afraid. It is
8 just something we have to do back at the office.

9 THE CHAIRMAN: Mr. Roth? I thought you wanted to say something?

10 MR. ROTH: No, for once not (Laughter)

11 MR. GREEN: That sounds as if it works, fine. We will see what it is, if it is non-confidential it comes out of
12 the ring; if it is then it stays within, so that seems to be a pragmatic solution.

13 So far as information going our way is concerned, can I just make two points? I do not want
14 to belabour the issue, but first there is an objective difference between my clients and the Applicants.
15 We are plainly in a different position, we are merging parties and the OFT require from us a huge
16 amount of information which, of course, they do not require from a complainant. Secondly, we believe
17 there is confidential information and they say there is not. Now, if it assists matters we do not mind if
18 our economist does not see their confidential information and we will remove the inequality that way.

19 THE CHAIRMAN: Well for the time being that probably is the most sensible way to resolve it.

20 MR. HOSKINS: Ma'am, I not sure we would agree with that – I am sorry to interrupt – because it does not
21 deal with our fairness point which is if this material is relevant why should our economists not see it, so
22 that we can take instructions from our economist? With respect, it deals with the imbalance point, I can
23 see where Mr. Green is coming from, but it simply does not deal with the fairness point at all. The
24 other option, of course, if it goes to a lawyers' ring and if we need to take instructions we will need to
25 come back – well, first of all we will need to go to the Interveners and say “Do you mind us taking
26 instructions on this?” and if they say “No”, we need to come back to the Tribunal which, given the
27 short timescale, seems to be a very unattractive proposition. It is far better simply for the economists in
28 the ring.

29 THE CHAIRMAN: Mr. Hoskins, at the moment, it is a live merger, and live confidential information. We
30 are told that it is highly confidential and one can assume that that is right in these circumstances. We
31 have a situation where, in relation to the economists' reports, the information is probably not relevant
32 because the economists should be dealing only with matters of principle. So what we are considering is
33 the lawyers being able to discuss and, if I put it in a rather loose way, of taking instructions. They
34 cannot take instructions directly from the client in relation to the particular material, and therefore the
35 question is whether they need to take instructions from an independent person. Now, what we do not
36 know at the moment is how independent the economists are vis-à-vis the parties – whether they are just
37 instructed for this Tribunal or whether they are advisers anyway. That may need to be ascertained. It
38 may or may not be necessary to take those instructions. It does seem to the Tribunal at the moment that

1 the half-way house is probably the most sensible route to go down today, which is that they are not in
2 the ring. I should say there is another matter that is worrying us slightly, because if the persons in the
3 ring are, for example, accountants or lawyers, then there is a regulatory body so that there is an
4 enforcement if there is a breach – one hopes there would never be a breach but one has to look at the
5 other side of it – if there was a breach they are bound by their regulatory body. I am not sure whether
6 the individuals here have a regulatory body which that applies to, so there is that difficulty as well
7 which might be relevant. Therefore, the half-way house seems to us to be the most appropriate.

8 If it turns out that, having looked at the materials, those in the ring, the lawyers, consider that
9 they need to discuss it with the expert, then that can be a matter which can be put to the other side. If
10 that cannot be sorted out I will be available to deal with it – we can either deal with it on the telephone
11 or, if necessary, come down but hopefully we can deal with it on the telephone, and that has proved to
12 be a good solution. That is probably the best solution we can have today.

13 MR. HOSKINS: We are very content with that, and we are grateful that you are able to make yourself
14 available in that way to solve a problem if it arises. It seems very sensible.

15 I am a bit confused, I think, now about where we are with confidentiality rings. I am not sure
16 whether the confidentiality ring now for everything is now lawyers only?

17 THE CHAIRMAN: Not in relation to the Decision, that is right is it not? The non-redacted copy of the
18 Decision – the full copy of the Decision – is going to be available to the experts and the lawyers. So
19 there is one confidentiality ring in relation to the Decision and there is the limited lawyer confidentiality
20 ring in relation to the materials. If it turns out that one needs to talk to the expert about matters that are
21 confidential in the materials then the request to the other side, which confines the matters so that they
22 know exactly what the position is, and if that does not resolve it I will try and resolve it.

23 MR. HOSKINS: Thank you, that is certainly very helpful for me. I think hopefully now everyone
24 understands where we are when we come to draft the confidentiality rings.

25 (The Tribunal confer)

26 THE CHAIRMAN: Mr. Hoskins, if the Lloyds/Cohen materials turn out to be confidential then that will have
27 to go into the limited ring.

28 MR. HOSKINS: That is what I understood, that is why asked the question. One point has just been raised
29 with me – I am sorry to raise details but it is probably better to do it now whilst we are here – I presume
30 our expert economist is going to be able to see all of their expert economist's report, but given it is at
31 the level of principle I imagine that again should not be a problem and therefore we do not have to
32 anticipate a problem until that arises.

33 MR. GREEN: I am sure that is right in principle.

34 THE CHAIRMAN: That should be right ----

35 MR. GREEN: We will endeavour to make it right.

36 THE CHAIRMAN: -- if the expert is dealing only with the principle he should not have to descend into the
37 particular, and therefore there should not be a problem with that.

38 MR. GREEN: No.

1 THE CHAIRMAN: If there was a problem with that then that means we have been wrong in relation to the
2 principle, or he is doing some job that he should not be doing.

3 MR. GREEN: Possibly! (Laughter)

4 THE CHAIRMAN: If there is a problem you will have to come back.

5 MR. GREEN: No, that should be fine.

6 MR. ROTH: One very small clarification. When we talk about the unredacted version of the Decision, as I
7 hope I made clear it will be unredacted on the horizontal issues, but not on wholesaling and contract
8 manufacturing.

9 THE CHAIRMAN: Yes.

10 MR. ROTH: Thank you.

11 THE CHAIRMAN: Yes, you are happy with that?

12 MR. HOSKINS: Happy, yes.

13 THE CHAIRMAN: Are there any other matters?

14 (The Tribunal confer)

15 THE CHAIRMAN: A couple of administrative points. Can we have the draft confidentiality agreement and
16 order by email?

17 MR. GREEN: Certainly, yes.

18 THE CHAIRMAN: I believe that there has been a request received that all documents will be delivered in
19 hard copy, but also we will receive an email copy – not of all the underlying evidence, but the materials
20 produced for the hearing.

21 MR. GREEN: Would it be sensible to consider an early start if we have only one day – either 9.30 or 10
22 o'clock?

23 THE CHAIRMAN: Yes.

24 MR. GREEN: I remember in the first case, *IBA*, when we were subject to very tight time limits for regulatory
25 reasons the Tribunal sat I think both early and late and we did manage to squeeze everything into one
26 day. I do not know how people are placed.

27 (The Tribunal confer)

28 THE CHAIRMAN: 9.30.

29 MR. GREEN: Thank you.

30 THE CHAIRMAN: If we do have to use the other end of the day as well we can sit the other end of the day,
31 hopefully not after 5.30. We do not quite know how to divide up the time today because we do not
32 know what all the issues are going to be.

33 MR. GREEN: It may well be that between the parties we can work out a sensible timetable and suggest
34 something to you. That should not be problematic. Once we have seen the evidence it should be clear.

35 THE CHAIRMAN: If that could be done during next week, so that it can be sorted out by Friday?

36 MR. GREEN: Yes.

37 THE CHAIRMAN: So that if there is a problem I can deal with that on Friday.

38 MR. GREEN: Certainly.

1 THE CHAIRMAN: There is one other matter which Professor Bain would like to raise.

2 PROFESSOR BAIN: I would like, Mr. Roth, to ask the OFT to provide a one page brief for me on the
3 Pharmaceutical Services Regulations throughout the UK, noting particularly that PCTs do not appear to
4 exist in Scotland. You are aware, of course, that Health is a devolved matter, and so Scottish
5 regulations are different from English regulations. So far as I can see the 1995 Rules in Scotland were
6 closely comparable to those in England. I have not readily been able to find a 2005 amendment to the
7 Scottish rules – there may or there may not have been – but I am sure that the OFT can provide a one
8 page brief saying what happens throughout the UK, which will include, of course, other parts than
9 England and Scotland too.

10 MR. ROTH: I am sure we can do that. I feel embarrassed not knowing the answer off the cuff as I am acting
11 for the Scottish Health Authority in another case, but we will provide that briefing paper.

12 THE CHAIRMAN: Subject to there having to be any matters referred to me in the meantime, Tuesday, 11th at
13 9.30.

14 (The hearing concluded at 3.25 p.m.)